Aboriginal Law: 2006 Year in Review

Mark Crow
Counsel, Constitutional Law Branch, Attorney General of Ontario[1]

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Introduction

2006 was another important year for developments in Aboriginal law. In December, the Supreme Court of Canada released two important decisions concerning rights protected by s. 35 of the *Constitution Act, 1982*. In ***R. v. Sappier; R. v. Gray***, 2006 SCC 54 (December 7), the Court recognized an Aboriginal right to harvest wood on Crown land for domestic uses. In ***R. v. Morris***, 2006 SCC 59 (December 21), the Court recognized a treaty right to hunt at night using illumination.

The Supreme Court released one other significant Aboriginal law decision in 2006, concerning the statutory protections offered by the federal *Indian Act* to First Nation funds situated or deemed to be situated on reserve: ***McDiarmid Lumber Ltd. v. God's Lake First Nation***, 2006 SCC 58 (December 15).[2]

There were also a number of significant appellate court Aboriginal law decisions in 2006. This paper will briefly review these decisions. It does not review legislative developments.

Part I – Supreme Court of Canada decisions

(a) *R. v. Sappier; R. v. Gray*, 2006 SCC 54

This was the biggest Aboriginal rights case of 2006, with the Supreme Court recognizing for the first time an Aboriginal right to harvest wood for domestic uses. The Aboriginal respondents were Maliseet (Dale Sappier and Clark Polchies, members of the Woodstock First Nation) and Mi'kmaq (Darrell Gray, member of the Pabineau First Nation). They had been charged with unlawful possession and cutting of Crown timber contrary to provisions of New Brunswick's *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1.

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[1] Any opinions expressed in this paper are those of the author alone.

[2] The Supreme Court also released three non-Aboriginal law decisions in 2006 concerning Aboriginal issues or persons: *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, [2006] 1 S.C.R. 744 (Insurer's duty to defend re: Jesuit operated residential school, 1913-58); *R. v. B.W.P.; R. v. B.V.N.*, [2006] 1 S.C.R. 941 (Aboriginal youth criminal sentencing); and *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326 (Review Board order affecting Aboriginal man found "not criminally responsible on account of mental disorder").

Sappier and Polchies were stopped by provincial officers with four yellow birch and 12 sugar maple logs on the truck they were driving. The logs had been cut on Crown lands. Polchies intended to use the logs in the construction of a furnished house on reserve, with the residue to be used as firewood. Gray was stopped on Crown lands by provincial officers while in possession of four logs, one of which was a bird's eye maple. Gray intended to use the logs to make cabinets, furniture and mouldings for his home.

All three respondents conceded the factual elements of the offences with which they were charged, but as a defence claimed Aboriginal and treaty rights to harvest timber for personal use. Sappier and Polchies succeeded in their treaty right defence at trial but failed in their Aboriginal right defence, a ruling confirmed on appeal. On further appeal to the New Brunswick Court of Appeal, both the treaty and Aboriginal right defences were accepted.

In contrast, Gray succeeded in his Aboriginal right defence at trial but failed in his treaty right defence, but the Aboriginal right finding was reversed on appeal. On further appeal to the New Brunswick Court of Appeal, the Court applied its ruling in *Sappier and Polchies* to reinstate the trial ruling that Gray had successfully made out an Aboriginal right defence. Gray had abandoned his treaty right defence by this time.

The Supreme Court of Canada unanimously affirmed the New Brunswick Court of Appeal's decisions that all three respondents had successfully established an Aboriginal right to harvest the logs in their possession. Having accepted this defence, the Court found it unnecessary to further consider whether Sappier and Polchies could equally have established a treaty right defence as accepted by the New Brunswick Court of Appeal.

Writing the lead majority judgment, Bastarache J. held (at para. 72):

> 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.

The Aboriginal logging rights recognized thus contain two internal limitations – a use limitation and a geographic limitation.

The use limitation in turn has two dimensions – (a) logs cannot be sold or traded and (b) must be put to domestic uses. The first dimension of no sale or trade fits squarely with the Supreme Court's holding in *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, rejecting Mi'kmaq claims to a treaty right to log for commercial purposes (and also rejecting, in the alternative, a claim of Aboriginal title with respect to the lands on which the commercial logging at issue had occurred). Here the Court added that logs cannot be sold or traded in order to obtain moneys to satisfy domestic needs (para. 25: "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 rightholder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components").

Binnie J., writing alone in a concurring opinion, took issue with the breadth of this dimension of the use limitation and would have qualified it by allowing internal sale and trade within Aboriginal communities (at para. 74):

> 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.

On the second dimension of the use limitation, the Court chose to restrict the right to harvesting wood for "domestic uses" instead of "personal uses", on the basis that present day uses must reflect pre-contact uses of the resource (at para. 24):

> 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 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.

As noted above, the second internal limitation imposed by the Supreme Court on the exercise of the right is a geographic one. The Court has frequently stated that Aboriginal rights are site-specific: see *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 30; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 138; and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at paras. 55-59. The geographic limitation also has two dimensions – (a) the right can only be exercised on traditional territories and (b) only on Crown lands.

The recognized right also has an external limitation, namely that it cannot be exercised without prior community approval. This suggests that some form of procedure must be followed by individuals to obtain community approval before exercising the right, and that communities have the ability to control the exercise of the right – presumably spatially, temporally, by proposed domestic use or by volume or species of harvest. The Court stated (at para. 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.

The criteria relied on by the Court to ground the recognition of an Aboriginal right to harvest wood for domestic uses is also noteworthy in a couple of ways. First, the Court discussed the question of whether a practice undertaken for survival purposes can meet the integral to a distinctive culture test at all (the test set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, to establish an Aboriginal right protected by s. 35).

The Court accepted that Mi'kmaq and Maliseet societies used wood for survival purposes pre-contact, after reviewing the evidence led at trial establishing that wood had been used for (at paras. 28-32): shelters, implements of husbandry, furnishings, rope, canoes, baskets, paddles, firewood, fishing spears and pots. But as most pre-contact Aboriginal societies relied on wood for survival, is such evidence capable of satisfying the *Van der Peet* test?

The Court noted that there was some confusion with respect to this question due to the statement in *Van der Peet* (at para. 56) that "aspects of the aboriginal society that are true of every human society (e.g., eating to survive)" do not constitute distinctive practices protected by s. 35.

The Court observed that even *Van der Peet* itself recognized (at para. 72) that the *means* by which survival is achieved (e.g. fishing for food) may constitute an Aboriginal right if the underlying practice was integral to the pre-contact society. After reviewing a number of cases consistent with such an interpretation, Bastarache J. concluded (at para. 37):

> …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.

The Court therefore concluded that an Aboriginal right to harvest wood, subject to the limitations reviewed above, had been made out. The Court accepted continuity of practice of the claimed right, allowing for logical evolution (e.g. from temporary shelters to modern dwellings – paras. 48 and 49), and held that the rights at issue had not been extinguished (paras. 56-61). The Court also noted that the provincial Crown had not attempted to justify the infringement of the rights by the legislation at issue (para. 54), but added that the right "is subject to regulation pursuant to the ordinary rules" (para. 55).

The second point of note is the Court's discussion of the meaning of "culture" within the *Van der Peet* test (at paras. 44 and 45):

> 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. … Ultimately, the concept of culture is itself inherently cultural. … 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).

The Oxford Concise English dictionary defines "culture" as "the customs, civilization, and achievements of a particular time or people", which is perhaps what the Court was trying to get at in this (somewhat post-modern) discussion.

(b) *R. v. Morris* 2006 SCC 59

This was the biggest treaty rights case of 2006, with the Supreme Court recognizing a treaty right to hunt at night using illumination. Unlike the unanimous recognition of the Aboriginal right in *Sappier and Gray*, here the Court divided 4-3.

The Aboriginal appellants, Ivan Morris and Carl Olsen, were charged with a number of offences under British Columbia's *Wildlife Act*, S.B.C. 1982, c. 57. They had been caught hunting at night from a vehicle in an enforcement operation set up by provincial conservation officers. Both men are members of the Tsartlip Band of the Saanich First Nation on Vancouver Island. They raised a treaty right to hunt at night as a defence to the charges. The Crown conceded that both men had a treaty right to hunt, but argued that the right did not extend to hunting at night. They were both convicted at trial of hunting wildlife with a firearm during prohibited hours. The convictions were upheld on appeal, and by a majority of the B.C. Court of Appeal on further appeal.

The Supreme Court reversed. Writing for the majority, Deschamps and Abella JJ. held that the North Saanich Treaty of 1852, which covers part of Vancouver Island, guarantees the right to hunt at night with illumination. They noted that the Crown's treaty promise to the Tsartlip was that they would be free to hunt "as formerly" over their traditional lands that remained unoccupied (paras. 17-25). In their view, this guarantee includes the right to hunt at night using illumination, as there was evidence that this was a pre-contact hunting practice of the Tsartlip – who traditionally used canoes and pitch from a tree for illumination (paras. 26 and 27).

Noting the logical evolution aspect of treaty rights, the majority concluded that these pre-contact practices could now be exercised in modern ways (para. 30):

> From 1852 to the present, the tools used by the Tsartlip in hunting at night have evolved. From sticks with pitch to spotlights and from canoes to trucks, the tools and methods employed in night hunting have changed over time. These changes do not diminish the rights conferred by the Treaty.

Having recognized a treaty right to hunt at night, the majority had to determine whether the provincial law at issue could restrict that right. The majority stated in three different parts of their judgment that the treaty right does not include the right to hunt dangerously, and therefore that B.C.'s ban on dangerous hunting *simpliciter* does not infringe the treaty right (paras. 14, 35 and 56):

> We acknowledge at the outset that there is no treaty right to hunt dangerously. Thus s. 29 of the *Wildlife Act*, which prohibits hunting or trapping "without reasonable consideration for the lives, safety or property of other persons", is a limit that does not impair the treaty rights of aboriginal hunters and trappers. … it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This limitation on the treaty right flows from the interest of all British Columbians in personal safety. It is also confirmed by the language of the Treaty itself, which restricts hunting to "unoccupied lands," away from any town or settlement.

This approach recognizes that treaty rights have internal limitations that operate to restrict the ambit of those rights. Such an approach does not engage constitutional division of powers issues, as the result is that a provincial law consistent with an internal limitation does not interfere with the treaty right at all.

The Court was in agreement on the analysis employed to this point, but parted ways on the issue of whether night hunting is inherently dangerous and therefore an internal limitation on the treaty right. The majority held that night hunting is not inherently dangerous, and therefore is part of the treaty guarantee (at paras. 35, 38-40, 58-59):

> 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 safety limitation in the Treaty should not be drawn so broadly as to exclude *all* night hunting … Protected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous. All hunting, regardless of the time of day, has the potential to be dangerous. …The Legislature has made no attempt to prohibit only those specific aspects or geographic areas of night hunting that are unsafe by, for example, banning hunting within a specified distance from a highway or from residences. … We believe that it would be possible to identify uninhabited areas where hunting at night would not jeopardize safety. This finding is supported by the evidence in this case that the Tsartlip's practice of night hunting with illuminating devices has never been known to have resulted in an accident, and that the conservation officers, in setting up the location for their mechanical decoy, were easily able to locate an area where night hunting could be practised safely.

Having reached this conclusion, the majority needed to examine the division of powers issue and concluded that provinces do not have the constitutional jurisdiction to significantly regulate treaty rights (para. 43): "Treaty rights to hunt lie squarely within federal jurisdiction [pursuant to s. 91(24) of the *Constitution Act, 1867*] over 'Indians, and Lands reserved for the Indians'." Although some provincial laws of general application that intrude into the core of "Indianness" can nevertheless still apply by virtue of referential incorporation into federal law under s. 88 of the *Indian Act*, R.S.C. 1985, c.

I-5, this is not the case for provincial laws that infringe treaty rights due to the opening language of s. 88 ("Subject to the terms of any treaty…"). Acquittals were therefore entered.

The majority made clear, however, that not all provincial laws that impact treaty rights will necessarily infringe those rights. It depends on the degree of impairment. Thus, a second technique – in addition to the internal limitation approach that restricts the ambit of treaty rights – is available to reconcile provincial laws and treaty rights, namely the "insignificant interference" or "modest burden" approach (para. 50):

> Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the *Indian Act*. This approach is supported both by *Côté* and by *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. rejected the idea that "anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement" (para. 91 (emphasis added)). Therefore, provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right. [See also paras. 36, 37, 48, 49, 52 and 53.]

As a further wrinkle, the majority also stated (at para. 46) that in the commercial rights context it remains an open question whether provincial laws may have more than an insignificant interference on treaty rights (e.g. constitute a *prima facie* infringement) and thereby engage the justification test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075:

> In the case of the provincially regulated resources, the Court [in *R. v. Marshall*, [1999] 3 S.C.R. 533] was not prepared to read the treaty right as requiring that access to them for purposes of commercial exploitation be subject to parallel and potentially conflicting federal and provincial oversight. That is not this case, which requires us to consider the more general question of what degree of provincial legislative interference with a non-commercial treaty right will trigger the s. 88 protection of treaty rights. Further consideration of the Court's position with respect to treaty rights of a commercial nature should be left for a case where it is directly in issue.

The dissenting members of the Court did not need to explore these division of powers issues, as their view was that night hunting is inherently dangerous and therefore an internal limitation on the right to hunt and not protected by the North Saanich Treaty. McLachlin C.J. and Fish J, writing for the minority, stated (at para. 82):

> …the right to hunt protected by the Douglas Treaty is subject to an internal limit: It does not include the right to hunt in an inherently hazardous manner. Or, put differently, the right to hunt under the treaty must be exercised reasonably and hunting practices that are inherently hazardous are antithetical to the reasonable exercise of the right to hunt. The impugned provision of the *Wildlife Act* regulates this internal limit. Since the regulation of dangerous hunting falls outside the scope of the treaty right to hunt, no treaty right is engaged. As there is no aboriginal right asserted, and as the law does not otherwise go to Indianness, the law applies *ex proprio vigore* and does not need to be incorporated by s. 88 in order to apply to Indians.

The minority explained that their approach was consistent with the Court's prior jurisprudence (at paras. 93 and 94):

> Many aboriginal and treaty rights are subject to internal limits. In *R. v. Marshall*, [1999] 3 S.C.R. 456 and [1999] 3 S.C.R. 533, the Court held the treaty right to trade for necessaries was subject to an internal limit to a catch that would produce a moderate livelihood. In similar fashion, safety may operate as an implicit or definitional limit on aboriginal or treaty rights. … In *R. v. Sundown*, [1999] 1 S.C.R. 393, the Court held that "there [is] no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others" (Cory J., for the Court, at para. 41, citing *Myran v. The Queen*, [1976] 2 S.C.R. 137, at pp. 141-42; see also *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 460; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 289; and *Simon*, at p. 403).

They also explained that while night hunting was not an inherently dangerous activity at the time the North Saanich Treaty was signed, it has become so today (paras. 108 and 110):

> When the Douglas Treaty was signed, hunting at night was not uncommon. Nor was it particularly dangerous. It would not have been surprising had both the Crown and the North Saanich aboriginals contemplated that the aboriginals would continue to hunt at night. At the time, this practice did not pose the same dangers as it does today (which dangers will be explained in detail below). And the parties may not have even had reason to anticipate that the dangers would grow. But they could not have believed that the right to hunt included a right to hunt dangerously. To impute that belief to them would do injustice to both parties and, would in addition, defy common sense. … The Crown was preoccupied by the need to secure the safety of the settlers. Hunting in an unsafe manner could not have been thought to serve the interests of the aboriginals any more than the interests of the Crown.

This is different application of the logical evolution test than is usually considered, as here a treaty right protected in its traditional form is *not* protected in its modern form because it has evolved into an inherently unsafe practice (at para. 117): "when the same sort of activity carried on in the modern economy by modern means is inherently dangerous, that dangerous activity will not be a logical evolution of the treaty right." It is interesting to note that this is in direct contrast to the majority's approach to logical evolution in this case, which employed the more traditional approach of relying on logical evolution to explain why a right to hunt at night with illumination when the treaty was signed can be exercised using modern vehicles, lights and weapons today (paras. 30-33, discussed above).

Finally, and most importantly as it is the key point of departure from the majority judgment, the minority set out the basis for their conclusion that night hunting is inherently dangerous and thus an internal limit on the treaty right (at paras. 129 and 130):

> The conclusion that a ban on night hunting is a reasonable exercise of the Province's regulatory power in defining the internal limit on the treaty right flows naturally and logically from the defining feature of nighttime – that is, darkness. The evidence at trial was more than sufficient to establish that one's ability to identify objects, estimate distances and observe background and surrounding items is greatly diminished in the dark, posing a real danger to other members of the public. … This added danger to hunting causes the risks associated with

> hunting at nighttime with a firearm to be unacceptably high. The *Wildlife Act* prohibition is a reasonable response to a real danger.

(c) *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58

This case does not concern s. 35 rights, but instead provisions of the federal *Indian Act* that protect property situated on First Nation reserves from seizure by creditors.

In a 6-3 decision, the Supreme Court held that ss. 89 and 90 of the *Indian Act* do not confer immunity from seizure to funds provided by the federal government to First Nations under Comprehensive Funding Arrangements ("CFAs"). CFA funds are designed to be spent exclusively for certain purposes, some of which may be closely related to treaty obligations (here education payments) but others that are in relation to economic and social development objectives unrelated to treaty obligations.

The funds at issue had been deposited in a bank account in Winnipeg – e.g. off-reserve – pursuant to a CFA between the God's Lake Band in Manitoba and the federal government. The respondent McDiarmid Lumber Ltd. was a creditor of the band, having supplied construction materials and services to the band over a number of years. It obtained a consent judgment (which by 2004, with interest, was approximately $1,223,000) and garnishment order against the band to satisfy the judgment.

Section 89 of the *Indian Act* protects property of an Indian or a band that is situated on reserve from seizure: "Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band." The Court was unanimous in concluding that the funds at issue were not situated on reserve pursuant to this general provision, as they were real funds (as opposed to issues surrounding where a *transaction* is located, where a connecting factors test is appropriate) located off-reserve in Winnipeg – see majority reasons at paras. 11-21, dissenting reasons at para. 77.

The Court divided, however, over whether CFA funds should be deemed to be situated on reserve pursuant to s. 90(1)(b) of the *Indian Act*: "For the purposes of sections 87 and 89, personal property that was … (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve."

The majority concluded that it depends on the purposes of the funding in any given CFA, but that here the band had not established that the CFA at issue was transferring moneys pursuant to treaty obligations. The funds therefore did not come within the deeming provision. McLachlin C.J., writing for the majority, concluded (at paras. 66 and 69):

> …the record does not disclose precisely why Parliament chose to replace the pre-1951 categories of protected property with protection based on whether the property had been given pursuant to a "treaty" or "agreement" with the Crown. Nor does it disclose precisely why the

> word "treaty" was supplemented with "agreement". However, Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties. Exempting property broadly would be inconsistent with self-sufficiency because it would deprive Indian communities of a cornerstone of economic development: credit. Eliminating all protection would neglect the persistent concerns about exploitation. ... Textual, historical and policy considerations all support the conclusion of this Court in *Mitchell* [*v. Peguis Indian Band*, [1990] 2 S.C.R. 85] that the word "agreement" in s. 90(1)(b) of the *Indian Act* should not be construed broadly as extending to any agreement between the government and Indians that confers benefits, or any agreement between the government and Indians that confers "public sector services" benefits. Rather, it should be understood in the sense of an arrangement that fleshes out treaty obligations of the Crown.

Binnie J., writing for the minority, took exception to this approach for a number of reasons: the text of the statutory provision (para. 133), the context of that provision (para. 134), its purpose (paras. 135-41), that a broad reading of the provision is not paternalistic (paras. 142-43), that CFAs should be deemed to be situated on reserve as a whole (paras. 144-47), that suppliers can protect themselves in other ways (para. 148) and that the public must pay twice for the same services if CFA funds are seized by creditors (para. 149). Binnie J. therefore concluded that a "public sector services approach" would be a better way to deal with this deeming provision (at paras. 129-30):

> In my view the word "agreement" in s. 90(1)(b) should include government to government transfers such as the CFA by embracing what I would call "the public sector services approach". Such an approach takes the categories of expenditure identified by La Forest J. at pp. 130 and 135 of Mitchell (namely education, housing, health and welfare) in the context of the numbered treaties and simply generalizes them more broadly (as I do not read La Forest J. as intending his list to be exhaustive) and applying them to Indian bands more generally (i.e., whether or not there is a treaty in place and irrespective of the benefits conferred by a particular treaty). The public sector services funding approach would not include monies provided by the federal Crown with a more commercial orientation such as the Resource Partnerships Program, Economic Development Opportunity Fund, Resource Acquisition Initiative, Aboriginal Contract Guarantee Instrument, and Aboriginal Business Development Initiative.

The minority viewed this approach as being both more rational and as treating bands more fairly, as it would not depend on whether or not they were treaty signatories or on whether particular CFA funds could be said to be payments to satisfy treaty obligations.

Part II – Appellate Court decisions

Important appellate court Aboriginal law decisions of 2006 include:

(a) *R. v. Kapp*, 2006 BCCA 277 (June 8, 2006; leave to appeal to SCC granted December 14, 2006)

In this case, a five member panel of the B.C. Court of Appeal held that the federal government's Aboriginal commercial fisheries program does not violate s. 15 of the *Canadian Charter of Rights and Freedoms*, the equality guarantee. A number of non-Aboriginal individuals had staged a protest against the Aboriginal commercial fishery program by fishing on a day that only Aboriginal licence holders were authorized to fish. They were subsequently charged under the *Pacific Fishery Regulations, 1993* and the *Fisheries Act*, R.S.C. 1985, c. F-14.

Four of the five judges held that there was no s. 15 violation because the Aboriginal commercial fisheries program is only one aspect of the federal government's regulation of the B.C. commercial fishery – there is therefore either (a) no differential treatment of individuals by the Aboriginal fisheries program (*per* Low and Levine JJ.A. and Finch C.J.: non-Aboriginal individuals were not denied a benefit of the law because they were entitled to apply for other commercial fishing licences) or (b) no resulting discrimination if there is such differential treatment (per Mackenzie, Low and Levine JJ.A. and Finch C.J.).

The fifth judge, Kirkpatrick J.A., took a different approach, holding that s. 15 need not be considered as s. 25 of the *Charter*, which states that "[t]he guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", was a complete defence to the challenge. She concluded (at para. 152):

> I hold the view that the benefit of the 24-hour communal fishing licence granted by the government to the Musqueam, Tsawwassen and Burrard bands is protected by s. 25 as an "other right or freedom that pertains to the aboriginal peoples of Canada". This category of rights embraces statutory or contractual sources of rights and freedoms that are attributed to the unique position of aboriginal groups within Canadian society. The appellants' s. 15 *Charter* challenge seeks to eliminate the [Pilot Sales Program]. Section 25 exists to prevent such abrogation.

The other judges expressly declined to consider the application of s. 25 in this case, on the basis that because there was no s. 15 violation there was no need to engage s. 25. The Supreme Court wrote to the parties on December 15, 2006, requesting "that subsections 15(1) and 15(2), and section 25 of the *Canadian Charter of Rights and Freedoms* are to be fully canvassed, in relation to the issues arising in the appeal, in the factums to be filed and in oral submissions at the hearing". As the Supreme Court has not fully engaged with s. 25 to date, it will be interesting to see how this appeal is dealt with by the Court.

(b) ***Drew v. Newfoundland and Labrador (Minister of Government Services and Lands)***, 2006 NLCA 53 (October 11, 2006)

In this detailed decision (287 paragraphs), the Newfoundland Court of Appeal unanimously upheld a lower court finding that the Mi'kmaq of Conne River (Miawpukek Band) do not have either an Aboriginal or treaty right to hunt, fish or trap in the Bay du Nord Wilderness Reserve.

After an extensive review of the evidence and applicable legal tests, the Court of Appeal upheld the following findings of the trial judge in their entirety, holding that the appellants failed to establish that the trial judge committed any palpable and overriding factual error or error of law in respect of any of these issues (para. 6):

> **Aboriginal rights claim**
>
> The ancestors of the Mi'kmaq of Conne River arrived on the Island of Newfoundland some time after 1550 A.D., by which time European contact and influences prevented their fishing, hunting and trapping practices from attaining the status of aboriginal rights.
>
> Even if the Mi'kmaq ancestors were present on the Island of Newfoundland before European contact, the [appellants] have not proven on a balance of probabilities that they then fished, hunted or trapped in the territory now known as the Bay du Nord Wilderness Area.
>
> **Treaty rights claim**
>
> The 1725 treaty ratified at Annapolis Royal in 1726 by Mi'kmaq representatives, by its express terms did not apply to Newfoundland; it should in any event be interpreted as restricted to territory within the jurisdiction of the Governor of Nova Scotia; and in any event it was terminated by subsequent hostilities between the Mi'kmaq and the British.
>
> The 1752 treaty signed by the Governor of Nova Scotia and the Chief of the Shubenacadie Mi'kmaq Band applied only to the territory of that Band and not to Newfoundland and in any event was terminated by subsequent hostilities.
>
> The [appellants] have not established that the 1759 Schomberg – Whitmore treaty involved anything more than an oath of allegiance by the Mi'kmaq to the British Crown.
>
> The [appellants] have not established the Halifax Treaty of June 25, 1761, signed by the Chief of the Cape Breton Mi'kmaq Band, and the Lieutenant-Governor of Nova Scotia, applies to Newfoundland since the express terms of a treaty probably similar to the missing Cape Breton document confines its application to Nova Scotia; it should in any event be interpreted as restricted to territory within the jurisdiction of the Governor of Nova Scotia, and in any event it would not apply to territory on the Island of Newfoundland where Cape Breton Mi'kmaq only infrequently fished, hunted and trapped up until 1761.
>
> The renewal of a treaty with Cape Breton Mi'kmaq by Captain Thompson aboard the Lark in September, 1763 was a renewal of the oath of allegiance to General Whitmore and did not involve rights to fish, hunt or trap.

(c) ***Ermineskin v. Canada*****,** 2006 FCA 415 (December 20, 2006)

This is another detailed decision (343 paragraphs) where the Federal Court of Appeal, in a 2-1 decision, dismissed an appeal from a decision of the trial court holding that the federal Crown had not mismanaged the accumulated royalties derived from the exploitation of oil and gas resources found beneath the surface of the Samson Reserve (which belongs to the Samson Nation), and the Pigeon Lake Reserve (which is shared by four bands, the Ermineskin Nation, the Samson Nation, and two other bands not parties to the litigation).

Evidence had been led at trial in two phases, a "General and Historical Phase" and a "Money Management Phase". The Court of Appeal unanimously agreed with the findings made in the ""General and Historical Phase", as well as other procedural and evidentiary rulings at trial, but divided on the findings made in the "Money Management Phase".

Richard C.J. and Sharlow J.A., writing for the majority, concluded (at paras. 171-73):

> The Crown's obligations as trustee of the royalties received for the benefit of Samson and Ermineskin are substantially different from the obligations of a common law trustee, because of the combined operation of the *Financial Administration Act* and the *Indian Act*. … The Minister's obligations are to deposit the royalties into the appropriate reserve or band capital account in the Consolidated Revenue Fund, to pay interest at the rate stipulated by the applicable Order in Council, to maintain accurate accounts, to provide periodic reports to Samson and Ermineskin, and to consider any requests by Samson or Ermineskin to authorize and direct expenditure of the capital money as proposed by a band council resolution. The Governor in Council, for its part, must establish a rate of interest that is reasonable in the circumstances. We agree with the Judge that the Crown has met all of its obligations as trustee of the royalties of Samson and Ermineskin.

Sexton J.A., dissenting, would have allowed the appeals (at paras. 175 and 182):

> The Bands say they could have earned many millions of dollars more if the moneys had been prudently invested. … I think the Crown was bound to invest the trust moneys, provided it first obtained the consent of the Bands. Because it failed to even attempt to obtain the Bands' consent to invest, it is liable for any damage this failure has caused. I am not persuaded that any of the defences proposed by the respondents exonerate the Crown.

(d) ***Kruger inc. c. Première nation des Betsiamites***, 2006 QCCA 569 (April 28, 2006)

In this somewhat technical decision, the Quebec Court of Appeal unanimously set aside a lower court order which had held that the Quebec government failed to adequately consult with the Innu concerning adjustments to timber supply allocations and forest management agreements proposed by the Quebec government in 2004 (particularly those concerning the operations of the forestry company Kruger Inc.).

Much of the confusion appears to have stemmed from the fact that the Innu had sought an interlocutory injunction to prevent the Quebec government from moving ahead with the changes, but that the Supreme Court subsequently released its decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (released November 18, 2004), and the judge erroneously granted a *Haida*-type order instead of making a decision on the interlocutory injunction sought (at paras. 68 and 69):

> The judge could not, by means of a safeguard order, allow in practice the part of the motion for an interlocutory injunction that constituted a *Haida* motion, particularly without allowing the appellant to fully contest the *Haida* motion. All that was before the judge was a motion for a safeguard order, a proceeding that is allowed only in a case of extreme urgency in which irreparable harm is imminent. In the circumstances, it is not up to us, nor do we have a duty, to examine whether the respondents would have been entitled to their conclusions had they brought a *Haida* motion or had the appellant fully contested such a motion. Thus, in accordance with the wishes of the respondents, we will limit ourselves to determining whether the judgment in first instance could have been rendered in conjunction with a safeguard order.

The Court concluded that the order made was improper and set it aside (para. 88):

> …the safeguard order did not seek accommodation, but the cessation of operations, as if a lack of consultation should necessarily result in the cessation of operations, despite the very large investments required by the project. In a motion for a safeguard order, the respondents would normally have been expected to demand one or more of the measures to which they claimed to be entitled. But, as we noted earlier, the respondents do not appear to have wanted transitional measures to be adopted. They wanted Kruger's operations to cease. However, there is no doubt that, in 1997, the respondents had not yet proven the existence of aboriginal title to the Area and that, consequently, they did not have a right of veto regarding Kruger's project. It would be paradoxical for them to obtain such a right of veto today by means of a safeguard order.

(e) *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790; 31 C.P.C. (6th) 11 (Ont C.A.) (December 14, 2006)[3]

This decision involved events at the ongoing dispute concerning a housing subdivision at Caledonia, Ontario. The property was occupied in February 2006 by protesters associated with the Haudenosaunee Six Nations Confederacy Council. In a unanimous decision written by Laskin J.A., the Court of Appeal held that an injunction obtained by the developer attaching to the subdivision did not need to be enforced once the subdivision was purchased by the Ontario government (at para. 72):

> The Ontario government stands in [the developer's] shoes. If it wanted to do so, it may have been entitled to enforce the injunction against the protestors. But it does not want to do so. Instead, Ontario is content to permit the peaceful occupation of its property. It has the right to do so. As a property owner it has the right to use its own land as it sees fit, as long as it complies with municipal by-laws and the laws concerning nuisance and public safety.

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[3] There was also a successful stay motion granted by the Court of Appeal in this matter on August 25, 2006: see *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 3411

Further, the Court of Appeal held that the process used to arrest protestors for contempt of court did not comply with procedural fairness requirements (at paras. 126-27):

> The motions judge heard the contempt motions in a summary procedure without the trappings of a formal criminal trial. That he was entitled to do. Typically, a criminal contempt hearing is a summary proceeding. … What the motions judge was not entitled to do was deny those he convicted of contempt and sentenced the procedural protections of natural justice – the basic rights afforded to any person charged with a criminal offence. Instead of providing that on arrest individuals were automatically convicted and sentenced, the motions judge should have given each protestor on the property an opportunity to be heard, an opportunity to call evidence and be represented by counsel, and if necessary, an opportunity to make representations on an appropriate sentence.

Laskin J.A. approved of the motions judge's approach of having the Attorney General and police report back to him with respect to the status of any contempt proceedings that may be brought concerning events that occurred prior to the purchase of the property by the government (at para. 132):

> The motions judge is entitled to require the Attorney General, in a public forum, to disclose how he has exercised its prosecutorial discretion in connection with any possible outstanding breaches of the injunction between April 20 and July 4, and why. He is entitled to ask the Attorney General to explain his actions or his inaction in enforcing the court's orders. Similarly, he is entitled to require the OPP to explain how it has exercised its operational discretion in the enforcement of the law.

The Court of Appeal concluded its decision by reiterating the importance of both a negotiated solution to the situation (para. 139: "the peaceful occupation of what is now Crown land points to reconciliation, not the force of the law, as the best way to achieve a lasting resolution of this dispute") and a balanced approach to the various dimensions of the rule of law in this context (at paras. 141-42):

> The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected. Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.

(f) Short summaries of other decisions

Tsilhqot'in Nation v. British Columbia, 2006 BCCA 2 (January 3, 2006)

Reduction of rate of costs indemnity provided by *Okanagan* advance costs order (see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and*

Revenue), 2007 SCC 2) made to assist the First Nation in bringing an Aboriginal title claim. The plaintiffs' estimated trial costs of $650,000 had already exceeded $10 million by October 2005 with a number of months of trial still to go.

Hall J.A. reversed the trial judge's decision to vary the terms of the initial advance costs order from 50% of special costs to 100% of special costs with a 20% holdback pending final taxation at the conclusion of the case. He stated (at para. 117): "this appeal should be allowed and the order made by Vickers J. in November 2001 and confirmed by the order of May 2004 for payment of interim costs at the level of 50% of special costs should be reinstated effective as of the date of delivery of this judgment."

Southin J.A. added (at para. 89): "the order of the learned judge, while it may be in the interests of the plainitff's solicitors, is not in the public interest. There is no incentive for economy and there is no incentive for settlement, an outcome which the Supreme Court of Canada says is desirable in cases such as these."

R. v. Polches et al., 2006 NBCA 50 (May 4, 2006, leave to appeal to SCC denied January 26, 2007, remanded to CA for reconsideration in accordance with *R. v. Morris*)

This was another night hunting with illumination case, where the New Brunswick Court of Appeal unanimously allowed an appeal and entered convictions for three Maliseet men who had been charged with hunting at night with a light contrary to s. 33(1)(b) of New Brunswick's *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1. The Court of Appeal rejected a claimed treaty right to hunt at night with illumination that had been raised as a defence to the charges. Like the dissenting members in *Morris*, the Court of Appeal concluded that hunting at night is inherently dangerous and therefore an internal limitation on the treaty right. As noted, the Supreme Court has remanded this case to the Court of Appeal for reconsideration in light of the *Morris* decision.

Paul First Nation v. Parkland (County), 2006 ABCA 128 (April 19, 2006)

Leave to appeal denied concerning lower court decision that the Subdivision and Development Appeal Board of Parkland County in Alberta did not owe the Paul First Nation a duty to consult prior to approving the development of a gravel pit on private lands near the First Nation's reserve (para. 14: "There is no duty of consultation on the Crown or landowners regarding privately owned lands.").

Métis National Council of Women v. Canada (Attorney General), 2006 FCA 77 (February 20, 2006)

Unanimous dismissal of appeal of lower court finding that the federal government's decision not to permit the Métis National Council of Women (MNCW) to become a party to an agreement under a labour market development program created by Human

Resources Development Canada did not violate s. 15 of the *Charter* (the equality guarantee).

R. v. Fournier, [2006] O.J. No. 2434; 209 C.C.C. (3d) 58 (Ont C.A.) (June 19, 2006)

Unanimous decision vacating *Okanagan* advance costs order erroneously made in criminal proceeding where Legal Aid order was also made. The Court of Appeal stated (at para. 9): "As is now apparent, the funding of the defence, including the constitutional issues raised, was available from Legal Aid and, in fact, those funds were paid. This, to us, clearly demonstrates that there was no basis for the trial judge's funding order. The procedure that ought to have been followed in the circumstances of this case is the one set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) p. 1 (Ont. C.A.) and confirmed in *R. v. Peterman*, [2004] O.J. 1758."

Williston v. Canada, 2006 FCA 316 (September 26, 2006)

Unanimous decision dismissing appeal from trial court ruling that had dismissed an action brought by Geraldine Williston for a declaration that the federal Crown and the Chippewas of Rama First Nation were required to renew her lease of a cottage lot on the First Nation's reserve at Moonlight Bay. The lands at issue had been surrendered for leasing purposes, but the underlying lease had expired on March 31, 2002.

R. v. Castonguay and Faucher, 2006 NBCA 43 (February 14, 2006)

Leave to appeal denied for individuals convicted of logging Crown lands without a licence, where the individuals had unsuccessfully raised an Aboriginal right defence at trial based on a claimed Métis heritage (they were unable to satisfy the requirements set out in *R. v. Powley*, [2003] 2 S.C.R. 207, as the trial judge held that there was "no evidence, historical or otherwise, of a Métis community in [New Brunswick]").

Sawridge Band v. Canada, 2006 FCA 228 (June 19, 2006)

Decision upholding trial judge's decision prohibiting First Nation plaintiffs from calling certain witnesses, and from entering certain expert reports, at the trial of their actions against the Crown on the basis that the evidence was irrelevant to the issues as pleaded.

The underlying action concerns a claim that the federal government's amendments to the *Indian Act* made by Bill C-31 in 1985 and 1988 abrogates their constitutionally protected Aboriginal right to determine their membership by unilaterally imposing upon them certain categories of members.