



## **The Cumulative Effects of Forestry: Recognizing Treaty Rights**

**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 good morning Kaya.

**Kaya Adleman:** 0:43

Good morning Janet. How are you on this lovely morning?

**Janet Sumner:** 0:47

Well, it's been raining all night here in Toronto, so it's not as lovely as I would like. I would really like to see a lot more snow, but as such as it is, we've got less snow and more rain still. So that's where I'm at. How about you, how's, how's, how's your all treating you?



**Kaya Adleman:** 1:06

We had freezing rain last night, yeah, but I don't think any of it is stuck. I haven't been outside yet, but I think it would be interesting to go outside and see if I'm going to slip and fall on the ground, cause definitely the sidewalks definitely have not been salted or shoveled yet.

**Janet Sumner:** 1:24

Yeah, oh dear, that's not good. Maybe some of those ice pick crampons that you can put on your bottom of your boots would help. I'm excited about today's conversation because and really for me, it all kicked off when we were talking about treaty rights with Anastasia in a previous episode. But this cumulative impact case that's going on in Ontario very given the blueberry hill decision or the blueberry decision, given the make a suit decision, etc. Which Amy's going to unpack further down but land use decisions that are happening on Indigenous territory that are impacting Indigenous rights, are seems to me to be kind of picking up. These challenges are starting to see more and more of them, so we thought it would be really good to have this conversation about what was happening with a case here in Ontario.

**Kaya Adleman:** 2:24

Yeah, I agree, I think I'm really excited about this conversation.

**Kaya Adleman:** 2:27

We talked about having it last year and also earlier this year and the cumulative impact case was referenced in our three part series with David Flood. Who's an Indigenous professional forester and we also had a bit of commentary on it from Anastasia Lindner, who you may remember from, I think, part two of that three part series. She's a non-practicing attorney and she kind of helped set up some of the frameworks for some of the legal issues that David Flood was talking about in his episode. And I think in starting this episode, I think a good place to actually start in setting the context for the discussion about this cumulative impact case is referring back to that conversation with Anastasia and how she explained to us the nature of treaties that were actually made with Indigenous people during the time of colonization and what their intentions were



and how those have kind of evolved over time. So we're going to hear a little bit from that and we haven't played this part yet. So this is part of our conversation that was not on air.

**Anastasia Lintner: 3:45**

The Europeans would not have survived in these lands without Indigenous peoples and their worldview of sort of guests in our land and they need help and we will do our best to, with ceremony, help if they ask sort of you know like, be in relationship with them, because that is the worldview. And there was a period of time of very much sort of growing economies that were respectful and an evolution of trying to understand each other and live together. And the meeting, the intention started to shift and it became, as there was more settlement and assertion of sovereignty and, relying on this, that the Europeans were supreme or had supremacy over and would take care of and become sort of sort of protectors of Indigenous people. It started to shift and so the treaty making up until 1763 was quite different. In 1763, there was a proclamation, the Royal Proclamation from the King of the time that said we are not going to let Europeans settling here just take advantage of the Indigenous peoples that existed. We're going to take them under our protection and you can't buy lands from them. You have to go through us, through the British crown. And so it was sort of a protective those lands belong to Indigenous peoples and settlers can't intersect with them directly, and also a treaty that was made in English and the British also made a wampum that represented the agreement and I think it was 1764. I wish I'd brought it with me because then I would look at it. I have replicas of some of the important treaties that were made and codified into wampum belts. That helped me remind me of the importance of these agreements and that they ought to be respected as law. So as there was this shift after 1763 and into 1764, then to confederation, there started to be a shift and then there was confederation 1867. So the treaties that happened after 1867, plus the Indian Act, this codification in the 1880s.

**Anastasia Lintner: 7:01**

There's a great book If you haven't read it I highly recommend it to everybody the 21 Things you Didn't Know About the Indian Act by Bob Joseph. It tells you all of these things, sort of names them all out, and some of them were that you wouldn't be able to exercise rights in the same way anymore, even if the treaty said you could. So this kind of limiting statute at the same time as making treaties. It's very like I have a lot of



cognitive dissonance over that, but the Indian Act was basically that we will help indigenous peoples by making sure they're all enfranchised into our system and it sort of outlined in other ways in which that was going to happen. You would hold Indian status and you would lose it under different conditions and you would not be able, for example, to leave your reserve without a permit from an Indian agent. Like all of these things that really limited the exercise of indigenous inherent rights at the same time as negotiating treaties.

**Anastasia Lintner:** 8:19

It does seem very unworkable, and that's not surprising that it would be called the dark times. Residential schools were established, all of the things that we know were happening in history. And the reason that the federal government could make that kind of law is that in the agreement about how we would have cooperative federalism, the Confederation Canada, is an agreement about who would exercise which powers. So the British North America Act that it was called at the time was the federal government would hold a number of powers One of them is 91, the lands, Indians and lands that belong to the Indians, and then division of powers to the two provinces at the time where they would have control or jurisdiction over very specific things, including natural resources and lands. So there was this division of powers we call it and way that the federal government can make that legislation is because of their responsibility for Indians and lands reserved to the Indians.

**Kaya Adleman:** 9:41

And so one of the things that's interesting about what Anastasia mentions is this period of growing economies happening during this time of treaty making and also a shifting of intentions with the treaties. And I feel that this is personally a good segue into our chat with Amy, our guest for today, because she really illuminated and tied together how economic drivers kind of fueled this shift in intention when it came to treaty making, which is really important for understanding the cumulative impacts case.

**Janet Sumner:** 10:17

Yeah, I think I'm. I'm very interested in her take on this as well, because a number of times I've been faced with my own lack of education in this area. And you know, growing up in Canada and I did we didn't have a lot of the education about how the



treaties were made, what the structure was, etc. And in my career as an environmentalist I've had a number of opportunities to kind of go to school again and learn from indigenous experts and about the treaties and the treaties from their perspective and and understand more about their history of the treaties and how they came about. So we're starting to see that become the foundation for some of these cases.

**Kaya Adleman:** 11:06

And, without further ado, we are going to introduce our guest, amy Westland, and so where Amy fits into all of this is over the course of 2020, 2022. She was involved in the development and launch of an important case being advanced by three Treaty 9 First Nations in Northern Ontario. You can read more about it actually, we'll include links to various news articles about the launch of this case and these First Nations are bringing the case as part of their long-term efforts in a variety of forums to protect their rights and the long-term health of the boreal forest, and First People's Law is actually bringing this case to trial now.

**Janet Sumner:** 11:50

Okay, welcome Amy. We're so, so happy to have you here. Kaya and I have been looking forward to this conversation for some time, and we're just going to start with something really simple and ask you tell us a little bit about you and your background and how you come to all of these conversations that we want to have with you. Well, thank you very much, Janet and Kaya and I'm very happy to be here too.

**Amy Westland:** 12:15

I'm a constitutional lawyer. I would say I've been practicing for 20 years, but my expertise has been primarily in the area of constitutional law and particularly the law relating to the protection set out in Section 35 of the Constitution Act of Canada for Aboriginal and Treaty rights of the First Nations, inuit and Métis peoples of Canada. So that's what I've been practicing for the last 15 years in that area. However, I did start.

**Amy Westland:** 12:44



I've practiced a wide range of law over the course of my career and started out for the first five years or so practicing corporate commercial law, working with corporations at a national firm in Toronto, and then I moved to the federal government where I joined the Department, the Federal Department of Justice, and there first worked on issues relating to treaty and Aboriginal rights, with a focus on issues that we saw as being of national scope or potential national impact, both in the context of litigation and negotiations.

**Amy Westland:** 13:19

And then, for the past five years, after leaving the government, I've had the privilege of working for First Nations in particular and helping them to advocate for the recognition and protection of their rights in the context of litigation and negotiations and resource development in their territories. And when I first rejoined the private sector, I practiced with a small firm based in Ottawa that has since merged with First People's Law, and then, about a year ago, I left that firm to start my own practice to try to build on what I've done to date and build in also a greater focus on rights and governance approaches that support sustainable development, as well as a facilitation of dialogue in the context of disputes and dispute resolution, which is something that I've grown more and more interested in over the course of my career. So, yeah,

**Janet Sumner:** 14:10

Did you grow up wanting to be a constitutional lawyer?

**Amy Westland:** 14:13

In fact, I didn't. I wanted to. Well, I wanted to. I've always been interested in environmental law and in history, and so, as I went down the path of becoming a lawyer, I quickly started to become interested in this area of the law, because understanding the law relating to treaty and Aboriginal rights really does require an understanding of the history and understanding of political relations between governments and Indigenous peoples here in Canada. And so, yeah, so I kind of ended up going down that path. But, you know, and in recent years I've found it very helpful actually in that context to be able to have had a wide range of experiences to understand somewhat the perspective of the law and somewhat the perspective of the issue of the use and jurisdiction over lands and resources from a government perspective, but also from a corporate perspective,



you know, and then being able to bring that to the table when I'm working with First Nations who are having to navigate that environment and confront those perspectives and worldviews, as we call them.

**Kaya Adleman:** 15:30

And you did a Bachelor of Commerce at McGill. Right, I did, I did originally. I'm also. I also went to McGill, oh really, so that's something we have in common, yeah.

**Amy Westland:** 15:41

It's funny how it's those university alumni issues kind of. They do resonate for some reason, but I guess it's a shared experience also. So, and I did really enjoy my time at McGill and actually my economic background, I find, informs a lot of my thinking in this area too, you know, because I think we see which I'm sure we'll talk about more as we, as our conversation unfolds but I just think that I so much of the history of Canada and really the world, if we're going to be honest, has to do with economic drivers and search for resources, and you know the capitalist model, for example, and understanding all of that and you know how that led to frameworks for the governments to authorize the use and development of lands and so on, is really part of what underlies everything that the First Nations are saying and some of these cases that we're going to discuss today about the impacts on their territories and on the land. So I've found it interesting to see that intersection of those earlier studies with what I've been doing over the course of the last 15 years.

**Janet Sumner:** 16:53

Where are you based now, Amy? Where's home now?

**Amy Westland:** 16:56

Now I'm based in Ottawa and I've been here. I started out in Toronto as a lawyer, but then I've been back here in Ottawa since around 2007.

**Janet Sumner:** 17:35





All right, so I'm actually I know I want to start out with something that we had a conversation prior to the podcast interview session and in that conversation you said something that I found really intriguing, that I had not had heard before, and I've worked a number of years as an environmentalist, in fact, more than 30 years. That's why I've got this shock of gray hair. But one of the things that you said and, of course, as I've done environmental work that has crossed over on Indigenous territory almost 100% of the time, so I've worked within a framework that has had to recognize Indigenous jurisdiction and actually treated as if we signed treaties, just like shocking right. But one of the things you said something about that the railways were kind of an instigator for treaties, and I'm wondering if you could unpack, because I haven't heard that in all the lawyers that I've talked to and all the people who've talked about constitutional law, that was a really. That was something that just sort of had me set up straight. I just wondered if you could talk about that a little bit.

**Amy Westland:** 18:53

Well, sure, and I'd be happy to, and I think the railways not alone, but as a means for facilitating more intensive and accelerated settlement. I think that's part of the history and maybe I think I would be inclined to take a step back and before I speak about the railways and the role that they played in especially Eastern Canada and moving out west towards the end of the 1800s, when they were going through, they were coming through in the context of a much broader and lengthier time period and taking a really big step back, I think it's important for Canadians to understand a bit better some of the longer history, which includes going all the way back to the settlement of North America. You saw people coming in, settlers coming in from Europe into the United States much earlier than we saw here in Canada and leading up to a document that people refer to often but don't always understand, which we call the Royal Proclamation of 1763. And that proclamation arose in the context of settlement, big moves and pushes to settle the United States, in particular in real wrongs and takings that were being done by.

**Amy Westland:** 20:19

Often individual settlers were coming and taking land and this was land that the First Nations based in the United States, what we now call the United States, were using and occupying since time immemorial and as the tensions between the United States and Britain continued to escalate at some point, moving towards war and the American





Revolution, one thing the British crown did was, through the Royal Proclamation of 1763, basically promised the First Nations.

**Amy Westland:** 20:53

We see, basically the message that was sent through it was we see what's happening with this settler communities coming in and lands being taken and we crown proclaims that, the British crown, if you trust us, that we will protect you better and we will set ourselves up. We will prohibit in certain areas that were covered by the proclamation, but we will ensure that no one can take land from indigenous peoples directly. They have to go through the crown. And so it set up a process also for First Nations to work with crown, to have a process to speak for the lands that they traditionally occupied and to, as the word language was at that time, to surrender their claims in exchange for some protection from the British crown. So that was a message that the it was stemming from what we say it was the honor of the crown and honorable promise.

**Amy Westland:** 21:58

There's various different perspectives about how, the nature of that document and to what extent it itself is a treaty, but in any event there was a clear message sent to indigenous peoples that the British crown would protect the First Nations land. So then, when you fast forward to the settlement of Canada and that starts to, it comes a bit later but it's accelerating in the course of the 1800s and as it started to intensify, and that started really to accelerate when the railway was coming through, the trans-Canada railway being built, first Nations were seeing this happening.

**Amy Westland:** 22:40

They were seeing settlement across the country, but certainly in Northern Ontario, where I have spent a lot of my time working with First Nations up there, the railway was a key driver for settlement. So as they're seeing that come through, the First Nations, actually, because of this messaging that had consistently come from the crown way back, starting in the 1763 proclamation, there was an understanding that through working with the crown and entering into treaties that in fact First Nations would benefit from the protection of the crown. And so that's where you have the history, the historical record, showing in many, if not most cases that treaties were actually being asked for by the chiefs from the perspective of saying we see all these settlers coming in and we wanna make sure that we can protect our communities and our livelihoods and our way



of life and that was what was having them come to treaty discussions, seeking that protection. I find it interesting.

**Janet Sumner:** 23:45

I'm really glad that she broadened that out and took us back to 1763 and how the royal proclamation played out, because it seemed like the British crown.

**Janet Sumner:** 24:02

There was a moment there in time where the script that was being written in the United States or I guess it wasn't actually the United States at the time, but the various states that were forming were taking up the land or taking it over and this was creating a fear. It was creating a fear in the North and Indigenous nations were aware of what was happening. You know, without the benefit of Google or the internet or whatever, they were aware of what was happening. Would Britain come in and start to do the same thing that was happening with US states or with the states that were being formed in the South by settlers? That's one of the big takeaways for me in the top and that chiefs were asking for treaties with Britain so that they could cement in the relationship and not have to go through kind of a takeover, if you will, and I guess that really struck me. I hadn't sort of pieced those pieces of the puzzle together yet.

**Kaya Adleman:** 25:12

And be able to protect their way of life right. So I think it's interesting that the railway as an economic driver, that we've come technologically to the point, like Anastasia just earlier said, that Europeans wouldn't have survived without Indigenous people in these new lands at the time, early days of colonization, with the fur trade, that was hugely beneficial for that economic sector. And then you come to the advent of the railroad and it's allowed kind of this massive wave of settlement across what is now called Canada, what is now called the United States, and the way of life or I guess definitely what you're saying, Janet like it makes sense that you know the treaties would be seen as a way to protect the livelihoods of Indigenous people, which is kind of the key cornerstone to what we're gonna discuss further today.

**Janet Sumner:** 26:20



And Britain's response to the fear emerging about what was happening in the south of this area was to respond by saying well, we won't do that, we won't come in and take your land, We'll protect you, We'll make sure that you know these new states don't come in here and take this and that we'll protect you. So that's an interesting frame to begin with the whole treaty conversation and as a foundation for that.

**Kaya Adleman:** 26:48

In hearing all of this from Amy. This actually led me to refer kind of in that moment back to our conversation with Anastasia, where she references this dichotomy between powers or, you know, the sentiment of the relationship between Indigenous peoples and, I guess, the crown during the time of treaty making, and then fast forward to the legal framework that would become Canada's constitution. And this is what we're gonna play now is something that you've already heard before from one of our previous episodes.

**Anastasia Lintner:** 27:21

It was like just an ordinary piece of legislation in the British Parliament that sort of created Canada and divided the powers between the federal crown and the provincial crown. So it's still the crown, represented in Canada by these two entities that hold the powers, and then they can delegate powers under certain conditions and if anything sort of. There's a residual clause called peace, order and good government that goes with the federal government and any federal legislation, if it's squarely within their jurisdiction, would supersede the province trying to do something similar. And it became the constitution of Canada when it was patriated in 1982. And that's when we got our charter of rights and freedoms and that is also when there were negotiations with Indigenous peoples around what would happen in the rights associated with recognizing their existing Aboriginal and treaty rights in section 35. So there are a number of things that were meant to happen in terms of constitutional conferences and discussions with Indigenous people. That happened but didn't sort of fulfill even its promise of changing how things worked.

**Kaya Adleman:** 28:46

And then so I asked Amy about it as well. I guess one thing in that this kind of relates back to the case is that there's seems to be, from our previous discussion, a conflict



between the treaties that were signed and their intentions and sections outlined in the Canadian constitution, with the provinces right.

**Amy Westland:** 29:09

Yeah, well, and so that's the you know. So, yeah, so you have the crown, we know which, this notion of the crown and of course that's an interesting whole other discussion, because really the crown represents the people, it represents the companies, you know, as the crown is negotiating these treaties. But then an interesting thing that happened and I think, important background to understanding, you know, some of the more recent litigation that we've seen in Canada and very important litigation in my view, relating to what we call the historic treaties, is that the crown was divided into two. So in Canada we have the federal government, you know, which is one arm or expression of the crown, and it was given under the Canadian constitution in 1867, responsibility for the relationship with First Nations and their lands. However, under that same constitution, the provinces were given the interest and jurisdiction over the lands themselves. So that's what the provinces understood anywhere, that they anyway, that they got the benefit of the lands that were covered by treaties. So, as the you know, the federal government went out over the course of the late 1800s negotiating these treaties. The historic treaties cover the whole area of Canada from, you know, Ontario. There's ones out East which don't deal with land. You know, don't say anything about land really at all, out on the East coast and in Quebec and then starting in Ontario and moving forward to Alberta and parts of BC and a little bit of the North, they dealt with land and they purported to say, in this treaty, you know, the First Nations were involved because it was recognized that they had traditional territories in the area and could speak for those areas.

**Amy Westland:** 31:19

And then the treaty contained two sets of provisions that had conflict. So one was it set up, reserved, confirmed reserves for the First Nations and contained a clause that purported to say that the First Nations surrendered or gave up the remainder of their lands. That's how the crown was interpreting it in many instances. However, they also contained very clear promises to the First Nations that they could continue to hunt, trap and fish throughout their territories and so, in other words, from the First Nations perspective, they did not understand that they were giving up all of their rights outside of



the reserves, that they could continue to hunt, trap and fish and pursue their livelihoods as they had.

**Amy Westland:** 32:10

And that was something when you see the historic records for the treaties, because again the context is the chiefs asking for, you know, asking for the protection of the crown wanting assurances that they'll be able to continue to carry on this way of life, and the crown repeatedly reassuring the First Nations that this would be so. And in some cases we have particularly clear records, such as in Northern Ontario where we have Treaty 9 and one of the treaty commissioners made clear notes that at every site you know the first the chiefs were asking to be sure that they could continue because they knew they couldn't farm on their lands, which is not very arable. And so, and yet there's a clause because of the surrender clause, and another clause which we refer to as the taking up clause, that those clauses said that the province, you know, although the, as they said, the First Nations could continue to hunt, trap and fish, subject to the right of the crown to take up land from time to time for settlement, mining, lumbering, et cetera. And so the province. And then the tension happened where, as you were referring to Kaia, that then, when we have this division of powers, the federal government gets control and, you know, jurisdiction over the relationship with First Nations from the crown's perspective, but the provinces were then given this jurisdiction over the lands.

**Amy Westland:** 33:44

The provinces, when we look at the history of Canada, really then proceeded to act as if the surrender clause had been complete. You know there were no rights existing outside of the reserves after these treaties were entered into and they took up lands extensively without much or any regard for the promise that the hunting, crafting and fishing and pursuit of the livelihoods could continue. And so that's where you know the First Nations who entered into those historic treaties across the country, which cover most of the countries I mentioned, apart from the East Coast and in BC and in most of the North, we did not have any treaties even up until the time of the Constitution. But for most of the First Nations who did enter into those treaties, what they have seen since the time of entering into them was quite contrary to what they had understood would be the case was that their way of life would be protected and instead what they've seen is extensive and the impacts, you know, extensive takings which have accumulated over



time and they would say in many cases have accelerated as technology has facilitated that.

**Janet Sumner:** 35:15

Yeah, I think it's important to listen to this because it's everything that we're laying the foundation for is all about how we use lands and resources and the foundations for today's legal cases and conflicts and why they occur and why the two worldviews are not synced up on the history, so this is an important framework.

**Kaya Adleman:** 35:37

One thing that really sticks out to me in this idea is that I think you actually said it before, Janet is that it seems like there's multiple different legal frameworks that are all existing over the same lands and resources. You have the First Nations, who signed this treaty with the Crown, the federal government, saying that they have the right to enact their livelihoods and their livelihoods won't be altered as they see fit. And then the Crown or the federal government is like yeah, we have jurisdiction over our relationship with you guys. You guys can do what you want. You have the right to your livelihoods on these lands, but we are overseers of your relationship. Again, we're protecting your attitude or frame. And then there's the provinces, and the provinces are like no, you guys surrendered your lands, except for where you have outlined reserves. So it's chaos I guess it's the only way that I can describe it and having to reconcile that is definitely a task that needs to happen and seems very complex. Those are my thoughts.

**Janet Sumner:** 37:02

Yeah, I think that you're right. It is extremely complex and just to speak to that, I'll say that I'm going to use a mining example. So, for example, in an area in Northern Ontario, that is, in intact peatlands in the Hudson Bay Lowlands, there has been an explosion of mining claims. We've seen mining claims in and around the Ring of Fire area. It's a proposed development and not yet a mine, but they're doing mineral exploration and mining claims there have grown 30% in just one year.

**Janet Sumner:** 37:40



And when a claim goes in it says oh yeah, okay. Well, the company says to whatever First Nation has that territory says we want to have a conversation about this claim and will it go forward. Well, the First Nations are now being inundated by this and can't keep up. And so this ability to consult on every single land use, and then that comes from the corporate sector, it doesn't come from the crown. The province isn't asking them. So you've got what's the law and then whether or not the representative of the crown, either province or the federal government, actually delegates, or in this case gives away that duty to consult and accommodate to a corporate entity and perhaps hundreds of corporate entities with this explosion of mineral claims. So you have First Nations at the other end trying to navigate this, plus housing and water situations and all the rest of the things that they have to manage on their reserves and on their lands, it just, it absolutely creates a confusing and conflictual relationship.

**Janet Sumner:** 39:21

Let's maybe just talk about forestry, for example. I mean forestry had not moved as far north I'm speaking specifically in Ontario had not moved as far north as where it currently is. I mean, when you talk about those lands in terms of taking up, the extent to which the impact is being felt from forestry, mining, roads, hydro development, in some cases seismic lines, those kinds of things, it's all taking up the land and impacting on the abilities or the livelihoods of Indigenous nations and yet that's seen as the purview, if you will, of the province to make those decisions, or seen by the province as the purview of the province to make those decisions without restriction or limited restriction.

**Amy Westland:** 40:15

That's right. Yeah, that's right. And I think that we're at a moment in time where it's really important and I'm still optimistic that as a society we can maybe get to this place. But we talk a lot about recognizing the sovereignty of First Nations but really when we see on the ground how the Crown continues to operate, particularly when it comes to the authorization of use or occupation of land, we see more of the status quo. And there I think it's important to just pause and explain that in law, British imperial law, when you read back through the cases where they examine what does sovereignty mean? And we define it.

**Amy Westland:** 41:01





And sovereignty is defined in law as a unilateral power to govern the people and to make decisions about the use of lands and resources. That's what's the sovereignty over land is that unilateral power to decide who gets to use and occupy the lands and how. That whole process of authorizing and permitting the development of land is an exercise, the primary exercise, of the legal idea of sovereignty. And we see in resource development the context of resource development. It continues to be that the governments, particularly the provincial governments, because they're the ones that have jurisdiction over the vast majority of the resources Canada has under the Constitution, jurisdiction over some coastal areas and lands that are subject to national defense bases and the Great Lakes, and there's some areas, national parks, things like that. But the provinces got most of the jurisdiction in their view, but they continue to operate as if what they have is a unilateral power and yet, and so sovereignty over those lands because of the treaties they believe, or confirmed by the treaties.

**Amy Westland:** 42:20

And so, whereas the First Nations and this is again this issue when people talk about, or one of the issues when we talk about reconciliation, one of the things we really need to understand better as a society, I believe, is that the First Nations, because they believed they were, as governments, entering into treaties that were akin to almost like international nation-to-nation treaties.

**Amy Westland:** 42:44

They didn't understand themselves by any means to be giving up their power to govern their people, and they also understood that they were being promised they could continue to use and occupy their traditional territories as they always had. So what they understood was that they were entering into a form of a shared sovereignty and not one where they were receding any kind of sovereignty over their people and lands to the provinces. But we really haven't gotten to the place where we are moving forward in a way that's more aligned with First Nations not fully, but part of why I find that this group of cases that we're seeing and some of the legal evolution that we've seen in recent years is quite exciting and important to support and I think it offers a pathway towards that kind of true reconciliation and, importantly from an environmental perspective, possibly towards a more sustainable future in a place where governments, the provincial governments, are authorizing the use of land not just with a view to economic development and so on, but in a true and meaningful consultation with the First Nations



about the health of their territories and the long-term health of their lands and communities.

**Janet Sumner:** 44:15

I think there is this huge opportunity right now to set a new direction and I'm going to harken back to our conversation with David Flood in a previous episode, where he talks about the need to get to coexistence coexistence with the planet, coexistence with each other and I really like that framework and I see the embers of that burning in various places. I see that in the new relationships, in the formative stages around new national urban parks. I've had privilege to work on two, potentially three right now. I've worked on Rouge National Urban Park and, hopefully, the creation of the new Ojibwe National Park in Windsor and we're seeing the building of a push for a national urban park in Guelph. But in all of those places, working in partnership with and coexistence with the Indigenous nations is leading to new discoveries and new ways of being and new conversations.

**Janet Sumner:** 45:22

Also seeing that in our northern work, where we're working on a national marine conservation area with the Mushkegowuk, who are working in partnership with Parks Canada and this trying to figure out how do we do co-creation, how do we do coexistence and what does that look like? It looks different in many of these regions, but there are some fundamental pieces and I think that what Amy? I'm so glad that she's still hopeful, because you can become jaded over time when you see these things not working. But it's very interesting to see the movement. And then certainly from David's Flood episode, he or episodes he certainly talks about this deep desire for coexistence, and it's also interesting to see it as fundamental to the coexistence with the planet, and I really like that. That, for me, gives me great hope, and so working on getting the relations right at a fundamental level with the treaties can be seen as part of our great environmental work as well, and so this becomes a foundation for all forestry and land use. So I'm super pleased that Amy said that and that she's got that hope.

**Kaya Adleman:** 46:40

Yeah, it's super important, right, I mean, if we want to untangle the mess that we've kind of gotten ourselves into, going back to that multi-level jurisdictional knot that we talked



about before, and I think this case and these cases, as you'll hear soon, really kind of emphasize this idea or kind of show a pathway to move towards that spirit of coexistence and reconciliation as well.

**Janet Sumner:** 47:12

So let's switch to these cases, because one of the things that we want to talk about today, as First Nations have been and this is predominantly in First Nations territory Metis may be involved in some cases, but the one I'm thinking about is in Northern Ontario, where we have I think it's three First Nations, is it who have a cumulative impacts case and they're challenging some of the ways that these treaties have been implemented and the impact on their life from the cumulative impact from all of these different land uses. So maybe you can speak to that and your role in it.

**Amy Westland:** 47:48

Yeah. So I was very, I felt very privileged to be a part of the development and launch of a case in here in Ontario. It's being brought by three treaty nine First Nations who are who, in various different ways and contexts, not just through the courts, but they have for many years been trying to advocate for the protection of their treaty rights in the forest and for the health of the boreal forest overall. So when I left the government, I first went to a small boutique firm here in Ottawa that was that focused on legal issues affecting indigenous peoples and through that firm I was involved in the development of this case which is now is being brought forward to trial by First People's Law. I'm not really a trial, a trial lawyer, so it's in their good hands and so, but I was. So that case is trying to build on. I think it's important we can talk in a moment just also about the specific things that they're seeking and taking issue with in terms of the management of the forest here in Ontario. But it's trying to build on some momentum.

**Amy Westland:** 49:09

You know that we see coming out of British Columbia in particular and other cases that we've been seeing across the country, not just in the last few years there's been several. I know when I was in the government, we were watching a lot of these cases, you know, as a way back as early as the early 2000s, coming forward in different ways claims against the provinces by First Nations, effectively saying you are not either consulting properly regarding our traditional territories before authorizing development



in our lands, or else you know treaty cases alleging asserting rights to those territories under the treaty, the treaties we just discussed. So they've been, they've been brewing in different ways, but then back in 2021, we saw a really big victory for First Nations on this issue, which is something, as I mentioned a few times, I see real opportunity. There's a real intersections between what came out of that case and some of the concerns, just, you know, from a purely environmental perspective. So that case was called Blueberry River, or it's referring to the First Nation that brought the case, and it was important because what the First Nation was saying in that context was, you know, we have in that case it's Treaty 8, and Treaty 8, like all of the number of treaties, contained these two competing provisions, the, you know, the taking up clause, but also the promise to be able to continue the hunting, trapping and fishing and in the BC Trial Court, the First Nation, you know, persuaded the court and made a really strong and effective case, which the court agreed with, that these rights to hunt, trap and fish are not purely that, they are connected to an entire way of life.

**Amy Westland:** 51:06

You know of livelihoods, the need to pursue livelihoods and way of life that was based on the need for healthy wildlife and healthy water. You know the need and a healthy, continuing healthy environment. You know a landscape that was unfragmented and also, to be able to honor that promise that the crown made, they need to be able to move fluidly over that healthy landscape. It's not sufficient to say, oh well, you can, you know hunt, trap and fish over here or do it, you know, over there, but you have to travel for 400, . You know kilometers, you know which is what's been happening more and more in most of most of the country. So they established that the treaty protected this way of life and that BC's approach to authorizing development in the territory had led to a place where they could no longer do that. You know more than the vast majority of the territory had been taking up, taken up for a variety of purposes roads and mines and logging and you know. And so it was at a point where they no longer could do that.

**Amy Westland:** 52:15

And the court also said you know they looked at the First Nation was saying you know there's no mechanism that exists to protect this either. You know the consultation the courts have said for a number of years. Back since 2004, they articulated what we call the duty to consult, and that means that the crown does have to consult with First Nations before they authorize, authorize development in their territories that could



adversely impact them. But the First Nation and Blue Bear River was saying this is not working for us. We are inundated with requests for consultation. We don't have the ability to to engage meaningfully on each and every one and this is essentially a desk by a thousand cuts because we can't possibly keep on top of all of it and meanwhile you know this or that project in isolation, it's hard to really articulate what the overall impact is.

**Amy Westland: 53:12**

And so the big victory in that case was that the court agreed with that and said that BC was effectively in breach of the treaty because it did not have any mechanism to assess or monitor for the cumulative impacts over on the treaty rights. So they really could not say you know how this particular road might impact the First Nation in the broader context of over a hundred years of various different impacts that had resulted in more than 85% of the territory that might be the wrong number, but it was close to that having been taken up. And so they said BC could no longer authorize any activity in the territory until they developed this mechanism, and what we've seen coming out of that is, you know, very progressive and much more detailed planning land use planning, you know, wildlife management plans, land use plans, planning for petroleum and natural gas, adoption of an ecosystem-based forest management approach, importantly, funding and areas set aside for restoration and wildlife stewardship and that kind of thing. So sitting down and coming up with we've seen BC sitting down and coming up with a binding agreement and approach to not just, you know, avoiding further harms but to actually restore certain areas from a perspective of needing to understand that the lands and the ecosystem is an interconnected whole.

**Amy Westland: 54:56**

You can't have an effective approach that has just one department, you know, dealing with the discussion, because all of these, one of the things that the case also showed, was that BC, just like we see in every province, as far as I know, and certainly we see here in Ontario, different departments had responsibility for different subject matters so you couldn't deal with just the first nations. You know, if they're trying to deal with one department about roads you know Ministry of Transportation let's say they also needed to be talking with Ministry of Environment if they wanted to talk about impacts on the water, but they wouldn't be there at the table, or else you'd need to talk with, you know, the Ministry of Natural Resources about the impacts of the mine that the road might lead



to, but that ministry might not necessarily be at the table. So this mechanism that they're developing in BC includes representatives from all of those departments and tries to break down some of the silos that we see often as a major impediment to taking an ecosystem-based approach to any kind of decision-making about lands and resources.

**Janet Sumner:** 56:04

Frankly, you can see the building blocks of an entire what I hoped will be a sea change in how we have our relations and how we can reset, and some of that is this real challenge that communities or indigenous nations are being inundated by a thousand decisions or a thousand cuts and it's impacting them and trying to respond to that in any kind of time frame that can lead to good decision making and with multiple levels of government and multiple departments of government. Just to go back to forestry in Ontario, for example, is the decision around the spraying of glyphosate is enabled by Health Canada, but where you're going to spray or the license in Ontario is by Ontario. So you've got First Nations trying to make sense of this and trying to navigate this and elders in communities who may or may not speak English or be able to navigate these worlds in this world view, being faced with these multiple layers of permissions and proposals, etc. We see that, you know, definitely. We see that in forestry, we see it in mining. We see it like, for example, the community of Attawapiskat on the shores of James Bay was looking at doing the Victor Diamond mine and I remember all the reports that were coming in. They were from during the environmental assessment process. They were from many departments at the federal level as well as the provincial level, and I think when we looked at the documents it was kind of like 18 boxes lined up in our office just a way through those documents, all written in very technical language, etc. And so it's no wonder that it's challenging and perhaps unsustainable for communities to try and respond to all of this and have a single mechanism.

**Janet Sumner:** 58:12

I hope that the approach that BC is taking starts to filter through the rest of the system and we start to see this one shop window where communities can be charged with, you know, co-creating a plan and figuring out how to get ahead of all of this, because that's really fundamental to how we do resource extraction planning that you need to have a way to get ahead of it. Do a land use plan or do a plan for the area that says these are the areas that we want to be left alone. They're important to us culturally, they're important to us for hunting, fishing and trapping, and it's also really interesting to me that



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we did and you know this is a change in a century of thinking but we didn't include in those treaties the right to hunt, fish and trap, and I'm so glad they interpreted as livelihood, because what I've heard from some of the southern First Nation communities is they've been cut off from being able to do culture and ceremony, and so, yes, the hunt, fish and trap rights are definitely about livelihood and it's so amazing to me that that was the interpretation and I'm very, very pleased with that because I think when you just hunt, fish and trap, it does not include the full breadth and, as you heard from David in the conversation in the previous pod, he talks about being in relation to the land. So I don't know how you protect that if you don't include the relation to the land, the ability to do cultural ceremony and practice. So for me, this is a very welcome change to start seeing it as the livelihood, because I think it is much more than just the ability to hunt, fish and trap.

**Kaya Adleman:** 1:00:05

Right and for me, you look at how land and resource management, planning and consultation with Indigenous communities works, just on a face value, and it makes you think why does this make any sense? Because if everything has to be done through a different department and approved by different entities, or you're being inundated with separate claims and have to contest each and every one of them, well, first thought to that is it definitely does not see ecosystems and lands as a singular entity. That's all interconnected, which we've talked about on our podcast quite a bit. That can't water soil, trees, they don't exist in vacuums. If you affect one thing, it's going to impact the other thing, species two. And then, second, I mean it makes you think like, who invented the system? Why does it work this way? And then you think, well, it's definitely to the benefit of some people, and who does it benefit? And so it kind of makes you think that maybe it's time to start thinking of an approach that is definitely more equitable and that respects the sovereignty that Indigenous communities should have over their lands and resources.

**Janet Sumner:** 1:01:38

That's interesting. I see it as a kind of a reflection of the Western worldview, and we've created the various departments and responsibilities on our side of the equation based on our worldview. Even our science works that way. When you talk to scientists who might be experts at studying bugs and you ask them a question about, I don't know, maybe trees, they may know some of the fundamentals, but their expertise kind of can





limit them sometimes from being able to see the bigger picture. And that is something I think that we will benefit from by working in coexistence with Indigenous nations. We will start to blend our two ways of seeing, or the two-eyed seeing, and this is my greatest hope is that what will happen then is that we will actually have a combined worldview that brings both of the expertise or the two-eyed seeing together and work from that as our foundation. And so instead of I don't know and I hope this doesn't offend, but seeing truth and reconciliation as an obligation or something that you have to do or something like that, seeing it as almost onerous I think it's the wrong approach. It's really a huge opportunity to grow and to get into this space where we decide to embrace coexistence and all the benefits that it can bring, because I think there are huge benefits from embracing coexistence with the planet and with each other and, as I said, I'm looking forward to this, and so that worldview of chopping everything up into little bits is, as I say, I see it as a reflection of the way that we think.

**Kaya Adleman:** 1:03:52

Yeah, it's a disservice. It's got the strengths too. Yeah, it's a disservice to ourselves to kind of be stuck in that mindset, right.

**Janet Sumner:** 1:04:02

And I do not want people to leave this believing that there is nobody out there doing consultation and accommodation and FPEC. Right, there are pockets all over Canada where we see the co-creation of new national urban parks or NMCAs, or, in many cases, where we've seen the just recently, the devolution of Nunavut. We've seen all kinds of exciting things, so that it's not without hope on the horizon of things that are happening and many good conversations that are happening with good companies that have the right end of this.

**Kaya Adleman:** 1:04:46

Right. So it's kind of a matter of getting it institutionalized or make it into a system level change.

**Janet Sumner:** 1:04:56



That's right. We can't just leave it to. If you have a good actor. Yeah, like a good will and intention.

**Janet Sumner:** 1:05:04

Yeah, it has to be a systemic change, and so we look forward to joining us for the next episode on the cumulative impacts case very specifically, and we'll get into that a little bit more and what change it could bring. Looking forward to it, Janet.

**Kaya Adleman:** 1:05:19

Thanks, Janet, thank you yeah.

**Janet Sumner:** 1:05:23

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**Kaya Adleman:** 1:05:34

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**Janet Sumner:** 1:05:55

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**Kaya Adleman:** 1:06:01

See you next time.