



In the Spirit of the Treaty: Collaborative Lands and Resource Planning

Janet Sumner: 0:00

Welcome to *The Clear Cut*. Hi, I'm Janet Sumner, Executive Director at Wildlands League.

Kaya Adleman: 0:08

And I'm Kaya Adleman, Carbon Manager at Wildlands League.

Janet Sumner: 0:14

Wildlands League is a Canadian conservation organization working on protecting the natural world.

Kaya Adleman: 0:21

The Clear Cut is bringing to you the much-needed conversation on Canadian forest management and how we can better protect one of Canada's most important ecosystems, as our forests are reaching a tipping point.

Janet Sumner: 0:40

So welcome back to another episode with Amy Westland and Anastasia Lintner. Today we're going to pick up where we left off. We got into the various the foundation of treaties and how that sets the table for land use decisions vis-a-vis resource extraction, forestry, mining, building roads, hydro development all of that. All of that development is built on a foundation of how we've operated under the treaties and how we honor them or we don't honor them or what that looks like, and so that was really the thrust of the previous episode, and today we're going to take you more into the cumulative impacts case with Amy Westland, but we're also going to speak with Anastasia Lintner. Do you want to say something about that, Kaya?

Kaya Adleman: 1:30



Yeah, so I think, as you were saying, Janet, this episode really dives into the specifics of the case and also the implications of what this could mean moving forward and kind of the snowball effect of these cumulative effects cases as they spread across the country and how the cumulative effects of resource extraction and development over time really requires a need for joint resource management and land use planning with indigenous folks and communities. And going into the episode, Anastasia is going to talk a little bit about consultation how consultation with First Nations, between First Nations communities, and sometimes it's industry, sometimes it's government how that all kind of works. We've heard this also a little bit in our three-part episode series with David Flood. So this is kind of a recap about consultation, how consultation works and how it can be better and why cumulative effects cases can kind of build on this better.

Janet Sumner: 2:44

Yeah, there are a number of them that are have either been heard or are being heard across Canada. So this is just one example of a cumulative impacts case, and I'm glad you talked about the cumulative impacts being about the impacts from industrial activities over time, and it's not just one industrial activity and many of these permits that are sought are done in isolation. Sometimes they're even cut up into little pieces. For example, I often refer to the Ring of Fire, where they're looking at the environmental assessment on just the roads. But the roads are going to go somewhere, they're going to facilitate some development, and we don't tend to and when we're looking at these region opening exercises, we aren't thinking in terms of what are the multiple impacts and how do we actually assess those as a full suite of impacts that are going to be happening in an area? So, yeah, I'm glad that you put that descriptor out there so that our audience can come with us on that journey.

Kaya Adleman: 3:41

And, without further ado, let's hear from Anastasia.

Anastasia Lintner: 3:45

The Mikisew Cree decision in the early 2000s it was can the federal minister decide that they just want to put a road through a protected area and indigenous lands and decide where it goes? And in that case the Mikisew were able to say that infringes our treaty



right and what ended up happening is that the road had to go around the indigenous lands. I think it still went through the park. Maybe I don't know if you know that off the top of your head, Janet probably did ultimately, but the idea that the federal government needed to go in and have a meaningful conversation with the Mikisew Cree to hear what their concerns were about where the road was being cited and where they might put it meaningful consultation and maybe accommodate them and then not run it through the reserve, that's what ended up happening.

Anastasia Lintner: 5:03

That duty to consult and accommodate does come from that constitutional commitment and protection.

Anastasia Lintner: 5:12

And it's long been held that the honor of the crown is always at stake when dealing with indigenous people.

Anastasia Lintner: 5:19

So anytime that there is something, a conversation going on, a dialogue, a negotiation going on, the honor of the crown is always at stake when dealing with indigenous peoples from that paternalistic perspective, the fiduciary perspective, and then taking that idea.

Anastasia Lintner: 5:42

When interpreting treaties, interpreting what's going on in agreements, we are seeing that evolution combined with what is in the duty to consult. And the duty to consult is described by the Supreme Court of Canada as a spectrum. It depends on what sort of the consequences are going to be, how big of an infringement is it anticipated to be, and then how much the need to go in and consult and maybe accommodate. And that idea of the duty to consult and potentially accommodate rights is very different than what's expressed in UNDRIP, the United Nations Declaration for the Rights of Indigenous People, around the idea of free, prior and informed consent. And that concept is something that I think more and more there is a desire to do it better. Do the interactions



with indigenous peoples when their lands are being involved in decision making. There is an intention to do it better, but it isn't done necessarily as well everywhere. That's the Mikisew case.

Janet Sumner: 7:16

I just want to comment on what Anastasia said there, which is UNDRIP. It's the United Nations Declaration on the Rights of Indigenous People and it requires free, prior informed consent, whereas the Mikisew case really got at having a duty to consult and accommodate but not consent. And so UNDRIP, or United Nations and what's been happening internationally, has really moved further than Mikisew and just to understand that there's a difference there and that provinces or the crown are still operating as if the Mikisew Creedecision is enough that just doing this consultation and accommodation and it has to be reasonable accommodation, but sometimes they just go oh well, we didn't hear back from them, so we're going ahead. So I think that's an interesting piece that Anastasia brings into this, that in some circles we've moved beyond this and we're actually seeking consent. Consent is very, very different than just I got informed and then they consulted me but I didn't get a chance to respond and they went ahead anyway.

Kaya Adleman: 8:26

Right and I think the approach Canada currently takes to consultation I've been thinking of it like imagine you get stung by a mosquito. Once you know it's itchy for a few days doesn't really bother you that much unless you're allergic. That's a whole other conversation. If you have like 20 or 30 mosquito bites on your leg, that's really uncomfortable and annoying and that has maybe more of an impact on your day to day activities than just a singular mosquito bite that you get in the summer. So yeah, the consultation approach that we're currently dealing with under the Mikisew decision seems to very much take a very individualistic perspective, which is what Anastasia is kind of saying that it doesn't really incorporate UNDRIP very well and it doesn't include, as you said, Janet, that consent piece that's super important and it's very lacking. And I think that kind of builds into what we're going to talk about further. And how can we go beyond this individualistic piece by piece approach?



Janet Sumner: 9:35

Yeah, and I will drop one other reference, which is in our [conversations](#) with Francois Dufresne about the FSC system. It's the only certification system that requires free, prior informed consent. Again, consent, not just we consulted you or we had a conversation or we did some accommodation, but we got your consent.

Kaya Adleman: 9:58

Yeah, and of course we had to talk with Amy about this too, of course, and how cumulative impacts cases can kind of be a game changer in better recognizing that holistic, more joint approach.

Janet Sumner: 10:52

Now I want to ask a question about the legal context before this case. So you talk about the duty to consult and maybe I'm wrong but didn't they also have a duty to accommodate?

Amy Westland: 11:08

Yes, and that's the one that often I think that we see and the First Nations certainly say and there was evidence of this kind of problem in BC and the First Nations that I've worked with, certainly over the last five years, and the ones also bringing this case, would say, is what unfortunately has happened with the duty to consult and, if appropriate, accommodate, which is what the Supreme Court said. I think it was actually a brilliant move by the Supreme Court to articulate that duty to say this is what, something we need in order, because we were seeing at the very beginning, once the Constitution came into power, into place, governments were often they were then kind of avoiding confirming where any rights were and authorizing lots of things in the meantime. And so I think when the Supreme Court decided this case we call it Haida in 2004, they said you can't do that in the interim, before the rights were, before it becomes clear where the rights are, exactly their nature and scope. You have to consult and understand, have a good understanding of that from the First Nations beforehand. So that was a really it was a good idea. But then I think what we've seen more often than not is that the governments have turned this into just a process. The law says in



the end they consult and let's say they don't consult to the right standard from the perspective of the First Nations.

Amy Westland: 12:40

Or if they consult and then don't accommodate appropriately, the only thing the First Nations can do is challenge the decision in court on the basis that it was unreasonable, that it shouldn't be considered a reasonable decision by the courts and should be overturned or otherwise revisited because it wasn't reasonable, because they didn't discharge their duty to consult. And there's many problems with that because, first of all, it costs often hundreds of thousands of dollars to go to court, even on a narrow issue like that, even on just one decision, and then the bar is really quite low because for the court to say to an elected government oh well, your decision on this was unreasonable. The courts are very reluctant to do that. And when the governments have started to get better and better at having very robust processes, they'll do those lengthy process or many, many opportunities for First Nations to participate, and often then the record will show that they don't necessarily participate in everything because they don't have the means to attend every meeting on every development project, in every sector. So then the government ends up with a record that shows. Well, look, we offered all these opportunities to consult and the First Nations didn't participate, and so it was reasonable for us to proceed in the timelines and so on.

Amy Westland: 14:01

So in all, to say that duty, there's a frustration, I would say, that has emerged with that duty in the way that it's been implemented, and that's why the kind of advance and long-term planning that we're seeing coming out of the Blueberry River case, I think offers a better pathway towards this consultation and accommodation of First Nations and hopefully, if done right, conservation as well, because it would mean, rather than having to chase every single decision that the government might authorize, which is impossible in the First Nations territories, instead they could sit down with the government in a more nation-to-nation way from the outset and identify these areas where might development be allowed of certain natures?

Amy Westland: 15:00



But on the other hand, where might it be set aside? It might not be allowed in the land set aside, and so then that's kind of like dealing with it at the front end, because so long as the government operates, then in accordance with that plan, they would have a pretty good argument that they've acted reasonably. But if they start to operate outside of the plan, then they would have a challenge, I think, in saying that they've operated reasonably if they start to authorize use or development of the lands outside of the plan. So it would get rid of this whole scrambling that First Nations have had to do and the incredible cost associated with having to challenge government decisions on a case-by-case basis.

Kaya Adleman: 15:50

Hi Kaya here.

Kaya Adleman: 15:52

Just interjecting quickly in case you were as confused as I was, when Anastasia mentions the Mikisew Cree decision when talking about Canada's duty to consult with Indigenous peoples, while Amy refers to the Haida case in 2004 when asked about the same topic.

Kaya Adleman: 16:08

Well, I looked into this and I came across the Library of Parliament [webpage](#) which I'll end up linking in the show notes for your reference as well and it turns out that these two cases are actually a part of a trilogy of decisions that came out in the early 2000s wherein and I'm quoting directly from the website here the fundamental notion of the duty to consult as we know it today was set out. So the webpage refers to the Haida case as the landmark case of the series quote in which the Supreme Court established that the Crown had a duty to consult Indigenous peoples when it intends to act in a manner that may adversely affect potential or established aboriginal or treaty rights. So the reason the Mikisew case and the Haida case are referred to when referring to Canada's legal duty to consult Indigenous peoples is because they are deeply related and together with the third case, the Taku River Tlingit case, these three set out pieces of the consultation framework and its implementation. So hopefully that clears things up, did for me. And now back to our regularly scheduled programming.



Janet Sumner: 17:20

Yeah, maybe you can take us into the cumulative impacts case itself and where it's going in Ontario and what it's based on.

Janet Sumner: 17:31

I know that these three communities are where forestry is occurring, so this would be certainly for the podcast. This would be really good because we're here to have conversations on forestry, and so it would be good and this is why we invited this, this conversation because we know that this is where we're currently taking up land, for forestry is directly over top of indigenous land, so this would be really good to have that conversation.

Amy Westland: 18:02

Yeah, so well. And so the context, as I mentioned, the three First Nations who are pursuing this cumulative impacts case here in Ontario, seeking to build on the momentum from cases that are like Blueberry River and others like it, that are confirming and clarifying that the First Nations rights to their traditional territories continue and have to be protected in order to comply with the treaty. They brought this case with a particular view to protecting their rights and the boreal forest. So there, all three of them are involved in the forest, have been around in the forest, living in the forest, their whole, their communities are there and they actually also are involved in the forest industry. They're not against industry and forestry of all kinds, but they've tried to do it from a more sustainable angle. And what they have been saying is that over there have been all these impacts since the time that that treaty, Treaty 9, was entered into at the beginning of 1905 and 1906. It was some later adhesions around 1930. But they're saying we've seen these impacts on the forest since that time. But what we've been seeing, in particular since they point often to 1994 and the Crown Forest Sustainability Act which came in at that time, which is a whole other discussion but the regime governing forest management changed, and at the same time they started to see technological changes that affected the way the forests were being managed. So whereas before I understand, in the past people would have to go into the forest and cut them down almost by hand with maybe some small machines, now, in the last few

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decades, what we see is larger and larger machines, these things called filibunchers, that can clear hundreds of trees in a few minutes and strip them and leave trees by the side of the road.

Amy Westland: 20:20

We've seen this movement towards clear cutting of large swaths of the forest and then planting with hybrid trees in their place. And then this practice of spraying the area with pesticides, usually, in particular glyphosate, in order to encourage the rapid regrowth of the conifers, which are the more valuable trees. And so, as I'm sure you know but the glyphosate is this chemical that is found, it's the primary chemical ingredient in pesticide known as Roundup, and it's designed to kill any plant with a leaf in it. So it won't kill the conifers, but it will kill the poplars and the hemlock and the birch trees, and so that's why, when they spray the areas that they've planted, it reduces or eliminates all of the competition for the conifers, so that the conifers actually do grow faster, and apparently the satellite images show that they grow really fast. And Ontario will often point to that and say, well, look how sustainable it is because it's regrowing so quickly.

Amy Westland: 21:30

But meanwhile on the ground there's a lack of diversity in the forest and the trees that they've planted. These hybrid ones are less healthy than the others, and meanwhile the soil is impacted in the waters in ways that the First Nations say they're convinced that it can't be healthy. And it just seems, from a common sense perspective, that it can't possibly be, given that this chemical has been linked more and more closely to cancer in humans. So all of this they keep seeing. So they brought this case to say this has to stop, these impacts have to stop in our traditional territories.

Amy Westland: 22:16

And we also say that there's no mechanism. Our treaty, just like create, requires a mechanism to be able to assess the cumulative impacts on our territories from all of these things that we've, the kinds of things I've just described, and there is no such mechanism here in Ontario either, which is not in accordance with the treaty. So that's why I think that this there's real intersections with some of the concerns that people have from just from, who are maybe not treaty nations, but there are other Canadians who see some of the problems that we're seeing in the forest and with the wildlife and



loss of habitat and so on, and it's related to the kind of forest management issues that are being identified in that case.

Kaya Adleman: 23:10

And just to clarify the grounds for this lawsuit against Ontario is that the treaty outlines that the livelihoods, the way of life of these indigenous communities should be protected in some way, and therefore they need a mechanism to assure that that's right, it's.

Amy Westland: 23:31

you know. The Treaty 9, so you know it contains these same clauses. You know they're set against each other the protection of the right to hunt, trap and fish, you know. And then this taking up clause and the yeah, so the argument being that the treaty, these promises, included this way of life that required a healthy you know healthy landscape and healthy, mature forests in order to be able to carry on those livelihoods, and a mechanism to be able to understand how the takings taking up of the province have impacted on the treaty rights.

Janet Sumner: 24:42

I mean the duty to consult an accommodate has been around for a long time and it's. I remember when it came into into being in, I, like you, was cheering on the Supreme Court going.

Janet Sumner: 24:54

Yeah really it's about time let's go. And I have I've heard, as you mentioned many, many, many times, that First Nations are feeling overwhelmed. It's not just you know forestry that might have to consult with them. It might be oh, we want to put a hydro dam in, or or we're looking to put a hydro line, or we're thinking about maybe even something that's good for the community or whatever it is. But all of these are requirements or a demand on the time of communities who may or may not have a lands and resources department may not have funding to do any of that work.



Janet Sumner: 25:34

Maybe you know the fact that we're providing all the information to them in English and their communities are saying, well, we have to speak with our elders and they don't speak or they don't, they don't operate as fluently in English, so we'd really like chance to translate.

Janet Sumner: 25:51

I know when we worked on the Victor Diamond Mine, we had many communities who were saying we need more time to translate and get the materials out to our and the timelines are also different. Right, we've got many communities who say, well, this is a, it isn't as simple as check the box. Like, did I tell everybody this was going to happen? It's like I have to sit down, I have to talk about your trapline, I have to talk about your history, I have to talk about where your grandparents are buried, where they are on the land, where our sacred places are, and that all takes time to get through. As well. As you know, we need these areas for caribou, or this is where the fish are, this is the watercourse that I'm concerned about, and we're really just trying to get through. Somebody once called an environmental assessment actually an approval process.

Janet Sumner: 26:37

And it's not really trying to get you an answer. It's just trying to get all the boxes ticked so you can get to the end, and I think that's one of the failures, from my perspective, that I see this duty to consult and accommodate really became. How does just we get the approval done? So how many times can you answer?

Amy Westland: 26:55

yes, that's right. Well, and I think in most provinces and that was another thing interestingly, on the trial record in blueberry river they were able to show that they had no evidence that any authorization had ever been denied in the in the first nations territories. And I suspect you would see similar, similar facts in most territories, you know. I think another thing that has happened, you know speaking about here in Ontario and most of the provinces too, again, because you had this, this evolution of understanding of what the obligations were under the constitution of Canada when it



was a new constitution, when the constitution was repatriated in 1982 and this protection was, it was included for Aboriginal and treaty rights for the first, you know, I'd say, decade and maybe even two. The real focus was out in BC and in the north, where they didn't have treat, these historic treaties, and the first nations were very quick to come forward with a lot of, you know, litigation about their rights and title, which is it's called. We call it out there. You know that's what their rights were out there because there weren't treaties. So the governments were in the resource companies. They were very interested in sorting this out in those areas, you know, so that they could have clarity about where could they develop the lands, where could they authorize the lands. And so modern treaties were negotiated and so on. But in the, in the areas where the historic treaties existed, the provinces, you know it, stayed kind of a little bit asleep at the wheel, I would say, and they weren't necessarily being as, as tested by by the waves of litigation. You know that that's starting to come now.

Amy Westland: 28:28

I think that you know we're seeing more and more, more and more realization of these rights to the traditional territories. You know that they, that they subsist and that they are enforceable in the provinces. And so what happened at the beginning? You know, I think the corporations saw the risk very early on, even in the provinces. And we saw the governments you know the provincial governments largely, I would say. You know, in my view, that shirking their responsibility on consultation, just to a large extent, and allowing the companies to go out very quickly, they, you know they, wanted to just avoid the risk rather than actually allowing the duty to consult to take place and be done according to law. You know the offer with nation, on the nation to nation basis, the companies went out and they just if there was first nations who might be able to tie this up. You know the process up then they were engaging with them and entering into impact benefit agreements and so on, and I think that that you know it was it ended up kind of reversing, reversing the process, you know from what?

Amy Westland: 29:36

From the nation to nation idea about consulting about rights and accommodating them in the crowns, decision making, you know, before the crown would authorize the use of land, you know the way that it ended up unfolding in most cases was the companies



decided they want to be able to use certain land and so they were going to go out and try to avoid any challenge.

Amy Westland: 29:57

You know, and so the provinces I think they're still really learning you know how to consult properly, how to do it.

Amy Westland: 30:06

You know, this is where I think this, these cases which are still new, like the Blueberry River and so on and that's an example where BC, you know, was very also heartening to see that, for example, they didn't, after they've been on the receiving end of many years of litigation but, you know, finally didn't appeal that decision from blueberry river, even though it was just a trial level decision. They could have gone to the court of appeal and the Supreme Court and tried to fight it out, but instead they conceded essentially at the trial level and immediately entered into negotiations with with Blueberry River and said they would extend the same approach to all the treaty nations, recognizing that they would be entitled to the same, the same outcome. And doing this, this front end planning that we talked about before, which is, I think, more with the Supreme Court head in mind, it's really commendable of BC right and consistent with their promise to honor the United Nations Declaration on the Rights of Indigenous People right.

Janet Sumner: 31:08

It is a consistent message.

Kaya Adleman: 31:10

It's not a workaround.

Janet Sumner: 31:11

It was. I mean, frankly, I was shocked and very, very pleased that they didn't try to take it any further, but just said, yep, okay, let's get on with it.



Kaya Adleman: 31:29

Well, I was just going to comment. That kind of this forward-facing approach kind of seems to respect this idea of sovereignty that you were talking about earlier more and almost that the previous consultation approach or I guess the one that exists now in Ontario still just from a face value standpoint, it seems really unfair because it's saying like companies or the provinces saying, we want to use your resources that you've been stewarding for Chin's time in memoriam, and we're placing the burden on you to say that you don't want this. So it seems like the forward-facing seems to, I guess, respect that idea of sovereignty more.

Amy Westland: 32:18

Yeah, well, exactly, and I think, sovereignty, because really I don't think it's overstating it to say that that tension that I mentioned before, which has existed, I think, since the time of the treaties and the time of confederation, where the federal and provincial governments believing and asserting that they had sovereignty over the lands, this unilateral power, but meanwhile the First Nations never understanding that they had surrendered or ceded their sovereignty over their people and their lands, and what's embedded in that is this tension and this notion that the First Nations had understood it was going to be a form of shared sovereignty and that's what we're going to say.

Amy Westland: 33:03

I don't think it's an understatement to say that true advance planning of land use, so shared control in the sense of effective and meaningful planning, conservation planning and all of the stuff we discussed it's a form of shared sovereignty which doesn't really exist, as far as I know, in the world very effectively.

Amy Westland: 33:29

I mean, humans have not found that many creative ways to share lands, even into the present, and share the governance of lands. Even the federal and provincial governments have often had more conflict than you would think it was necessary when it's just that small number of people, so a small number of governments, so this kind of sitting down and planning together. I think it's starting to head in that direction of a form



of shared sovereignty. I think if you have a plan that the First Nations are involved in developing and that they consent to, then, as long as the authorizations fall within the plan again, you're on the right direction towards form of free, prior and informed consent. So I think it's exciting in that way to see this kind of a model emerging, because often I think governments and industry, they scratch their heads and they think, well, how can we possibly do this? But I think we see some viable models emerging now that I hope we'll see more and more of over time.

Janet Sumner: 34:39

Sorry, I was just going to say it kind of suggests that we might be moving to a model that gives greater certainty for industry as well.

Amy Westland: 34:48

Yes, I think it's a real opportunity for industry because I think that approach that they took from the beginning and again, that was my small visibility into it I left the private sector, that corporate commercial practice, in 2007.

Amy Westland: 35:01

So that was just shortly after Haida. So that corporate perspective of not wanting to tie anything down, not even wanting to wait for the governments to get to it and consult, because they knew it would take them a long time on every decision. So it was working for the corporations at the beginning, I think, to try to get ahead of it and consult and negotiate with First Nations on a project-by-project basis. But I think now with the First Nations more and more certainly in the historic treaty areas, as they've come to that growing clarity in the law about their continuing rights in their territories, now it's getting complicated for the companies to know how to navigate that and how to navigate complexities between on a particular project, you might have a First Nation who's comfortable with it and another one that's not and understanding where the territories are and who needs to be consulted deeply and accommodated on a project versus not. I mean this is starting to get too complicated for the companies, I think, to figure out.

Amy Westland: 36:14



And it's starting to not achieve their getting it taken care of goal, I would say, and so I think it's in their interest too actually to have this advance planning.

Amy Westland: 36:28

That would give them some clarity in advance about where should they even pursue authorization for this or that project, versus where should they just not really invest the time and energy, only to find out that it's going to be a problem. So I see it as which it would ultimately would be. As I said earlier, I think an interesting element of the history of Canada is, if you look back, some of the earliest settlement here and exploration here, it was related to companies. From the beginning it was the Hudson's Bay Company, it was those trading, the whole trading companies, and it's connected to to economics. It's been connected to economic development from the very beginning, and the crown, you know, more or less just tries to authorize the economic development and so so if we see a situation emerging where the companies are also, you know, supporting this kind of more progressive model and this kind of planning model, because ultimately it's in their interest too, I think that would be, you know, a real step forward for the country. Actually Lots to unpack there.

Janet Sumner: 37:53

Yeah, there is the model that we have right now sort of assumes that the land use is going to be X, mineral exploration, forestry, maybe both, and then it asks the First Nations to comment on that. What the BC model is doing, or what it's purporting to do, is to say let's do land use planning. And this is not the first time we've seen land use planning, and I'll just harken back to when I first started at Wildlands Lake, which is over 20 years ago, and the conversation then was about how to get a far north act in place that would say you're required to do land use planning before development could proceed. And that was under a previous government I think was the McGuinty government and they said you know, we're going to require this and then we're going to get all the development decisions right, Everybody's going to agree, there'll be certainty on the land and we'll be able to move forward. And that was seen as a reversal of the paradigm. In other words, usually the paradigm is we're going to assume everything's going to get developed and we'll try to figure out where we can put some areas that won't have development. So that's what we've been working with before, that it looks like BC is actually really embracing this now and I'm very excited about it because if you



do land use planning right and you can get those decisions up front and figure out the areas that you want to move forward with development, then you're comfortable with and that's a good idea, Then you can give companies some certainty.

Janet Sumner: 39:30

And I guess the other piece here is that she talks about it. You know it's getting too complex when you do land use planning at that scale. It is far too complex for an individual company to go in and seek how they can consult and accommodate. But I would say it's actually not the duty of the companies to consult and accommodate, that's the Crown's duty. And I know that the crown has often said oh well, you know you've got a project, you go figure out if the First Nation is good with this. But it's supposed to be a nation to nation conversation. It's supposed to be the crown having that conversation, whether that's the province or the federal government or whatever. And that's not that we have delegated or abrogated or basically handed over that duty in some cases and set to companies. You go ahead and do this.

Janet Sumner: 40:23

So the land use planning, if it is to be done right and actually really get a good plan in place and then people know which areas are off limits, which areas are open to development, then that does create certainty and it also takes a weight off the companies, where they are not having to do that consultation and negotiation with individual communities, but they're actually using a map that has a bigger picture already overlay applied to it. So that's what I think Amy's suggesting that this could actually be a progressive model and not just for First Nations and this is actually this, you know, harkens back to the other conversations we've had about how do we learn to coexist with nature but coexist with each other. And this allows us to do that planning together, figure out what the area is going to look like, what's good for everybody, and then look at environmental assessments and permits and all the rest of it. But it's the co-creation of that map of what are the opportunities.

Kaya Adleman: 41:27

To your initial points, Janet, my one comment would be, because I think you've covered basically everything that I have kind of written down here in my notes.



Amy Westland: 41:36

Sorry, I jumped in.

Kaya Adleman: 41:39

No worries, you explained it probably better than I could have, but I guess you've said before that a lot of times. When we think about maybe doing an approach like this joint land resource planning, you know, the Western mind kind of thinks the mentality or the frame is, oh, I'm giving something up, when these kinds of approaches are actually in the best interests for all parties involved and so hopefully we can move forward with more progressive strategies and not view them as something that is going to be at the non-benefit of one party or one person sitting at the table, you know. So that's kind of what comes to mind with all of this.

Janet Sumner: 42:25

Try to get to a win.

Amy Westland: 42:26

A win for everybody.

Janet Sumner: 42:28

Yeah, I think it's pretty cool. I said I was going to say that I'm going to be paying attention to the BC case. I know that the Ontario case we tried to do that in the early 90s, but I wouldn't say that it was a success. And one of the reasons for that is because, well, politically, it had the right ingredients when it got turned over to the planning at the bureaucratic level and the civil servants were doing it.

Janet Sumner: 42:57

And we often would walk into a situation and say, well, here's the terms of reference for the land use planning. You could make slight modifications, but the table was set in a



way. And so that's also very difficult. If you're walking in and you're essentially saying we're going to set the table and you have to come and sit at our table and then have that conversation, it's really got to start. Co-creation has to start from the very beginning of that, looking at values and what you would like and what your ultimate goals are, et cetera, et cetera. You can't walk in and say, basically, you have to agree to our approach or it's no approach. So that's yeah.

Kaya Adleman: 43:38

Was there? Just so that I'm clear. Was there a similar case in Ontario before?

Janet Sumner: 43:43

No, it actually. It came about because there was a political promise to well. I think actually this preceded my time at Wildlands League, but there had been a number of environmental groups who had done a good job of talking to the then opposition parties and saying, look, if you're going to develop the best way to I mean, this just makes sense. If you've bought a lot of land and you're trying to figure out what you're going to put on that land, wouldn't it be better to actually sit down and say we have a plan for the whole thing, as opposed to saying, oh, we're going to build the shed over here, you build the shed and then you go? Oh darn, I was really hoping to actually have the house there, right. So this approach was put before the opposition parties and they were asked to endorse it, and at that time they did. And when the Guinty government came into power they said, okay, well, we promised to do that.

Janet Sumner: 44:40

No development would happen in the north unless we'd land use planning first. So they created the Far North Act and they went about doing that. Now there was a number of other challenges that had occurred as well. There were some challenges around mining and kitchen and make who's the banana wig? And we're not here to unpack all of that, so I'm not going to get into it. And I think that helps spur on their desire to implement the Far North Act. But again, when they did that it was still within that frame that Ontario had at the time we didn't have on drip yet, we didn't have fruit brown and form cassette, I don't even really think that we were implementing the Mikisew decision yet. But they



did have this agreement to do land use planning before development, so they started down that path.

Janet Sumner: 45:30

We didn't get far enough, and we still went in with our own table setting. So hopefully BC will start to chart the course. We can all pay attention to this and figure out if they're going to do a good job of it, and if land use planning works there or maybe even lessons are learned there, then maybe we can start to look at what happens across the rest of Canada and try to work collaboratively on that.

Kaya Adleman: 45:55

Right and I guess that makes sense, Like I mean, if anything is to be learned from the past, can implement that. Moving forward and moving on to the next part of our conversation, we kind of discuss what the potential opportunities and benefits are of a joint land use and resources planning approach.

Amy Westland: 46:45

Well, so, yeah, so I think, looking like, for example, in the forest management context. You know, because, well, most you know a lot of the First Nations across the country. Their territories are covered by forest, you know, but I think we would see and I can't speak to you know everything that the First Nations, in this particular case, are trying to achieve. You know with the case, you know, but I think it would involve the kind of outcomes that we're seeing, you know, in BC, the sort of you know, wildlife planning with specific targets to protect animals.

Amy Westland: 47:23

You know where we saw there. You know the First Nations established that not having healthy, mature forests was reducing the population of a number of different species that actually require intact, healthy forests in order to have healthy populations. You know they talked a lot about fur bearing animals in particular and the impacts. You know it's kind of a cascading impact if you protect those. You know those bigger animals they talked about in that case moose and caribou and martin and fissure. These are all connected to other animals whose habitat is being lost. You know land protection areas

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that are set aside from certain types of, you know, mining or oil and gas type of activities. I think it would involve this idea of restoration. You know investment into restoration of some areas, because you know another reality is that a lot of these impacts have happened long before anyone was, you know, really understanding some of the history of the treaties in the First Nations. You know so there's large areas where First Nations have been displaced a long time ago. You know which would not have been their choice and it was not in they would say, is not in keeping with the treaty and never was. But now you know it's hard to go back and fix it, and so I think investment into those restoration activities would be important. And then again, that mechanism, through this planning, to bring to the table all of the necessary players. You know, not just one department who's involved in it, you know, but all the departments who have responsibility for various different elements of the forest. You know, if we're talking about the forest and whether we talked before, that you have, you know, you might have, the forest In Ontario. You know, ministry of Natural Resources and Forests has responsibility to authorize the forest management plans and the. You know, the logging activities. But then environment has responsibility over the water, you know, the transportation might have responsibility over the roads, you know. And then we have a situation where the forest management planning is exempted from environmental assessment here in Ontario. So there's, there's any. So we don't currently have any mechanism to bring all of those departments together when when they're looking at the plan.

Amy Westland: 49:53

So I think some kind of a mechanism that would bring all the key players together, you know, ultimately including Canada as well, because when you look at even just one particularly thorny issue like this glyphosate spraying, it's another thing where here you've got these first nations who are up against the system, and in that case you have. It's also Canada that's involved, because health Canada is the entity that approves something like glyphosate for use in Canada says it's healthy enough which I think is questionable healthy to be used as a killer of weeds. You know control weeds. And then it's Ontario though that it exercises its jurisdiction over forest management, to say it can be used to control weeds in the forest. And then the first nations trying to say, you know having to deal with both levels of government when they try to say how can you call, you know, poplars and birches and hemlock and things that the animals and we use as



medicinal plants and you know that are integral to the overall system, you know how can you consider these things weeds.

Amy Westland: 51:00

But the point is they're having to make those arguments, but to all different departments and in different levels of government, and it's really very challenging. So so I think, to answer your question, that piece developing a mechanism where the First Nations aren't having to navigate all of that, you know, on an issue that is of importance and they say is essential to protecting, you know, the lands in their territories and the health of the environment on which their treaty rights depend. There'd be some mechanism to have all the right people at the table, you know, from the government's perspective, to address those issues and to tackle them.

Janet Sumner: 51:40

Well, and I guess you know Kaya's question about what do you see? I mean, what I also see is if First Nations can truly be at the table in a substantive way, having a conversation about all of these issues, all these land uses at the same time, because they're they all have an impact, it will not only serve the First Nations but it will be a way to deliver better outcomes for everybody. Like if you're not spraying glyphosate across tens of thousands of hectares and that is killing everything. That is not a conifer and it's actually going into watersheds and it's upstream from thousands of Canadians. It's not just impacting First Nations, it's traveling, you know, airborne deposition, etc. Etc.

Janet Sumner: 52:31

And these forests are being converted. They're being converted into a managed forest from an intact standing forest, so this is going to be a big win for Canadians. I also think that it will hopefully be able to help address these multiple impacts in terms of climate change. I mean, we're seeing our forests go up in flames in some cases, and certainly Indigenous nations have been practicing prescribed burns for millennia and we have stopped doing some of those burns to basically keep as much of the forest standing so that we can harvest it, and then, of course, it becomes the very tender which can spark a larger and larger fire. So it would be an incredible opportunity, I think, for all Canadians to the outcome of these cases.



Janet Sumner: 53:24

And yeah, so that's just my commentary on it and I wonder if you can maybe give us an update on where the case is right now. Like is it? You know? Has all the arguments been heard? Where's the dad? So maybe you can give us that update.

Amy Westland: 53:41

Yeah, so the case is just in the early stages, the one here in Ontario that the claim has been filed and we are still the First Nations, are still awaiting Ontario's defense. So you know, Ontario, there's a whole process and this litigation process can be very, very slow, as you know. So anyway, so they're still awaiting Ontario's defense, so it'll be a while before you know. Then it's after that that all the evidence is entered, is exchanged and you know, trial would be at least a couple of years down the road, I would estimate. You know, just once the process unfolds.

Janet Sumner: 54:24

One audacious question could the government of Ontario take a look at the BC example of where they just agreed they went?

Janet Sumner: 54:32

you know what we lost the case we get it, the writings on the wall. We're going to move ahead with something that's proactive, set something up. Could Ontario look at that and sort of go you know what, instead of launching a big defense and trying to defend all of this stuff, couldn't we save some taxpayer money and just say why don't we do something that would be proactive and actually set something up to address all these concerns and get an agreement and go forward?

Amy Westland: 55:01

Exactly well, and I would say, of course they could, and you know that's building. I wanted to respond to your comment before about this. You know the opportunity that these cases present, you know, in terms of a way forward and a better way forward.

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You know, also for the environment and for the rest of Canadians, and I think you know, building on that, that I too. First of all, ideally the First Nations would not have to bring these cases to court and have to incur all the costs associated with doing that. You know this is a treaty relationship and you know it shouldn't be that they've been having to litigate so many of their claims for the courts. And I think, when you see, you know that's why, again, that I do think it really was honorable of BC to not. You know they litigated the trial really hard, or you know, I have to say but but then, having lost it, they then move forward in a more honorable way and there's nothing to stop governments in other provinces from following that model, from seeing that that kind of an approach could actually help to manage their risk on some of these cases. You know, from seeing that, like we talked about before, that they're taking this approach could actually not only start to give them a bit of a way for it on free, prior and informed consent, but also be in the interests of the court. You know the industry might even support it, so they could do that as a matter of agreement, in the way that BC has done it all as a matter of agreement, without court cases, and in fact, you know, I think it really would be.

Amy Westland: 56:33

You know this opportunity that we have to, instead of fighting about sovereignty and, you know, control over the lands, which is just, you know it's frustrating that we're still at this place as a society.

Amy Westland: 56:48

But instead of doing that, you know this could be a very, I think, beautiful expression of a form of reconciliation, where you know the First Nations and you know, as one of the Indigenous peoples of Canada who, I would say, you know, never lost their sense of connection to the land.

Amy Westland: 57:05

You know, I often say, you know, before I say these next comments, that I'm somebody of Northern European descent and I, you know, I know that our cultures were also connected to the land in the past, you know, just like every human culture, and when I was younger I sometimes would resist some of the distinctions that were drawn or, you know, feel a bit inclined to defend some of our cultural ways of being.



Amy Westland: 57:30

But I have seen over time that, you know, we became very disconnected to the land and, certainly after the Industrial Revolution, lost a lot of that sense of connection to the land. And so wouldn't it be, you know, a beautiful expression of reconciliation in Canada, if we could be reminded of that, you know, by the First Nations, not necessarily and ideally not through litigation, but through dialogue, you know, with governments and decision makers and developing these kinds of plans that would not only honor the treaties but would also help to protect the ecosystem and the wildlife and the plants and create, protect those carbon storage areas, you know, by maintaining healthy soil and trees and so on. So I think that nothing stops them from doing that proactively, and that would be ideal in my view.

Janet Sumner: 58:28

It would be so nice if we were operating in the spirit of the treaty and in the spirit of two, I'd say that would be just phenomenal.

Janet Sumner: 58:36

This has been fantastic. I really appreciate you providing us with this time and we're probably going to check back in with you on how the case is going once we start to see and if you can speak about it. I know you might not be privy to some of the documents etc. But, as all of this is, litigation unfolds and we're seeing more cases across Canada and it would just be good for, I think, for Canadians, for everybody, to understand what the underlying legal framework is and how these decisions are made. And, yeah, and where we could actually be more proactive and maybe some of our listeners want to help governments get to the point faster and with spending less taxpayer money on fighting these cases and more money in putting things right.

Amy Westland: 59:27

Yes, well, certainly I'd be happy to carry on that discussion and you know comment on where things are at, and you know, as I say, because there's other cases too that are



making their way through the court. So it will be an ongoing something that's going to be important to watch for years to come. Thanks so much.

Janet Sumner: 59:55

Okay. So wow, Kaya, I want you to start. I want you to start.

Kaya Adleman: 1:00:03

Well, I was so excited about this.

Janet Sumner: 1:00:04

So go ahead.

Kaya Adleman: 1:00:06

I really love what she says at the end there, like wouldn't it be a beautiful expression of reconciliation in Canada if we could be reminded of our connection to the land by the First Nations, and not, ideally, not through litigation, but through dialogue? I think that's a really awesome quote. We'll have to pull that and definitely use it in our listserv and definitely use it in our socials. But I think I'm really really glad that we did this episode because, well, first and this is maybe just a me thing, but I love really diving through and being able to finally understand, like, really complicated issues. Like I feel like there's the, the concepts that make up this kind of really complex, complex and entangled legal landscape, and being able to unpack all of that.

Kaya Adleman: 1:01:01

You know, I, like everyone says, for instance, that the 2008 financial crisis is really hard to understand.

Kaya Adleman: 1:01:08

No one can explain it, and you know I watched the Big Short.



Kaya Adleman: 1:01:12

I read like hundreds of articles about it, and being able to finally understand, you know, the mechanisms of what you know made the 2008 financial crisis happen was really deeply satisfying to me. And I feel even more satisfied that I'm able to kind of wrap my head around a lot of these concepts when it comes to this case, and also I feel like being able to understand it conceptually makes me even more compelled to watch these cases and to see the outcome of them. And I think they are really important to watch, as Amy said, because you know, like we read newspaper articles about them or you know a one-off thing like, oh, this is just something that's happening in a court in Ontario and then we move on with our day, but you know, this has like real implications for the future, especially since we are in a biodiversity and a climate crisis. So these are important things to watch, not just because we should all care about reconciliation and you know better recognizing first nation sovereignty over their lands and resources, but because this also impacts us all.

Janet Sumner: 1:02:27

Well said, well said. I think one of the things I like about unpacking this is it's not just happening in Ontario. Obviously, Blueberry was in British Columbia. There are other challenges. I think Amy mentioned one I think in I can't remember which province, but somewhere in the prairies, I believe and might have been Alberta. Anyway, so I think it's.

Janet Sumner: 1:02:51

There are cases that are coming up repeatedly now, and Canada has signed on to the United Nations Declaration on the Rights of Indigenous People. So we are in a time of change where the legal systems are changing and Canada is evolving, and so you're actually part of history when we're getting a chance to unpack this and really understand it. This is what's going to be in the history books in 20, 30, 40 years time. This is going to be how Canada changed from one legal structure to a new legal structure, what that meant, how it happened, and we're getting a chance to like a ringside seat on history in the making and getting a chance to digest it and really unpack all of this, and so that, to me, is an extraordinary opportunity. It also by spending some time on this.



Janet Sumner: 1:03:47

This is the big thing for me is that we're not just doing sound bites, right, when you're hearing all these stories in the media, it's like, well, this community is challenging, or there's a protest, or this is happening, or somebody's suing somebody.

Janet Sumner: 1:03:58

This is a chance to really understand what's the motivation, what are the things that are broken, what are the solutions that are trying to fix things and how are they trying to fix them. So I like all of this and I'm so glad that we were able to have on a Stacey Lindner and Amy Westland, on people who have been, you know, legally trained and can think through this and really understand what's going on and then explain it all to us. So I'm thrilled that we're able to do that with them and, as I said, I think this is history in the making. So it's fantastic. And I'm just going to finish with your last point, which is and again this for me gets back to that episode we did with David Flood which is we must learn to coexist Coexist with nature, but also coexist between peoples, and coexistence has never been more precious, and that is actually what's going to get us to the solutions on environment and interactions with each other. So I'm so glad that we were able to do this episode and discuss history in the making.

Kaya Adleman: 1:05:09

Yeah, absolutely, absolutely. And yeah, thanks to Amy for being so informative on this, and I'd also just like to thank the three first nations, in this case the Missanabie Cree Nation, Chapleau Cree First Nation and Brunswick House First Nation, for actually bringing this case to court because, as Amy said before, this is, you know, expensive litigation and I think it's been a lot of time and effort and, yeah, absolutely Thank you to all the members of those communities.

Janet Sumner: 1:05:39

It's a courageous step and not one without cost to you as individuals and as a community. So thank you so much.

Kaya Adleman: 1:05:47



All right, I'm excited to see where all this goes, but also excited to explore further topics and new episodes soon.

Janet Sumner: 1:05:57

Yeah, and we'll get back as the case develops or as new cases emerge, because this is all setting the very foundation and context within which resource extraction has done, namely forestry, mining, etc. So this will be a really good to keep checking in on and see how it's going.

Kaya Adleman: 1:06:16

Thanks, Janet.

Janet Sumner: 1:06:17

Thank you. If you like listening to *The Clear Cut* and want to keep the content coming, support the show. It would mean a lot to Kaya and I. The link to do so will be in the episode description below.

Kaya Adleman: 1:06:31

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Janet Sumner: 1:06:51

That's @wildlandsleague on Instagram, Twitter and Facebook or LinkedIn, of course.

Kaya Adleman: 1:06:57

See you next time.