Forestry Law:
Recent Developments of Importance

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FORESTRY LAW

RECENT DEVELOPMENTS OF IMPORTANCE

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Significant developments in forestry law in 2006 include the finalization and implementation of a new softwood lumber agreement between Canada and the United States and further judicial decisions on aboriginal rights to forest resources.

Canada-US Softwood Lumber Agreement 2006

The single most important legal development for the Canadian forest industry in 2006 was the agreement of the Canadian and United States governments to the terms of a new Softwood Lumber Agreement (the "**SLA 2006**"), and the coming into force of the SLA 2006 on October 12, 2006. Subsequently, on December 14, 2006, the *Softwood Lumber Products Export Charge Act, 2006* received royal assent in Parliament. The SLA 2006 resulted in the revocation of all outstanding US countervailing and antidumping duties, with the return to Canadian producers of over US$4.5 billion in duties collected by the US government and the establishment of an export charge regime applicable to Canadian exports of softwood lumber products to the United States. These export charges will be collected by the Canadian federal government and returned to the Canadian provinces.

Background

Softwood lumber is one of Canada's largest exports to the United States and for over more than 20 years has been the subject of one of the most enduring trade disputes in modern history. Since 1982, US softwood lumber producers have sought, and at times succeeded in obtaining, action by the US federal government to challenge, restrict and impose duties on trade in Canadian softwood lumber imports into the United States.

The SLA 2006 represents the latest negotiated settlement in the softwood lumber dispute, which itself has revealed significant flaws in the dispute resolution processes of the North American Free Trade Agreement ("**NAFTA**"). Specifically, the most recent softwood lumber dispute has demonstrated how determined parties can succeed in prolonging proceedings notwithstanding the existence of a negotiated, bilateral dispute resolution mechanism.

The most recent segment of the Canada-US softwood lumber dispute (commonly referred to as "**Lumber IV**") commenced after the expiry of a five-year, quota-based Canada-US softwood lumber agreement initially signed in 1996 (the "**SLA 1996**"). Within days of the SLA 1996's expiry in 2001, US lumber producers brought proceedings against the Canadian lumber industry alleging that Canadian stumpage and log export systems constituted a counteravailable subsidy and also, for the first time, that Canadian softwood lumber producers were dumping their softwood lumber products in the US market. As a result of these allegations and subsequent proceedings and determinations, Canadian softwood lumber producers paid approximately $5 billion in combined countervailing and antidumping duties to the US government, until the return of approximately $4.5 billion of these duties to Canadian producers in late 2006 after the implementation of the SLA 2006.

After many years of these costly proceedings in domestic courts and bilateral and international tribunals, a majority of Canadian softwood lumber producers agreed in 2006 to support the federal government's efforts to resolve the dispute through the SLA 2006. Whether the agreement is ultimately a good solution for its full duration for the Canadian forest industry will however depend on a number of industry, economic and political factors.

Softwood Lumber Agreement 2006

On December 14, 2006, the Honourable David Emerson, Minister of International Trade of the Canadian federal government said of the SLA 2006:

> "This Agreement enables softwood lumber companies to grow their businesses, contributing to Canada's economy and sustaining jobs in hundreds of lumber-dependent communities across Canada."

Certainly, the SLA 2006 achieves, at least for its duration, peace on a significant economic issue and source of political tension between Canada and the United States. The SLA 2006 is for a term of at least seven years, with an option to renew for two additional years. However, in one of the SLA 2006's more controversial provisions, either party may also unilaterally terminate the agreement once it has been in force for 18 months, on only 6 months notice. If the United States government terminates the SLA 2006 under this provision, the SLA 2006 provides that the United States government and the U.S. lumber industry may not commence proceedings for countervailing or antidumping duties for a further one year period – a measure intended to provide the Canadian industry with additional assurance in the light of these early termination provisions and the history of US government and industry activism.

Under the SLA 2006, Canadian softwood lumber producing regions will be entitled to select the application of one of two export charge regimes available for products originating from their territory. Both export charge regimes will only apply when the price per thousand board feet of lumber drops below US$355 (the price of lumber is presently at US$283 (as of March 22, 2007)).

The two options are generally stated as:

- Option A: an export charge rate varying from 0 to 15% depending on lumber prices; and
- Option B: an export charge rate varying from 0 to 5% with volume restraints, where both the rate and the volume restraint vary with the lumber price levels.

The provinces of British Columbia and Alberta have selected Option A and the provinces of Saskatchewan, Manitoba, Ontario and Quebec have selected Option B. Softwood lumber exports produced in the Atlantic provinces, the Yukon, Northwest Territories, Nunavut, and from certain Quebec border mills are exempt from the export charge measures under the SLA 2006.

The SLA 2006 also includes a "surge mechanism" to monitor future lumber shipments from particular provinces. In short, the SLA 2006 provides that where a province's exports to the United States in a particular period exceed 110% of its base allocation (based on historical share of its United States market) the applicable export charges on shipments from that province will be increased by 50%.

Under the SLA 2006, certain export charge exemptions are also provided for independent lumber remanufacturers in order to allow these producers (who are, generally speaking, not permitted to be direct or indirect tenure holders in any of the Canadian provinces) to benefit from a first mill price and pay export charges only on the initial value of the products they manufacture, and not on the value-added component.

Under the SLA 2006, approximately 80% of the outstanding duties collected from Canadian softwood lumber producers during Lumber IV were refunded to Canadian producers in late 2006. The balance of approximately $1 billion was distributed among US interests and will be applied as follows:

- US$500 million will be distributed to the members of the Coalition for Fair Lumber Imports;
- US$450 million will go to meritorious initiatives in the United States to be determined in consultation with Canada; and
- US$50 million will go to an initiative benefiting the North American lumber market.

As noted above, although the SLA 2006 is clearly the most significant legal development for Canadian softwood lumber producers and the industry in 2006, it will be a matter of not only legal but also industry, market and political forces which will determine both the longevity and effectiveness of this important agreement.

Aboriginal Right To Harvest Timber For Personal Non-commercial Use Recognized By Supreme Court Of Canada

In our last report on recent developments in Forestry Law, we commented on a 2005 Supreme Court of Canada decision which rejected a claimed treaty right to harvest timber for commercial purposes. In December, 2006, the Supreme Court of Canada released another important decision addressing aboriginal rights to forest resources. The *Sappier* decision[1] is the first Supreme Court of Canada decision to recognize an aboriginal right to harvest forest resources for personal, non-commercial use, and could have significant implications for forestry companies in Canada.

The decision involved three status Indians, two Maliseet Indians (Mr. Sappier and Mr. Polchies) who are members of the Woodstock First Nation in New Brunswick and one Mi'kmaq (Mr. Gray) who is a member of the Pabineau First Nation in New Brunswick. All three had cut trees on Crown lands without authorizations from the Government of New Brunswick, and were charged with unauthorized possession of timber taken from Crown lands. In their defence, they asserted a treaty right and an aboriginal right to harvest timber for personal use under s. 35(1) of the *Constitution Act, 1982*.

In *Sappier*, the Supreme Court held that Sappier, Polchies and Gray had each established a defence of aboriginal right to harvest timber for personal use, and in doing so clarified the legal requirements for establishing aboriginal rights under s. 35(1).

Scope of Aboriginal Right Narrowly Defined

The Supreme Court took pains in characterizing the nature of the right claimed, stating that the characterization of the right to harvest wood must be directly associated with the particular way of

[1] *Gray v. R.; R. v. Sappier and Polchies*, 2006 SCC 54 ("*Sappier*").

life of the aboriginal community. The Court found the "right to harvest timber for personal uses"[2] to be too general. Instead, the right was characterized as a right to harvest wood for domestic uses as a member of the aboriginal community. The Maliseet and Mi'kmaq were "migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation." Thus, the right to harvest wood was tied to meeting the communities' traditional needs for such things as shelter, tools and fuel.

The Court emphasized that the right to harvest timber for domestic uses could have no commercial dimension. No timber could be sold, traded or bartered to produce assets or raise money even if money so generated were used to build or purchase shelter.[3] While the aboriginal right to harvest timber was therefore recognized, the Supreme Court — no doubt recalling the violent reaction that followed the release of the *Marshall* decision — carefully circumscribed the scope of the right.

Right Tied to Specific Sites

In *Sappier,* the Supreme Court applied the "site-specific" requirement on hunting and fishing rights of aboriginal communities from previous case law to the present case of harvesting timber. The Supreme Court placed a geographic limitation on the aboriginal right, stating that it was limited to domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation.

This is an important limitation. It means that, in each case where an aboriginal right to harvest forest resources is asserted, the existence of the right must be decided based upon evidence of supporting the existence of the asserted right in a specific location. The fact that the Supreme Court has recognized a right of members of two First Nations to harvest trees in two locations in New Brunswick does not mean that those First Nation members have a right to harvest trees elsewhere; nor does it mean that other aboriginal peoples in other parts of Canada necessarily have similar rights.

Threshold Lowered for Cultural Importance of Activity as basis of Aboriginal Right

Another important issue for the Supreme Court was to decide whether harvesting timber was central enough to the First Nations' culture to warrant constitutional protection as an aboriginal right. In previous cases, the Supreme Court had set a high standard for this test, holding that an activity had to be integral to the distinctive culture of the aboriginal group in question. In its decision in *Mitchell*[4]*,* the Supreme Court had said that an aboriginal activity must be part of the core identity of an aboriginal community in order to constitute an aboriginal right.

However, timber harvesting for home construction was an activity shared by aboriginal and non-aboriginals alike. A test requiring that the activity be part of the core identity of the aboriginal community could make it impossible for an aboriginal community to establish an aboriginal right tied to activities like harvesting trees for shelter. To address this potential problem, the Supreme Court effectively lowered the standard for determining cultural importance of an activity, by holding

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[2] At ¶46.
[3] At ¶25.
[4] *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911.

that that the pre-contact practice upon which the aboriginal right is based need not go to the core of the society's identity, *i.e.* it need not be its single most important defining character.[5] The Supreme Court stated that, in establishing an aboriginal right, a court must seek to understand how the particular pre-contact practice relied upon relates to the aboriginal community's current way of life. However, the practice does not have to go so far as to be the "core of a people's culture".

In addition, the Court clarified what is meant by "culture" in the analysis. It held that the inquiry is into the pre-contact way of life of a particular aboriginal community, including the community's "means of survival, their socialization methods, their legal systems, and potentially, their trading habits".[6] The Court indicated that "flexibility" is important when assessing whether a traditional practice constitutes an aboriginal right, because the object is to "provide cultural security and continuity for the particular aboriginal society."[7] In the absence of direct evidence, judges are to draw necessary inferences about the existence and integral nature of the practice.

Right to Harvest Timber is Not a Right to Sustenance

In this case, the aboriginal defendants had argued that their timber harvesting was part of a broader aboriginal right to sustenance. This was rejected by the Supreme Court. The Court distinguished the right to sustenance from the right to the means of obtaining sustenance. It held "that the traditional means of sustenance, meaning the pre-contract practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people". However, the Court firmly stated that "there is no such thing as an aboriginal right to sustenance".[8]

Evolution in the Exercise of the Right

Consistent with earlier decisions allowing the exercise of aboriginal rights in a modern manner, the Supreme Court held that the nature of the aboriginal right to harvest timber must be considered in light of present day circumstances. On that basis, the Supreme Court rejected the Crown's submission that the respondents should not have a right to harvest wood to build large permanent dwellings, obtained by modern methods of forest extraction. The Supreme Court stated that ancestral practices that are the foundation for aboriginal rights may be expressed in modern form. The Supreme Court cautioned that limiting the rights of aboriginal communities to building wigwams would truly limit the doctrine of aboriginal rights "to a narrow subset of 'anthropological curiosities' and our notion of aboriginality would be reduced to a small number of outdated stereotypes."[9]

Extinguishment

A final consideration was the impact of the Government of New Brunswick's forest regulatory regime on the aboriginal right to harvest forest resources. Where timber harvesting is extensively regulated by provincial laws, the question arises whether that regulatory regime has effectively extinguished any inconsistent aboriginal right. In this case, the Crown argued that any aboriginal

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[5] *Sappier,* at ¶40.
[6] *Ibid.* at ¶45.
[7] *Ibid.* at ¶34.
[8] *Ibid.* at ¶37.
[9] *Ibid.* at ¶49.

right to timber had been extinguished by provincial legislation and regulation of timber harvesting. As in the *Sparrow* case, [10] this argument was rejected. The Supreme Court reconfirmed that it is the Crown who bears the burden of proving extinguishment, and that the intention must be clear and plain.[11] The Court held that the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses. Therefore, the aboriginal right to harvest wood continued to exist despite the extensive regulatory regime governing timber harvesting on Crown land in New Brunswick.

Implications

As the first Supreme Court decision to recognize an aboriginal right to timber, the decision will have important practical implications. Governments will have to review forest tenures and regulatory regimes to consider whether changes are required to accommodate any site-specific rights that may be established in the future. While the decision clearly rules out any commercial component to the right, existing commercial timber licensees may still be affected if governments are required to give priority to aboriginal timber harvesting rights over commercial rights. In this sense, the *Sappier* decision could have the same impact on the forest industry as the Supreme Court's *Sparrow* and *Marshall*[12] decisions had on the commercial fishing industry.

The *Sappier* decision also provides guidance on the nature of aboriginal rights and the requirements for establishing their existence:

- the right to sustenance is not an aboriginal right, although the means to obtaining the sustenance may be a right;
- aboriginal rights are to be defined on a site-specific and case-by-case basis;
- the threshold for finding an aboriginal right should not be unnecessarily heightened by words such as "core identity" from previous case law;
- courts should consider how particular pre-contact practice that is relied upon relates to the current way of life of the aboriginal community, including modern forms of the practice; and
- characterization of an aboriginal right must not be overly broad, must contain a geographic element and should avoid personal or trade uses.

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[10] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.).
[11] *Sappier,* at ¶29.
[12] *R. v. Marshall*, [1999] 3 S.C.R. 456; reconsideration refused, [1999] 3 S.C.R. 533 (S.C.C.).

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