GOVERNMENT OF PRINCE EDWARD ISLAND

PROVINCIAL POLICY
ON
CONSULTATION WITH THE MI'KMAQ

Preface
The Government of Prince Edward Island recognizes it has a duty to consult in a meaningful way with the Mi'kmaq when a proposed provincial decision or action may adversely affect a treaty right, or an asserted or proven Aboriginal right, of the Mi'kmaq.

This document describes the Provincial approach to consultation with the Mi'kmaq regarding their treaty rights, or their asserted or proven Aboriginal rights. This document is intended to provide a general framework for consultation. On specific matters, legal advice must be sought from legal counsel of the Office of the Attorney General and general policy advice sought from the Aboriginal Affairs Secretariat.

In this policy, potentially existing Mi'kmaq Aboriginal rights are referred to as "Aboriginal Interests."

Policy Statement
It is the policy of Prince Edward Island to consult with and, if required, accommodate the interests of the Mi'kmaq when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it.

Application
This policy applies to all departments.

Purpose
The purpose of this policy is to provide inter-departmental guidance on the Crown's duty to consult the Mi'kmaq.

The Crown's duty to consult and, where appropriate, accommodate Aboriginal peoples is an emergent area of law. Both Government and the Mi'kmaq will develop knowledge and best practices as they participate in consultation on varied matters. This policy is therefore an initial step and can be expected to transform in accordance with both practical experience and legal developments.

The policy is also intended as a mechanism for departments to develop additional policies and procedures for the management of department-specific activities and initiatives.

This policy does not obligate departments to consult with the Mi'kmaq in any specific instances. It is the responsibility of individual departments, using this document as guidance, to judge when consultation is required. This policy document represents the Province's intention to uphold the duty of the Crown to consult, but does not constitute an admission by the Province of the existence of a duty to consult with the Mi'kmaq in any particular situation.

Principles
Policies or guidelines for consultations with Aboriginal peoples must ensure that the duty to consult is fulfilled in a way that is consistent with current legal decisions and will consider individual communities' traditions and consultation requirements. Proper consultation in Prince Edward Island will include:

- Meaningful consultation undertaken in a timely manner and in good faith;
- Government's ability to manage resources in question;
- Consideration of whether consultation is on private land or Crown land;
- Participation by government, proponents/applicants and the Mi'kmaq; as may be appropriate;
- Interdepartmental mechanisms to monitor and coordinate consultation practices;
- Assessed on a case by case basis and proportionate to a preliminary assessment of the strength of the claimed right and the seriousness of the adverse effect on the right;
- Avoidance, mitigation and minimization of effects on potential Aboriginal Interests;
- Consultation will occur within existing decision-making processes and timeframes.

Responsibility of Departments

Each department is responsible for determining whether the duty to consult with the Mi'kmaq is engaged regarding its respective decisions or actions. Accordingly, if the Province has real or constructive knowledge of an Aboriginal Interest of the Mi'kmaq, the Crown's duty to consult will be engaged if the proposed Provincial decision or activity may adversely affect such Aboriginal Interest. The degree of consultation will be proportionate to the strength of the Aboriginal Interest being made and the potential for an adverse effect on such Aboriginal Interest.

Departments must consider whether the Crown's duty to consult and, where appropriate, accommodate is triggered, particularly for issues affecting land and water under provincial jurisdiction. This may require legal advice regarding, among other factors:

- Known or potential existence of claims of treaty rights, Aboriginal rights, or Aboriginal title;
- the strength of the claims;
- whether the land in question is privately held in fee simple, or is Crown land or held under some form of Crown tenure;
- the likelihood of litigation.

The Aboriginal Affairs Secretariat is available to provide further advice, including information about how other departments may have dealt with a similar situation.

Determine Need for Department-specific Policies/Procedures

Departments should review the range of matters possibly requiring consultation and determine whether more specific policies and procedures are required.

Departments are advised to consult with the Aboriginal Affairs Secretariat to assist with the development of department-specific policies or procedures.

Designated Contacts in Departments

Deputy Ministers are asked to designate individuals who will have responsibility for consultation issues. These departmental designates should be a member of the Senior Management Team of their respective department and will be required to be the primary contact on consultation matters. Expectations of designated contacts should include:

- an understanding of departmental decision-making processes;
- timely access to senior decision-makers within the department;

- good understanding of the Mi'kmaq community in Prince Edward Island;
- an ability to lead the development and coordination of departmental approaches to consultation; and
- networking with the Aboriginal Affairs Secretariat and counterparts in other departments to facilitate development of common over-all provincial approaches and processes.

Responsibility of the Mi'kmaq
The Crown may reasonably expect the Mi'kmaq to:

- clearly outline in a timely manner the nature and scope of the Aboriginal Interests or treaty rights they claim and the potential adverse impacts that the Crown activity or decision will have on such Aboriginal Interests or treaty rights;
- Make the concerns of the affected Mi'kmaq community known to the Applicant/Proponent and the Crown;
- Not frustrate reasonable good faith attempts to consult by the Crown, or the proponent/applicant on the Crown's behalf, or take unreasonable positions that thwart the Crown from making decisions;
- Attempt to reach a mutually satisfactory resolution to a particular situation.

Role of Proponents/Applicants
- While the Crown may delegate procedural aspects of consultation to third parties, the ultimate legal responsibility for consultation and, where appropriate, accommodation rests with the Crown;
- Proponents/Applicants may assist Crown decision maker in satisfying the obligation to consult and, where appropriate, accommodate.

Role of the Aboriginal Affairs Secretariat
The role of the Aboriginal Affairs Secretariat on consultation issues includes the following:
- Coordinate provincial policy issues for consultation, including development of broad, long-term policies and guidelines;
- Build capacity and awareness within departments and agencies on how to undertake effective consultation with the Mi'kmaq;
- Provide advice to departments on consultation approaches and the implementation of this policy;
- Provide information to departments about Mi'kmaq processes, protocols and internal organization regarding consultation issues; and
- Provide advice on intergovernmental and cross-jurisdictional consultation issues where departments are involved.

While the 'Provincial Policy on Consulting with the Mi'kmaq' provides the basis for a standardized approach to consultation and accommodation in the Province of Prince Edward Island, it is not intended to undermine or interfere with pre-existing arrangements between the Crown and the Mi'kmaq.

Key groups for consultation include:

Bands
- Consultation should include the Chief and Band Council of the Lennox Island First Nation and the Abegweit First Nation, as may be appropriate. For most situations

they are the appropriate entities with authority to speak on behalf of communities.

Other Mi'kmaq organizations
The Aboriginal Affairs Secretariat can provide advice on groups likely to be affected or interested.

Use Available Mi'kmaq Processes to the Extent Possible

- The Mi'kmaq may also establish internal mechanisms to coordinate consultation activities;
- Departments are encouraged, where possible, to make use of these mechanisms as the preferred choice for consultations.

The Aboriginal Affairs Secretariat can assist departments to make use of these processes as they are developed and finalized.

Be Clear that Consultation is Intended
Departments should provide written notification to the appropriate groups when they wish to consult with the Mi'kmaq. There should be a clear indication in the letter that the provincial government is seeking to consult regarding a decision it is contemplating which might adversely affect Mi'kmaq Aboriginal Interests on a given issue. There should also be clear indication of the decision making process that will be followed, as well as the timeline and key issues.

No need to take legal position on consultation issues
Given legal uncertainties, departments should avoid stating formal positions about the existence or extent of a legal duty to consult in specific situations. Regardless of whether there may be a legal duty to consult, there may be policy reasons to consult. Also, there may be situations where a department may choose, for policy reasons, to broaden the scope of a consultation beyond the minimum that may be required from a strictly legal perspective.

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Interpretation/Definitions

Aboriginal peoples: Under section 35 of the *Constitution Act*, 1982, Canada recognizes three groups of Aboriginal peoples that hold or may hold Aboriginal or treaty rights — Indians, Métis and Inuit.

Aboriginal Interests: An asserted but unproven aboriginal right, including aboriginal title or an asserted treaty right.

Aboriginal rights: Practices, traditions, and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with Europeans (Van der Peet). Generally, these rights are fact and site specific.

Aboriginal title: Aboriginal title is a sub-category of Aboriginal rights and is the Aboriginal right to the land itself.

Comprehensive Claim: Comprehensive Land Claims Agreements are negotiated in areas of the country where Aboriginal rights and title have not been addressed by treaty or through other legal means. These agreements are modern-day treaties between Aboriginal claimant groups, Canada and the relevant province or territory.

Crown's Duty to Consult: The general principles of the Crown's duty to consult and, where appropriate, accommodate, were laid out in 2004 and 2005 by the Supreme Court of Canada in the *Haida*, *Taku River* and *Mikisew Cree* decisions. The law is now clear that the duty to consult is founded upon the honour of the Crown, which requires that the Crown consult with and, if required, accommodate the interests of the Aboriginal peoples when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it. The scope of the duty is proportionate to a preliminary assessment of the strength of the asserted Aboriginal or treaty right and the seriousness of the potentially adverse effect upon it.

Terra nullius: The concept of Aboriginal rights in Canada was initially grounded in the concept of terra nullius. In the early modern period (c. sixteenth - seventeenth centuries), European expansion and colonization of new lands was governed by international law under the doctrine of discovery, which, based on the concept of terra nullius (empty land, land belonging to no one), gave the "discovering" power immediate sovereignty, rights, and title.

Treaty Rights: 'Treaty rights' are the rights that Aboriginal peoples have as a result of agreements they entered into with the French, British and Canadian governments, both prior to and after Confederation. These agreements include both the historic treaties, the last of which were entered into in the 1920s, and modern land claims treaties, dating from the mid-1970s.

BACKGROUND

In the 1960s and 1970s, land claims became the driving force in the North American Aboriginal rights movement. Since then, the legal definition and determination of Aboriginal rights has followed a complex trajectory marked by several landmark Supreme Court of Canada decisions. While such cases led to the creation of legal tests for Aboriginal rights and title, the Supreme Court also recently found that governments have a duty to consult with Aboriginal peoples where their claimed rights may be impacted or infringed. The law in this area continues to evolve, but the current legal context generally suggests:

- Governments may have a duty to consult Aboriginal peoples prior to making decisions or taking actions that might adversely affect Aboriginal Interests.
- There is a reciprocal obligation on Aboriginal groups to participate in consultation initiated by the Crown in good faith; and
- The extent of consultation and, where appropriate, accommodation that may be required is proportional to the strength of the Aboriginal Interest being claimed and the seriousness of the potential impact of the proposed activity or decision on Aboriginal Interests. However, ultimate decision-making authority remains with government.

Defining Aboriginal Rights and Title

Between 1927 and 1951, under the terms of the *Indian Act*, Aboriginal people in Canada could not retain a lawyer to bring a claim against the Crown without the Government of Canada's permission. Prior to this, however, disputes over land and resources between Aboriginals and settlers had previously brought issues of Aboriginal rights to Canadian courtrooms, including some cases which were heard in the Maritime Provinces. In *St. Catherine's Milling and Lumber Co. v. the Queen* (1888) for example, the Judicial Committee of the Privy Council held that Aboriginal title over land was allowed only at the Crown's pleasure, and could be taken away at any time.

After 1951, the two cases that would expand the question of title in Canada were *R. v. White and Bob* (1965) and *Calder v. British Columbia* (1973), both of which were heard in British Columbia. While both cases established continuous land use and occupation as the premise for Aboriginal rights in general, *Calder* also produced a first definition of Aboriginal title based on the recognition of the Aboriginal presence in Canada before the assertion of British sovereignty:

> …the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means (Justice Wilfred Judson in *Calder* (quoted in Isaac 2001: 71)

Following the *Calder* judgment, the Government of Canada announced its intention to settle land claims in all parts of Canada where no treaties had been made, giving rise to the comprehensive land claims process. Fourteen comprehensive claims agreements have been settled since 1973 when the federal government's policy was announced.

In 1979, *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* refined the *Calder* definition of Aboriginal title, giving rise to a test comprised of four criteria:

1. Proof that the plaintiffs and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the Aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

Nearly two decades later, this test was further refined with the landmark case *Delgamuukw v. British Columbia* out of which emerged the present-day test for Aboriginal title. The *Delgamuukw* case involved a claim to lands in central British Columbia by fifty-one hereditary chiefs of the Gitskan and Wet'sewet'en. A long and complicated case, *Delgamuukw* drew on various lines of evidence related to ancestral land use.

In his reasons for judgment in this case, Chief Justice Allan McEachern recognized that the Gitskan and Wet'suwet'en had had rights to use and occupation but ruled that their rights had been extinguished by the Crown. The British Columbia Court of Appeal held that while there was not enough evidence for ownership, the claimants did have Aboriginal rights of the area in question, and these rights had not been extinguished.

Finally, in December 1997, the Supreme Court of Canada offered a less narrow definition of Aboriginal title, stating that Aboriginal peoples not only have the right to occupy traditional lands, but they are entitled to control activities that are not limited to traditional uses, such as hunting and fishing. Relying on Australia's *Mabo v. Queensland,* which had overturned the notion of *terra nullius,* the Court concluded that the substantial maintenance of the connection between the people and the land is a crucial relationship when proving Aboriginal title. Chief Justice Lamer thus laid out three criteria for Aboriginal title:

1. Prior to the British assertion of sovereignty, the land must have been occupied by the ancestors of the Aboriginal group claiming title.
2. Continuity between existing and pre-sovereignty occupation must be demonstrated when existing occupation of the lands in question is being offered as proof of pre-sovereignty occupation.
3. At the time of sovereignty the occupation by the Aboriginal group must have been exclusive.

Fundamental to Chief Justice Lamer's test for Aboriginal title, therefore, was a fundamentally non-Aboriginal definition of land use: a sedentary, continuous, and exclusive occupation of a delimited territory. Although it failed to take into account the internal mechanisms governing present and past Aboriginal land tenure and resource procurement, Lamer's criteria did appear to retire the emphasis on social organization/evolution, which had been central to *Baker Lake* and *Van der Peet.*[8] As Isaac (2001: 78) recently observed,

[8] From *Calder* and *Baker Lake* through *Van der Peet,* as seen above, Aboriginal rights cases had been influenced by the 1919 *Rhodesia* judgment, which assessed and rejected claims on the basis of nineteenth-century social evolutionary theory.

this omission was perhaps indicative of the legal system's sensitivity to a wider censure of ethnocentrism.

The next major development in the Aboriginal rights movement came with *Van der Peet* (1996) and the inception of a ten-point test to establish Aboriginal rights:

1. Courts must consider the perspective of Aboriginal peoples themselves.
2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right.
3. In order to be integral, a practice, custom, or tradition must be of central significance to the Aboriginal society in question.
4. The practices, customs, and traditions that constitute Aboriginal rights are those which have continuity with the traditions, customs and practices that existed *prior* to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, tradition, or custom to constitute an aboriginal right, it must be of independent significance to the aboriginal culture in which it exists.
8. The integral-to-distinctive-culture test requires that a practice, custom or tradition be distinctive; it does not require that the practice, custom or tradition be distinct.
9. The influence of European culture will be relevant to the inquiry only if it is demonstrated that the practice, custom or tradition is integral only because of that influence.
10. Courts must take into account both the relationship of Aboriginal people to the land and the distinctive societies and cultures of Aboriginal people.

In this case, Chief Justice Lamer upheld the definition of an Aboriginal right as the special status that Aboriginals have within Canadian society and that the rights exist because Aboriginals were here before European colonization. Yet Lamer further characterized the determination of Aboriginal rights as a cultural matter, specifying that: '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' (*Van der Peet*, 1996, para. 46). A practical way of assessing whether the practice, tradition, or custom was integral, suggested Lamer, was to

> ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question (*Van der Peet*, 1996, para. 59).

More recently, *R. v. Sappier; R. v. Grey* (2006) redefined the "integral to a distinctive culture" requirement, making it the current leading authority on Aboriginal rights tests. *Sappier* lowered the threshold for proving an Aboriginal right by removing the requirement

that Aboriginal claimants show that their culture would have been "fundamentally altered" without the practice in question. Similarly, *Sappier* did away with the requirement that the practice lay at the "core of the people's identity." While this marks a retreat from the rigors of *Van der Peet*, Aboriginal claimants are still required to provide evidence for the pre-contact activity being claimed as a right, a task whose complications are often underestimated.

During this time *R. v. Sparrow* (1984, 1990) tested the Constitutional protection of Aboriginal rights. In *R. v. Sparrow* the court presided over Reginald Sparrow's Aboriginal right to fish for food in the Fraser River. Based in part on the *Constitution Act* (1982) and the *Canadian Charter of Rights and Freedoms*, *Sparrow* affirmed that Indians have definable, common law rights that flow from their history and culture. The court ruled that the rights protected by section 35 under the *Constitution Act* were those that had not been extinguished by statute or by consent of the Indians and that Aboriginal and treaty rights could evolve over time and should be interpreted in a 'generous and liberal manner.' It was also observed that regulation of a right does not extinguish it, but that government regulation of Aboriginal resource use could only be done with a compelling and substantial objective (Coates 2000: 89). This overturned some earlier decisions which suggested that Aboriginal and treaty rights had been "frozen" in the form in which they had been regulated prior to 1982.

Aboriginal Rights in Atlantic Canada

Aboriginal peoples in Atlantic Canada were not able to secure a solid legal basis for their rights in Canadian law until the latter part of the twentieth century and, even then, have had limited success arguing Aboriginal rights cases before the courts. Prior to the *White Paper* and several key Supreme Court decisions, the provincial courts in the Maritimes did hear a number of Aboriginal rights cases, including *R. v. Syliboy* (1928), *Warman v. Francis et. al.* (1958), *R. v. Simon* (1958), and *R. v. Francis* (1969). In each of these cases, the court rejected the Mi'kmaq arguments, which were based on treaty rights. In *R. v. Syliboy* (1928) the Nova Scotia County Court considered the appeal of the Grand Chief of the Mi'kmaq who had been convicted of unlawfully possessing furs. In this case, the Treaty of 1752 was used as a defence because it provided Indians the right to hunt and trap at all times. It was concluded, however, that the treaty was not binding because it had not been made with the whole Mi'kmaq nation, but with a smaller group of individuals. Furthermore, the chief could not demonstrate to the court a direct genealogical connection to the eighteenth-century delegates with whom the treaty was made. The judiciary's conclusion was that the accused therefore could not appeal to this treaty to uphold a general right for any Mi'kmaq to hunt and trap at all times (Isaac 2001: 50).

In *Warman v. Francis et al.* (1958), heard in the Supreme Court of New Brunswick, members of the Big Cove Reserve also argued the right to cut trees on the grounds that their Aboriginal rights had never been surrendered and that the land in question remained the property of the Big Cove Band by virtue of a treaty made between King George III and the Mi'kmaq Nation of Indians in 1752. Chief Justice Anglin, compelled by the *Syliboy* interpretation (which doubted whether this treaty had been made with the entire Mi'kmaq nation), concluded that the Indians had no rights to the land but were privileged to use it at the Crown's pleasure. This decision ignored the concept of existing Indian title. Instead it was presumed that Aboriginals had conceded title to the French and that later, with the cession of France, Indian title had been automatically conferred to the British.

R. v. Simon (1958) is another example of the approach Maritime courts took to Aboriginal and treaty rights at this time. In *Simon*, the New Brunswick Court of Appeal considered the case of a Mi'kmaq convicted of setting a net contrary to the New Brunswick fishery regulations made under the federal *Fisheries Act*. The appellant claimed immunity by virtue of the Boston Treaty of 1725 and 1752. However, using reasoning employed by the Nova Scotia court in *Syliboy*, the New Brunswick court also held that there was no connection between the appellant and those who signed the treaties of 1725 and 1752 (Isaac 2001: 50). On appeal, the judges' conclusion was that 'the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and such group of Indians' (McNair, Bridges and Ritchie 1958: para. 101).

In *R. v. Francis* (1969), the appellant was charged with illegally fishing for salmon with a net and without a licence, violating the *Fisheries Act* and New Brunswick fishery regulations. The appellant appealed his case on the strength of the *Boston Treaty* of 1725 and 1752 and the Treaty of 1779, which was entered into with 'several Tribes of Micmac Indians' from New Brunswick and Nova Scotia on September 22, 1779. As with *R. v. Simon* and *R. v. Syliboy,* the New Brunswick Supreme Court rejected the appeal based on the grounds that the 1752 Treaty was only made with a small group of Mi'kmaq, not the whole nation and it could not be shown that the appellant was directly related to the individuals that ratified the treaties applied. In reference to the Treaty of 1779, the judge found that the peace treaty did not confer any right of hunting or fishing.

As Hurley (1962: 15) has pointed out, these early cases reflected a growing legal consensus that treaties could not be used for Aboriginal rights in the Maritimes, and that Aboriginal rights, governed primarily by the *Indian Act*, made Indians subject to provincial laws. These early cases not only exemplify the narrow approach employed by the courts during this period but are also illustrative of the prevailing attitude that Aboriginals could not be a competent contracting party. This changed in 1982 when section 35 was included in the *Constitution*, providing protection to Aboriginal and treaty rights and setting the stage for a more liberal approach to their interpretation (Isaac 2001: 50). Several cases would follow the constitutional change, including key Aboriginal rights cases located in New Brunswick and Nova Scotia: *R. v. Marshall* 1 and 2 (1999), *R. v. Marshall* (2005), and *R. v. Bernard* (2005).

R. v. Marshall, No. 1 (1999) and *R. v. Marshall,* No. 2 (1999) were two decisions given by the Supreme Court of Canada on one case regarding the Mi'kmaq Aboriginal treaty right to fish. In the first decision, the court held that Donald Marshall's catching and selling of eels was valid under the 1760 Treaty of Peace and Friendship. In the second decision the court maintained its position, but also made the highly contentious clarification that Aboriginal treaty rights were still subject to regulation under Canadian law. Both decisions proved highly controversial.

As a result of the *Marshall* decisions, members of Mi'kmaq communities in New Brunswick and Nova Scotia understood that their rights extended to the harvest of other resources as well. To establish that right they began logging on Crown lands in New Brunswick and Nova Scotia without seeking permits from the provincial governments. Stephen Frederick Marshall and thirty-four other Mi'kmaq were consequently charged with unauthorized cutting of timber on Crown lands in Nova Scotia (*R. v. Marshall,* 2005) and Joshua Bernard, a New Brunswick Mi'kmaq, was charged with unlawful possession of twenty-three spruce logs, which had been cut by another party on Crown lands in contravention of the *Crown Lands*

and Forest Act (*R. v. Bernard,* 2005). Marshall and Bernard were arrested and charged by the provincial governments with violating provincial forestry laws.

In both cases, the Mi'kmaq relied on *Marshall* No. 1 and *Marshall* No. 2 as a defense to the charges, arguing that they had a treaty right to cut and sell timber and retained Aboriginal title to the lands on which they had cut the trees. They did not, therefore, need the permission of the provincial government. In both cases, these arguments failed and the Mi'kmaq were convicted on the grounds that commercial logging was not one of the traditional trading activities that the treaties were intended to protect. The claim for Aboriginal title in the relevant areas was rejected.

Although the earlier *Marshall* cases had affirmed treaty rights long claimed by the Mi'kmaq, the later *Marshall* and *Bernard* decisions indicate that it will be more difficult for Aboriginal groups to convince courts that they have Aboriginal title to resources or treaty rights.

Most recently, in *R. v. Sappier; R. v. Gray* (2006), the Supreme Court concluded that the Mi'kmaq and Maliseet's pre-contact practices of harvesting and using wood have evolved into a present-day, site-specific communal right to harvest timber for the construction of a modern dwelling. The Court found that the respondents had an Aboriginal right to harvest wood for domestic uses on Crown Land that falls within the Aboriginal community's traditional territory. Domestic uses of wood include shelter, transportation, tools, and fuel. There is no commercial dimension to this right, so it does not include the sale, trade or barter of timber to produce assets or raise money, even if intended to help finance the construction of a modern dwelling.

Before the release of its decision in *R. v. Sappier; R. v. Gray*, most Supreme Court of Canada cases dealing with Aboriginal practices and rights were limited to addressing hunting and fishing rights. By extending Aboriginal rights to include harvesting timber for domestic uses, this case sets an important precedent. While the Aboriginal rights affirmed in this decision are held only by members of the Mi'kmaq of the Pabineau First Nation and the Maliseet of the Woodstock First Nation, it is likely that other Aboriginal communities may refer to the *R. v. Sappier; R. v. Gray* decision and claim similar rights to harvest timber on Crown land elsewhere in the country.

Aboriginal Rights – Prince Edward Island

To date, Aboriginal rights or title have not been tested in Prince Edward Island.

In Prince Edward Island, there are five Indian Reserves: Lennox Island 1, Morell 2, Rocky Point 3, Scotchfort 4, and Lennox Island 5 which are held in trust for the Lennox Island and Abegweit Indian Bands.

The creation of these reserves would not likely affect claims to Aboriginal Interests, and would not, at first view, form the basis of an argument that such Aboriginal Interests had been surrendered or extinguished.