

Reconciliation of Aboriginal Rights with Crown Sovereignty

"The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

CONSTITUTION ACT, 1982, s.35(1)

"The responsibility of a member to the public is ... [t]o have regard for existing legislation, regulation, policy and common law; and to seek to balance the health and sustainability of forests, forest lands, forest resources, and forest ecosystems with the needs of those who derive benefits from, rely on, have ownership of, have rights to, and interact with them."

ABC PF CODE OF ETHICS, BYLAW 11.3.3

BY VIRTUE OF S-S.35(1) OF THE *Constitution Act* 1982 AND A SERIES of decisions from the Supreme Court of Canada existing Aboriginal rights in Canada, including ownership of land, have received constitutional protection. A breach of Aboriginal rights can result in a spectrum of legal remedies, including monetary damages. The concepts of Aboriginal rights and title are now deeply embedded within the law of British Columbia and apply to the lands that forest professionals manage in BC. The question now is one of how to reconcile Aboriginal rights with Crown sovereignty.

To have meaningful regard for the law, BC forest professionals have to possess some understanding of Aboriginal rights and title and, in particular, the process of reconciliation mandated under s-s.35(1) of the *Constitution Act*, 1982. The hallmark of this process is the Crown's obligation to consult and accommodate First Nations.

There are two species of this obligation. The first arises in connection with proven claims to Aboriginal rights and title. In the decision of *R v. Sparrow* the Supreme Court of Canada held that the sovereignty of the Crown could only infringe upon Aboriginal rights and title if the infringement was 'justified.' An infringement is constitutionally justified only if the infringement does not, among other things, violate the 'honour' of the Crown; the honour of the Crown requires (again, among other things) consultation with and accommodation of First Nations in respect of decisions that infringe upon Aboriginal rights and title.

Given that there are relatively few proven claims of Aboriginal rights and title in BC, consultation with First Nations over Aboriginal rights and title was, until recently, motivated more out of an abundance of caution over the prospect of what if a First Nation were able to establish a claim to Aboriginal rights and title that was inconsistent with a proposed development. Without a proven claim of Aboriginal rights or title, there was no existing legal compulsion to consult, only the potential for legal consequences.

This all changed in 2004 with the Supreme Court of Canada's landmark decision in *Haida Nation v. British Columbia*. In *Haida*, the court held that the Crown had an obligation to consult with and accommodate First Nations even if there was no proven claim of Aboriginal right or title:

"[The Crown] must respect these potential, but yet unproven, interests. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some of all the benefit of the resource. That is not honourable."

The court applied a broader conception to the Crown's honour—one that was not only engaged to determine whether the infringement of an 'existing' Aboriginal right was justified, but that applied more broadly to the Crown's dealings with First Nations. With *Haida*, the motivation to consult and accommodate is no longer based upon concerns of what might happen in the future—it is now a current, independent and legally enforceable obligation.

Practically all of the public lands that forest professionals manage in BC are subject to claims of Aboriginal rights and title, and questions of consultation and accommodation will, therefore, continue to exist for some time. Given their ethical mandate, and given public nature of the forest resource, BC forest professionals will have to develop procedures and methodologies to identify the specific requirements of consultation and accommodation in any given instance. 🐾

Jeff Waatainen is an adjunct professor of law at UBC who has practised law in the forest sector for over a decade. He currently works as the sole practitioner of his own firm of Westhaven Forestry Law in Nanaimo.



WESTHAVEN FORESTRY LAW
Big City Advice, Small Town Price

Jeff Waatainen
BARRISTER & SOLICITOR

Phone: 250.758.9485
Cell: 250.618.5776
Facsimile: 250.758.9486
Email: jeff@bcforestrylaw.com
Website: www.bcforestrylaw.com

5359 Bayshore Drive, Nanaimo BC, V9V 1R4