Breakout 3B: The Peel River Case: Implementation through Litigation (Wednesday, November 15, 2017)

Speakers:

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When land use plans fail under a modern treaty, they may require implementation through litigation. The Peel River watershed case is instructive in this regard.

Fourteen First Nations in the Yukon Territory worked together to collaborate on an Umbrella Final Land Claims Agreement. Today, eleven of those First Nations have self-governance agreements, which are constitutionally protected and allow for independence and self-management over lands, people, budgets, and programs and services.

The Tr'ondek Hwech'in is a self-governing First Nation in Dawson City, Yukon and areas of their traditional territory are directly tied to the Peel River watershed. Their Agreement provides for a land use plan whereby a commission is established to gather scientific and historical information, carry out consultation, and draft a final plan to the territorial government. In 20 years, only one land use plan has been approved – the North Yukon Land Use Plan.

A land use plan for the Peel River watershed was developed by the commission over the course of four years. The 68,000-square kilometre Peel region has been used by all regional First Nations for thousands of years. It is a place the Tr'ondek Hwech'in Chief described as their "university; it's where we go to learn, where we get our medicines, where we get our food." In developing the plan, the commission consistently heard that Peel's biodiversity required safeguarding for the next seven generations. Following consultation and research, the commission submitted a draft recommendation to the Yukon Government providing that 80% would be protected with 20% being open for industrial development.

Under Chapter 11.6 of the Umbrella Agreement, it is then open to the Government to approve, reject, or modify the draft land use plan following a period of consultation with the Yukon communities, First Nations, and conservation societies (section 11.6.2 of the Agreement). The Government responded by asking for modifications geared toward "more access and a better balance plan". No explicit modifications were made to the 80/20 proposal. Under the Agreement, it is the commission's job to then draft a new plan in accordance with the Government's comments. The Government could then, after further consultation, approve, reject, or modify the plan (section 11.6.3.2). Instead, the Government, made unilateral modifications to the plan suggesting 70% would be open to industry with 29% under protection.

The Tr'ondek Hwech'in, along with other affected First Nations, commenced a lawsuit against the Yukon Government for breach of the Umbrella Agreement by failing to consult. At trial, the

Court sided with the First Nations holding that the Government's interpretation of the Agreement usurped the planning process and diminished work done by commission in suggesting the 70/29 proposal. Viewed globally, the Government did not respect the land use planning process nor did it interpret the Agreement in a manner that upheld the Honour of the Crown. The trial judge sent the process back to the second consultation step (section 11.6.3.2) and limited the Government to consult only on their initial modification requests.

The Government appealed. The Court of Appeal found that, while the Government had breached Chapter 11.6, it found the breach had happened at the first consultation stage (section 11.6.2) and sent the process back to that sage.

The First Nations appealed to the Supreme Court of Canada. A decision has yet to be issued.

Case law continues to emerge respecting the implementation of modern treaties. This is the first case where the Court will have an opportunity to craft a remedy for the breach of a modern treaty. Further, it is an opportunity for the Court to weigh in on modern treaty interpretation. Should they be read like contracts between two sophisticated parties? Or should they avoid legalistic and narrow interpretations with the benefit of the doubt always falling on the side of the First Nation like an historic treaty? The hope is the remedy will promote reconciliation in the long term to build trust between the parties and preventing them from having to redo stages of their land use planning process.

From this litigation, Tr'ondek Hwech'in learned that, when faced with a protracted legal proceeding such as this, it is incumbent on the First Nation to pause, discuss the matter internally, bring on advisors, articulate their legal position, and stick to that position throughout litigation.