

Traditional Knowledge and Co-Management Tribunals

John Donihee

Willms & Shier Environmental Lawyers LLP

www.willmsshier.com

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INTEGRATING
TRADITIONAL
KNOWLEDGE INTO
DECISION-MAKING
THROUGH CO-
MANAGEMENT
TRIBUNALS

Presentation Outline

- **Introduction**
- **Examples of Legislation requiring TK integration**
- **Co-management tribunals**
- **Legal requirements – Tribunals and challenges to using TK**
- **Recommendations**

TK IN ENVIRONMENTAL DECISION-MAKING –

TOP DOWN OR BOTTOM UP?

SCOPE of PRESENTATION

- Ellis (2003) describes 2 ways to ensure that TK forms a part of environmental decision making
- The “bottom-up” approach seeks to foster TK at the community level, for its own purposes and indirectly contributes to decision-making
- The “top-down” approach is based on laws and rules which require the use of TK without - in many cases addressing the nature or content of TK

This presentation focuses on the “top-down” approach – earlier session focused on the bottom-up approach

Land Claims and TK - NWT

- **Inuvialuit Final Agreement**
 - **Section 14(5)** The relevant knowledge and experience of both the Inuvialuit and scientific communities should be employed in order to achieve conservation.
 - More recent land claims require the use of “Traditional Knowledge” in decision-making. These requirements are frequently reflected in legislation.

Land Claims and Co-Management

- Starting with the JBNQA and the IFA, land claims established new governance institutions – co-management tribunals
- Half the members of these tribunals are appointed on nomination of or by the aboriginal party to the land claim
- Most often, membership is 50% or more aboriginal
- These members are culturally and linguistically sensitive to the importance of TK in their decisions

Land Claims and Legislation

- Land claims have driven the legislative agenda in all three northern territories and have re-shaped wildlife, environmental, land and water and other laws
- Co-management plays a central role in decisions about all these resources under these laws
- Evidence including TK is essential to the decision makers on these tribunals -- if their decisions are to reflect the goals of the land claims

So – I am going to talk about our use of TK in this context

EXAMPLES OF LEGISLATION REQUIRING THE USE OF TRADITIONAL KNOWLDGE

TK in Legislation

- We have been quite successful in ensuring that TK requirements are reflected in legislation
- But, as I will explain below -- this is an area where our reach has exceeded our grasp
- The legal requirement to collect and make use of TK and to give it equal weight to western science was easy to write into law
- Actually doing this is the hard part -- especially for administrative tribunals
- Below are some examples of TK requirements in law

Legislation - NWT

Species at Risk Act

- **Preamble:** And whereas the conservation of species at risk should use the best available information, including Aboriginal **traditional knowledge**, community knowledge and scientific knowledge, and be based on an ecological approach
- Traditional knowledge is a requirement appointing SARC committee members, and in drafting species status reports

Legislation - NWT

Mackenzie Valley Resource Management Act

Land and Water Management

60.1 In exercising its powers, a (land and water) board shall consider

(b) any **traditional knowledge** and scientific information that is made available to it.

Impact Assessment

115.1 In exercising its powers, the Review Board shall consider any **traditional knowledge** and scientific information that is made available to it.

Legislation - NWT

MVRMA Environmental audit

- 148.** (1) The federal Minister shall have an environmental audit conducted at least once every five years by a person or body that is independent.
- 150.** The Governor in Council may, after consultation by the federal Minister with affected first nations, the Tlicho Government and the territorial Minister, make regulations for carrying out the purposes and provisions of this Part and, in particular, regulations
 - (a) respecting the collection of data and the analysis of data so collected and scientific data, **traditional knowledge** and other information, for the purposes of section 146;

Legislation - Yukon

Environment Act

48(2) The Yukon State of the Environment Report shall

(b) incorporate the **traditional knowledge** of Yukon First Nation members as it relates to the environment;

Legislation - Yukon

Forest Resources Act

Defines “forest resources management” as:

- the practical application of scientific, biological, social, cultural and economic information and **traditional knowledge** of first nations to the management, use and conservation of forests to meet specific public interest goals and objectives, while maintaining the productivity and health of the forest; use and conservation of forests to meet specific public interest goals and objectives, while maintaining the productivity and health of the forest;

Legislation - Nunavut

Nunavut Planning and Project Assessment Act

- **103.** (1) In conducting a review of a project, the Board must take into account the following factors:
- (3) In its review of a project, the Board must take into account any **traditional knowledge** or community knowledge provided to it.

Legislation Federal

Canadian Environmental Assessment Act, 2012

- Community knowledge and Aboriginal Traditional knowledge
 - S.19(3) The environmental assessment of a designated project may take into account community knowledge and **Aboriginal traditional knowledge**.

MORE ABOUT CO- MANAGEMENT TRIBUNALS

TRIBUNAL MEMBERSHIP AND TK

- Co-Management tribunals are often required by legislation to include “such TK as may be available” in their decisions
- Through their appointments land claim parties can ensure that members bring their own TK to the board table
- Aboriginal members also understand and are culturally attuned to TK evidence
- They may also speak native languages and be able to understand elders and TK holders directly

CO-MANAGEMENT TRIBUNALS

NWT EXAMPLES

Inuvialuit Final Agreement

- WMAC (NWT) & (NS); FJMC; EISC; and EIRB

Gwich'in, Sahtu and Tlicho Agreements

- Renewable Resources Boards
- Mackenzie Valley Resource Management Act
 - Mackenzie Valley Environmental Impact Review Board
 - Mackenzie Valley and regional land and water boards
 - Land use planning boards

TRIBUNAL USE OF TK

- White (2007) points out that if we measure the extent to which law and tribunal practice seek to include TK -- we would conclude that significant aboriginal influence is clearly present
- However, if we measure how well tribunals actually incorporate TK into their operations and decisions, we see clear limits on the extent of TK' s influence

This is the gap between our reach and our grasp that I referred to earlier

CO-MANAGEMENT AND ADMINISTRATIVE LAW

- Co-management tribunals are creations of Canadian – not aboriginal law
- They are administrative tribunals and operate in a legal context based on English and Canadian laws
- They are subject to supervision by the Courts via Judicial Review
- The legal rules applicable to their operation depend on the nature of the work they are doing
- More “court-like” tribunals must have more formal processes

ADMINISTRATIVE LAW

- The formality required of tribunal practice is generally related to the nature of their work – administrative and policy work, or work leading only to recommendations, attracts less formality
- Work involving hearings where rights and/or economic interests are affected requires more rules and formality
- Thus, WMAC work usually attracts less formality than that of the EISC and EIRB
- This context and formality has an effect on the integration of TK

ADMINISTRATIVE LAW

The Administrative law model: does it work?

Barriers to the presentation and use of TK

- Procedural fairness requirements
- Evidence required & “strict rules of evidence”
- Adversarial Structure
- Context and Culture

Not always conducive to the integration of TK into decision-making

A CURRENT EXAMPLE

- **MVEIRB Jay Pipe EA Caribou impacts**
- **MVEIRB TK Guidelines**
- **MVEIRB Engagement Policy**
- **EIS Terms of Reference**
- **TK and the evidence before the Board**
- **Conflicting views about impacts based on TK and science**

TRIBUNALS AND TK

WHAT CAN WE DO?

- Aboriginal parties to land claims must insist on better outcomes – better use and integration of TK in “their processes”
- Focus on rules and process
- Tribunals are “masters of their own procedures” they can and should do better
- No one is opposed – land claims and statute already require TK

TRIBUNALS AND TK

WHAT CAN WE DO?

- Tribunals do not produce their own evidence – they must use their rules and process to ensure TK is available
- Set out a clear framework for TK requirements and use for applicants
- Ensure community and aboriginal engagement in all proceedings
- Require reporting of TK collection and use
- Monitor performance

TRIBUNALS AND TK

WHAT CAN WE DO?

- **Systematic, rigorous tracking of collection, use and integration of TK is needed**
- **Various tools can be used – rules of procedure; policies, guidelines, terms of reference for EIS etc.**
- **Test outcomes -**

CONCLUSION

- Land claims and legislation have made the use of available TK mandatory in the co-management decision-making process
- In the co-management context legal and institutional constraints affect the use of TK
- Co-management tribunals have the authority and tools needed to improve TK use
- A systematic and rigorous approach to the integration of TK is needed.

Contact Information

John Donihee

613-217-8521

jdonihee@willmsshier.com

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www.willmsshier.com

