PROTECTING THE HUMAN RIGHTS OF COAST SALISH PEOPLES IN BRITISH COLUMBIA, CANADA

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Introduction

Modern-day treaty negotiations have reached a deep stalemate on the southeast coast of Vancouver Island. This is after 15½ years of talks and nearly $20 million of negotiation loan debt being accrued by the six member First Nations of the Hul'qumi'num Treaty Group (hereafter HTG), where I have worked full-time as a negotiator, advisor and researcher for the past 9 years.

Hul'qumi'num people have been involved in these modern-day treaty negotiations, like so many other First Nations in British Columbia, because the legal, social, political and constitutional relationships concerning the title to and governance of their territories have never been formalized with the state. There has never been a treaty or any other formal arrangement that reconciles the fact of their prior occupation of their territories with colonial settlement and the establishment of the Canadian state.

The HTG's mandate is to achieve a treaty that, through a combination of securing title to land, governance over territories, and compensation for lost opportunities, will provides for future prosperity while ensuring that the full complexities of Coast Salish cultural practices may be exercised into the future.

After over a decade of intense negotiations locally at HTG table, and collectively with over 60 other First Nations at a 'Common Table', the talks have left many First Nations feeling that there is little prospect for achieving reconciliation through the treaty process. Most First Nations in the process have concluded that a common cluster of policy-related issues thwarts any potential progress at their tables. In addition to these policy issues, the HTG has been stalemated by the unwillingness of government to negotiate reconciliation of the near-complete privatization of the land in their territories by the 1884 E&N Railway Grant.

In 2006, the HTG leadership decided to challenge Canada's intractable position on private lands by reframing the discourse about land claims. The HTG leadership approached the international community through the Organization of American States, to seek the recognition and protection of their human rights in their territories. This bold step, they hoped, will be a tipping point for settling land claims in Canada.

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NEGOTIATING TREATIES: HOW TO AFFIRM RIGHTS OVER "NON-NEGOTIABLE" PRIVATE LAND

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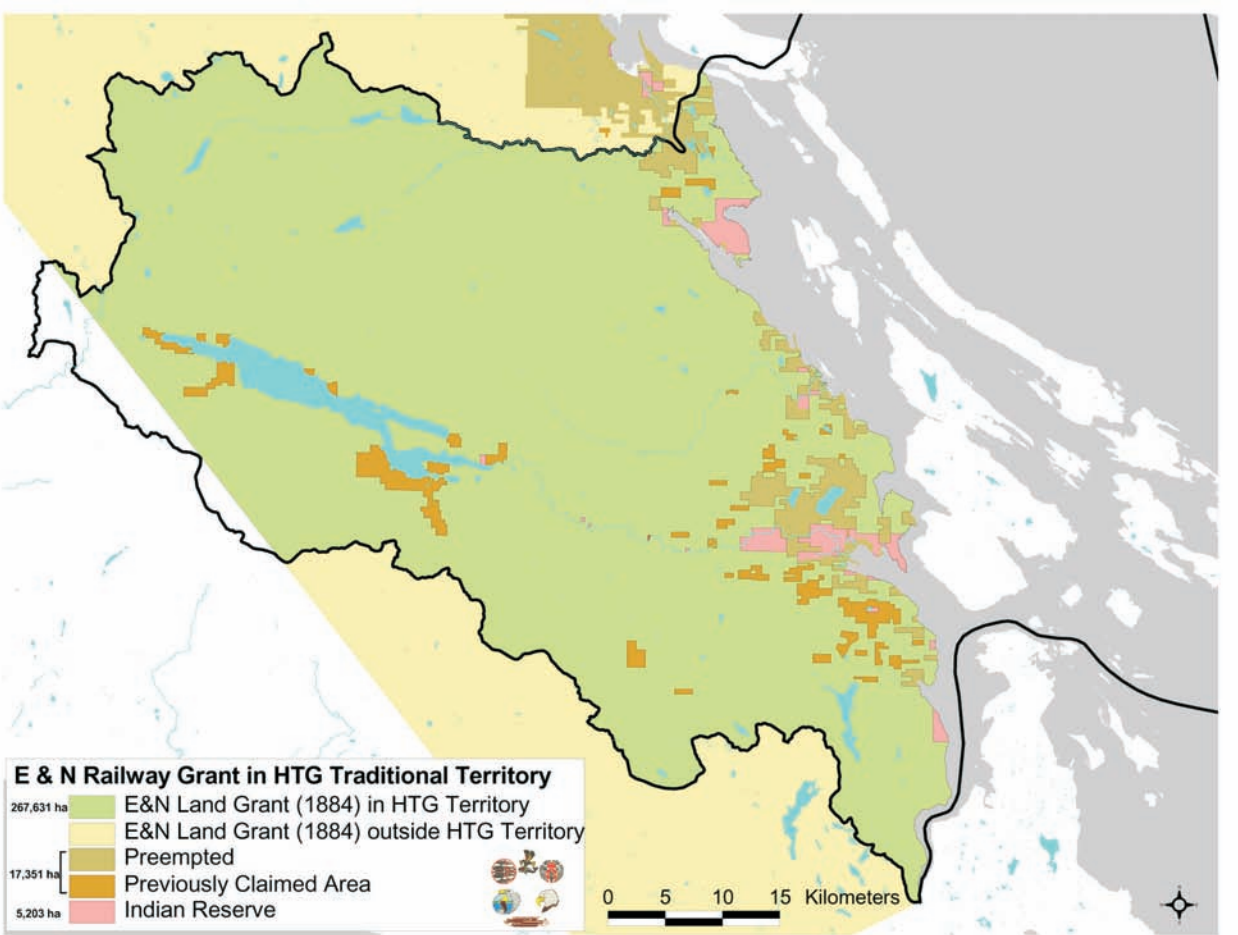
In 1884 E&N Railway Grant gave over 800,000 hectares fee-simple land, timber and subsurface rights to coal barron James Dunsmuir in exchange for building a railroad from Esquimalt to Comox. This 'exchange' went nearly unnoticed by the First Nations leadership of the day, but its effect on their territories could not have been more dramatic.

In the territories of the HTG member First Nations, nearly their entire traditional land base came to be owned and occupied by coal and forest companies, private farmers and towns like Ladysmith to support the intensive extractive industries that have operated continuously on them since 1884. Today, three large forest companies privately own nearly the entire upper watesheds of the Nanaimo, Chemainus, Cowichan and Koksilah Rivers, with some of the highest-value real-estate outside major urban centers in Canada being settled in the valleys, waterfront and Islands in Hul'qumi'num territory. All of the forested watersheds have highly developed logging road networks into them. They are now gated where they cross the holdings of private timber companies and are well signed to indicate the limits of trespass. As the province has not legislated extensively for forest or environmental management on private lands, these lands have been extensively clear cut, with much of the area being in their third rotation since old growth.

Most of the governance jurisdiction which has on-the-ground relevance today rests with a patchwork of 8 different local governments, who through permissive land use zoning have, particularly in the past 10 years, facilitated intense sub-urban expansion in the area. The food-baskets of beaches and access points to the sea of Hul'qumi'num territory are also massively restricted from access by the Hul'qumi'num people by the dense network of private homes that now consume the waterfront. Private moorage sites, leaking septic fields, urban sewage outfall, and agricultural run-off all shut-down the intertidal food basket that sustained Hul'qumi'num people for millennia.

At the treaty table there has been no space for discussion of private land in spite of it being a unique if not defining feature of this area. Certainly, some of the limited, formula-based funds on offer (by my estimates ~$35,000 1993$ per capita over 25 years) could be used to purchase small areas of high-value land, but this is a matter of cherry-picking real-estate, not reconstituting territorial relations. Private land is not on the table for any other purpose either: no co-management, no revenue sharing, no recognized jurisdictions of any kind, no constitutionally protected inter-jurisdictional arrangements, no arrangement for the exercise of cultural rights of any kind not subject to landowner veto, no ability to acquire land over the long-term without local government (from whose tax base the lands would come) veto, and remarkably, absolutely no consideration for compensation. Consistent with the principle voted on by the BC public in the 2002 referendum on treaty talks, private lands are completely off the table, leaving HTG in an impossible situation for achieving its mandate.



A new approach to this problem presented itself through the confluence

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TRADITIONAL LANDS GIVEN AWAY CUSTOMARY LAWS IGNORED INDIGENOUS RIGHTS IGNORED

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of family connections so emblematic of First Nations communities. The daughter of HTG chief negotiator decided to attend the Indigenous Peoples Law and Policy Program and the University of Arizona (U of A) school of law. Here James Annaya, Robert A. Williams Jr., and Robert Hershey have been world leaders in working with indigenous communities like the Awas Tingi of Nicaragua, Maya communities of southern Belize, the Western Shoshone and others, to articulate their land rights as human rights in various international forums. Drawing on the generous energies of these legal scholars from the U of A, and the various capacities and expertise the HTG has developed over the years, a petition protesting the violation of human rights to property and culture was drafted and submitted in 2007 to the Inter-American Commission of Human Rights, one of the key human rights instruments of the Organization of American States (OAS).

The HTG petition asked the Inter-American Commission on Human Rights (hereafter 'the Commission') to recognize the ongoing human rights violations in Canada's non-negotiable stance on private lands. Through sustained ethnographic research, HTG was able to draw out evidence about the customary land tenure system which define in indigenous terms the property rights and cultural practices which are being systematically violated by Canada through unilaterally granting, permitting and licensing rights and interests in their traditional lands and resources to private third parties. HTG alleged that:

State "privatization" of these traditional lands of the Hul'qumi'num has irretrievably damaged forests and essential water supplies, straining plant and wildlife populations and threatening access to and use of Hul'qumi'nurn natural resources, medicines and sacred sites. Pollution and noise from private logging operations and commercial and residential developments adversely affect and interfere with Hul'qumi'num hunting, fishing and gathering practices. Destruction and clear-cutting of forest lands endangers many of the most sacred ceremonial practices, which are essential to Hul'qumi'num cultural and physical survival.

HTG argued in its petition to the IACHR that, while HTG member First Nations "continue to exercise, assert and defend their property, user, self-government and other rights and interests in their traditional lands, territories, and resources, through hunting, fishing, gathering, and spiritual and ceremonial activities unique to their culture and indigenous way of life," these practices are rarely accommodated on private lands. HTG argued that the close, intimate, and life-sustaining connection between Hul'qumi'num people and their traditional territory is fundamental to their

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RE-FRAMING STATE-ORDERED AND STATE-CONTROLLED TREATY NEGOTIATIONS IN CANADA

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cultural identity, integrity, way of life and very survival as indigenous peoples. Such ongoing cultural survival is in jeopardy by the States' double-threat of both not engaging in relationships with First Nations over private land and insisting on 'extinguishment treaties' that fundamentally reshape the property rights which are so bundled up with this way of life. HTG's petition alleges that Canada is acting in violation of article XXIII, the right to property, article XIII, the right to culture, article II the right to equality under the law, and other human rights protected under the Inter-American declaration on human rights.

In this re-framing of State-ordered and controlled treaty negotiations into a trans-national forum for human rights claims, HTG is radically challenging Canadian land claims discourses. Hul'qumi'num people have rejected a municipal-plus type model of land ownership and governance for urban-area First Nations that Canada and BC proffer at treaty tables, instead articulating the continuance of extensive territorial relations as the only viable option. At the level of on-the-ground impact, the potential effects of such a request could not be more different. Treaty negotiations have produced little tangible result after 15 years effort and millions of dollars expended.

The State's referrals/consultation processes over Crown decisions have, particularly in recent years, produced a staggering number of unanswerable correspondence regarding narrow aspects of land use decisions. In contrast, HTG's request to the Commission for 'precautionary measures' – a type of international injunctive request – could stall or halt all permitting activities of local, regional, provincial and federal governments in the territory until some relief of the human rights violations can be achieved. Relief in the context of these human rights claims for other indigenous peoples, has included the recognition, delimiting, demarcation and titling of indigenous territorial lands, or the payment of compensation for those lands which were not returned.

Canada's Response

The State has responded with an uncompromising rejection of HTG's petition. They have argued that there is no evidence of human rights violations in Canada, that the case is inadmissable under Commission rules because the HTG has not 'exhausted all domestic remedies', and that the Commission has no jurisdiction or scope of authority to consider the issues raised by HTG in the case.

The most vigorous element of Canada's argument is the valorization of the range of domestic remedies available in Canada for resolving issues of aboriginal property rights, which, they argue, are amongst the most generous and effective of anywhere in the world. Forward-looking, interest-based treaty negotiation, Canada claims, allow First Nations to negotiate land without having to prove anything with respect to their historic use and occupancy. The courts, Canada claims, are effective places to obtain title declarations. Injunctive relief and judicial reviews are immediately available in Canada, and the duty towards consultation and accommodation over potential impacts to aboriginal rights is part of the honour of the Crown, even on mere primae facie evidence of a potential impact to a right. Indigency, Canada claims, is not a concern in these cases, as the courts can order First Nations costs be paid if the issues are compelling.

HTG responded to the Commission that given their own experiences, and the experiences of the other Aboriginal communities in Canada, there are no clear prospects for any of these to be effective with respect to issues stemming from the 1884 E&N Railway Grant. In a stunning show of solidarity, HTG received over a dozen amicus curae briefs and affidavits from First Nations, aboriginal political organizations, leaders and negotiators, including: Ahousaht First Nation, the Assembly of First Nations, the First Nations Summit, Nunavut Tunngavik Inc, the Union of British Columbia Indian Chiefs, Laich-Kwil-Tach Treaty Society, British Columbia Assembly of First Nations, Sto:lo Tribal Council and Gitanyow Hereditary Chiefs, Okanagan and Secwepemc First Nations, and affidavits from the Chief of the Westbank First Nation and the Chief Treaty Negotiator for the Westbank First Nation, legal council for the Sliammon and Snuneymuxw First Nations, amongst others. These often lengthy briefs to the Commission forcefully articulate support of HTG's views that the courts, the injunctive and judicial review processes, and especially the BC Treaty Process have all been largely ineffective in protecting and recognizing indigenous property and cultural rights.

Conclusions: Waiting for the Commission

Now, after two hearings and several thousand pages of submissions, the leaders of the HTG communities are waiting to hear from the Commission if their petition will be admissible, if their precautionary measures request will be granted, and if they will get a date to further argue the merits of the case before the commission. HTG's legal council has requested on numerous occasions that Canada submit to the 'friendly settlement' procedure under the auspices of the Commission, a gesture which Canada has repeatedly refused, not wishing to relinquish any of its control over the process of the negotiation of reconciliation with its aboriginal peoples.

In engaging the Organization of American States' Inter-American Commission on Human Rights, HTG leaders have sought to unmask Canada as a pariah state whose human rights abuses of its indigenous peoples have been cloaked in a masquerade of law, policy and the representation in public forums of how generous -- even excessive -- Canada is in its dealing with First Nations. The HTG leaders are drawing on the moral strength of the international human rights discourse to transcend the ultimately colonial characterization of indigenous rights and interests by Canada. The threads of these trans-national discourses may be key to building a 'new relationship' between aboriginal people and the State in Canada.