



It's Not Just Culture It's a Constitutionally Protected Right

THE LANDSCAPE FOR THE AVERAGE FORESTRY consultant has changed dramatically in the last few decades with respect to regulation. We have moved from the days of little to no regulation to today with more regulation than ever. One of the primary issues influencing forestry regulation today, along with environmental protection, are Aboriginal issues like land claims and self-government.

We have seen everything from blockades, negative media campaigns and legal action all which have far reaching consequences for the forestry industry. Part of the response from government has been to introduce or change regulation designed to address Aboriginal Peoples and their cultures.

Before discussing balancing regulation with culture, I think it is important to know what culture is. The *Merriam-Webster* dictionary defines culture in part as, "the integrated pattern of human knowledge, belief, and behaviour that depends upon the capacity for learning and transmitting knowledge to succeeding generations and the customary beliefs, social forms, and material traits of a racial, religious, or social group."

The problem with this definition of culture is that comes across as a non-threatening concept. It makes people think that culture is language, dancing and crafts. One might think, "Why should I, or the government for that matter, be worried about culture? We live in a society that allows people to be who they are by providing freedom of religion and all manner of other freedoms."

This in turn can make forestry consultants think, "It will be easy to balance their culture with regulation and the regulators will be happy with me. I will get my permit and things will proceed as planned." However, this is not the case and is a total underestimation of what we are actually dealing with.

To get to the root of what we are really dealing with we need an equation. Culture equals something? Culture, in the case of Aboriginal Peoples, equals constitutionally protected legal rights. These legal rights are the leverage that Aboriginal Peoples have to protect their cultures. Below is Section 35 of the Constitution of Canada. Be sure to pay particular attention to section 35(1).

Rights Of The Aboriginal Peoples Of Canada

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

35. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

35. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes
35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.(96)

There is a lot of meaty stuff in section 35. But from the perspective of regulation and culture, section 35(1) says it all. It states that the existing Aboriginal and treaty rights of the Aboriginal Peoples in Canada are recognized and affirmed.

What does this mean? It means that, from a federal and provincial government perspective, governments have to recognize and affirm rights and not take them away through regulation or subsequent activity or activities. There is a legal principle from the Sparrow decision (R. v

See **PROTECTED RIGHT** on page 29

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FLEXIBLE continued from Page 15

an independent power producer or a biomass producing firm the next. Exposure to these opportunities provides perspectives for young professionals as they work at defining their careers.

And of course, lifestyle plays a big role for those forest professionals working for consulting firms. There is typically flexibility to work long shifts and then take extended holidays, thus capitalizing on busy and then quiet periods. Consultants can locate themselves in central locations, be based in home offices if desired, pursue work close to home or travel far and wide if that is their choice. This means they have choices in how to balance work and family in a way that suits them best. Many people choose the consulting lifestyle to enjoy the small company work environment, preferring it to the larger employers and the politics they have.

As service providers, employers and members of the community, consulting forestry firms are key to the ongoing operation of the BC forest industry, providing valuable skills, experience, manpower and flexibility. 🌲

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PROTECTED RIGHT continued from Page 19

Sparrow, [1990] S.C.R. 1075) that states that any proposed government regulation that infringes on the exercise of Aboriginal rights must be constitutionally justified.

Further, the Delgamuukw and Gisdaway Supreme Court decision of December 1997 stated that Aboriginal title and rights exist and governments must design regulations to avoid infringing on constitutionally protected rights. Keep in mind that from the courts perspective the discussion about whether Aboriginal rights exist is closed. The Supreme Court of Canada has required the government to shift their focus to a process of defining those existing Aboriginal and treaty rights through regulation, consultation, or treaty and reconciliation negotiations.

It follows then that Aboriginal Peoples for the most part look at the world through section 35 glasses and ask themselves a simple question. "Does this regulation and subsequent activity, forestry for example, infringe on the exercise of our constitutionally protected rights?" If the regulation or subsequent activity does infringe then they have legal remedy not available to people of other cultures.

One potential remedy is to go to court and seek judicial reviews challenging permits usually on the basis of lack of consultation. Such judicial reviews can tie projects up for lengthy periods of time incurring huge project delay costs as well as associated legal fees.

What then can you do to balance culture with regulation? Change the focus from culture to constitutionally protected legal rights and do whatever it takes to avoid infringing on constitutionally protected rights. The key is to work effectively with Aboriginal Peoples early and often, avoid infringing, seek accommodation and don't assume that by simply fulfilling legal and regulatory requirements that projects will proceed as you wish. Lots have tried this approach and many have failed. 🌲

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