Aboriginal Activities and Aboriginal Rights:

A Comment on *R. v. Sappier; R. v. Gray*

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Section 35 of the Constitution Act, 1982, *affirms the "existing [A]boriginal rights" of the Aboriginal peoples of Canada but does not define the content of such rights. Beginning with the 1990 decision in* Sparrow, *and particularly with the 1996 triology of* Van der Peet, Gladstone *and* NTC Smokehouse, *the Supreme Court of Canada has refined the content of this significant constitutional provision. This process of refinement continues with the Court's decision in* R v. Sappier; R v. Gray. *Whereas much Aboriginal rights litigation since 1996 has focused on the* Van der Peet

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"integral to the distinctive culture" test for determining the content of an Aboriginal hunting or gathering right with a focus, in many instances, on specific resources, the Supreme Court in R v. Sappier; R v. Gray *adopted a broader approach focusing on the significance of a resource to the Aboriginal "lifestyle." While taking a more generous approach to Aboriginal rights, the Court adopted a less generous approach to the actual exercise of such rights making* R. v. Sappier; R. v. Gray *an important decision meriting closer analysis.*

I INTRODUCTION

Is an Aboriginal right characterized as a right to fish or as a right to fish for salmon; as a right to harvest timber or as a right to harvest bird's eye maple? Is a harvesting activity "integral to a distinctive culture" if it was a matter of survival in the given resource environment and has been common to all peoples in similar environments since the dawn of time? The answers to these simple questions have profound significance.

For a practice, custom or tradition to be recognized as an existing Aboriginal right, it must have been "integral to a distinctive culture" of the Aboriginal group in question prior to contact with European societies. But, what does that actually mean? In *Van der Peet*,[1] the Supreme Court held that the practice, custom or tradition must be more than "an aspect of [the] [A]boriginal society"; it must be "one of the things which *made the society what it was*."[2] The Court held that the appellant, a member of the Sto:lo First Nation in British Columbia, failed to prove a claimed Aboriginal right to exchange fish, namely salmon, for money or to barter for other goods. The focus of the historical evidence and of the legal argument was not on the fishing itself but on the trade or barter aspect of the claimed right. Earlier, in *Sparrow*,[3] the Court confirmed the existence of a claimed Aboriginal right to fish salmon for food upon the anthropological evidence that, for the Musqueam people in British Columbia, "the salmon fishery has always constituted an *integral part of their distinctive culture* ... not only for subsistence purposes, but also ... on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their culture and physical survival."[4] That evidence, as summarized in the joint reasons for the decision of Dickson C.J.C. and La Forest J., stressed the importance of salmon to the Musqueam belief system:

1. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].
2. *Ibid.* at para. 55.
3. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
4. *Ibid.* at 1099.

> The salmon were held to be a race of beings that had, in "myth times," established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual.[5]

Further, in *Gladstone*[6] the Court recognized an existing Aboriginal right on evidence that the "exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the Heiltsuk prior to contact."[7]

Considering this jurisprudence, one might be excused for concluding that an Aboriginal fishing right, the point of analysis, is defined not in terms of the activity of fishing *per se*, but the activity of fishing for a specific species of fish. As the Court itself stated in *Van der Peet*, "fishing for food is something done by many different cultures and societies around the world."[8] The same approach would logically apply to Aboriginal right claims in relation to the harvesting of animals through hunting and the gathering of forest resources such as bird's eye maple and birch bark. For such claims to succeed, evidence would be required to establish the significance of the activity—be it fishing, gathering or hunting—by evidence of myths, customs and practices associated with that activity.

Ten years after its famous 1996 trilogy on Aboriginal rights—*Van der Peet*, *Gladstone* and *NTC Smokehouse*[9]—the Supreme Court revisited the definitional elements of Aboriginal rights in *R. v. Sappier; R. v. Gray*.[10] In clarifying the Aboriginal rights concept, the Court rejected the species or resource specific approach to Aboriginal rights in favour of an activity approach which emphasizes the adjective "Aboriginal" in the sense of a specific lifestyle. While taking a more generous approach to Aboriginal rights, the Court adopted a less generous approach to the actual exercise of such rights. For these reasons, *R. v. Sappier; R. v. Gray* is an important decision meriting closer analysis.

II THE FACTUAL BACKGROUND

In 1998, the government of New Brunswick entered into interim commercial harvesting agreements with the 15 on-reserve Mi'kmaq and Maliseet (or

5. *Ibid.* at 1095, quoting the Court of Appeal decision (1986), 9 B.C.L.R. (2d) 300 at 308.
6. *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].
7. *Ibid.* at para. 26.
8. *Supra* note 1 at para. 72.
9. *Van der Peet*, *ibid.*, *Gladstone*, *supra* note 6, and *R. v. NTC Smokehouse*, [1996] 2 S.C.R. 672 [*NTC Smokehouse*].
10. 2006 SCC 54 (7 December 2006), [2006] 2 S.C.R. 686 [*Sappier and Gray*].

Wolastoqiyik) communities in the province. These agreements, concerning access to timber and related forest resources on Crown land, created order in the wake of unregulated harvesting activity by Aboriginal and pretended Aboriginal persons in response to judicial recognition of a right to harvest timber for commercial purposes.[11] A trial court had held in favour of a treaty right to harvest timber and then, on appeal, a summary conviction appeal court recognized the right as an incident to existing Aboriginal title to Crown lands. The Court of Appeal reversed on both points and entered a conviction with the rather understated comment that the reasons for decision below "with respect to [A]boriginal title to the Province of New Brunswick have generated uncertainty."[12] It was in this context, and in consideration of the Supreme Court's decision in *Gladstone*[13] concerning limitations on a commercial harvest, that the parties entered into these agreements. The interim agreements allotted 5.3 per cent of the allowable cut from Crown forest lands to the First Nations communities (a figure slightly higher than the percentage of Aboriginal persons in the provincial population). The interim agreements were substituted by five-year agreements (2002-2007) to provide the framework for managing the First Nations wood harvest on provincial Crown lands. These are "without prejudice" agreements which do not affect the constitutional rights of either party and are intended as economic development agreements to promote employment opportunities for on-reserve community members. The agreements specifically provide that all harvested timber is to be sold at a designated mill at market rates "unless otherwise approved by the Minister"—an exception applicable, for example, if a First Nation decided to divert harvesting from commercial to personal use. For the fiscal year 2005-2006 the agreements allocate 215,937 m^3 of combined softwood and hardwood harvest to the 15 on-reserve First Nations communities, including 13,909 m^3 to the Maliseet First Nation at Woodstock and 5,073 m^3 to the Mi'kmaq First Nation at Pabineau.[14] These agreements provide a contextual background to the Supreme Court's decision in *R. v. Sappier; R. v. Gray*.

R. v. Sappier; R. v. Gray represents the joinder before the Supreme Court of appeals arising from two separate prosecutions in New Brunswick. The facts of both *Sappier* and *Gray* are rather straightforward.

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11. *R. v. Thomas Peter Paul* (1996), 182 N.B.R. (2d) 270 (Prov. Ct); (1997), 193 N.B.R. (2d) 321 (Q.B.).
12. (1998), 196 N.B.R. (2d) 292 (C.A.) at para. 26. Leave to appeal to the Supreme Court of Canada denied, see (1998), 204 N.B.R. (2d) 400.
13. *Supra* note 6.
14. Department of Natural Resources, *Annual Report 2005–2006* (Fredericton: Department of Natural Resources, 2006) at 69.

III TRIAL DECISIONS

In *Gray*, the accused Mi'kmaq from the Pabineau reserve near Bathurst harvested four bird's eye maple trees on Crown land and was charged with unauthorized cutting under the provincial *Crown Lands and Forests Act*.[15] At trial, Gray admitted the essential factual elements but defended on the basis of an Aboriginal right and a treaty right to harvest for personal use. Crown counsel did not dispute and the trial judge accepted that Gray intended to use the wood to make "household cabinets, coffee and end tables, and mouldings."[16] The trial judge summarized as follows the evidence of Gilbert Sewell (an elder and former chief of the Pabineau reserve community) who testified as an expert on Mi'kmaq "lore and history":

> Now Mr. Sewell described that he would go on trips with his grand-father for as long as three months and he would describe, of course, that they would build cabins, shelters to protect them from the elements for that extended period of time. And I would say that if the Supreme Court of Canada has recognized as part of the tradition and the lifestyle of [A]boriginals that one can be able to build a hunting shelter, surely if the Court were confronted with a situation as to whether one could use wood to build a year-round shelter, that the decision ought to be similar. So Mr. Gray argues that he was going to put that wood to the construction of his home or use it in the construction of his home. He stipulated cabinets, and mouldings as well as fashioning of end tables and coffee tables. But all of that, I think, accords with what has been the tradition of Mr. Gray's people. Sewell testified to the effect—because he was cross-examined on that as well—that wood was used to make small furniture, that legs to furniture were made out of hard wood. There is certainly an ancestral foundation which has been laid for what Mr. Gray purported to be doing on that occasion.[17]

The Supreme Court of Canada decision alluded to in this excerpt is *R. v. Sundown*[18] in which the Court confirmed that construction of a log cabin in a provincial park is a reasonable incident to a treaty right to hunt in the context of the traditional hunting style of the Cree which involved daily hunting forays from a base camp. The trial judge accepted the Aboriginal right

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15. S.N.B. 1980, c. C-38.1, s. 67(1)(a).
16. *R. v. Gray* (2004), 273 N.B.R. (2d) 157 (C.A.) at para. 2.
17. As quoted in *R. v. Sappier and Polchies* (2003), 267 N.B.R. (2d) 1 (Prov. Ct.) [*Sappier and Polchies*]. The summary appeal court judge described Sewell's area of expertise as "regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by [A]boriginals and the geographical area encompassed by the terms of the charge", see *R. v. Gray*, 2003 CarswellNB 635 (Q.B.) at para. 5 (McIntyre J.).
18. [1999] 1 S.C.R. 393.

defence but rejected the argued treaty right relating to the treaties of 1752 and 1779.

The essential facts in *Sappier* occurred on 12 January 2001 when natural resources officers stopped a truck with a load of timber (16 hardwood logs; four yellow birch and 12 sugar maple) near an Aboriginal harvest area in York County, New Brunswick.[19] The driver (Sappier) and passenger (Polchies) in the truck were members of the Maliseet First Nation reserve community at Woodstock, Carleton County. Sappier told the officers that the timber was firewood taken from the nearby Aboriginal harvest area but the officers determined that it had been taken from Crown land 1.5 kms distant from the Aboriginal harvest area; Polchies acknowledged that he had cut the timber. Sappier and Polchies were then charged with unauthorized possession of timber from Crown lands.[20] Like Gray before them, the two accused argued both an Aboriginal and a treaty right. At trial, the presiding judge made two additional findings of fact: 1) that Polchies had cut the 16 hardwood logs for the purposes of constructing a house and furniture on the Woodstock reserve with any excess to be available for use by reserve community members as firewood; and 2) the 16 hardwood logs were "sufficient to make hardwood flooring and furniture consisting of tables, beds and cabinets."[21] Referring to the unreported trial decision in *Gray*, the trial judge rejected the Aboriginal right defence but accepted the argued treaty right. In rejecting the argued Aboriginal right, the trial judge held that the use of wood had not been shown to have been "integral to Maliseet society":

> There is no question that the evidence of Mr. Sewell in *Gray*... clearly established an historical pattern and tradition of the use of wood from Crown lands for the construction of furniture and housing. Similar evidence was led in the case at bar.
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> However the test set out in *Van der Peet* ... is that the tradition must be integral to the distinctive culture of the [A]boriginal group claiming that right. When one asks whether, without this tradition, the culture in question would be fundamentally altered or other than what it was or is, or affirmatively, whether the tradition is a defining feature of the culture in question, in both cases the answer must be in the negative.

19. The essential facts are taken from the agreed statement of facts entered at trial, see: *Sappier and Polchies*, *supra* note 17
20. Pursuant to the *Crown Lands and Forest Act*, *supra* note 15.
21. *Supra* note 17. In a newspaper account of the Supreme Court hearing, Clark Polchies is described as "sitting 50th on a list of people asking for a house from the Woodstock First Nation" and that "he got tired of waiting while he and his three children lived with his mother." See Campbell Morrison, "Judge reserves ruling in Native logging rights case" *The Daily Gleaner* (19 May 2006) at A6.

> Chief Justice Lamer cites the example of "eating to survive" as a right that every human society possesses, one that is incidental to livelihood and not one that is integral to a culture. The same can be said of the right to seek shelter from the elements and to use the host of materials available to achieve that purpose.[22]

The trial judge did find the harvesting of wood from Crown lands protected by a 1725 treaty (ratified in 1726) which confirmed the right of the Maliseet and Mi'kmaq peoples to "not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other [of] their Lawful Occasions by His Majesty's Subjects or their Dependants." The trial judge interpreted the word "occasions" to refer to "needs" in the sense that the treaty parties recognized for the Maliseet and Mi'kmaq "a need to use the product of the forest to maintain their traditional way of living." The trial judge also recognized that it was indeed lawful in 1725-1726 to cut and remove wood from the forests. Thus, "lawful occasions" included the right to harvest the timber for personal use.[23]

IV SUMMARY CONVICTION APPEAL

The Crown successfully appealed the trial decision in *Gray* but its appeal of *Sappier* did not succeed. In *Gray*, the trial judge had characterized the Aboriginal right as a right to harvest wood for personal use on the traditional land of Gray's Mi'kmaq ancestors; on appeal to the Court of Queen's Bench, the summary conviction appeal judge also rejected the argued treaty right, but in addition rejected the trial judge's characterization of the claimed Aboriginal right. Instead, he characterized the claimed right narrowly as a right to harvest bird's eye maple trees "to make furniture for his own use or to use as a finish for the interior of his house."[24] The appeal judge found that the evidence did not support a finding that such a right was "integral" to Mi'kmaq culture. The elder evidence on this point was that "he could only remember that they used alder to build rustic chairs for sale and bed legs were made of wood …. The big items were canoe paddles, axe handles and baskets."[25] Such evidence, concluded the summary appeal judge, did not demonstrate that

22. *Supra* note 19 at paras. 27-28 and 30.
23. The trial judge identified the permitted personal uses as "the cutting of lumber for the purpose of constructing shelters, crafting implements of tools and husbandry, of which furniture would be an evolutionary extension and providing for firewood", *ibid*. at para. 57.
24. *Gray*, *supra* note 17 at para. 15.
25. *Ibid*. at para. 18.

> furniture making for their own use was a central defining feature of the Mi'gmaq culture. I agree with the trial judge that Mr Sewell's testimony is reliable and persuasive in establishing that the Mi'gmaq from the Pabineau First Nation Reserve made axe handles, paddles and baskets as well as some rudimentary furniture for their needs, but the evidence falls short of establishing, even on a balance of probabilities, that such activity was a practice, custom or tradition which was integral to their distinctive culture.[26]

Accordingly, the summary conviction appeal judge allowed the Crown's appeal and found Gray guilty.

In *Sappier*, the summary conviction appeal judge affirmed the trial decision recognizing a treaty right but not an Aboriginal right.[27] The appeal judge, in brief oral reasons, affirmed that the "Woodstock First Nation, have a Treaty right to timber taken from crown land for purposes of building houses and making furniture for their personal use" and dismissed the argument that the accused also should have proven that they had exercised the treaty right with community authority. The point had not been raised at trial and in the absence of evidence of community disapproval, the appeal judge considered the point without merit. On the main point, the appeal judge stated,

> I find that this particular matter ... does not merit any further discussion. To consider an in-depth analysis of issues such as incidental treaty rights, [A]boriginal rights, and the admissibility of evidence at trial would derogate from the trial court's finding that quite simply the [accused] were found not guilty of possessing timber from crown land .... It would take far greater information and more resources allocated to this Court on this Appeal to deal with such far-reaching issues.[28]

V COURT OF APPEAL

The New Brunswick Court of Appeal heard the appeal in *Gray* on 26 November 2003 and in *Sappier* eleven weeks later on 11 February 2004. Judgments in both appeals, per Robertson J.A., Daigle and Deschênes JJ.A. concurring, were released on 22 July 2004 with the main decision being in relation to *Sappier*[29] and the Court applying the essential reasoning in that decision to *Gray*.[30]

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26. *Ibid.* at para. 20.
27. 2003 NBQB 389. The statement of facts on appeal indicate that at trial Sappier testified that he did not know the source of the wood on the truck or who had cut it but was "under the impression that the 16 hardwood logs were for the purpose of firewood." *Ibid.* at para. 4 (point 20).
28. *Ibid.* at para. 21.
29. (2004), 273 N.B.R. (2d) 93.
30. *Supra* note 16.

On the treaty issue in *Sappier*, Robertson J.A. agreed with the trial judge that the word "occasions" in the phrase "lawful occasions" in the 1725-1726 treaty would have been understood at the time to have meant "personal want or need" and that the phrase is not ambiguous, at least in relation to personal use.[31] His statement of the treaty harvesting right, however, differed from that of the trial judge by omitting reference to the intended uses of the harvested wood because "the proposed uses of the timber become relevant at a later stage in the analysis: when applying the so-called logical evolution test."[32] Robertson J.A. found the logical evolution test satisfied:

> Extensive evidence was adduced at trial with respect to the use of wood in the Maliseet's daily living patterns in the 18th century. Specific examples included: the construction of wigwams and sweat lodges, the use of firs and spruce boughs as beds, kettles for cooking, hollowed tree trunks as stoves, vessels for food, wooden utensils, kilns for pottery, wood for fires, fishing spears, drums, pipes, handles for tools and snowshoes. The trial judge referred to these historic uses of wood as "rude furnishings." In my respectful view, the trial judge's finding that the harvesting of timber from Crown lands for shelter, furniture and firewood represents an evolution of the treaty right and not a transformation is unassailable.
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> In brief, I am of the view that construction of a bungalow constitutes a modern day expression of a 1725 treaty right to harvest wood for purposes of constructing a wigwam. Similarly, the construction of furniture is a modern expression of the ancestral practice of crafting "rude furnishings" from wood, as part of the Maliseet's 18th century lifestyle.[33]

On the Aboriginal right issue, Robertson J.A. reversed the conclusion of both the trial and summary conviction appeal judges and found an existing Aboriginal right to harvest timber. In a detailed and scholarly analysis of Supreme Court jurisprudence, Robertson J.A. identified a five-step test (rather than the two-step approach in *Van der Peet* and the four steps of *Sparrow* and *Gladstone*):

> 1. "identify the nature of the [A]boriginal right being claimed" i.e. characterization
> 2. "determine whether the claimed right imports a geographical element; that is to say, whether the claimed [A]boriginal right is 'site-specific'"
> 3. "determine whether the evidence establishes, as a question of fact, an ancestral practice, in existence prior to contact with Europeans"

31. *Supra* note 29 at paras. 10 and 11.
32. *Ibid.* at para. 14.
33. *Ibid.* at paras. 18-19.

4. "determine whether the practice was 'integral' to the distinctive culture of the [A]boriginal community"
5. "the claimant must establish continuity between the [A]boriginal practice that existed, prior to contact with Europeans, and the practice as it is exercised today."[34]

Building on the repeated references in *Sparrow* and other fishing cases to an Aboriginal right to fish rather than an Aboriginal right to fish for a specific species like salmon, Robertson J.A. identified the critical element in the characterization of the claimed right as whether its exercise is for personal use or for purposes of trade and, if for trade, whether as a commercial right or for the exchange for money or goods.[35] Consideration of the specific species is relevant, per Robertson J.A., at the justification of infringement stage of analysis. The second and third steps (whether site-specific and pre-contact) did not require elaboration but the fourth step invited attention. Robertson J.A. quoted paragraphs 55 and 56 of the reasons for decision of Lamer C.J.C. in *Van der Peet*, in which the Chief Justice discussed the "integral to the distinctive culture test," and then stated:

> If we take the above passage at face value, it could be argued that the activities of hunting and fishing cannot qualify as [A]boriginal rights, for the reason that those activities were and remain common to all societies. Obviously, a literal reading of this passage makes no sense once it is recognized that the case law has repeatedly recognized the [A]boriginal right to fish or hunt.[36]

Continuing with his review of *Van der Peet*, Robertson J.A. found that the "distinctiveness" versus "distinctness" discussion in that case had clarified any ambiguity such that a claimed practice, custom or tradition also practiced by Europeans in North America becomes relevant only if the Aboriginal practice "can only be said to exist because of the influence of European culture."[37] Thus, in relation to fishing, Robertson J.A. concluded that "so long as the activity of fishing for food was an integral part of the [A]boriginal culture, that activity may qualify as an [A]boriginal right"[38]—the critical element in his analysis. Finally, at the fifth step, Robertson J.A. stressed the need for flexibility in relation to the elements of continuity and evolution in order to avoid a frozen rights approach to Aboriginal rights.

Applying these analytical steps, Robertson J.A. characterized the claim as an Aboriginal right "to harvest trees for personal use" and found the site-

34. *Ibid.* at paras. 25-29.
35. *Ibid.* at para. 34. Robertson J.A. noted that the Supreme Court rejected the argued characterization of the Aboriginal right in *R v. Powley*, [2003] 2 S.C.R. 207 as a right to hunt moose in favour of a claimed right to hunt for food.
36. *Ibid.* at para. 54.
37. *Ibid.*, quoting *Van der Peet*, *supra* note 1 at para. 73.
38. *Ibid.* at para. 55.

specific element satisfied in relation to "Crown lands traditionally occupied by members of the Maliseet community now living on the Woodstock (First Nation) Reserve."[39] The third step regarding evidence of pre-contact practice was clearly satisfied by evidence of Maliseet use of wood and wood products in the pre-contact period around 1500 (based on judicial notice of the arrival of Jacques Cartier in the Baie de Chaleur area in 1534 and subsequent contact with Mi'kmaq and Maliseet peoples). Given his conclusions on the nature of the "integral to the distinctive culture test," Robertson J.A. concluded that both the trial and summary conviction appeal judges had erred by failing to consider that "the activity of harvesting wood was as much an integral and defining feature of the Maliseet community, as were the traditional gathering activities of hunting and fishing."[40] In so doing, Robertson J.A. rejected the Crown's argument that linked the Aboriginal right to the purposes for which the Maliseet harvested wood in the pre-contact era. This he dismissed as a frozen rights approach which failed to reflect the exercise of an Aboriginal right in a modern form.[41] Finally, the requirement of continuity was found to have been satisfied through the evolution test. The issue of justification of the infringement did not arise because of the Crown's concession that the legislative limitations could not justify the infringement under the *Sparrow* test.

In granting the appeal and finding both an existing treaty and Aboriginal right to harvest wood from Crown lands for personal use, Robertson J.A. identified licensing as an appropriate subject for future negotiation between government and Aboriginal communities. A licensing scheme would benefit Aboriginal persons by providing an easy means to establish their existing right and would benefit both Aboriginal communities and government by discouraging abuse by non-Aboriginal persons. The Court later entered a stay of proceedings pending the appeal to the Supreme Court, a period which the latter Court extended until the disposition of the appeal.

In the *Gray* appeal, Robertson J.A. applied his reasons for decision in *Sappier* to restore the acquittal entered at trial. On appeal, counsel had abandoned the treaty right argument and concentrated on the Aboriginal right issue. Referring to "around" 1534 as the generally accepted date of contact, Robertson J.A. addressed the evidentiary challenge involved if an Aboriginal right must be characterized in terms of specific resources used for specific purposes:

39. *Ibid.* at paras. 64 and 68, respectively.
40. *Ibid.* at para. 84.
41. *Ibid.* at para. 97.

> In my view, it is simply unrealistic to expect any [A]boriginal person to adduce evidence that his or her ancestors were harvesting bird's eye maple trees around 1534, let alone identify the specific uses being made of this species of tree.[42]

Thus, he affirmed the trial judge's characterization of the Aboriginal right as a right to harvest trees for personal use. The evidence at trial supported the finding that Gray had undertaken his harvesting activity on Crown lands where his Mi'kmaq ancestors had also harvested trees, and Robertson J.A. affirmed the "common sense understanding that the [A]boriginal communities within New Brunswick had been traditionally harvesting trees for personal use at the time of contact with Europeans."[43] At the third step, the "integral to the distinctive culture test," Robertson J.A. referred to both the appeal decision in *Sappier* as support for the conclusion that harvesting trees for personal use was integral to the Mi'kmaq's distinctive culture, and to the Court's earlier decision in *Bernard*[44] regarding the lifestyle of the Mi'kmaq people:

> From the decision of this Court in *Bernard* at para. 370, we know that at the time of contact with Europeans the Mi'kmaq were a hunting and fishing people who migrated seasonally from their inland hunting grounds to the coast for summer fishing. The reality that trees provided them with a practical means of constructing a convenient mode of transport for purposes of traversing New Brunswick's intricate network of waterways is well documented. Had the Mi'kmaq not harvested wood from time immemorial, surely that [A]boriginal society would have been fundamentally altered. Finally, one cannot seriously argue that the harvesting of wood for personal use was merely incidental or marginal to the Mi'kmaq culture, in the sense that it was an activity that occurred infrequently. History tells us otherwise: see *Bernard* at paras. 490, 495 and 497, in which the same findings were made of those Mi'kmaq communities of the Miramichi.[45]

It is this statement which became the focus of the challenge on further appeal to the Supreme Court of Canada. Robertson J.A. then proceeded to find the other definitional steps satisfied and the claimed right to be an existing Aboriginal right in relation to which the Crown had failed to justify the statutory infringement. The Court granted the appeal and restored the trial finding of not guilty. It also granted a stay for one year, a stay which the Supreme Court continued pending resolution of the further appeal.

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42. *Supra* note 16 at para. 12.
43. *Ibid.* at para. 17.
44. *R. v. Bernard* (2003), 262 N.B.R. (2d) 1 (C.A.) [*Bernard*].
45. *Supra* note 16 at para. 19.

VI THE SUPREME COURT OF CANADA

The Supreme Court appeal attracted significant attention. The Attorney General of Canada and six provincial Attorneys General appeared as intervenors and the Court granted standing to 10 other intervenors representing various Aboriginal organizations and to provincial forestry associations in New Brunswick and Nova Scotia. Bastarache J. wrote the majority reasons for the decision dismissing the Crown appeals in both *Sappier* and *Gray* while Binnie J. separately expressed his concurrence except in respect of the concept of personal use.

Bastarache J. characterized the pre-contact Maliseet and Mi'kmaq peoples as "migratory living from hunting and fishing, and using the rivers and lakes of Eastern Canada for transportation" and identified the central issues as "how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture."[46] Like Robertson J.A., Bastarache J. applied a five-step analytical framework to address the Aboriginal right issue, though the framework did differ in some respects from that of Robertson J.A.

The first step required characterization of the claimed Aboriginal right. This step is undertaken contextually and involves "consider[ation of] such factors as the nature of the action which the applicant is claiming was done pursuant to an [A]boriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right."[47] This presented an evidential challenge because of the nature of the evidence presented at trial. The claimant alleged an Aboriginal right to harvest wood for personal use in contravention of a provincial statute, but the evidence focused on the importance of wood to Maliseet and Mi'kmaq culture (lifestyle) rather than on an actual practice. Bastarache J. agreed that Aboriginal rights are not to be defined in terms of a specific resource "because to do so would be to treat it as akin to a common law property right"—an approach rejected in *Sparrow* in favour of the characterization of Aboriginal rights as *sui generis*.[48] The emphasis moved from the resource itself to the practice—"how that resource was harvested, extracted and utilized. These practices are the necessary '[A]boriginal' component in [A]boriginal rights."[49] Bastarache J. then recharacterized the claimed right in the specific context of the Maliseet and Mi'kmaq peoples:

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46. *Supra* note 10 at para. 2.
47. *Ibid.* at para. 20.
48. *Ibid.* at para. 21.
49. *Ibid.* at para. 22.

> [I]t is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular [A]boriginal community. The claimed right should then be delineated in accordance with that practice .... The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period is that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore *characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the [A]boriginal community*.[50]

So characterized, the claimed Aboriginal right excludes any "commercial dimension" including trade or barter *to finance* domestic uses such as the construction of a house or furnishings as claimed in *Gray*.[51] As a communal right recognized in the *Constitution Act, 1982*, section 35, to ensure the continued existence of Aboriginal societies, Bastarache J. then declared a critical definitional limitation on the exercise of the Aboriginal right:

> The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the [A]boriginal community independently of the [A]boriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.[52]

Bastarache J. did not address the question of whether Sappier and Gray acted independently of their respective communities when they cut down trees for their private use.

Second, having so characterized the Aboriginal right, Bastarache J. considered the "integral to a distinctive culture test" and effectively combined two separate steps of the analytical framework identified by Robertson J.A. This second step involved three considerations: a) the lack of specific evidence regarding pre-contact activity; b) whether a practice associated with survival in an environment can be integral to a distinctive culture; and c) the meaning of distinctive. The elder evidence at trial, it will be recalled, focused on knowledge of Mi'kmaq customs, particularly experiences with his own grandfather. Counsel for the Attorney General of Nova Scotia objected to this evidence because of the time period seemingly involved—logically the life of the witness' grandfather would have spanned the latter decades of the 19th century and the early to mid decades of the 20th century rather than the critical period at contact, around 1534. Bastarache J.

50. *Ibid.* at para. 24 [emphasis added].
51. *Ibid.* at para. 25.
52. *Ibid.* at para. 26.

resolved this dilemma by treating the evidence as confirming the undoubted importance of the resource to the Maliseet and Mi'kmaq peoples prior to contact (the elder, Sewell, had testified "we've been always gathering and we've been always using wood as … a way of life"[53]) and the Crown had conceded in both appeals the importance of wood to Aboriginal survival pre-contact.[54] Referring to both *Van der Peet* and *Mitchell*,[55] Bastarache J. stressed the desirability of flexibility in relation to such evidence and the use of post-contact evidence "to prove the existence and integrality of pre-contact practices."[56]

The survival element did not affect the finding that the practice was integral to the distinctive culture. The trial judge in *Sappier* had considered that any society in a position similar to that of pre-contact Maliseet would have harvested food for survival and used the wood as had the Maliseet; so such a practice could not be integral to the distinctive Maliseet society. But, Bastarache J., referring to *Adams*[57] where the Court had confirmed the practice of fishing for food as an Aboriginal right, rejected the notion that practices associated with mere survival cannot constitute a practice integral to the distinctive culture:

> I wish to clarify, however, that there is no such thing as an [A]boriginal right to sustenance. Rather, these cases stand for the proposition that the traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular [A]boriginal people.
>
> I can therefore find no jurisprudential authority to support the proposition that a practice undertaken merely for survival purposes cannot be considered integral to the distinctive culture of an [A]boriginal people. *Rather, I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an [A]boriginal community*.[58]

He stressed that traditional means of survival are indeed integral to the continuation of the [A]boriginal society and rejected the Court's earlier use of the phrase "core identity" in *Mitchell* as "unintentionally" indicating a higher degree of required integrality (in the sense of "single most important defining character").[59]

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53. *Ibid.* at para. 31.
54. *Ibid.* at para. 32.
55. *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 [*Mitchell*].
56. *Supra* note 10 at para. 34.
57. *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].
58. *Sappier and Gray*, *supra* note 10 at para. 37 [emphasis added].
59. *Ibid.* at para. 40. Bastarache J. also rejected the "defining feature" standard for the concept of integral: see *ibid.* at para. 41.

On the definitional element of distinctiveness, Bastarache J. identified the proper focus to "be on the nature of [the] prior occupation ... really an inquiry into the pre-contact way of life of a particular [A]boriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits."[60] This focus responds to the criticisms of the dissenting justices in *Van der Peet* and of commentators that a focus on discrete activities risks giving legal weight to racialized [A]boriginal stereotypes, such as using birch bark to make baskets. Noting for the third time that pre-contact Maliseet and Mi'kmaq peoples were migratory and lived from hunting and fishing activities, Bastarache J. restated the challenge as "to understand how the particular pre-contact practice ... relates to that way of life" and found sufficient distinctiveness in the harvesting of wood for domestic purposes linked to survival.[61]

Third, Bastarache J. invoked continuity in terms of the logical evolution of the pre-contact practice to counter the obvious deficiency in the distinctiveness element just discussed. In other words, the issue is how to link the construction of a modern permanent home to the migratory lifestyle of pre-contact [A]boriginal peoples. Bastarache J. found that the modern permanent home was an evolution from the pre-contact construction of temporary shelters and therefore the exercise of the [A]boriginal right in modern form—"[a]ny other conclusion would freeze the right in its pre-contact form."[62]

Fourth, the Crown concession at trial that the accused had conducted their harvesting activities within Maliseet and Mi'kmaq traditional territories, respectively, was sufficient to satisfy the site-specific requirement. Fifth, the Crown acknowledged that the statutory prohibition on harvesting had infringed the claimed [A]boriginal right (if found to exist) and either did not attempt to justify the infringement or did not challenge the determination at trial that the infringement had not been justified.

Before concluding, Bastarache J. addressed additional issues relating to the argued extinguishment of the [A]boriginal right by colonial legislation; the treaty right claim and the impact of the Crown concession on the validity of the 1725-1726 treaty; and the supposed use of "extrinsic evidence" by Robertson J.A. in the Court of Appeal.

In brief separate reasons, Binnie J. expressed disagreement with the majority's limitation on the use of harvested wood which excludes trade or barter within the community for money or other goods for domestic use. Binnie J. would have permitted barter or sale within "the reserve or other

60. *Ibid.* at para. 45.
61. *Ibid.* at para. 46.
62. *Ibid.* at para. 48. Rather emphatically, Bastarache J. stated at para. 49, "The cultures of the [A]boriginal peoples ... cannot be reduced to wigwams, baskets and canoes."

local [A]boriginal community" as reflecting a "more efficient use of human resources."[63]

VII COMMENT

Clarification of the proper approach to characterization of a claimed Aboriginal right is the jurisprudential contribution of *Sappier and Gray*. Before discussing characterization, I must begin with a confession. I am one of those who understood the concept of an existing Aboriginal right in terms of human activity linked to a specific resource. As noted above, the anthropological evidence in *Sparrow* had identified salmon fishing as an integral part of the distinctive culture of the Musqueam people. In *Gladstone*, the Supreme Court had characterized the claimed right as relating specifically to herring spawn on kelp. Even in *Adams*, which Bastarache J. treats as an obvious example of just fishing for food *simpliciter*, the evidence established that the Mohawk traditionally fished for perch in Lake St. Francis and Adams had been charged because he had fished for perch without a licence:

> In this case, the appellant's claim is best characterized as a claim for the right to fish *for food* in Lake St. Francis. First, Francis Lickers, a biologist working for the St. Regis band, testified at trial that the [translation] "Indians used perch for food in the winter and caught the fish during summer in order to store it for the winter."
>
> There was no suggestion that the perch caught by the appellant was to be used for any purpose other than to meet the food requirements of the appellant and his band ... all the evidence presented at trial to support the appellant's claim was directed at demonstrating that it was a custom of the Mohawks to rely on the perch in Lake St. Francis for food.[64]

It seemed logical at the time to understand the Court's use of the phrase "fishing for food" in *Adams* as consistent with the evidence and the charge concerning the accused fishing perch for food. Support for this interpretation could also be found in the general approach to the moderate livelihood standard applicable to both Aboriginal rights and treaty rights. The right of Aboriginal persons is not to gain a moderate livelihood from *all* the resources of the land whether or not distinctive to their Aboriginal culture at contact or within the contemplation of the parties at treaty time but to gain a moderate livelihood from resources and through activities consistent with

63. *Ibid.* at para. 74.
64. *Supra* note 57 at para. 36 [emphasis in original].

their Aboriginalness. It is this more limited right linked to a concept of Aboriginalness which the *Constitution Act, 1982*, section 35 has constitutionalized. Thus, for example, mining for a uranium rich mineral such as uraninite would seem beyond the pale of an Aboriginal right.

More importantly, and as noted above, the logic of a resource-specific approach to Aboriginal rights seemed to follow from the Supreme Court's acknowledgement that all human societies near rivers, lakes and oceans fish for food and other purposes. To repeat the words of Lamer C.J.C. in *Van der Peet*: "Certainly no [A]boriginal group in Canada could claim that its culture is 'distinct' or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world."[65] The degree of distinctiveness required for recognition of an Aboriginal right would be satisfied by evidence of the significance of the species to that culture in terms of associated customs, practices and belief systems such as prayers of respect at the taking of a fish or animal life. In addition to specific customs and practices, the cultural significance of certain resources to Aboriginal culture is evident by the use, for example, of specific species of animals, fish and birds as clan totems and as clan names.

The specific resource approach to recognition of an Aboriginal right had the added advantage of eliminating any concern about an activity associated with survival or subsistence. Thus, for example, fishing for salmon was a distinctive part of Musqueam culture in *Sparrow* and not just a resource harvesting activity for survival, that is, fishing for food as an activity supported by the belief system of the society. The specific resource element inserted a limitation in the characterization of the right which avoided the broader characterization of a right to fish for food and ensured the Aboriginalness of the claimed right.

In *Sappier and Gray*, the Supreme Court affirmed the decision of the New Brunswick Court of Appeal in favour of a broader—and admittedly more generous—characterization in which resource specificity need not be associated with the activity that grounds the claimed Aboriginal right. Reaction to this development has been positive. Aboriginal groups in Atlantic Canada hailed the decision as affirming what they had previously understood as their access rights to resources, and as an impetus for future economic development on reserves in the long term and for lower housing costs on reserve in the short term.[66] Government and industry also responded positively. Though government lawyers had warned during the appeal hearings of the possibility that a recognized right might lead once again to unrestricted logging on Crown lands, the actual government and industry

65. *Supra* note 1 at para. 72.
66. Chris Morris, "Timber ruling 'blows our minds'" *The Daily Gleaner* (8 December 2006) at A1-A2.

response focused on the "domestic use" limitation on the exercise of the right and the belief that its exercise can be accommodated within the existing harvesting framework agreements with the 15 bands in the province.[67]

As noted above, the Supreme Court characterized the claimed Aboriginal right as the "right to harvest wood for domestic uses as a member of the [A]boriginal community" while the Court of Appeal had characterized it as the "right to harvest trees for personal use" and the summary conviction appeal judge in *Gray* had characterized the right as harvesting birds' eye maple. The difference between the Supreme Court and Court of Appeal characterizations lies apparently in the context of the matters under appeal. The general intent behind both expressions of the internal limitation is to express the non-commercial nature of the right, with Bastarache J. further explaining that the "wood cannot be sold, traded or bartered to produce assets or raise money." While the phrase "for personal use" is sufficient to indicate a non-commercial right, the phrase "for domestic purposes" reflects the actual claim in the matter under appeal, that is, to harvest wood for the purpose of constructing a house and making furniture. In this context, "domestic uses" refers to the intended use of the wood by the claimant. So considered, it remains open to future claimants to assert and prove an Aboriginal right to harvest wood for personal use outside the context of domestic use. In other words, "domestic use" should not be considered the sole use permitted under an existing Aboriginal right to harvest wood. Other non-commercial uses remain to be claimed and proven.

The "as a member of the Aboriginal community" qualification on the claimed right is interesting. Obviously, Sappier, Polchies and Gray are members of their on-reserve Aboriginal communities. Is the purpose of this qualification to reflect identity as a mere fact or does it import the on-reserve status of the claimants? If the latter, it may again just reflect the context under appeal, namely, that the claimants intended to use the harvested wood on their respective reserves. Considered more broadly, the qualification reflects the nature of the claimed right as a collective right of the Aboriginal community. This raises two distinct implications. First, individual exercise of the collective right is subject to collective regulation and management by the community through band bylaws which should be respected by those seeking to exercise the right. Second, the claimant must be an accepted member of the Aboriginal community. As expressed by Bastarache J., "The right to harvest ... is not one to be exercised by any member of the [A]boriginal community independently of the [A]boriginal society it is

67. *Ibid*.

meant to preserve."[68] This has important implications for those off-reserve non-status persons who are not accepted as members of on-reserve Aboriginal communities but who self-identify as Aboriginal because of their ancestry. It raises the question whether non-status off-reserve persons who self-identify as Aboriginal, but are not accepted as such by the larger Maliseet or Mi'kmaq communities, may nevertheless assert Aboriginalness because of acceptance by the non-recognized not-accepted sub-community to which they do belong. In the context of access to scarce natural resources, it may be anticipated that this qualification will result in further litigation.

The right characterization selected by Bastarache J. has the obvious advantage of avoiding, at least in part, the use of racialized stereotypes which might be thought to exist if a claimed Aboriginal right is characterized as a right of a Maliseet or Mi'kmaq person to harvest birch trees to make birch bark canoes. Yet, the actual uses of a resource at the time of contact remain relevant. The "domestic use" characterization serves to generalize the uses to harvested birch trees, but it does not relieve a right claimant of the evidentiary burden of proving the "integral to the distinctive culture" standard. To prove that, at contact, Aboriginal peoples made specific uses of resources does not necessarily invite racialized stereotypes any more than identification of Aboriginal peoples with hunting, fishing and gathering.

Critical to the Court's characterization of the Aboriginal right is the clarification of the "integral" element of the "distinctive culture" standard. The word integral had been refined in the Supreme Court's own jurisprudence to the point that the standard had become "at the core of the peoples' identity ... a 'defining feature' of the [A]boriginal society, such that the culture would be 'fundamentally altered' without it," per McLachlin C.J.C. in *Mitchell*.[69] In *Sappier and Gray*, the Supreme Court rejected this notion of centrality as ever having been the appropriate test. As noted above, Bastarache J. identified the proper inquiry to be on the pre-contact "way of life" of the Aboriginal people, in this case as migratory peoples using rivers and lakes for transportation by canoe and satisfying subsistence needs by hunting, fishing and gathering. As a result, it should be easier for claimants to prove the activity in question as an integral element of the Aboriginal lifestyle. That this is so is amply illustrated by the Court's treatment of the elder evidence in *Gray* pertaining to the witnesses own experiences and his recollection of those of his grandfather. The Court dismissed the objection to that evidence (because it did not pertain directly to pre-contact times) on the basis that such post-contact evidence is relevant to the identification of pre-contact practices, customs and traditions.

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68. *Sappier and Gray*, *supra* note 10 at para. 26.
69. *Supra* note 55 at para. 12, quoted in *Sappier and Gray*, *ibid*. at para. 39.

Finally, the qualification expressed as "domestic uses as a member of the [A]boriginal community" provides the internal limitation on the exercise of the Aboriginal right. Consistent with *Sparrow*, the exercise of this Aboriginal right is subject to conservation measures but is otherwise entitled to priority relative to persons who do not enjoy a constitutional right to harvest wood. The qualification serves to identify when the right has been satisfied by access to sufficient wood to meet actual needs. The Supreme Court majority position that "[t]he harvested wood cannot be sold, traded or bartered to produce assets or raise money" presents a clear personal use limitation but does not exclude gifts to another community member. Nor would it seem to exclude access to wood by rights holders who are otherwise physically incapable of harvesting the wood personally such as the elderly and the differently abled. This appears consistent with the reference to uses "as a member of the [A]boriginal community." It does, however, raise the question whether a community member can pay another community member to harvest wood in exercise of the Aboriginal right of the payor. In this scenario, the payee is not selling the wood but rather is compensated for his or her time and labour. If construed strictly as a right which must be personally exercised, the elderly and differently abled might be incapable because of physical disability from exercising the right, a situation surely unacceptable on human rights grounds. In addition, it would seem self-evident that the Aboriginal right does not extend to harvesting sufficient quantities of wood to construct a lavish mansion of twenty rooms nor to the modern practice of house-flipping in which a person builds a home, lives in it for a period of time, sells it, and uses the profits to then recommence the cycle in a larger home.

Binnie J. obviously understood the majority position as excluding other than personal harvesting, thus excluding actual exercise of the right by the elderly and the differently abled. It is this understanding which motivated his separate opinion favouring recognition of intra-community barter and sale:

> Barter (and, its modern equivalent, sale) within the reserve or other local [A]boriginal community would reflect a more efficient use of human resources *than requiring all members of the reserve or other local [A]boriginal community to which the right pertains to do everything for themselves*. They did not do so historically and they should not have to do so now.[70]

This approach is certainly more generous than that of the majority and would lead to more on-reserve employment and economic activity not only in relation to wood but to other resources harvested in the exercise of an Aboriginal right. Doubtless the personal access limitation has the benefit of

70. *Supra* note 10 at para. 74 [emphasis added].

preserving the Aboriginal quality of the exercise of the right and prevents a measure of resource leakage into the non-Aboriginal community under cover of the Aboriginal right.

The three other points addressed by Bastarache J. merit some attention. First is the matter of argued extinguishment of Aboriginal rights to harvest wood. This relates to four statutes enacted by the colonial legislature of New Brunswick between 1840 and 1862.[71] Crown counsel interpreted these statutes as evidencing an implicit intention to extinguish Aboriginal rights. In the Court of Appeal and in the Supreme Court, this interpretation did not succeed because the statutes were characterized as regulatory in nature with the purpose of protecting the rights of licensees and lessees to timber on Crown land. To achieve this purpose, the statutes essentially created offences for the removal of timber from Crown and private lands without lawful authority and recognized in a licensee a right to maintain an action for trespass and replevin. Neither Court found in these statutes the requisite legislative intention to extinguish Aboriginal wood harvesting rights. That no such intention is evidenced is hardly surprising given that legislators of that era did not consider that the Maliseet and Mi'kmaq peoples had any legal rights in the lands of the province either as traditional territories or as reserve lands. The concept of Aboriginal title was then unknown. During an 1844 debate on a Bill permitting the sale of reserved lands and the use of the proceeds for the benefit of the Maliseet and Mi'kmaq peoples, the following comments were expressed by members of the Legislative Assembly:

> Hon. J.A. Street: The Indians had no title whatever in these reserves; the title was held by the Crown and for the benefit of all.
>
> Mr. Fisher: was in favour of selling all the reserved lands; the Indians had no local claims; as the lands were reserved for the benefit of all the Indians who were at that time residing in the Province, or the descendants, and should be sold and the interest arising from the fund be appropriated for their use.
>
> Hon. Mr. Wilmot: When the lands were reserved the title was not vested in the Indians, but in the Crown; but what were the reserves for? Did hon. members believe they were reserved for the Indians to settle on? No; but the large blocks were reserved as hunting grounds, and the smaller ones as fishing grounds. In the County of Northumberland, there were nearly 33,000 acres reserved, while the Indians in that county were rapidly decreasing; now suppose they decrease

71. *An Act to provide for the more effectual prevention of Trespasses and protection of Timber growing on Crown Lands within this Province*, S.N.B. 1840, c. 77; *An Act for the better prevention of Trespasses on Crown Lands and Private Property*, S.N.B. 1850, c. 7, retitled to *Of Trespasses on Lands, Private Property, and Lumber*, R.S.N.B. 1854, c. 133, s. 90 and as amended by S.N.B. 1859, c. 23 and S.N.B. 1862, c. 24.

> until there is but twenty or thirty in the county, would they, be entitled to the whole of the 33,000 acres, or to the whole of the profits arising therefrom![72]

What is of greater immediate interest is the unequivocal statement of Bastarache J. that "during the colonial period, power to extinguish [A]boriginal rights rested with the Imperial Crown" citing as authority the statement of Lamer C.J.C. in *Delgamuukw* that "[t]his power reposed with the Imperial Crown during the colonial period."[73] The statement of Lamer C.J.C. in *Delgamuukw* is found in his summary of the reasons for decision of the trial judge in that case and continues: "Upon Confederation the province obtained title to all Crown land in the province subject to the 'interests' of the Indians."[74] In context, this appears to be an allusion to the wording of the *Constitution Act, 1867*, section 109 which states that "All Lands, Mines, Minerals, and Royalties *belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union* ... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." But note that the section does not confer title of Crown lands on the provinces; the title must have existed before the section came into effect. This seems a wholly inadequate authority for the proposition stated by Lamer C.J.C. This is so particularly when it is recalled that the words "title" and "belong" are somewhat inappropriate when applied to Crown lands in common law jurisdictions. Is there any instrument of cession by which any holder of the office of King or Queen purported to divest title to lands in a colony to that colony?

In theory and former practice, ungranted lands were held by the Crown for its private benefit until 1760 when George III ascended the throne. In that year, the King surrendered to Parliament the hereditary territorial and casual revenues of the Crown in exchange for a civil list or annual payment. In 1831, the surrender to Parliament broadened to include colonial revenues and in 1837 New Brunswick gained control of the hereditary territorial and casual revenues of the colony in exchange for a similar annual civil list in

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72. *The Loyalist and Conservative Advocate*, vol. 2, no. 48 (18 March 1844). Such views are consistent with a report appended to the 1838 Statutes of New Brunswick by the Commissioner of Crown Lands enumerating the "Lands reserved for the use of the Indians in this Province," which describes the nature of the Aboriginal interest as "To occupy and possess during pleasure": see *Warman v. Francis* (1958), 20 D.L.R. (2d) 627 (N.B.Q.B.) at 635.
73. *Sappier and Gray, supra* note 10 at para. 58 referring to *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 15 [*Delgamuukw*].
74. *Delgamuukw, ibid*.

support of government.[75] Ten years later, control also passed to the provinces of Canada (1847) and then to Nova Scotia (1849).[76] Thus, the real focus is not on Crown title but administration of Crown lands. Even before formal recognition of the divisible Crown, each colony effectively held "title" to Crown lands in right of that colony well before Confederation. In any event, Bastarache J. did not find it necessary to consider in detail the issue of pre-1867 colonial jurisdiction to extinguish Aboriginal title given his finding that the legislation in issue did not evidence the necessary intention. Given the attitudes of the era, it is unlikely that the issue may ever arise for decision. But, considering the broad jurisdiction conferred on colonial legislatures to enact laws for the "public peace, welfare and good government" of the colony and that such jurisdiction was re-enforced by the *Colonial Laws Validity Act, 1865*,[77] there seems a strong case for the theoretical existence of such jurisdiction. Considering the broad definition of "treaty" as encompassing any promise of a responsible colonial official, it would seem strange that a colony could create valid treaty obligations without imperial consent but could not extinguish Aboriginal rights without it.

Related to this point is the reality that not all legislation purporting to affect lands—even reserve lands—was subject only to royal assent by the colonial governor. It should be recalled that governors could reserve bills for approval by the Imperial government. For example, the colonial legislature specifically reserved the 1844 statute "*Of Indian Reserves*," discussed above, for the pleasure of the Queen in Council so it came into effect only after an imperial order in council issued on 3 September 1844.[78]

Second, Bastarache J. commented on the concession at trial by Crown counsel concerning the validity of the 1725 treaty and its 1726 ratification as well as the status of Sappier and Polchies as treaty beneficiaries—notwithstanding the contradictory evidence of the Crown's own expert witness on the validity of that treaty. At Boston in 1725, delegates of the eastern Indians, including the Maliseet and Mi'kmaq, negotiated peace treaties with the governments of the colonies of the Massachusetts Bay, New Hampshire and Nova Scotia. The Maliseet and Mi'kmaq delegates concluded a separate treaty with Major Paul Mascarene of Nova Scotia on

75. *An Act for the Support of the Civil Government in this Province*, S.N.B. 1837, c. 1. Enacted with a 10 year term, the *Act* became perpetual by R.S.N.B. 1854, c. 5.
76. W.H. Clement, *The Law of the Canadian Constitution*, 3d ed. (Toronto: Carswell, 1916) at 331.
77. 28 & 29 Vict., c. 63 (U.K.).
78. See: S.N.B. 1844, c. XLVII, s. XIII: "[T]his Act shall not come into operation until Her Majesty's Royal approbation shall be thereupon first had and declared." A note to the *Act* states that it was ratified and confirmed by an Order in Council of 3 September 1844 which was published in New Brunswick on 25 September 1844. The Bill had passed the Assembly on 13 April 1844.

15 December 1725, Mascarene having been commissioned by the Nova Scotia government to participate in the Boston proceedings for that purpose. Recall that this treaty, which contains the "lawful occasions" promise, was interpreted favourably by Robertson J.A. The Crown concession reflects the dynamic nature of Aboriginal rights litigation. The facts in *Sappier* occurred in 2001 and the trial in 2003. Occurring in tandem was the Nova Scotia and New Brunswick litigation which became the Supreme Court decision in *Marshall and Bernard* (2005).[79]

The evidence at trial led the court in the Nova Scotia *Marshall* prosecution to focus on the treaties of 1760 and 1761 because of the evidence of hostilities in the 1750s which terminated the previous relationship represented by the treaty of 1752. The treaties of 1760-1761, which are also the focus of the Supreme Court's earlier analysis in *Marshall I* and *Marshall II*,[80] were negotiated more than three decades after the 1725-1726 treaty relied on in *Sappier* and, in the treaty version ratified by the Maliseet, refers to and reproduces the promises made by the Maliseet in the 1725-1726 Boston treaty but not the promises of Major Mascarene. The significance of this lies in the dissenting opinion of McLachlin J. (as she then was) in *Marshall 1* who held that the 1760-1761 treaties were not to be interpreted in light of the prior understanding of the Aboriginal parties because the new treaties "completely displaced" the earlier 1752 treaty and "the different wording of the two treaties cannot be supposed to have gone unperceived by the parties."[81] It seems that the 1725-1726 Boston treaty considered in *Sappier* may not be a valid and subsisting treaty at all unless the historical evidence in a future case reveals that the former treaties were not terminated by Maliseet/Nova Scotia hostilities. This observation highlights the significance of the Crown concessions at trial. Bastarache J. pointed to the then "pending" decision of the Newfoundland Court of Appeal in *Newfoundland v. Drew*[82] as illustrating the extra-provincial significance of a Crown concession at trial when similar issues are being litigated elsewhere. In *Drew*, the 1725-1726 treaties were argued on behalf of the Mi'kmaq but the trial judge found the treaties terminated by subsequent hostilities.

It is interesting to observe that though the 7 December 2006 Supreme Court decision referred to *Drew* as "pending" before the Newfoundland and Labrador Court of Appeal, that Court had released its decision some two

79. *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall and Bernard*].
80. *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall I*] and *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall II*].
81. *Marshall 1*, *ibid*. at para. 105.
82. (2003), 228 Nfld. & P.E.I.R. 1 (N.L. Sup. Ct., Trial Div.) (Barry J.).

months earlier, on 11 October 2006.[83] Doubtless, this reflects the delays in the judgment release process due to translation and final editing. It is unfortunate that the Court did not revise its reference to *Drew*. In extensive *per curiam* reasons for decision, the Newfoundland and Labrador Court of Appeal affirmed the trial judgment which had concluded that the Mi'kmaq of Conne River have neither a treaty nor an Aboriginal "right to hunt, fish and trap in the Bay du Nord Wilderness Reserve."[84] In particular, that Court affirmed the finding at trial that the 1725 Mascarene Treaty and its subsequent ratification at Port Royal in 1726 not only did not apply to the Cape Breton Mi'kmaq (ancestors of the Mi'kmaq of Conne River) but had indeed, on the evidence, been terminated by subsequent hostilities.[85] The Court also rejected arguments relating to other claimed treaty rights and rejected the argued existence of site-specific Aboriginal harvesting rights because of the historical evidence that the Mi'kmaq were not on the island of Newfoundland prior to contact with Europeans. In May 2007, the Supreme Court of Canada dismissed an application for leave to appeal in *Drew*.[86]

Third, the Crown argued that the Court of Appeal had inappropriately made use of extrinsic evidence. In his reasons for decision, Robertson J.A. referred to historical evidence concerning the circumstances leading to the 1725-1726 treaty and to the lifestyle of the Mi'kmaq people at the time of contact, particularly concerning the historical use of wood. The specific reference was not to the evidence presented at trial, but to evidence presented and discussed in the Court of Appeal's earlier decision in *R. v. Bernard*[87] released three months before the Court heard the appeal in *Gray* and four months before the appeal in *Sappier*. But, as Bastarache J. observed, Robertson J.A. did not rely on *Bernard* to make findings of fact in *Sappier* and *Gray*. Instead, the references to *Bernard* gave context to the Crown's concession concerning the validity of the 1725-1726 treaty and provided additional support for the trial judge's findings concerning Mi'kmaq lifestyle at contact.

That this point deserved argument before the Supreme Court necessarily invites the process question: Is trial in a summary conviction court the proper forum for adjudication of Aboriginal rights? The trier of fact is limited to the evidentiary record presented at that trial, a record which may or may not be consistent with the record presented at different proceedings. LeBel J. gave voice to this not uncommonly expressed concern in *Marshall and Bernard*:

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83. (2006), 260 Nfld. & P.E.I. R. 1.
84. *Ibid.* at para. 1.
85. *Ibid.* at paras. 162-163.
86. Supreme Court of Canada, "Bulletin of Proceedings" (4 May 2007) at 611.
87. (2003), 262 N.B.R. (2d) 1 [*Bernard*].

> Although many of the [A]boriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating [A]boriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating [A]boriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.[88]

The reasons for decision at the various levels of court in the proceedings which led to *Sappier and Gray* do not identify the actual length of the trials. At the *Sappier* trial, the parties submitted an agreed statement of facts to the Court which doubtless had the effect of promoting efficiency and reducing court time. By way of contrast, in *Drew*, oral testimony occupied 47 days at trial followed by the oral argument of counsel. It is doubtful that the *Sappier* and *Gray* trials were that intense. The wisdom of the process concern expressed by LeBel J. (and others) is clear. Yet, there are alternatives to a judicial process. The treaty table in place in Saskatchewan and now in British Columbia should surely commend itself as suggesting a reasonable alternative to litigation. One of the challenges in Atlantic Canada is the absence of an agreed historical record concerning Aboriginal–colonial relations. There are few original or official treaty documents; copies have variants as transcribers misstated words or omitted words or paragraphs.[89] It is time for a treaty table or joint commission to examine the historical record with a view to making findings as definitive as possible—recognizing the challenges of "definitiveness" in relation to historical research—so that individual litigants and their counsel do not have to bear the burden (financial and otherwise) of reproducing such research through expert witnesses each time an issue arises for adjudication. That is the essence of Robertson J.A.'s reference to the evidence in other matters which so raised the ire of Crown counsel that it became an appeal point.

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88. *Supra* note 79 at para.142.
89. I once had a student researcher compare treaty documents as reproduced in various court decisions with copies of treaty documents retrieved from archival sources. The lack of consistency was at times disturbing though most of the discrepancies were of minor importance.

An interesting situation presented itself immediately after the Court of Appeal decision in *Gray*. In its 22 July 2004 decision on the merits, the Court of Appeal had simply allowed the appeal and entered an acquittal. Subsequently, Robertson J.A. signed a consent order on 25 October 2004 to stay the effect of that decision because of an application by the Crown on 28 September for leave to appeal to the Supreme Court. On 1 November, Gray learned from his solicitor that the stay had been granted by consent; that is, the solicitor had consented to the stay. With new legal counsel, Gray moved to set aside the consent order on the narrow basis that the *Supreme Court Act*, section 65.1 only permitted a "stay of proceedings" and, with the acquittal, there were no such continuing proceedings. Dismissing the motion,[90] Robertson J.A. found the narrow interpretation of section 65.1 had been rejected in *RJR-MacDonald v. Canada (A.G.)*,[91] in which the Supreme Court had held that the jurisdiction conferred by that section is sufficient to "make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court."[92] Accordingly, jurisdiction existed per that section to order a stay of the effect of the Court's judgment on the merits. Robertson J.A. also dismissed the challenge to the authority of the solicitor to consent on behalf of the client, Gray, because such consent lay within the apparent authority of the solicitor and could only be set aside because of common mistake, fraud, collusion, misrepresentation, duress or illegality, none of which had been alleged by Gray. The stays granted by consent in *Gray* and by the Court on application in *Sappier* operated such that an accused who engaged in similar activities during the period of the stay could not rely upon the Court of Appeal decision as a defence. And, indeed that situation did present itself. The trial and summary conviction appeal courts dismissed a treaty right defence put forward by Maliseet defendants charged with unauthorized possession of Crown timber during the period of the stay. In brief reasons for decision, the Court of Appeal set aside the convictions and remitted the matter back to trial because the treaty right in issue arose from the 1760-1761 treaties considered in *Marshall* and not the 1725-1726 treaty conceded in *Gray*.[93]

VIII CONCLUSION

Unlike *Marshall*, the Supreme Court decision in *Sappier and Gray* did not result in a rush to the forests to exercise the recognized Aboriginal right. Perhaps it is a question of timing; the Supreme Court released *Marshall* in

90. *Gray v. The Queen*, 2004 CanLII 47133 (N.B.C.A.).
91. [1994] 1 S.C.R. 311.
92. *Ibid*. at 329.
93. *Paul v. The Queen*, 2007 NBCA 15 (15 March 2007).

September 1999 in good fishing weather and its subsequent clarification in mid-November 1999 when winter was "just around the corner." The Supreme Court released *Sappier and Gray* on 7 December 2006, hardly the time of the year to be thinking of harvesting trees for domestic use, at least in New Brunswick. So, the reaction on the ground to *Sappier and Gray* was fairly muted, but it is sure to result in future challenges of application and understanding. As mentioned, government and industry appear to believe that the Aboriginal harvesting right can be accommodated within the existing Aboriginal harvesting program. Aboriginal groups may not agree.

The case draws attention yet again to the nature of Aboriginal rights as collective rights exercised individually. Unfortunately, much of the Aboriginal rights jurisprudence in this country has not developed as a result of deliberate test cases orchestrated by Aboriginal groups but as a result of the actions of individuals. A challenge for Aboriginal communities is to regulate the exercise by individuals of the collective rights of the community. At some point, Aboriginal persons acting independently may find themselves charged with breach of a community law, rather than a provincial statute or regulation, as a manifestation of Aboriginal self-government. Yet, until that day, it is pertinent to ask (as did LeBel J.) if summary conviction trials are the proper venue for the definition of Aboriginal rights.