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Aboriginal Law Update

The *Sappier* Decision: Supreme Court of Canada Recognizes Aboriginal Right to Timber for Domestic Purposes and Clarifies Requirements for Establishing an Aboriginal Right

On December 7, 2006, the Supreme Court of Canada handed down its decision in the cases of *Gray v. R* and *R. v. Sappier and Polchies*.[1] In this decision, the Court upheld New Brunswick Court of Appeal decisions finding that the Maliseet and Mi'kmaq people have an aboriginal right to harvest timber from Crown lands for domestic uses.

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*[2] and *Marshall*[3] 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;

[1] [2006] SCC 54 [*Sappier*].
[2] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.).
[3] *R. v. Marshall*, [1999] 3 S.C.R. 456; reconsideration refused, [1999] 3 S.C.R. 533 (S.C.C.).

- Courts should consider how particular pre-contact practice 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.

The remainder of this newsletter provides a summary of the decision and the Supreme Court's definition of aboriginal rights to harvest timber for personal use.

BACKGROUND

R. v. Sappier and Polchies

The case of *R. v. Sappier and Polchies* involved two status Indians and members of the Woodstock First Nation, a Maliseet community living in New Brunswick, who were charged under s. 67(1)(c) of the *Crown Lands and Forest Act*[4] for unauthorized possession of timber taken from Crown lands. The essential elements of the charge were admitted by both defendants; however, in their defence, they asserted a treaty right and an aboriginal right to harvest timber for personal use under s. 35(1) of the *Constitutional Act, 1982*. The Crown took the position that no such rights existed.

The trial judge concluded that the defendant had a treaty right, and characterized it as the right to harvest wood for personal use. The trial judge found there was no aboriginal right to do so. On appeal to the Summary Convictions Proceedings Appeal Court, the trial decision was upheld.

Both parties applied for leave to appeal to the Court of Appeal of New Brunswick. The Crown appealed the finding of a treaty right, while the defendants appealed the failure to accept the defence of an aboriginal right. While the Court of Appeal confirmed the existence of both a treaty and an aboriginal right, they narrowed the previous characterization of the right by adding a geographical requirement. The right was defined as the right to harvest timber for personal use on Crown lands traditionally occupied by members of the Woodstock First Nation community.[5] Robertson J.A. emphasized that a practice need not be distinct in order to found an aboriginal right claim – it need only be integral to a distinctive culture. The decision was appealed to the Supreme Court of Canada.

R. v. Gray

The facts in *Gray v. R.* are very similar to those in the case above. *Gray v. R.* involved Darell Joseph Gray, a status Indian and member of the Pabineau First Nation, a Mi'kmaq community in New Brunswick who was charged under s. 67(1) of the *Crown Lands and Forests Act*[6] for unauthorized cutting of timber on Crown lands. The defendant admitted the essential elements of the charge, but in his defence he claimed that he had both a treaty and an aboriginal right to harvest trees for

[4] S.N.B. 1980, c. C-38.1
[5] 2004 NBCA 56, at para 13.
[6] S.N.B. 1980, c. C-38.1.

personal use under s. 35(1) of the *Constitution Act, 1982*. The Crown argued that no such right existed.

At trial, the judge denied the treaty right defence, but concluded that the defendant had an aboriginal right and characterized it broadly as the right to harvest and gather wood for personal use. The defendant was acquitted of the charge. On appeal, the Summary Conviction Proceedings Appeal judge rejected both the treaty and aboriginal right defences. The appeal judge concluded that the trial judge had erred in characterizing the aboriginal right too broadly. Instead, the appeal judge adopted a much narrower characterization: the right to harvest bird's eye maple trees to fabricate furniture for Mr. Gray's own use and for moulding for his house. The appeal judge went on to hold that the evidence presented by the defendant did not prove that the right was an integral aspect to the Mi'kmaq culture. Consequently, the defence failed and the defendant was found guilty of the charge.

The New Brunswick Court of Appeal allowed Mr. Gray's appeal and restored the trial judge's acquittal. The Court of Appeal adopted the trial judge's broad characterization of the right, but added to it a site-specific requirement limiting the right to Crown lands traditionally occupied by members of the Mi'kmaq community now living on the Pabineau (First Nation) Reserve. This decision was appealed to the Supreme Court of Canada.

THE SUPREME COURT OF CANADA'S DECISION

The Supreme Court heard the appeals of the two cases together and, in a unanimous decision, dismissed both appeals from the New Brunswick Court of Appeal. The Court held that Sappier, Polchies and Gray had each established a defence of aboriginal right to harvest timber for personal use. In finding that the respondents had established aboriginal rights, the Court did not need to consider the treaty right claims.

(a) Establishing an Aboriginal Right

In *Sappier*, the Supreme Court clarified its *Van der Peet* analysis for establishing aboriginal rights under s. 35(1). The *Van der Peet* decision states that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether the claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right.[7]

(i) Nature of the Aboriginal Right Claimed

In *Sappier*, the Supreme Court instructs judges to focus on the nature of the prior occupation of aboriginal people. The Court emphasizes the need to identify the pre-contact practice upon which the aboriginal right claim is founded. Leading evidence about the pre-contract practice is of great importance to the claim.

[7] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 46.

The Supreme Court spends some time 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 life of the aboriginal community. The Court finds the "right to harvest timber for personal uses"[8] to be too general. The right is 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 used to fulfill the communities' needs for such things as shelter, tools and fuel.

The Court held 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.[9] While the aboriginal right to harvest timber was therefore recognized, the Supreme Court — no doubt recalling the violence that followed the release of the *Marshall* decision — carefully circumscribed the scope of the right.

(ii) The Site-Specific Requirement

In *Sappier,* the Supreme Court applies the "site-specific" requirement on hunting and fishing rights of aboriginal communities from previous case law (see *Adams*, *Cote*, *Mitchell* and *Powley)* to the present case of harvesting timber. In Gray's case, the Court's characterization of the aboriginal right imports a geographic element: domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation. The Court states that the integral-to-a-distinctive-culture test should be assessed on a site-specific basis. This is an important geographic limit on the right.

(iii) The Integral to a Distinctive Culture Test

The next step in the analysis is to decide whether the practice which founds the aboriginal right claim (of harvesting wood for domestic use) was integral to the distinctive culture of the aboriginal community, pre-contact. The Court states 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 the "core of a people's culture".

The Court clarifies the reference in *Mitchell*[10] to a "core identity", which may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. The Court discards the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, *i.e.* its single most important defining character.[11]

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[8] *Sappier, supra* note 1at para 46.
[9] *Ibid.* at para 25.
[10] *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911.
[11] *Sappier, supra* note 1 at para 40.

In addition, the Court clarifies what is meant by "culture" in the analysis. It states 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".[12]

The Court states that "flexibility" is important when engaging the *Van der Peet* analysis, because the object is to "provide cultural security and continuity for the particular aboriginal society."[13] If there is no direct evidence available, the Supreme Court instructs judges to draw necessary inferences about the existence and integral nature of a practice.

The Court distinguishes the right to sustenance from the right to the means of obtaining sustenance. It states "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 states that "there is no such thing as an aboriginal right to sustenance".[14]

(iv) Continuity of the Claimed Right with the Pre-Contact Practice

The nature of the right must be established in light of present day circumstances. The *Sappier* decision upholds L'Heureux-Dube's explanation in dissent in *Van der Peet* that "distinctive aboriginal culture must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands."[15]

The Court rejects 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 Court states that ancestral rights may find modern form. The Court warns 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."[16]

(b) Extinguishment

The Crown argued that any aboriginal right to timber had been extinguished by legislation and regulation of timber harvesting. The Supreme Court reconfirmed that it is the Crown who bears the burden of proving extinguishment.[17] 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

[12] *Ibid*. at para 45.
[13] *Ibid*. at para 34.
[14] *Ibid*. at para 37.
[15] *Ibid*. at para 23.
[16] *Ibid*. at para 49.
[17] *Ibid*. at para 29.

continued to exist despite the extensive regulatory regime governing timber harvesting on Crown land in New Brunswick.

For more information on this decision or on how it may affect your company, please contact any of the members of our Aboriginal Law practice group.

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