When Environmental Laws Collide with Aboriginal Rights – Quiz

Canadian law recognizes certain otherwise illegal activities that are part of Aboriginal rights

Laws purporting to limit the use of land, water and natural resources to preserve the environment may conflict with the rights and traditions of Aboriginal peoples. This scenario, which is based on a landmark Canadian Supreme Court case called *R. v. Sappier*, (2006 SCC 54 (CanLII), [2006] 2 SCR 686) illustrates the interplay between Aboriginal rights and environmental laws.

SITUATION

Agents from the New Brunswick Department of Natural Resources and Energy stop a truck loaded with timber. They determine that the wood comes from Crown Lands. Since the driver doesn't have a timber license, they charge him with unlawful possession of Crown timber (under Sec. 67 of the NB *Crown Lands and Forests Act*). The driver is of Maliseet origin. The practice of harvesting timber for domestic use from what is now Crown Lands is a distinctive feature of Maliseet culture, one that existed before the Europeans came to North America. So, the driver claims that he has an Aboriginal right to take the timber.

QUESTION

The driver would be guilty of unlawful possession of Crown timber:

1. If he intends to use the wood to build a traditional Maliseet home
2. If he intends to use the wood to build a modern home
3. If he intends to sell the wood and use the proceeds to fund the continuation of culturally distinctive Maliseet practices
4. Under any circumstances because the NB licensing requirement extinguishes the Maliseet's Aboriginal rights to harvest timber from the land

ANSWER

1. **The driver would be guilty if he intends to sell the wood, even if he plans to use the proceeds to support Maliseet cultural activities.**

EXPLANATION

To allow for the preservation of aboriginal cultures, Canadian law (specifically, Sec. 35 of the *Constitution Act of 1982*) protects certain activities as 'Aboriginal rights.' According to the courts, to be considered an Aboriginal right, the activity must be 'an element of a practice, custom or tradition integral to the distinctive pre-contact culture' of the group claiming the right. In the *Sappier* case on which this scenario is based, the Canadian Supreme Court found that harvesting wood for domestic use was, in fact, a practice integral to the distinctive Maliseet culture.

C is the right answer because the Maliseet's Aboriginal right to harvest wood is based on the practice of using the wood for domestic purposes such as building homes, cooking, etc. Using

the wood for commercial purposes isn’t part of the traditional practice and thus not part of the Aboriginal right. So, if the driver intends to sell the wood, the right won’t apply and he would be guilty of illegal possession of Crown timber. The outcome wouldn’t be any different even if the ultimate purpose of the sale was to support traditional Maliseet cultural practices.

WHY WRONG ANSWERS ARE WRONG

A is wrong because using the wood to build a home is a domestic use protected by the Aboriginal right. The Court cited a historical expert who testified at the trial that the practice of using timber from the forests in which they lived to build shelters, implements of husbandry and furniture was ‘critically important’ to the Maliseet way of life.

B is wrong because the driver’s right to harvest wood to build his home wasn’t based on the style of home he builds. The distinctive practice must trace back to pre-contact times, the Court explained; but the right it creates can ‘evolve’ with the times. Thus, the 10th century Maliseet practice of harvesting wood by hand to build a wigwam has in the 21st century evolved into the right to use a chainsaw to cut down trees to build a modern style home.

D is wrong but it demonstrates another important principle. A piece of legislation like the NB Crown *Lands and Forests Act* can extinguish an Aboriginal right, but only if that’s the ‘clear intent’ of the law. The prosecutor failed to meet this high standard in the *Sappier* case. According to the Court, ‘the regulation of Crown timber through a licensing scheme does [not demonstrate] a clear intent to extinguish the Aboriginal right to harvest wood for domestic uses.?