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ABORIGINAL LAW NEWSLETTER

Notes for British Columbia First Nations

VICTORY FOR ABORIGINAL NATIONS IN NEW BRUNSWICK: SUPREME COURT OF CANADA UPHOLD ABORIGINAL RIGHT TO HARVEST TIMBER

R. v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54

On December 7, 2006 the Supreme Court of Canada issued its decision in *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54. In a decision of significance to the interpretation of aboriginal rights and title generally, the Supreme Court of Canada unanimously ruled in favour of aboriginals from the Maliseet and Mi'kmaq First Nations who had been charged with unlawful possession and unlawful cutting of Crown timber from Crown lands.

The defendants had cut timber off of Crown lands for the purpose of construction of a house and furniture on reserve. Two separate trials were held for the three individual defendants. Both trial judges ruled against the aboriginal people. The trial judges reasoned that the harvesting of

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NOTE:

This ABORIGINAL LAW NEWSLETTER is intended to provide our general comments on new developments in the law. The NEWSLETTER is not intended to be a comprehensive review of all developments. It is not intended to provide legal advice. Readers should not act on information in the NEWSLETTER without first seeking legal advice on the particular matters that are of concern to them.

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VICTORY FOR ABORIGINAL NATIONS IN NEW BRUNSWICK (CON'T)

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wood for personal use would have been done by any human society living in what is now New Brunswick. Accordingly, the practice could not be seen as a distinctive feature of aboriginal culture. The trial judges both ruled, therefore, that the claim to aboriginal rights had not been made out.

The Supreme Court of Canada carefully explained that wood taken for survival purposes by the aboriginal community may well be seen as integral to the distinctive culture of the aboriginal people and, therefore, a constitutionally protected aboriginal right. The court warned against a narrow conception of aboriginal rights that could limit these rights to particular cultural practices such as canoe building and basket-making. To do this, the Supreme Court of Canada warned, "… would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes".

The court, therefore, rejected the government's argument that the use of wood was not sufficiently distinctive to be characterized as an aboriginal right. Instead the court held on the evidence of the case before it that "… the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the [aboriginal] way of life…". The aboriginal rights claim, therefore, was upheld.

The trial judges reasoned that the harvesting of wood for personal use would have been done by any human society living in what is now New Brunswick.

As always in cases involving aboriginal rights, great care was taken to properly define or "characterize" the rights in question. The Supreme Court did not see this case as involving the right to harvest wood for commercial purposes. Nor did it see this case as being about the right to harvest wood for whatever purpose the First Nation chose. It also rejected the view that this case involved the right to harvest wood for "personal uses", finding that this term was too general. Instead the Court held that in this case, that the issue was whether the aboriginal nation had the right to harvest wood to address the communities' domestic needs for such things as shelter, transportation, tools, and fuel.

The Supreme Court did not see this case as involving the right to harvest wood for commercial purposes.

Because of this characterization of the right, on the facts of this case, the Court held that the right has "no commercial dimension". The wood could not be sold, traded or bartered. One judge, Justice Binnie, would have held that the right did include the right to barter within the reserve or other local aboriginal communities. Fur-

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VICTORY FOR ABORIGINAL NATIONS IN NEW BRUNSWICK (CON'T)

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ther, it is important to remember that the lack of commercial component in this case is a reflection of the particular evidence offered at trial. The right to a commercial use of wood could well be established on other facts, in particular where wood was harvested in an area to which the aboriginal Nation could establish aboriginal title.

The *Sappier* and *Gray* decision makes some important points about evidence in the aboriginal rights context. Courts have noted in the past that oral history will play a pivotal role in the proof of aboriginal rights and title. This point was affirmed in the *Sappier* and *Gray* decisions. Of particular note, the Supreme Court of Canada cited with approval the qualification of a Mi'kmaq elder and historian as an expert witness on oral traditions and customs concerning the use and gathering of wood by aboriginal people in the area.

The Supreme Court of Canada emphasized the importance of providing as full as possible evidentiary record on pre-contact aboriginal culture. This evidence is critical to determining the existence, nature, and limits of the aboriginal right being asserted. The Court noted, however, that the rules of evidence must be adapted to aboriginal rights litigation so as to allow the use of post-conduct evidence to prove the existence of pre-contact practices.

The Crown argued that if there was an aboriginal right to harvest timber for domestic purposes this right had been extinguished by the Colony of New Brunswick prior to Confederation. The Court underlined, as it has in the past, that a regulatory scheme that interferes with the exercise of aboriginal rights is not the same thing as an extinguishment of aboriginal rights. Extinguishment can only be achieved with clear and plain intent. The Crown failed to establish that it had extinguished the aboriginal rights in question in this litigation.

The *Sappier* and *Gray* decision is important to First Nations across Canada. It is a strong antidote to those who would interpret aboriginal rights as museum pieces that cannot evolve and develop over time. The Supreme Court of Canada has sent a the message that aboriginal rights must be interpreted in a fair and reasonable way that gives them meaning and relevance to modern day aboriginal communities.

AND A WIN ON THE WEST COAST: SURPEME COURT OF CANADA AFFIRMS HUNTING

R. v. *Morris*, 2006 SCC 59

On December 21, 2006 in an early Christmas present, the Supreme Court of Canada ruled in favour of the aboriginal side on *R.* v. *Morris*, 2006 SCC 59. Here two members of the Tsartlip First Nation, Ivan Morris and Carl Olsen, were charged under British Columbia's *Wildlife Act* for night hunting with an illuminating device.

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And a Win on the West Coast (cont.)

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They raised defenses based on the North Saanich Treaty of 1852. In a 4:3 split decision the Supreme Court of Canada upheld the Treaty defense.

Speaking for the majority, Justices Deschamps and Abella noted that between 1850 and 1854 James Douglas, Governor of the Colony of Vancouver Island, entered into fourteen treaties with bands living on Vancouver Island. These treaties all included a provision acknowledging that the First Nation was "at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". The majority reviewed the evidence of Tsartlip's historical hunting practices which included night hunting with illumination. The Court emphasized that when interpreting a Treaty a Court is looking for "common intention which best reconciles the interests of the parties".

Applying this test the majority concluded that the common intention of the parties was that the Tsartlip would have the right to hunt at night with illumination. The Treaty could not be interpreted to grant "a right to hunt dangerously". On the other hand, however, the general prohibition of night hunting everywhere in British Columbia, and under all circumstances, was viewed by the majority as an overly broad and intrusive infringement of the hunting rights guaranteed by the Treaty. As the Court noted, "British Columbia is a very large province and it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the Treaty area at issue in this case".

The majority concluded that a complete prohibition of night hunting with illumination constituted a significant interference with the Treaty right. Accordingly, the majority set aside the convictions of Morris and Olsen and ordered that acquittals be entered.

In a strongly worded dissent three judges of the Supreme Court of Canada concluded that night hunting was an inherently dangerous activity and that the prohibition of night hunting could not, therefore, be seen as an infringement of the Treaty right. Accordingly, the majority and the dissent differed primarily over the underlying factual issue of whether night hunting with modern day hunting equipment is an inherently dangerous practice.

This decision is a significant one as it requires British Columbia to look carefully at its legislation to determine whether interference with aboriginal rights contemplated by provincial legislation is minimized. The Morris and Olsen decision, in addition to affirming the constitutional requirement that Treaty promises be honoured, also stands for the proposition that the province cannot rely on overly general hunting prohibitions when something more narrow and carefully crafted will sufficiently address the legitimate provincial interest.

The Use of Societies by First Nations

A Society can often be a useful corporate vehicle for a First Nation. Unlike a corporation with share capital, its members do not invest money in the hope that their share capital will increase in value to that they can sell it for a profit. Instead, its members join in the pursuit of shared community purposes for which societies are usually created.

In this way a Society can more accurately reflect the true nature and aspirations of a First Nation community. In addition a corporation with share capital presents certain challenges for a First Nation that a Society does not present.

Challenges Encountered When Using Corporations

A corporation with share capital must have shareholders who, by owning their shares, will control the corporation. Although the shareholders can hold their shares in trust for a First Nation, this requires that there be a written declaration of trust signed by each shareholder. This is a detail that sometimes does not get put into writing.

Furthermore, when there is an election, a newly-elected Chief and Council may want to change the trustee shareholders. They will therefore have to have a lawyer look at the declarations of trust signed by the Trustee shareholders established by the previous Chief and Council. It may be difficult to find those declarations. Once they are found, they may not provide clear and simple guidance on the process to follow in order to make the desired change in trustee-shareholders.

Even if the declarations of trust can be found and they provide a straight-forward process for changing the trustee shareholders, it may be hard to find those shareholders and to interest them in signing the necessary papers.

They may have died. They may no longer have legal capacity. In those cases, their personal representatives become the trustee-shareholder assuming personal representatives have been appointed. If the property of the shareholder is not sufficient to warrant the appointment of a personal representative, it may be that court proceedings will be necessary to achieve the desired change in shareholders.

On the other hand, one or more of the shareholders that are supposed to transfer their shares may be alive and legally competent but hard to find. This can cause both delay and expense.

In the absence of just one of the shareholders, it will not be possible to appoint new directors with the normal written resolution signed by all the shareholders. Instead proper notice of a meeting of shareholders must be given for the purpose of changing directors. This could involve giving notice to the personal representatives of a shareholder who has died or become incapacitated.

If the majority of the shareholders cannot or will not transfer their shares or attend the necessary meeting to appoint new directors it may be necessary to get a court order to change the directors and the shareholders.

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THE USE OF SOCIETIES BY FIRST NATIONS (CONT.)

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All these issues can lead a new Chief and Council and possibly their management team to conclude that there are more pressing matters to attend to than these difficult little pieces of paper work. Eventually this can lead to serious problems where the corporation is trying to enter into a substantial contract which attracts a detailed review of its past history. It may be that the finalization of the contract has to be postponed while the corporation catches up on many years of paperwork. The delay could even mean that the contract is lost.

Thus corporations with share capital can present challenges to a First Nation seeking to establish a corporate structure.

Possible Solutions

One solution might be to have each trustee-shareholder sign a share transfer at the time of acquiring the share effective at a time chosen by the Chief and Council. This transfer could be left in the corporate records. However, although that might be the plan when the corporation is first established, changes in Chief and Council and changes in legal advisors might result in that plan not being followed.

Another alternative might be a voting trust administered by a large trust company. However that would involve complexity and expense and the insertion of a large trust company into the management of the affairs of the community whenever there is change in leadership.

These challenges can be avoided by using a Society the constitution of which provides that the Chief and Council will automatically be directors. It could also provide that Chief and Council will automatically be the sole members of the Society. Therefore, after an election, the new Chief and Council would automatically acquire control of the Society.

Alternatively, one or more directors could be elected directly by the members of the First Nation. A second alternative would be to have all members of the First Nation automatically become members of the Society.

The community also needs to be aware that the financial statements of a Society may have to be made available to the public.

Furthermore, the purposes of a Society cannot include the purpose of making a profit. There may be technical ways, however, to alleviate the difficulties of these requirements. There are also techniques that can be used to ensure that a Society pays no income tax.

On balance, therefore, First Nations should carefully consider using a Society when a corporate vehicle is required in the conduct of their affairs.

For further information or to discuss your corporate or business law issues further please contact Merrill Shepard: ph) 604-688-4272; email) *merrill_shepard@aboriginal-law.com*

INDIAN RESIDENTIAL SCHOOL UPDATE: THE COMMON EXPERIENCE PAYMENT

On December 15, 2006, Chief Justice Brenner of the British Columbia Supreme Court gave his conditional approval for the national residential school class action settlement program. Under the terms of the proposed settlement, former survivors of the residential schools who resided in the residential schools are each entitled to receive $10,000 for the first year of attendance and $3,000 for each subsequent year. This payment is known as the Common Experience Payment ("CEP").

The original Political Accord between Canada and the Assembly of First Nations promised the CEP to everyone who attended residential schools. During closed-door negotiations that followed, Canada insisted that day students be denied access to the CEP. Accordingly, the CEP is only available to those who resided at residential schools.

Now that the class action is certified, survivors have to decide whether or not to opt out. If they do nothing, survivors are deemed to be included in the class action. The deadline for opting out is August 20, 2007. If more than 5,000 survivors opt out across the country then Canada may, at its option, terminate the agreement.

Why would survivors want to opt out? If you accept the CEP then you are deemed to legally release Canada and the Church from your claims for physical and sexual abuse at the residential school. If you were physically and sexually abused, and you have not opted out, you must go through the Government's own Independent Assessment Process.

The Independent Assessment Process is based on a point system which we think is inappropriate. We argued before the British Columbia Supreme Court that the proposed settlement was unfair because:

1. It required you to give up your legal rights to sue for physical and sexual abuse in order to access the CEP;

2. It excluded day students from eligibility for the CEP; and

3. The new point based system for the calculation of compensation for physical and sexual abuse is dehumanizing and inconsistent with principles of Canadian Law. On the other hand, if you do opt out you will not be eligible for the CEP. There are clearly advantages and disadvantages to either decision.

If you are a survivor who was physically or sexually abused at a residential school, then you should consider getting some legal advice concerning whether or not it is your advantage to stay in the class action or to opt out.

Our firm represents residential school survivors. To speak with a lawyer, free of charge, please contact:

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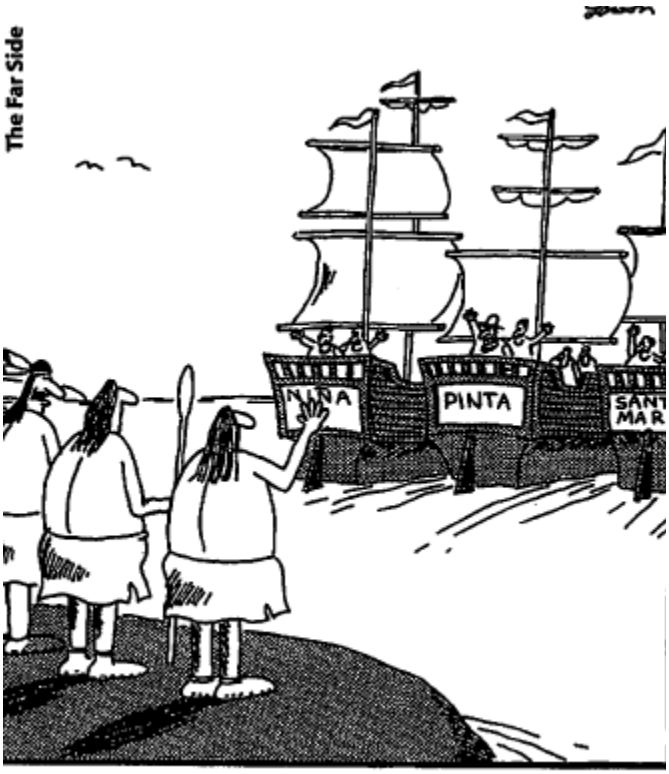
THE FAR SIDE



"Did you detect something a little ominous in the way they said, 'See you later'?"

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Energy and Experience
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Donovan & Company provides services in all areas of aboriginal practice including litigation, Specific Claims, Treaty negotiations, aboriginal business ventures, natural resource ventures, tax matters and negotiations with government and industry concerning a wide range of issues facing First Nations.

The Lawyers at Donovan & Company practice in a wide range of areas in the service of Aboriginal Nations and Aboriginal peoples. Please feel free to call any one of us at any time.

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