

**The Supreme Court of Canada Recognizes the Aboriginal
Right to Harvest Wood for Domestic Use**
R. v. Sappier, R. v. Gray

Introduction

On December 7, 2006 the Supreme Court of Canada released a very important decision for the aboriginal peoples of Canada, recognizing that aboriginal rights includes the right to harvest wood from Crown lands for “domestic use”. The decision is known as *R. v. Sappier* and *R. v. Gray*.

The Court defined the right as “an aboriginal right to harvest wood for domestic uses”. In doing so, the Court rejected any “commercial dimension” to harvest, even if the money was being used for the purposes of raising funds to complete the construction of a dwelling.

However, the Court made some very important findings and recognized the importance that the aboriginal right must be protected to preserve the particular aboriginal society which, in this case, were the Maliseet and Mi’kmaq.

The final decision was that the Court upheld the previous acquittals for the three accused deciding that they possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by the Maliseet and Mi’kmaq.

Important Elements of the Findings

The Court accepted the evidence of a Mi’kmaq historian and found it extremely helpful in determining the nature of the right. Second, the Court recognized that the importance of the particular resource to these peoples was sufficient to demonstrate the importance of the right to harvest wood as an aboriginal right, even if there was little actual evidence of the Mi’kmaq and Maliseet pre-contact practices.

The Supreme Court of Canada also addressed some of the key problems that have arisen since the 1998 *Van der Peet* decision, such as arguments related to the “distinctive culture” test. In *Van der Peet* the Court held that in order for a practice to be an aboriginal right it had to be “integral to the distinctive culture” of the aboriginal people involved. Since then arguments have been raised that the practice must be “distinct”, or different from other cultures. In the *Sappier* decision the Court recognized that a practice can still qualify as an aboriginal right even if it is a practice related to survival or is one engaged in by other aboriginal peoples around the world. The Court found that harvesting wood for domestic uses which were undertaken for survival purposes was sufficient to meet the “distinctive culture” threshold.

TEL 604 685 1229 Peter Grant & Associates*
TOLL FREE 1 800 428 5665 Barristers & Solicitors
FAX 604 685 0244 900—777 Hornby Street
WEB grantnativelaw.com Vancouver, BC Canada, V6Z 1S4



PETER
GRANT
&
ASSOCIATES

Aboriginal Rights & Title Indian Residential School Claims Assistance to Aboriginal Governments
Treaty Negotiations Consultation & Accommodation Test Cases Economic Development

*Personal Law Corporation

The Court also underlined that aboriginal practices could be carried out in a modern form. The fact that in pre-contact days the use of wood was possibly for temporary structures “must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling”.

Although the Court recognized the site-specific requirement of this aboriginal right, it also recognized that the evidence demonstrated that the harvesting of wood would have been within the traditional Maliseet and Mi’kmaq territories and therefore the site-specific test did not apply except that the harvesting should be within their traditional territory.

No Commercial Component of the Right

Eight of the nine justices held that the right asserted had no commercial component, meaning that the harvested wood could not be sold, traded or bartered for other assets or to raise money even if the intent was to finance construction of a home. The ninth justice, Mr. Justice Binnie, agreed with the majority that the acquittals of Sappier, Polchies and Gray should be upheld, but he argued for a limited commercial use for the wood. He wrote that the accused should be able to barter, sell or trade the wood if it was for domestic purposes and it was done within the reserve or local aboriginal community.

While Mr. Justice Binnie’s comments are refreshing, he was a minority of one of nine. Still, it is possible that other court decisions may refer to it in the coming years and that the asserted right may even be expanded over time to include some form of barter or sale component, at least within a person’s reserve community or other local aboriginal community.

Impact of Case in British Columbia

This case will be of particular importance for aboriginal nations in British Columbia whether they have entered the new Forest and Range Opportunities [“FROs”] with the Province or not. The funding under those FROs and the timber resources provided were all considered as part of “revenue sharing”.

Following the principles of *Sparrow*, we believe the issue now becomes one of allocation with respect to forest resources. After conservation, the next priority should be the aboriginal right to harvest wood for domestic purposes. Just as in the fishery resource, that should be protected first prior to allocating for commercial purposes to licensees. This will provide a very interesting opportunity for aboriginal nations in British Columbia who are engaged in negotiations with the Crown with respect to a share of forest resources, whether in the context of treaty negotiations, in the context of negotiating FROs or revenue sharing, or in other contexts.

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