

ATTORNEY GENERAL OF NEW BRUNSWICK

POLICY STATEMENT ON CASES INVOLVING AN ABORIGINAL RIGHT TO HARVEST CROWN TIMBER FOR DOMESTIC USE

NOTE: This Attorney General charging policy does not apply to other provincial resources or to treaty right claims to Crown timber.

1. The Attorney General of New Brunswick takes the position that the substantive legal test for harvesting Crown timber for domestic use is set out as follows in paragraphs 25 and 26 of the Supreme Court of Canada's decision in *R. v. Sappier and Polchies; R. v. Gray*, 2006 SCC 54:

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

¶ 26 The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the Aboriginal community independently of the Aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.

2. Crown timber is to be harvested exclusively for domestic use and is not to be sold; communal authority is a prerequisite to such a harvest and the harvest must be for the benefit of the community.
 - a. the test is objective in respect of the domestic use and communal authority components of the test;

- b. the test is one of reasonableness in respect of community benefit; and
 - c. consistent with the principles of Constitutional law and Regulatory law, the test must be met by the individual claiming the right and be based upon the evidence at hand or otherwise produced by the individual under investigation.
3. The harvesting Crown timber for domestic use test has three components:
- a. **Domestic Use:** Domestic use means the harvesting of Crown timber for the benefit of the community, but it does not include the sale, trade or barter of Crown timber. The concept of domestic use includes the following considerations:
 - i. Quantity – the volume of the Crown timber harvested must be consistent with the stated purpose of the domestic use harvest (i.e. it might not require 20 truckloads of timber to build cabinets for a home);
 - ii. Quality – the quality of the Crown timber harvested must be consistent with the stated purpose of the domestic use harvest (i.e. high grade veneer might not be used to build roof trusses for a home);
 - iii. Species of timber – the species of the Crown timber harvested must be consistent with the stated purpose of the domestic use harvest (i.e. not all species are suitable for all purposes).
 - b. **Communal authority is required before the harvest takes place:** An individual claiming a right to harvest Crown timber for domestic use must have acceptable and recognized communal authorization.
 - i. The Attorney General takes the view that the Department of Natural Resources (DNR) should approach each First Nation community to determine the parameters of communal authority. This ensures a “meeting of the minds” between the Crown and the community, and will make the task of determining the nature of the authority certain and predictable. It will also involve the particular First Nation community in the process and assure them that they have an important role to play in monitoring the right, as well as exercising it.
 - ii. If any particular community fails to exercise its authority, then the Attorney General will have to decide as a prosecution decision what is legally acceptable as communal authority and what is required as proof. This decision should be communicated to the community when that decision is taken. This will constitute evidence of Crown ‘good faith’ at any subsequent trial.

- c. **Harvesting Crown timber must be for the benefit of the community:** There is a wider dimension to this aspect of the test in terms of what is or could be considered a community benefit. Again, it would be beneficial if there was some degree of Crown/First Nation consensus on the matter, but failing this, the Attorney General's position is that a reasonableness test is appropriate in terms of the size, quantity, and usefulness or value to the community of any structure, tool, or implement. This part of the test will necessarily be informed by the authority given for the harvest, **as the authority should make reference to the purpose, rough dimensions and quantity of wood required.**
4. The Attorney General of New Brunswick takes the position that the Aboriginal right to harvest timber is not transferable to a non-Aboriginal for assisting in any aspect of the harvesting activity.

(Original signed by)

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Date