SUPREME COURT OF CANADA

CITATION: R. *v.* Sappier; R. *v.* Gray, [2006] 2 S.C.R. 686, 2006 SCC 54

DATE: 20061207
DOCKET: 30533, 30531

BETWEEN:

Her Majesty The Queen
Appellant
and
Dale Sappier and Clark Polchies
Respondents

AND BETWEEN:

Her Majesty The Queen
Appellant
and
Darrell Joseph Gray
Respondent
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Union of New Brunswick Indians, Forest Products Association of Nova Scotia, Mi'gmawei Mawiomi, New Brunswick Aboriginal Peoples Council, Assembly of First Nations, New Brunswick Forest Products Association, Assembly of Nova Scotia Mi'kmaq Chiefs, Okanagan Nation Alliance and Shuswap Nation Tribal Council, Congress of Aboriginal Peoples, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, and Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations)
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 73)	Bastarache J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)
CONCURRING REASONS: (para. 74)	Binnie J.

R. *v*. Sappier; R. *v*. Gray, [2006] 2 S.C.R. 686, 2006 SCC 54

Her Majesty The Queen *Appellant*

v.

Dale Sappier and Clark Polchies *Respondents*

- and -

Her Majesty The Queen *Appellant*

v.

Darrell Joseph Gray *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Union of New Brunswick Indians, Forest Products Association of Nova Scotia, Mi'gmawei Mawiomi, New Brunswick Aboriginal Peoples Council, Assembly of First Nations, New Brunswick Forest Products Association, Assembly of Nova Scotia Mi'kmaq Chiefs, Okanagan Nation Alliance and Shuswap Nation Tribal Council, Congress of Aboriginal Peoples, and Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations) *Interveners*

Indexed as: R. *v*. Sappier; R. *v*. Gray

Neutral citation: 2006 SCC 54.

File Nos.: 30533, 30531.

2006: May 17, 18; 2006: December 7.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for new brunswick

Aboriginal law — Aboriginal rights — Right to harvest wood for personal uses — Members of Maliseet and Mi'kmaq First Nations charged in New Brunswick with unlawful possession or unlawful cutting of Crown timber — Crown lands where timber harvested forming part of First Nations' traditional territory — Whether Maliseet and Mi'kmaq have aboriginal right to harvest wood for personal uses on Crown lands.

Aboriginal law — Van der Peet test — Meaning of "distinctive culture".

The respondents, S and P who are Maliseet and G who is Mi'kmaq, were charged under New Brunswick's *Crown Lands and Forests Act* with unlawful possession of or cutting of Crown timber from Crown lands. The logs had been cut or taken from lands traditionally harvested by the respondents' respective First Nations. Those taken by S and P were to be used for the construction of P's house and the residue for community firewood. Those cut by G were to be used to fashion his furniture. The respondents had no intention of selling the logs or any product made

from them. Their defence was that they possessed an aboriginal and treaty right to harvest timber for personal use. They were acquitted at trial. S and P's acquittals were upheld by the Court of Queen's Bench and the Court of Appeal. G's acquittal was set aside by the Court of Queen's Bench but restored on appeal. G did not pursue his treaty right claim before the Court of Appeal or before this Court.

Held: The appeals should be dismissed. The respondents made out a defence of aboriginal right.

Per McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. Here, the way of life of the Maliseet and of the Mi'kmaq during the pre-contact period was that of migratory peoples who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. The record also showed that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. The relevant practice in the present cases, therefore, must be characterized as a right to harvest wood for domestic uses as a member of the aboriginal community. This right so characterized has no commercial dimension and the harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling. Further, it is a communal right; it cannot be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. Lastly, the right is site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members' respective First Nations. In these cases, the respondents possessed an aboriginal right to harvest wood for domestic uses

on Crown lands traditionally used for that purpose by their respective First Nations. [21] [24-26] [72]

Although very little evidence was led with respect to the actual harvesting practice, an aboriginal right can be based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. Courts must be flexible and be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available. The evidence in these cases established that wood was critically important to the pre-contact Maliseet and Mi'kmaq, and it can be inferred from the evidence that the practice of harvesting wood for domestic uses was significant, though undertaken primarily for survival purposes. [27-28] [33]

A practice undertaken for survival purposes can be considered integral to an aboriginal community's distinctive culture. The nature of the practice which founds an aboriginal right claim must be considered in the context of the pre-contact distinctive culture. "Culture" is an inquiry into the pre-contact way of life of a particular aboriginal community, including means of survival, socialization methods, legal systems, and, potentially, trading habits. The qualifier "distinctive" incorporates an element of aboriginal specificity but does not mean "distinct". The notion of aboriginality must not be reduced to racialized stereotypes of aboriginal peoples. A court, therefore, must first inquire into the way of life of the pre-contact peoples and seek to understand how the particular pre-contact practice relied upon by the rights claimants relates to that way of life. A practice of harvesting wood for domestic uses undertaken in order to survive is directly related to the pre-contact way of life and meets the "integral to a distinctive culture" threshold. [38] [45-48]

The nature of the right cannot be frozen in its pre-contact form but rather must be determined in light of present-day circumstances. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling. The site-specific requirement was also met. The Crown conceded in the case of S and P and the evidence established in the case of G that the harvesting of trees occurred within Crown lands traditionally used for this activity by members of their respective First nations. [48] [52-53]

The Crown either accepted or did not challenge before the Court of Appeal that the relevant provisions of the *Crown Lands and Forests Act* infringed the respondents' aboriginal right, and it did not attempt to justify the infringement in this Court. [54-55]

The Crown did not discharge its burden of proving that the aboriginal right had been extinguished by pre-Confederation statutes. The power to extinguish aboriginal rights in the colonial period rested with the Imperial Crown and it was unclear whether the colonial legislature had ever been granted the legal authority to do so. In any event, the legislation relied upon by the Crown as proof of extinguishment was primarily regulatory in nature. 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. [57-60]

Given this Court's decision on the aboriginal right issue, there was no need to decide whether S and P also would benefit from a treaty right to harvest wood for personal uses. [3]

Per Binnie J.: The reasons of Bastarache J. were agreed with except as to his limitation of the exercise of aboriginal rights within modern aboriginal communities. A division of labour existed in aboriginal communities, pre-contact. Barter (and, its modern equivalent, sale) within the reserve or other local aboriginal community would reflect a more efficient use of human resources than requiring all members of the community to do everything for themselves. Trade, barter or sale outside the reserve or other local aboriginal community where the person exercising the aboriginal right lives would represent a commercial activity outside the scope of the aboriginal right established in this case. [74]

Cases Cited

By Bastarache J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Bernard* (2003), 262 N.B.R. (2d) 1, 2003 NBCA 55; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Newfoundland v. Drew* (2006), 260 Nfld. & P.E.I.R. 1, 2006 NLCA 53, aff'g (2003), 228 Nfld. & P.E.I.R. 1, 2003 NLSCTD 105.

Statutes and Regulations Cited

Act further to amend Chapter 133, Title xxxiv, of the Revised Statutes, "Of trespasses on lands, private property, and lumber", S.N.B. 1862, 25 Vict., c. 24.

Constitution Act, 1982, s. 35.

Crown Lands and Forests Act, S.N.B. 1980, c. C-38.1, ss. 67(1)(*a*), (*c*), 67(2).

Indian Act, R.S.C. 1985, c. I-5.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Daigle, Deschênes and Robertson JJ.A.) (2004), 273 N.B.R. (2d) 93, 717 A.P.R. 93, 242 D.L.R. (4th) 433, [2004] 4 C.N.L.R. 252, [2004] N.B.J. No. 295 (QL), 2004 NBCA 56, affirming a decision of Clendening J. (2003), 267 N.B.R. (2d) 51, 702 A.P.R. 51, [2004] 2 C.N.L.R. 281, [2003] N.B.J. No. 386 (QL), 2003 NBQB 389, affirming a decision of Cain Prov. Ct. J. (2003), 267 N.B.R. (2d) 1, 702 A.P.R. 1, [2003] 2 C.N.L.R. 294, [2003] N.B.J. No. 25 (QL), 2003 NBPC 2. Appeal dismissed.

APPEAL from a judgment of the New Brunswick Court of Appeal (Daigle, Deschênes and Robertson JJ.A.) (2004), 273 N.B.R. (2d) 157, 717 A.P.R. 157, [2004] 4 C.N.L.R. 201, [2004] N.B.J. No. 291 (QL), 2004 NBCA 57, setting aside a decision of McIntyre J., 2003 CarswellNB 635, setting aside a decision of Arsenault Prov. Ct. J. Appeal dismissed.

William B. Richards, *Henry S. Brown, Q.C.*, and *Iain R. W. Hollett*, for the appellant.

Richard Hatchette and *Maria G. Henheffer, Q.C.*, for the respondents Dale Sappier and Clark Polchies.

Ronald E. Gaffney and *Thomas J. Burke*, for the respondent Darrell Joseph Gray.

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René Morin and *Caroline Renaud*, for the intervener the Attorney General of Quebec.

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Daniel R. Theriault, for the intervener the Union of New Brunswick Indians.

Thomas E. Hart and *Jane O'Neill*, for the intervener the Forest Products Association of Nova Scotia.

D. Bruce Clarke, for the intervener Mi'gmawei Mawiomi.

Michael J. Wood, *Q.C.*, for the intervener the New Brunswick Aboriginal Peoples Council.

Bryan P. Schwartz and *Jack R. London, Q.C.*, for the intervener the Assembly of First Nations.

Mahmud Jamal and *Neil Paris*, for the intervener the New Brunswick Forest Products Association.

Ronalda Murphy, *Mary Jane Abram* and *Douglas Brown*, for the intervener the Assembly of Nova Scotia Mi'kmaq Chiefs.

Clarine Ostrove and *Leslie J. Pinder*, for the interveners the Okanagan Nation Alliance and the Shuswap Nation Tribal Council.

Andrew K. Lokan and *Joseph E. Magnet*, for the intervener the Congress of Aboriginal Peoples.

Robert J. M. Janes, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively Te'mexw Nations).

The judgment of McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 The three respondents were charged with unlawful possession or cutting of Crown timber. Messrs. Sappier and Polchies are Maliseet, and Mr. Gray is Mi'kmaq. All three respondents argued in defence that they possess an aboriginal and treaty right to harvest timber for personal use. Mr. Gray has since abandoned his treaty right claim.

2 The respondents submit that the practice of harvesting timber for personal use was an integral part of the distinctive culture of the Maliseet and Mi'kmaq peoples prior to contact with Europeans. The claimed right refers to the practice of harvesting trees to fulfil the domestic needs of the pre-contact communities for such things as shelter, transportation, fuel and tools. The Maliseet and Mi'kmaq were migratory living from hunting and fishing, and using the rivers and lakes of Eastern Canada for transportation. The central question on appeal is how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture. The Crown submits that the evidence of wood usage in pre-contact Maliseet and Mi'kmaq societies was primarily a reference to the need for harvesting wood on a daily basis in order to survive. In the Crown's submission, this is not sufficient to establish a defining practice, custom or tradition that truly made the society what it was.

3 For the reasons that follow, I find that all three respondents have established an aboriginal right to harvest wood for domestic uses. Given this Court's decision on the aboriginal right issue, I need not decide whether Messrs. Sappier and Polchies also benefit from a treaty right to harvest wood.

2. Facts

2.1 *R. v. Sappier and Polchies*

4 The parties entered into an agreed statement of facts at the opening of the trial. On January 12, 2001, at approximately 18:00 hours, a truck load of timber driven by Mr. Sappier was stopped by Department of Natural Resources and Energy officers

at the junction of the Nashwaak Road and the wood access road to the Native Harvest Block 1266 near Gorby Gulch, New Brunswick. Mr. Clark Polchies was one of the passengers in the truck. Officer Wallace noticed that there were 16 hardwood logs, 4 yellow birch and 12 sugar maple, in the truck.

5 During some preliminary questioning by Officer Wallace, Mr. Sappier was asked as to where the wood had originated, to which he replied that it was firewood and that it came from Harvest Block 1266. The officers determined that the 16 hardwood logs did not come from Harvest Block 1266, but from Crown Lands approximately 1.5 kilometres away from Harvest Block 1266. Officer Wallace proceeded to read the *Charter* Notice and Police Caution to Messrs. Sappier and Polchies and seized the truck and logs based on the respondents' unauthorized possession of Crown timber. They were charged with unlawful possession of Crown timber pursuant to s. 67(1)(*c*) and s. 67(2) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1. Officer Collicott then questioned Messrs. Sappier and Polchies regarding who had cut the timber on the truck. Mr. Polchies indicated to Officer Collicott that it was he who had cut all the timber on the truck.

6 The parties agreed that Messrs. Sappier and Polchies were not at the time of their arrest authorized to be in possession of such timber pursuant to the *Crown Lands and Forests Act* or by any other Act of New Brunswick or regulations thereto, or by the Minister of Natural Resources and Energy of New Brunswick. Messrs. Sappier and Polchies are both Maliseet and members of the Woodstock First Nation. They are also registered under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5.

7 Judge Cain of the Provincial Court of New Brunswick found that the 16 hardwood logs were to be used by Mr. Polchies in the construction of a house and furniture on the Woodstock First Nation, with the residue's being made available to the Reserve for fire wood. The learned trial judge also found that the hardwood logs represented an amount sufficient to make hardwood flooring and furniture consisting of tables, beds and cabinets.

2.2 *R. v. Gray*

8 Mr. Gray was charged with unlawful cutting of Crown timber pursuant to s. 67(1)(*a*) and s. 67(2) of the *Crown Lands and Forests Act*. On December 9, 1999, two forest service officers with the New Brunswick Department of Natural Resources and Energy saw Mr. Gray cut down a bird's eye maple tree on Crown lands. Mr. Gray, who was accompanied by two other men, proceeded to cut a log from the tree. All three men were recognized and acknowledged to be status Indians. The men were not asked the use to which the logs would be put. Mr. Gray is Mi'kmaq and lives on the Pabineau First Nation, near Bathurst, New Brunswick. Judge Arsenault of the Provincial Court of New Brunswick accepted Mr. Gray's evidence that four logs had been cut from trees from which he intended to make cabinets, end tables, coffee tables and mouldings for his home. The trial judge also accepted that Mr. Gray had no intention of selling the logs or any product made from them.

9 In both cases, the critical issue at trial was whether the cutting or possession of Crown timber was unlawful within the meaning of the Act. All three defendants claimed an aboriginal and treaty right to harvest timber for personal use.

3. Judicial History

3.1 *R. v. Sappier and Polchies*

3.1.1 New Brunswick Provincial Court, [2003] 2 C.N.L.R. 294, 2003 NBPC 2

10 Cain Prov. Ct. J. held that the defendants did not benefit from an aboriginal right to harvest timber for personal use. Cain Prov. Ct. J. opined that any human society living on the same lands at the same time would have used wood and wood products for the same purposes. On this basis, Cain Prov. Ct. J. held that the practice of using wood to construct shelters or to make furniture was not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation. The learned trial judge ultimately concluded that the culture of this pre-contact society would have not been fundamentally altered had wood not been available for use because the Maliseet would probably have found some other available material to use in its place.

11 Cain Prov. Ct. J. concluded, however, that the defendants benefited from a valid treaty right to harvest timber for personal use. He held that the *Crown Lands and Forests Act* infringed the treaty right, and that the Crown had not succeeded in justifying the infringement. Accordingly, the defendants were acquitted.

3.1.2 New Brunswick Court of Queen's Bench, [2004] 2 C.N.L.R. 281, 2003 NBQB 389

12 In a relatively short decision, Clendening J. dismissed the Crown's appeal and affirmed the decision of the trial judge.

3.1.3 New Brunswick Court of Appeal (2004), 273 N.B.R. (2d) 93, 2004 NBCA 56

13 Robertson J.A., writing on behalf of the Court of Appeal, held that the defendants benefited from both an aboriginal right and a treaty right to harvest timber for personal use. He 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. In his view, the fact that tree harvesting was undertaken for survival purposes, and that perhaps any human society would have done the same, was not determinative. Moreover, in direct response to Cain Prov. Ct. J.'s reasons, Robertson J.A. queried what other resource could have been used had timber not been available.

14 Before the Court of Appeal, the Crown no longer alleged that the right was extinguished by either pre- or post-Confederation legislation. The Crown also accepted that the relevant provisions of the *Crown Lands and Forests Act* infringed the alleged right and that the infringement could not be justified under the *R. v. Badger*, [1996] 1 S.C.R. 771, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, test.

3.2 *R. v. Gray*

3.2.1 New Brunswick Provincial Court (No. 03190311, August 27, 2001)

15 Arsenault Prov. Ct. J. held that the defendant benefited from an aboriginal right to gather and harvest wood for personal use. In finding an aboriginal right, Arsenault Prov. Ct. J. relied heavily on the evidence of Mr. Sewell, a Mi'kmaq and status Indian, recognized as an elder and historian, and declared as an expert, "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 aboriginals in the geographical area encompassed by the terms of the charge" (p. 3). Mr. Sewell's evidence was not contradicted by the Crown on cross-examination or by the introduction of any other documentary or historical evidence. The Crown did not lead evidence to justify the infringement of the aboriginal right.

16 Arsenault Prov. Ct. J. also held that Mr. Gray did not benefit from a treaty right to harvest timber for personal use.

3.2.2 New Brunswick Court of Queen's Bench, 2003 CarswellNB 635

17 McIntyre J. allowed the Crown's appeal and found the defendant guilty. In finding that the claim for an aboriginal right had not been made out, McIntyre J. cited a portion of Judge Cain's reasons in *R. v. Sappier and Polchies*. He found that Mr. Sewell's evidence was insufficient to conclude that furniture making for personal use was a central defining feature of the Mi'kmaq culture. He agreed with Cain Prov. Ct. J. that any human society would have done the same.

3.2.3 New Brunswick Court of Appeal (2004), 273 N.B.R. (2d) 157, 2004 NBCA 57

18 On behalf of a unanimous Court of Appeal, Robertson J.A., relying on his reasons in *R. v. Sappier and Polchies*, allowed Mr. Gray's appeal and found that a successful claim for an aboriginal right to harvest timber for personal use had been made out. Robertson J.A. further held that his concurring opinion and that of Daigle J.A. in *R. v. Bernard* (2003), 262 N.B.R. (2d) 1, 2003 NBCA 55, were sufficient to

dispose of the Crown's extinguishment argument. The Crown did not dispute that the *Crown Lands and Forests Act* infringed the alleged right, nor did it challenge the trial judge's finding that the Crown had failed to justify the infringement.

19 Mr. Gray did not pursue his treaty right claim before the Court of Appeal or before this Court.

4. The Aboriginal Right Claim

4.1 *Characterization of the Respondents' Claim*

20 In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46. The first step is to identify the precise nature of the applicant's claim of having exercised an aboriginal right: *Van der Peet*, at para. 76. In so doing, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal 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: *Van der Peet*, at para. 53. In this case, the respondents were charged with the unlawful cutting and possession of Crown timber. They claimed an aboriginal right to harvest timber for personal use so as a defence to those charges. The statute at issue prohibits the unauthorized cutting, damaging, removing and possession of timber from Crown lands. The respondents rely on the pre-contact practice of harvesting timber in order to establish their aboriginal right.

21 The difficulty in the present cases is that the practice relied upon to found the claims as characterized by the respondents was the object of very little evidence at trial. Instead, the respondents led most of their evidence about the importance of wood in Maliseet and Mi'kmaq cultures and the many uses to which it was put. This is unusual because the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an aboriginal right. Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right. In characterizing aboriginal rights as *sui generis*, this Court has rejected the application of traditional common law property concepts to such rights: *Sparrow*, at pp. 1111-12. In my view, the pre-contact practice is central to the *Van der Peet* test for two reasons.

22 First, in order to grasp the importance of a resource to a particular aboriginal people, the Court seeks to understand how that resource was harvested, extracted and utilized. These practices are the necessary "aboriginal" component in aboriginal rights. As Lamer C.J. explained in *Van der Peet*, at para. 20:

> The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights. [Emphasis in original.]

Section 35 of the *Constitution Act, 1982* seeks to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown: *Van der Peet*, at para. 31. In an oft-quoted passage, Lamer C.J. acknowledged in *Van der Peet*, at para. 30, that, "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis deleted). The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

23 Second, it is also necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form. This Court has long recognized that aboriginal rights are not frozen in their pre-contact form, and that ancestral rights may find modern expression: *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 13; *Van der Peet*, at para. 64.

24 In the present cases, the relevant practice for the purposes of the *Van der Peet* test is harvesting wood. It is this practice upon which the respondents opted to found their claims. However, the respondents do not claim a right to harvest wood for any and all purposes — such a right would not provide sufficient specificity to apply the reasoning I have just described. The respondents instead claim the right to harvest timber for personal uses; I find this characterization to be too general as well. As previously explained, it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice: *Van der Peet*, at para. 52. 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 aboriginal community.

25 The word "domestic" qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a right holder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components.

26 The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. 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 aboriginal community independently of the aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.

4.2 *The Integral to a Distinctive Culture Test*

4.2.1 The Evidentiary Problem

27 The question before the Court at this stage is whether the practice of harvesting wood for domestic uses was integral to the distinctive culture of the Maliseet and Mi'kmaq, pre-contact. As previously explained, very little evidence was led with respect to the actual harvesting practice. Nevertheless, this Court has previously recognized an aboriginal right based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. In *R. v. Adams*, [1996] 3 S.C.R. 101, this Court recognized an aboriginal right to fish for food in Lake St. Francis despite the fact that "[t]he fish were not significant to the Mohawks for social or ceremonial reasons" (para. 45). The Court based its holding on the fact that "[the fish] were an important and significant source of subsistence for the Mohawks" (para. 45). In other words, the Court recognized a right to fish for food based on the

importance of the resource. Fishing was such a significant practice as to constitute a way of life. In this sense, it was part of what made the pre-contact Mohawk community distinctive.

28 In the present cases, the evidence established that wood was critically important to the Maliseet and the Mi'kmaq, pre-contact. The learned trial judge in the *Sappier and Polchies* prosecution found that the Maliseet people used wood or wood products from the forest in which they lived to construct shelters, implements of husbandry and perhaps in the construction of what might be called rude furnishings (para. 12). Cain Prov. Ct. J. also referred to evidence that was led to the effect that the pre-European Maliseet society revered wood and considered it sacred (para. 13). Referring to the *Gray* prosecution, Cain Prov. Ct. J. stated that, "[t]here is no question that the evidence of Mr. Sewell in *Gray* (*supra*) clearly established an historical pattern and tradition of the use of wood from Crown lands for the construction of furniture and housing" (para. 27). He went on to comment that "[s]imilar evidence was led in the case at bar" (para. 27).

29 In the *Gray* prosecution, the trial judge declared the defence witness, Mr. Sewell, an expert "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 aboriginals in the geographical area encompassed by the terms of the charge" (Arsenault Prov. Ct. J., at p. 3). As previously mentioned, Mr. Sewell is Mi'kmaq and a status Indian who is recognized as an elder and historian within his community. Arsenault Prov. Ct. J. stated that:

> I have found and I do find that the evidence of Mr. Sewell was reliable and extremely useful to this court and I might point out that it was in no way diminished by cross-examination nor did the Crown in this case elect to contradict it by any documentary evidence or the evidence of any historian. [p. 23]

30 Mr. Sewell testified about the many uses to which wood was and continues to be put. He spoke of using the inner bark of a cedar tree for rope, and of cutting strips of it to be used in the construction of the old birch bark canoes. Birch bark and ash were used to make baskets. Birch, poplar and black spruce were fashioned into paddles. Any leftover birch or maple was used for firewood. He spoke of using cedar to make drums, and of how the aboriginal peoples were also carvers. He testified that some of the figureheads on the first ships to arrive in Canada were done by aboriginals. Mr. Sewell spoke of building camps and making pots out of wood. He testified that the pots were made out of large logs, using fire first to burn out the centre and then chiselling it out. He spoke of using bird's eye maple and curly maple in the construction of axe handles and boat paddles, either for sale or for gifts. He confirmed that the extraction of sap from maple and birch trees had been known to the Mi'kmaq for centuries (testimony of Gilbert Sewell, presented during examination-in-chief, October 4, 2000, pp. 16-19 (A.R., vol. I, at pp. 80-83)). Finally, he spoke of the practice of fashioning spears for fishing out of ash (A.R., vol. I, at p. 94).

31 Mr. Sewell concluded that, "[s]o, as far back as I can read in history or the oral tradition that has been passed down to me, it's been — we've been always gathering and we've been always using wood as, as, as a way of life" (A.R., vol. I, at p. 81). This evidence detailing the many uses to which wood was put by the Mi'kmaq as a whole is important given the communal nature of aboriginal rights. The trial judge

accepted this evidence as proof that the practice of harvesting wood for domestic uses was integral to the pre-contact Mi'kmaq way of life.

32 Before this Court, the Crown conceded in the *Sappier and Polchies* appeal that wood was important to the Maliseet for survival purposes in the pre-contact period (appellant's factum, at para. 46). The Crown also acknowledged that "wood was undeniably used in many facets of aboriginal life" (*ibid.*). In the *Gray* appeal, the Crown similarly conceded that "wood was used in Mi'kmaq society to ensure survival" (*ibid.*, at para. 44).

33 As in *Adams*, I infer from this evidence that the practice of harvesting wood for domestic uses was also significant, though undertaken primarily for survival purposes. Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.

34 Flexibility is also important in the present cases with regard to the relevant time frame during which the practice must be found to have been integral to the distinctive culture of the aboriginal society in question. It is settled law that the time period courts consider in determining whether the *Van der Peet* test has been met is the period prior to contact with the Europeans (see *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, which modified the *Van der Peet* test insofar as it applies to the Métis although it affirmed it otherwise). As Lamer C.J. explained in *Van der Peet*, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land prior to

the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights" (para. 60). Before this Court, the Attorney General of Nova Scotia, intervener, objected to some of Mr. Sewell's evidence insofar as he did not specify to which time period he was referring when describing the uses to which harvested wood was put by the Mi'kmaq. In other words, it was respectfully submitted that it was unclear whether he was always describing pre-contact practices. In dismissing this concern, I need only repeat what was said in *Van der Peet*, and reiterated more recently in *Mitchell* at para. 29, about the adapted rules of evidence applicable in aboriginal rights litigation and the use of post-contact evidence to prove the existence and integrality of pre-contact practices:

> That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights. [para. 62]

4.2.2 Whether a Practice Undertaken for Survival Purposes Can Be Considered Integral to an Aboriginal Community's Distinctive Culture

35 The principal issue on appeal is whether a practice undertaken for survival purposes can meet the integral to a distinctive culture test. The learned trial judge in the *Sappier and Polchies* trial concluded that it could not. Cain Prov. Ct. J. was of the view that:

> The practice of using wood to construct shelters, irrespective of whether they were wigwams or wooden building or of using wood to make furniture, was not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation in pre-European times. From the evidence adduced it is clear that they used wood or wood products from the forest in which they lived to construct shelters, implements of husbandry and perhaps in the construction of what might be called rude furnishings. Any humane society who would have been living on the same lands in New Brunswick at the same time would have used wood and wood products for the same purpose. [para. 12]

36 In making these comments, Cain Prov. Ct. J. relied on a statement made by Lamer C.J. in *Van der Peet*, at para. 56:

> To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [Emphasis added; emphasis in original deleted.]

Relying on this passage, Cain Prov. Ct. J. concluded that harvesting timber to construct a shelter was akin to eating to survive. This statement by Lamer C.J. appears to have resulted in considerable confusion as to whether a practice undertaken strictly for survival purposes can found an aboriginal right claim. However, further in his decision, Lamer C.J. clarifies that the pre-contact practice, custom or tradition relied on need not be distinct; it need only be distinctive. In so doing, he confirms that fishing for food can, in certain contexts, meet the integral to a distinctive culture test:

> That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow*, *supra*, of an aboriginal right to fish for food. Certainly no aboriginal 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. What the Musqueam claimed in *Sparrow*, *supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s. 35(1). [Emphasis deleted; para. 72.]

37 More recently, this Court has recognized a right to fish for food in *Adams* and in *R. v. Côté*, [1996] 3 S.C.R. 139. In *Adams*, the Court specifically noted that fish were only important as a source of subsistence. In *Côté*, Lamer C.J. emphasized that "[f]ishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter" (para. 68). Moreover, this Court has previously suggested that the scope of s. 35 should extend to protect the means by which an aboriginal society traditionally sustained itself, and that the *Van der Peet* test emphasizes practices that are vital to the life of the aboriginal society in question: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at para. 28, and *Mitchell*, at para. 12, respectively. I wish to clarify, however, that there is no such thing as an aboriginal 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 aboriginal people.

38 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 aboriginal people. Rather, I find that the jurisprudence

weighs in favour of protecting the traditional means of survival of an aboriginal community.

39 McLachlin C.J. explained in *Mitchell* that in order to satisfy the *Van der Peet* test, the practice, custom or tradition must have been integral to the distinctive culture of the aboriginal peoples, in the sense that

> it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 . . .). [Emphasis deleted; para. 12.]

40 As I have already explained, the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival. Although this was affirmed in *Sparrow*, *Adams* and *Côté*, the courts below queried whether a practice undertaken strictly for survival purposes really went to the core of a people's identity. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a "core identity" may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard 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. This has never been the test for establishing an aboriginal right.

This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.

41 The notion that the pre-contact practice must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights. The trial judge in the *Sappier and Polchies* prosecution concluded that Maliseet culture would not have been fundamentally altered had wood not been available to it. In his opinion, "[t]he society would in all probability have used some other available material" (para. 14). In response, I would adopt the following comments made by Robertson J.A., on behalf of the Court of Appeal:

> . . . I am at a loss to speculate on what other natural resource might have been used had wood not been available. Snow houses would have provided New Brunswick's aboriginal societies with adequate shelter during the winter months only. Whether fish and wildlife by-products would have served as an alternative source of fuel, and an adequate one, is a question on which I need not speculate. There is also the question as to how the aboriginal societies of New Brunswick would have traversed the lakes and rivers of this Province, in pursuit of fish and wildlife, without the traditional means of transportation: canoes. [para. 91]

I further agree with Robertson J.A. that courts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued. The learned judge correctly notes that "[a] society that fishes for sustenance will survive even if it does not consume meat and the converse is equally true" (para. 92).

4.2.3 Applying the *Van der Peet* Test: the Meaning of "Distinctive Culture"

42 This brings us to the question of what is meant by "distinctive culture". As previously explained, this Court in *Van der Peet* set out to interpret s. 35 of the Constitution in a way which captures both the aboriginal and the rights in aboriginal rights. Lamer C.J. spoke of the "necessary specificity which comes from granting special constitutional protection to one part of Canadian society" (para. 20). It is that aboriginal specificity which the notion of a "distinctive culture" seeks to capture. However, it is clear that "Aboriginality means more than interesting cultural practices and anthropological curiosities worthy only of a museum" (C. C. Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997), 55 *U.T. Fac. L. Rev.* 419, at p. 434). R. L. Barsh and J. Y. Henderson argue that as a result of the *Van der Peet* decision, "'culture' has implicitly been taken to mean a fixed inventory of traits or characteristics" ("The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993, at p. 1002).

43 Many of these concerns echo those expressed by McLachlin J. (as she then was) and by L'Heureux-Dubé J. in dissenting opinions in *Van der Peet*. L'Heureux-Dubé J. was of the view that "[t]he approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted" (para. 150). McLachlin J. opined that "different people may entertain different ideas of what is distinctive", thereby creating problems of indeterminacy in the *Van der Peet* test (para. 257).

44 Culture, let alone "distinctive culture", has proven to be a difficult concept to grasp for Canadian courts. Moreover, the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages. Barsh and

Henderson note that "[w]e can find no precise equivalent of European concepts of 'culture' in Mi'kmaq, for example. How we maintain contact with our traditions is *tan'telo'tlieki-p*. How we perpetuate our consciousness is described as *tlilnuo'lti'k*. How we maintain our language is *tlinuita'sim*. Each of these terms connotes a process rather than a thing" (p. 1002, note 30). Ultimately, the concept of culture is itself inherently cultural.

45 The aboriginal rights doctrine, which has been constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context. As L'Heureux-Dubé J. explained in dissent in *Van der Peet*, "[t]he '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: *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was)" (para. 159). The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples" (J. Borrows and L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev.* 9, at p. 36).

46 In post-hearing submissions to the Court of Appeal in the *Sappier and Polchies* case, the Crown admitted that gathering birch bark for the construction of canoes or hemlock for basket-making were practices likely integral to the distinctive Maliseet culture (para. 94). But it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must first inquire into the way of life of the Maliseet and Mi'kmaq, pre-contact. As previously explained, these were migratory communities using the rivers and lakes of Eastern Canada for transportation and living essentially from hunting and fishing. The Court must therefore seek to understand how the particular pre-contact practice relied upon relates to that way of life. In the present cases, the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the way of life I have just described. I have already explained that we must discard the idea that the practice must go to the core of a people's culture. The fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient, given the evidence adduced at trial, to meet the integral to a distinctive culture threshold.

47 I therefore conclude that the practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both the Maliseet and Mi'kmaq peoples.

4.3 *Continuity of the Claimed Right With the Pre-Contact Practice*

48 Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances. As McLachlin C.J. explained in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25, "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means." It is the practice, along with its associated uses, which must be allowed to evolve. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood by modern means to be used in the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form.

49 Before this Court, the Crown submitted that "[l]arge permanent dwellings, constructed from multi-dimensional wood, obtained by modern methods of forest extraction and milling of lumber, cannot resonate as a Maliseet aboriginal right, or as a proper application of the logical evolution principle", because they are not grounded in traditional Maliseet culture (appellant's factum in *Sappier and Polchies* appeal at para. 76; appellant's factum in *Gray* appeal at para. 80). I find this submission to be contrary to the established jurisprudence of this Court, which has consistently held that ancestral rights may find modern form: *Mitchell*, at para. 13. In *Sparrow*, Dickson C.J. explained that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (p. 1093). Citing Professor Slattery, he stated that "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'" (p. 1093, citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 782). In *Mitchell*, McLachlin C.J. drew a distinction between the particular aboriginal right, which is established at the moment of contact, and its expression, which evolves over

time (para. 13). L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes. The cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes.

4.4 *The Site-Specific Requirement*

50 This Court has imposed a site-specific requirement on the aboriginal hunting and fishing rights it recognized in *Adams*, *Côté*, *Mitchell*, and *Powley*. Lamer C.J. explained in *Adams*, at para. 30, that

> if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question. [Emphasis deleted.]

51 The characterization of the claimed right in the present cases, as in *Adams*, *Côté* and *Mitchell*, imports a necessary geographical element, and its integrality to the Maliseet and Mi'kmaq cultures should be assessed on this basis: *Mitchell*, at para. 59. I agree with Robertson J.A. in the *Sappier and Polchies* decision that "[t]his result is hardly surprising once it is recognized that all harvesting activities are land and water based" (para. 50).

52 At the trial of Messrs. Sappier and Polchies, the Crown conceded that "the issue of territoriality does not arise in the trial of the Defendants on the charge set out herein" (Agreed Statement of Facts at para. 12, reproduced in the trial decision at p. 296). Moreover, in its reply to the defendants' Notice of Contention, the Crown addressed the question of whether the harvesting of trees occurred within Crown lands traditionally used for this practice. The Crown responded: "This question would not appear to be an issue as wood was gathered at will within the traditional Maliseet territory" (reproduced in the reasons of the Court of Appeal at para. 71). Territoriality is therefore not at issue in the *Sappier and Polchies* prosecution.

53 In the *Gray* trial, the trial judge accepted Mr. Sewell's evidence that the Mi'kmaq had traditionally used the Crown lands in question for the purpose of tree harvesting. The Court of Appeal noted that the Crown did not dispute this finding (para. 15). I would conclude on this basis that Mr. Gray has established an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation.

4.5 *Infringement and Justification*

54 In the *Sappier and Polchies* litigation, the Crown accepted that the relevant provisions of the *Crown Lands and Forests Act* infringed the alleged right and that the infringement could not be justified under the test set out in *Sparrow* and in *Badger* (Court of Appeal reasons, at para. 3). The Crown did not argue otherwise before this Court. Before the Court of Appeal in the *Gray* case, the Crown did not challenge the trial judge's conclusions that the impugned legislation infringed the right and that the Crown had failed to justify the infringement (para. 26).

55 The aboriginal right to harvest wood for domestic uses is subject to regulation pursuant to the ordinary rules applicable in that regard. However, given that the Crown did not attempt to justify the infringement in the present cases, this is a question that need not be addressed in the circumstances of these appeals.

4.6 *Extinguishment*

56 The Crown did not allege before the Court of Appeal in the *Sappier and Polchies* litigation that the aboriginal right was extinguished by either pre- or post-Confederation legislation (see Court of Appeal reasons, at para. 3). The argument was raised at trial, but not advanced on appeal because of that Court's decision in *Bernard*, in which the Crown had argued that any right of the Miramichi Mi'kmaq to cut logs on Crown lands as an aspect of their aboriginal title over the area in question had been extinguished by the same series of four pre-Confederation statutes enacted by the province of New Brunswick between 1837 and 1862 (*per* Robertson J.A., at para. 177). The argument was advanced on appeal in the *Gray* case, where Robertson J.A. explicitly held that:

> My concurring opinion and that of Justice Daigle in *Bernard* is a sufficient basis for purposes of disposing of any argument that an existing aboriginal right was extinguished by either pre- or post-Confederation provincial legislation: see *Bernard* at paras. 176-179 and 523-541. [para. 25]

57 The Crown bears the burden of proving extinguishment. Before this Court, it relied on four pre-Confederation statutes enacted by the New Brunswick legislature between 1840 and 1862 as evidence of the Crown's intent to extinguish any aboriginal right to harvest wood. A clear intent is necessary in order to extinguish aboriginal rights. However, that intent need not be express and therefore aboriginal rights may also be extinguished implicitly: *Sparrow*, at p. 1099; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at paras. 31 and 34.

58 First, it must be emphasized that during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 15. Given the submissions advanced on behalf of the respondents and the Assembly of First Nations, intervener, it is not at all clear that the colonial legislature of New Brunswick was ever granted the legal authority by the Imperial Crown to extinguish aboriginal rights. I do not deal with this argument in any detail as I conclude that the pre-Confederation legislation does not indicate a clear intention to extinguish aboriginal rights.

59 The legislation relied upon by the Crown as proof of extinguishment is primarily regulatory in nature, although it does introduce prohibitions and create misdemeanour offences. The earlier legislation aimed to penalize those who harvested timber on Crown lands without permission. Starting in 1850, the statutes sought to strengthen the rights of Crown lessees and licensees by providing the legal method by

which they could regain timber which had been unlawfully taken. The Crown relies in particular on the 1862 amendment, which defined the rights of licensees as existing notwithstanding "any law, usage or custom to the contrary thereof" (S.N.B. 1862, 25 Vict., c. 24).

60 Following this Court's decision in *Sparrow*, 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. As Lamer C.J. explained in *Delgamuukw*, at para. 180, "[i]n [*Sparrow*], the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been 'necessarily inconsistent' with the continued exercise of aboriginal rights, they could not extinguish those rights." The same distinction was made in *Gladstone*, where the Court explained that a varying regulatory scheme that at times entirely prohibited aboriginal peoples from harvesting herring spawn on kelp could not be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk Band. Lamer C.J. concluded that, "[a]s in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of aboriginal rights" (para. 34).

61 For this reason, I find that the Crown has not discharged its onus of proving that the aboriginal right to harvest wood for domestic uses has been extinguished.

5. <u>The Treaty Right Claim</u>

62 As part of the agreed statement of facts put before the Court in the trial of Messrs. Sappier and Polchies, the Crown admitted that the Treaty of 1725 and the ratification thereof in 1726 are valid Treaties and that the defendants are beneficiaries of those Treaties. The Crown's concession about the validity of the Treaty is one of law. This Court has recognized that it is not bound by concessions of law: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45. Nonetheless, the fact that this concession occurred in the context of a criminal prosecution raises fundamental fairness concerns.

63 The onus of proving that a treaty right has been extinguished rests with the Crown, and not with the claimant: *Badger*, at para. 41; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1061; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 406; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404. The Crown's concession in this regard is akin to it leading no evidence with respect to extinguishment, insofar as it bears the burden of proof in this respect. The concession was made at the beginning of trial, although the Crown's own witness, Dr. Stephen Patterson, presented contradictory evidence with respect to the validity of the 1725 Treaty. The defendants, Messrs. Sappier and Polchies, have rightly relied on this concession since trial. It is fundamental to their defence that they were not in unlawful possession of Crown timber because they were exercising a valid treaty right to harvest timber for personal use.

64 Although I would not discourage concessions regarding the applicable law in a criminal prosecution, the Crown's concession in the present case has important implications outside the Province of New Brunswick. The Treaty of 1725 was negotiated in Boston by the Penobscots and ratified by Mi'kmaq representatives at Annapolis Royal, Nova Scotia, in 1726 (see W. C. Wicken, *Mi'kmaq Treaties on Trial*

(2002), at pp. 28, 86 and 89; S. E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999), 48 *U.N.B.L.J.* 41, at pp. 51 and 55). As New Brunswick was not recognized as a separate colony until the partition of Nova Scotia in 1784, it was Nova Scotia which negotiated on behalf of the British Crown with the aboriginal peoples of the region: Patterson, at pp. 45-46. The precise boundaries of British Nova Scotia following the 1713 *Treaty of Utrecht*, and the intended geographic scope of the 1725 Treaty, are complex issues which have yet to be historically or judicially resolved (see Wicken, at p. 101; Patterson, at pp. 42-46). These issues, along with the validity of the 1725 Treaty, were recently the subject of judicial consideration in the Province of Newfoundland and Labrador. In *Newfoundland v. Drew* (2003), 228 Nfld. & P.E.I.R. 1, 2003 NLSCTD 105, the trial judge concluded that the 1725-1726 Treaties have no legal force insofar as they were terminated by subsequent hostilities between the Mi'kmaq and the British. Alternatively, he held that the 1725 Treaty by its express terms did not apply to Newfoundland, and that, in any event, the scope of the Treaty should be interpreted as restricted to territory within the jurisdiction of the Governor of Nova Scotia. An appeal from that judgment was dismissed by the Newfoundland and Labrador Court of Appeal ((2006), 260 Nfld. & P.E.I.R. 1, 2006 NLCA 53). I raise this case only to illustrate the contentious nature of the Crown's concession in the *Sappier and Polchies* trial and its potential implications outside the Province of New Brunswick. I do not wish to be taken as pronouncing on the validity or geographical scope of the 1725 Treaty.

65 Given the Court's decision on the aboriginal rights issue, there is no need to consider the treaty right claim in further detail.

6. Incorporation of Extrinsic Evidence by the Court of Appeal

66 Before concluding, I wish to address the Crown's argument that Robertson J.A. on behalf of the Court of Appeal inappropriately incorporated extrinsic evidence into his reasons for judgment. The dispute over the alleged incorporation of extrinsic evidence arises partly out of Robertson J.A.'s reasons in the *Sappier and Polchies* case:

> The Crown admitted that the *Treaty of 1725*, which includes the promises of Major Paul Mascarene and the ratifications of 1726 (hereafter the *Mascarene Treaty*) is valid and subsisting, and that the defendants are beneficiaries of that *Treaty*. The historical events leading up to and surrounding the signing of this "Peace and Friendship" treaty are set out in *R. v. Bernard (J.)* (2003), 262 N.B.R. (2d) 1 . . . (C.A.), and in Professor Patterson's article, *Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context* (1999), 48 U.N.B.L.J. 41. [Emphasis added; para. 5.]

67 The Crown also objects to para. 19 of Robertson J.A.'s reasons in the *Gray* decision:

> Applying *Sappier and Polchies*, I agree with the trial judge's finding that the harvesting of trees for personal use was integral to the Mi'kmaq's distinctive culture. Just as hunting and fishing for food are essential to survival, so too was the need for shelter to protect against the natural elements and for fuel to generate sufficient warmth. Moreover, the use of artifacts crafted from wood in pursuit of an aboriginal lifestyle is well documented. One need only turn to the use of the canoe in aboriginal societies in New Brunswick to appreciate the significance and importance of trees. 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 aboriginal 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. [Emphasis added.]

68 First, the Crown objects to Robertson J.A.'s reference to the findings of fact made in the *Bernard* case, which was decided and released prior to the Court of Appeal hearings in both of the cases at bar. *Bernard* was released on August 28, 2003. The *Sappier and Polchies* hearing before the Court of Appeal took place on February 11, 2004, while the *Gray* hearing occurred on November 26, 2003. In other words, by the times the hearings occurred in the cases at bar, the *Bernard* decision, including its findings of fact, was in the public record and ought to have been known to the Crown. Moreover, in the *Sappier and Polchies* decision, the reference to *Bernard* is merely informative, given the Crown's concession about the validity of the 1725 Treaty. It is not operative in Robertson J.A.'s reasoning precisely because the historical events leading up to the signing of the treaty were not contentious.

69 Similarly, in the *Gray* decision, Robertson J.A. clearly stated that he agreed with the trial judge's finding that the harvesting of trees for personal use was integral to the Mi'kmaq's distinctive culture. The reference to the *Bernard* decision and to its findings of fact in respect of the Mi'kmaq communities of the Miramichi are merely offered in support of his conclusion. In any event, the Crown concedes at para. 44 of its factum that "wood was used in Mi'kmaq society to ensure survival", and generally does not take issue with the significance of wood and the many uses to which it was put in pre-contact Mi'kmaq society.

70 Second, the Crown also takes issue with Robertson J.A.'s reference to Dr. Patterson's article in the *Sappier and Polchies* reasons for judgment. Dr. Patterson

gave evidence at the *Sappier and Polchies* trial as the Crown's own witness. The article Robertson J.A. referred to was also referred to by Dr. Patterson in his oral evidence. He offered to provide a copy to the trial court. The Crown declined that invitation, noting it was unnecessary in view of Dr. Patterson's presence to provide oral testimony (A.R., vol. III, at pp. 392-93). In any event, the Crown conceded the validity of the treaty. Dr. Patterson's article is merely offered as a source of information about the historical events surrounding the signing of the treaty, as they are not addressed in the reasons as a result of the Crown's concession.

71 Lamer J. (as he then was) relied on additional documents in *Sioui* and took judicial notice of historical facts contained therein. Some of those documents were put forth by the intervener in that case and others were obtained by way of personal research. The Crown is correct to note, however, that the parties in *Sioui* were provided with notice of these additional documents. I would agree that it is generally wise not to incorporate evidence submitted in other cases without disclosing it to the parties and allowing them the possibility of challenging it or presenting contrary evidence. But because the *Bernard* decision and Dr. Patterson's article were in the public record and well known to the Crown, and because the Crown has failed to allege any material dispute or discrepancy as a result of this so-called incorporation of extrinsic evidence, I respectfully conclude that extrinsic evidence was not improperly incorporated into the learned judge's reasons.

7. Conclusion

72 For the above reasons, I conclude that the respondents have made out the defence of aboriginal right. The respondent Mr. Gray possesses an aboriginal right to

harvest wood for domestic uses on Crown lands traditionally used for that purpose by members of the Pabineau First Nation. The respondents Messrs. Sappier and Polchies possess an aboriginal right to harvest wood for domestic uses. That right is also site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members of the Woodstock First Nation.

73 Accordingly, I would dismiss the appeals.

The following are the reasons delivered by

74 BINNIE J. — I agree with my colleague, Bastarache J., about the disposition of this appeal for the reasons he gives except, with respect, for his ruling that

> [t]he harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a right holder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components. [para. 25]

In aboriginal communities pre-contact, as in most societies, there existed a division of labour. This should be reflected in a more flexible concept of the exercise of aboriginal rights *within* modern aboriginal communities, especially considering that the aboriginal right itself is communal in nature. Barter (and, its modern equivalent, sale) within the reserve or other local aboriginal community would reflect a more efficient use of human resources than requiring all members of the reserve or other local aboriginal 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.

On the one hand, it seems to me a Mi'kmaq or Maliseet should be able to sell firewood to his or her aboriginal neighbour or barter it for, say, a side of venison or roofing a house. On the other hand, I agree that trade, barter or sale *outside* the reserve or other local aboriginal community would represent a commercial activity outside the scope of the aboriginal right established in this case. In other respects I agree with my colleague.

Appeals dismissed.

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