April 30, 2025

No. 8829116, 8829126,
8829128, 8829130

Provincial Court of Nova Scotia

Between:

HIS MAJESTY THE KING

and

CONNOR PAUL and SCOTT PAUL

REPRESENTATION OF MI'KMAQ DEFENDANTS BY ELDERS CONSTITUTIONAL BRIEF

TO:

1. Attorney General of Nova Scotia, The Honourable Becky Druhan, 1690 Hollis Street, Halifax, Nova Scotia, B3J 1V7 via email JUSTMIN@novascotia.ca
2. Attorney General of Canada The Honourable Arif Virani, 284 Wellington Street, Ottawa, Ontario, K1A 0H8 via email mcu@justice.gc.ca
3. Crown Prosecutor Len MacKay: 10th Floor, Duke Tower 5251 Duke Street, Halifax, Nova Scotia B3J 1P3 via email <Leonard.Mackay@ppsc-sppc.gc.ca>

Introduction and Issue

1. Former National Chief Delbert Riley and his assistant Tom Keefer have been representing over a dozen members of the Micmac Rights Association (MRA) facing criminal charges for the exercise of their Aboriginal and treaty rights over the past several years. Chief Riley and Mr. Keefer's representation of MRA members has been in accordance with Mi'kmaw custom and convention and s. 800(2) and 802(2) of the *Criminal Code* of Canada which provides for representation by agent. This representation has been approved by the Court with no objection by the Crown.

2. On April 17th, 2025 Crown Council Leonard MacKay sent an email to Tom Keefer stating that according to Section 802.1 of the *Criminal Code* "a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months." Mr. MacKay stated that "It is the Crown's view that this section effectively bars you [Mr. Keefer] and Chief Riley from conducting trials where the maximum sentence exceeds six months. This would include all the *Cannabis Act* matters in which you are involved. We should probably bring this to the Court's attention sooner than later."

3. On April 23rd, 2025 Terry E. Farrell sent a similar letter to Judge Rosalind Michie regarding Connor Paul and Scott Paul, two MRA members represented by Chief Riley and Tom Keefer. The letter raises the same issues raised by Mr. MacKay and holds that because the "charges pursuant to the Excise Act have a maximum punishment in excess of 6 months therefore the section prohibits the accused from being represented by an agent."

4. Chief Riley and the members of the MRA that he represents do not agree with the Crown's position and hold that s. 802.1 is unconstitutional to the extent that it prohibits Mi'kmaw people from being represented by their traditional elders or leaders. Such a blanket ban infringes the Aboriginal and treaty rights of Mi'kmaq people, specifically their right (under s.35 of the *Constitution Act, 1982*) to be represented in court by knowledgeable elders such as former National Chief Del Riley. The Aboriginal and treaty right to representation by elders is grounded in:

    a. Mi'kmaq Aboriginal rights and legal traditions in which elders and community leaders customarily speak on behalf of members in important matters of legal conflict and justice, a practice that should be respected and accommodated by Canadian courts as part of Canada's commitment to reconciliation.

    b. The Crown's treaty obligations (notably Article 8 of the 1752 Peace and Friendship Treaty) guaranteeing Mi'kmaq people the same "benefit, Advantages and Priviledges" in court as other British subjects, which we interpret as including the right to representation by their chosen traditional leaders.

    c. Section 35 of Canada's *Constitution Act, 1982* which "recognizes and affirms" existing Aboriginal and treaty rights, imposing a duty on courts and the Crown to

uphold those rights and adapt legal processes to facilitate Indigenous participation rather than seek to frustrate it.

d. The Federal Department of Justice's own "*Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*" a document which "reflect[s] a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights." The government policy, which was published in 2018, "recognizes that Indigenous self-government and laws are critical to Canada's future, and that Indigenous perspectives and rights must be incorporated in all aspects of this relationship. In doing so, we will continue the process of decolonization and hasten the end of its legacy wherever it remains in our laws and policies."

5. Accordingly, it is the position of the defendants that s. 802.1 should be declared of no force or effect or read down in its application to Mi'kmaq defendants who seek representation by an elder such as former National Chief Del Riley. Such an outcome would uphold the honour of the Crown and the constitutional imperative of reconciliation, while still preserving the court's ability to ensure that trials are conducted in a fair and orderly manner. We propose remedies including a declaration that s. 802.1 cannot bar traditional Mi'kmaq representatives, or an interpretive reading that exempts Indigenous elders acting on behalf of Mi'kmaq accused. In the alternative, if the court were not to grant such an exemption, we argue that the proceedings against the accused should be stayed or otherwise remedied under s.24(1) of the Charter for violating constitutional rights. We also suggest that the appointment of an *amicus curiae* by the Court to assist the accused in understanding legal procedures and ensuring the fair presentation of their constitutional defence may help to address these issues.

6. The members of the MRA represented by Chief Riley and Mr. Keefer are prepared to file Notices of Constitutional Question and to bring forward elder and expert testimony in order to challenge a motion or ruling that prevents Chief Riley and Mr. Keefer from representing them.

Background and context

7. The Micmac Rights Association (MRA) is an Indigenous Governing Body (as per the definition in Canada's *Indigenous Services Act*) of Mi'kmaq people with s. 25 & 35 Aboriginal and treaty rights. The organization was created at a founding meeting on Oct 12, 2022, in Millbrook First Nation and currently represents over 210 registered members from 24 different Mi'kmaq communities across Mi'kma'ki including Abegweit, Acadia, Annapolis Valley (Cambridge 32), Bear River, Eel River Bar, Elsipogtog, Eskasoni, Fort Folly, Glooscap, Gold River, Lennox Island, Listuguj, Membertou, Millbrook, Natoaganeg (Eel Ground), Oromocto, Pabineau, Paq'tnkek, Pictou Landing, Potlotek (Chapel Island), Sipekne'katik (Indian Brook), St.Mary's, Tobique, and We'koqma'q.

8. The MRA is primarily comprised of Mi'kmaw entrepreneurs, many of whom are also fishermen and hunters. The organization was created to assert and protect constitutionally protected Mi'kmaq Aboriginal and treaty rights. These rights include hunting and fishing and the right to engage in trade and commerce for a moderate livelihood. The MRA has established a framework to regulate cannabis sales at Mi'kmaw truckhouses to ensure the upholding of Mi'kmaq conventions regarding issues of public safety and youth access to cannabis. The MRA has also attempted to negotiate with provincial governments over regulatory structures. There are approximately 50 Mi'kmaw businesses which are registered with the MRA.

9. From its inception, the MRA has sought the advice and guidance of former National Chief Del Riley. Chief Riley is a Hereditary Crane Clan Chief of the Chippewa Nation, a survivor of 9 years of abuse in Indian residential and day schools, a former elected Chief of the Chippewas of the Thames First Nation, a former Land Claims Director and two term President of the Union of Ontario Indians, and the last President of the National Indian Brotherhood (the forerunner to the Assembly of First Nations, which he helped to found). As President of the National Indian Brotherhood, Chief Riley drafted and negotiated s. 25 and s. 35 of Canada's *Constitution Act, 1982* which enshrined the protection of Aboriginal and treaty rights into Canada's supreme laws.

10. According to the custom and convention of most traditional Indigenous societies – including the Mi'kmaq Nation – it is the norm to seek the most knowledgeable and respected elders to provide political representation and testimony in a court setting or an interaction with Crown authorities. Many traditional Indigenous people distrust Canadian lawyers as they see them as either ignorant of the Crown's responsibilities towards them or biased against Indigenous interests, and thus prefer to be represented by traditional Indigenous leaders and knowledge holders familiar with Indigenous laws and perspectives on treaty rights. Chief Riley, as the architect of s. 25 & 35 of Canada's *Constitution Act*, is undoubtedly one of the most accomplished and well respected traditional Indigenous leaders on Turtle Island. By virtue of the leading national role he played in constitutional negotiations, Chief Riley made deep connections with all the Indigenous nations involved in the constitutional process – including the Mi'kmaq – and was taught by the generation of elders active in the constitutional debates of the 1970s. There are very few people alive today who have been taught by as wide a range of influential Indigenous elders as Chief Riley, or who have had his range of experiences.

11. Chief Riley has a long history of representing Indigenous people on rights based issues in Canadian courtrooms. Chief Riley first represented himself in court at the age of 15 when he was charged for violating the *Indian Act*. He was successful in winning that case, and has successfully represented innumerable other Indigenous people in Canada's courts in the intervening 65+ years. As National Chief of the Indian Brotherhood, Chief Riley dealt extensively with constitutional legal issues and Canadian law. Two of Chief Riley's lawyers when he was National Chief went on to serve as Supreme Court of Canada Justices. Chief Riley is currently representing two people in court in Ontario on non-cannabis related issues, several MRA members in New

Brunswick, and is currently representing the following MRA members in court matters in Nova Scotia: Connor Bowser-Knockwood, Cody Bowser-Knockwood, Matthew Cope, Thomas Durfee, Connor Paul, Scott Paul, Cody Ward and Dustin Whitman.

12. Mr. Keefer, Chief Riley's assistant, has a BA Honours degree in History, a Masters Degree in Political Science, and taught at York University for 6 years while pursuing his PhD in Political Science. Mr. Keefer has spent two decades working directly with traditional Indigenous leaders from dozens of different First Nations, and has been Chief Riley's assistant and secretary since 2018.

13. The Micmac Rights Association has requested that Chief Riley and his assistant Tom Keefer represent those of its members who are fighting rights based court cases and has facilitated Chief Riley's participation in these legal matters by covering the costs of transportation and hotels for he and Mr. Keefer to attend these hearings in person. As an Indigenous Governing Body the Association is assisting its members to articulate a collective Aboriginal and treaty right as they exercise their rights.

14. Chief Riley and Mr. Keefer successfully represented MRA members Trent Francis and Daniel Francis in a Dartmouth court case for fishing rights in 2023. Chief Riley and Mr. Keefer also successfully represented Cody Caplin in two separate trials over fishing related issues in New Brunswick in 2024 and 2025. There have been no issues with the quality of Chief Riley and Mr. Keefer's advocacy and representation. Indeed after the Attourney General of Canada stayed the charges against Cody Caplin, Judge Donald LeBlanc stated regarding the involvement of Chief Riley, "I appreciated his help in this file and his testimony. He is a knowledgeable person to have as a reference. I note his devotion to the law and to his people."

Legal Argument

15. According to the protocols of the Covenant Chain of Peace and Friendship treaties made between the Mi'kmaq nation and the British Crown between 1725 and 1779, disputes and disagreements between the Mi'kmaq Nation and the British Crown were to be resolved through yearly treaty gatherings. In such meetings with the Crown, Mi'kmaq people selected their spokespeople through their clans and political structures based on who was the most knowledgeable and best able to articulate their people's wishes. Article 6 of the Treaty of 1752 specifies the date, October 1st of every year, and the location, Halifax, for this meeting. Article 6 of the treaty states that:

> "That to Cherish a good Harmony & mutual Correspondence between the said Indians & this Government, His Excellency Peregrine Thomas Hopson Esqr. Captain General & Governor in Chief in & over His Majesty's Province of Nova Scotia or Accadie, Vice Admiral of the same & Colonel of one of His Majesty's Regiments of Foot, hereby Promises on the Part of His Majesty, that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, and some Powder & Shot;

> and the said Indians promise once every Year, upon the first of October to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions."

16. It is the position of the MRA members represented by Chief Riley that this treaty gathering – which continues to take place yearly, and which was attended by the Lieutenant Governors of four provinces in 2024 and the leadership of the Mi'kmaq Nation's Grand Council – is the appropriate place to seek resolution of conflicts surrounding such issues as the Mi'kmaq right to fish and hunt or to operate truckhouses.

17. In the absence of the Crown upholding its responsibilities to address such matters at the Oct 1st treaty gathering, MRA members have appeared in Provincial Courts to address these matters because of Article 8 of the 1752 Peace and Friendship Treaty. This article provides that "all Disputes whatsoever…shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Priviledges, as any others of His Majesty's Subjects." This treaty guarantee is a solemn promise that Mi'kmaw individuals will enjoy equal treatment and equal access to justice in the courts, and represents a commitment from the Mi'kmaq nation to address their disputes with the Crown and its subjects in the Crown's courts.

18. At the time that the treaty was made, most Mi'kmaw people did not speak the English language and were unfamiliar with the British legal system. We submit that equal "benefit" and "privileges" in court include the ability to present one's case effectively – which, for British subjects at the time and today, has meant the right to have an advocate speak on one's behalf. Just as a British subject could choose someone knowledgeable to represent them, so too the Mi'kmaw must be permitted to be represented by their own trusted advocates, consistent with their customs (e.g. a respected elder or leader).

19. Notably, the Supreme Court of Canada has emphasized that treaties must be interpreted liberally and in light of their purpose and the understandings of the Indigenous signatories. The Court in *R. v. Marshall* affirmed several principles of treaty interpretation, including that: (a) treaties are *sui generis* agreements attracting special interpretation rules; (b) they should be construed generously, resolving any ambiguities in favour of the Indigenous parties; (c) the goal is to choose the interpretation that best reconciles the interests of both parties at the time of signing; (d) technical or legalistic interpretations should be avoided; and (e) treaty rights are not frozen in time and should be allowed to evolve in their modern context. Applying these principles here, Article 8's promise of equal court privileges should be given a broad, purposive interpretation rather than a narrow or technical one. The purpose of that clause was to assure the Mi'kmaq of fair and equitable treatment in colonial courts, overcoming disadvantages they might face. In 1752, Mi'kmaq negotiators would have understood this as protection against bias and unfamiliar legal processes – effectively, a right to meaningful assistance in court equivalent to what a British subject could expect.

20. In modern terms, the core *treaty right* at stake can be understood as the right to a fair hearing with the benefit of a representative or advocate who understands the cultural,

political and legal frameworks of their own nation. While British subjects today typically exercise that right through licensed counsel, the Mi'kmaq, in accordance with their customs and conventions, may wish to exercise it through their own leaders and elders. Treaty rights are to be updated to provide for their modern exercise, meaning we must ask what modern practice is reasonably incidental to the treaty promise in its context. The SCC's decision in *R. v. Sundown* is illustrative: the Treaty 6 right to hunt included the incidental right to build a hunting cabin, even though the cabin was a "modern" adaptation of traditional shelter. Likewise here, allowing an elder to act as an advocate is a modern practice incidental to the treaty right to equal court privileges. It gives life to the treaty's promise by ensuring Mi'kmaw defendants can participate on an equal footing.

21. Importantly, the 1752 Treaty (like other Peace and Friendship treaties) did not involve any surrender of land or sovereignty; instead, it was oriented toward peace, friendship through trade, and mutual obligations. The Mi'kmaq retained their legal systems and customs. Article 8 can thus be seen as the Crown's agreement to integrate Mi'kmaq legal customs within the colonial courts to some degree, so that Mi'kmaw people would not be estranged from justice. One key Mi'kmaq custom is the guidance of elders in resolving disputes. Even today, Mi'kmaq legal traditions emphasize talking out issues with the assistance of elders to find solutions. Elders and traditional authorities, such as Grand Council members, play key roles in examining issues and leading discussions toward resolution. Historically, when Mi'kmaw interacted with colonial authorities, they primarily did so through Chiefs or designated spokespeople on behalf of the community. Thus, a Mi'kmaw accused standing alone in a British court, especially on a rights matter, was culturally alien – the norm would be to have a respected voice speak for the community's interest in the matter. Allowing an Indigenous elder to represent a defendant is consistent with that tradition and gives effect to the treaty's intent to make the court process accessible and fair. Denying that assistance would hollow out the "benefit" promised by the treaty, reducing it to a mere formality. The courts must avoid an interpretation that leaves a treaty promise as an empty shell.

22. It bears emphasizing that the 1752 Treaty is a valid and existing treaty recognized by Canadian law. In *Simon v. The Queen*, the Supreme Court of Canada confirmed that the 1752 Treaty is still in force and that its promises (in that case, the hunting rights of Article 4) can be enforced by Mi'kmaw people as a defence to charges. Chief Justice Dickson in *Simon* underscored that treaties are sacred agreements and that failing to give them effect by insisting on inaccessible forms of proof would render nugatory the rights of the Indigenous signatories. By analogy, if this Court allows a strictly imposed procedural rule (s.802.1) to nullify the Mi'kmaq treaty right to equal advantages in court, it would similarly render the treaty promise meaningless. The honour of the Crown and the principles of treaty enforcement demand that we not interpret Article 8 in a way that deprives Mi'kmaw nationals of a substantive advantage they were meant to have.

23. Article 8 of the Treaty of 1752 guarantees Mi'kmaw people a right to fully benefit from the court system to the same extent as other subjects. This includes the right to representation in court, which for the Mi'kmaq reasonably encompasses representation

by their own elders or traditional leaders – especially on rights matters which may affect the larger polity. We hold that the Mi'kmaq have a treaty right (protected by s.35) to have an elder speak on their behalf in court proceedings if they so choose.

The Nova Scotia Historical Context

24. In the mid-1700s when the Peace and Friendship treaties were negotiated, the British colonial legal system in Nova Scotia was in its infancy. Outside of Halifax, the administration of justice was conducted primarily through local magistrates, quarter sessions, and inferior courts of common pleas. These institutions were intentionally informal, designed to be accessible to ordinary settlers, many of whom were illiterate or unfamiliar with English legal customs. It was neither expected nor required that individuals be represented by a licensed lawyer. Instead, self-representation was the norm for most people appearing before colonial courts. Lay agents, including friends, family members, local merchants, clergy, and community leaders, frequently appeared on behalf of others. Formal legal education was virtually non-existent in the region until well into the 19th century, and few trained lawyers were available outside of major towns.

25. Legal historians such as Barry Cahill have documented that in 18th-century Nova Scotia, "the legal profession was rudimentary," and that formal legal advocacy was viewed with suspicion by much of the settler population. The assumption that representation must be by a lawyer would have been entirely foreign to most subjects of the Crown at the time – including the Mi'kmaq.

26. In parallel to colonial legal custom, the Mi'kmaq maintained their own legal traditions, in which elders, chiefs, and other traditional leaders regularly spoke on behalf of their community members in matters of governance, conflict resolution, and negotiation with colonial authorities. The oral nature of Mi'kmaq law and governance emphasized collective responsibility, with spokespersons and representatives presenting the interests of the community. This form of collective legal participation was well known to colonial authorities and was accommodated, if not formally recognized, in many early interactions.

27. When the Mi'kmaq agreed to Article 8 of the 1752 Treaty, they would have understood the right to participate in British courts to mean the right to appear through their traditional spokespeople – in the same way that settlers might appear through lay representatives or agents.

28. The shift to lawyer-dominated representation in Nova Scotia was a gradual development of the 19th century, not a founding principle of British law in the colonies. Key developments included the emergence of a trained legal profession in Halifax beginning in the early 1800s; the establishment of the Supreme Court of Nova Scotia with appellate jurisdiction in 1811; the founding of Dalhousie Law School in 1883, which professionalized legal education in the province; and the enactment of bar admission

statutes and court procedural rules that, over time, limited lay representation to minor matters or prohibited it altogether.

29. By the late 19th and early 20th centuries, professional legal counsel became the norm in higher courts. However, this transformation was driven not by a change in public need or access, but by the legal profession's increasing monopoly over courtroom advocacy. Importantly, this evolution occurred without any consultation or accommodation of Indigenous legal traditions, and without any renegotiation of the treaty agreements and promises made to the Mi'kmaq.

30. In 1849, H.W. Crawley, an Indian commissioner in Cape Breton, discussed the ongoing failure of the courts to protect Mi'kmaw people. He wrote "Under present circumstances no adequate protection can be obtained for the Indian property. It would be in vain to seek a verdict from any jury in this Island against the trespassers on the reserves; nor perhaps would a member of the Bar be found willingly and effectually to advocate the cause of the Indians, inasmuch as he would thereby injure his own prospects, by damaging his popularity." We suggest that the same problem continues to exist today within the legal system of Nova Scotia.

31. Understanding this history is essential to interpreting the modern scope of Article 8 of the Treaty of 1752 and the Aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982*. When the Mi'kmaq were promised equal "benefit, Advantages and Priviledges" in court, the contemporaneous understanding of legal representation included lay advocacy. The Mi'kmaq right to appear in court through a respected Elder or traditional leader is therefore not only culturally grounded, but is historically consistent with British legal norms at the time when the treaty was concluded.

32. To now impose a modern statutory rule, such as section 802.1 of the *Criminal Code*, which bars non-lawyer agents from representing a defendant, is to introduce a *post facto* procedural barrier that undermines the very promise made to the Mi'kmaq in 1752. Such a rule violates the principles of liberal and purposive treaty interpretation recognized in *R. v. Marshall*, *R. v. Simon*, and *Restoule*, and is inconsistent with the honour of the Crown.

33. The right of a Mi'kmaw treaty-rights holder to be represented in court by a trusted Elder, such as former National Chief Del Riley, is grounded not only in Indigenous legal tradition and treaty promise, but also in the practices of 18th-century British colonial law. To deny this right today – by rigidly applying a statutory rule that did not exist when the treaty was made – is to deny both the intent and historical context of Article 8.

34. The matters on which Chief Riley is representing MRA members concern treaty rights issues and issues of regulation of legal products. None of the people Chief Riley is representing have acted in a violent or aggressive way, and there are no allegations against them that they have harmed anyone. In most of these cases the MRA members operating treaty truckhouses reached out either through the Association or with the assistance of Chief Riley – as a respected elder with a national profile – to alert

authorities via letters as to their identity and to invite them to a meeting to discuss the issue of the exercise of their rights. These are not the actions of criminals, but rather of Mi'kmaw people seeking to exercise their rights in a straightforward and open manner.

Mi'kmaq Legal Traditions and Elder Representation

35. The Mi'kmaq possess an inherent Aboriginal right to maintain their own legal traditions and customs, which is also protected by s.35 of the *Constitution Act*. Even apart from the treaty text, the practice of elders guiding and representing members in matters of justice is integral to Mi'kmaq culture. Long before European contact, Mi'kmaq governance structures relied on their Keptins (captains) and elders' councils to resolve disputes and advocate for the people's interests. Speaking through an elder or leader is a time-honoured mode of Mi'kmaq legal practice. Such practices are precisely the kind of traditional customs that s.35's recognition of Aboriginal rights encompasses, as they are integral to the distinctive culture of the Mi'kmaq. The Supreme Court has repeatedly acknowledged that Indigenous legal traditions are part of the fabric of Canada's constitutional heritage and must be respected. For example, in *R. v. Sioui* the Court upheld the Hurons' treaty-protected right to carry out traditional customs and religious practices, holding that general laws (there, a provincial parks regulation) could not interfere with the customs of the Huron secured by treaty agreement. By the same token, the Mi'kmaq custom of elder representation in collective matters should be upheld against a general rule that would otherwise bar it.

36. Furthermore, Canadian courts are coming to recognize the importance of incorporating Indigenous perspectives in the courtroom. Initiatives across the country have included inviting elders to open court sessions with teachings or prayers, using sacred items (such as an eagle feather) for oaths, and even holding court in Indigenous communities to improve accessibility. These developments reinforce a constitutional norm of procedural accommodation: courts have an obligation to adapt their procedures to accommodate Indigenous participants and traditions where possible. The Supreme Court acknowledged this need in *Delgamuukw v. British Columbia*, where Chief Justice Lamer held that, "Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." This adaptation was required so as not to impose an impossible burden on Aboriginal claimants and thereby negate their rights. In other words, the Court recognized that strict adherence to ordinary rules (developed from a non-Indigenous perspective) could itself become an injustice in the context of Aboriginal rights, and thus flexibility is a constitutional requirement.

37. The principle from *Delgamuukw* applies here: just as evidence rules were modified to avoid negating Aboriginal rights, representation rules must be flexible enough to avoid negating the Mi'kmaq right to a fair hearing according to their customs. Section 802.1, as

a rigid rule, does not presently admit such flexibility – it imposes a blanket prohibition on non-lawyer representation in certain cases, with no explicit exemption for Indigenous customs and conventions. If enforced literally, it would force Mi'kmaq defendants to either find a licensed lawyer or represent themselves, with neither option respecting their tradition of collective support through elders. The *effect* is to exclude the Mi'kmaq perspective and participation in the court process, much as an exclusion of oral histories would have silenced Indigenous voices in *Delgamuukw*. Canadian courts cannot countenance procedures that systemically disadvantage Indigenous people or suppress their ways of presenting their case. As the Supreme Court observed in *R. v. Gladue* and *R. v. Ipeelee*, the Canadian justice system has historically failed to consider the unique circumstances of Aboriginal offenders and there is an obligation to alter that approach by accounting for Indigenous values and circumstances in the legal process itself. While *Gladue* dealt with sentencing, the broader principle is that Indigenous accused are entitled to participate in the criminal process in a manner that respects their cultural identity and community ties. Allowing an elder to speak for a Mi'kmaq accused is a manifestation of that principle.

38. Chief Del Riley exemplifies the kind of traditional representative at issue. More than that, he helped to constitutionalize the very rights those he represents are invoking. Chief Riley's depth of knowledge of Indigenous rights, traditions, and Canadian law is first rate. In Mi'kmaq culture (as in many First Nations), respected leaders can speak on behalf of others with the community's blessing. Chief Riley's role in current Mi'kmaq rights disputes confirms this: he has been invited to assist numerous Mi'kmaq communities across Mi'kma'ki, he has been appearing in Nova Scotia courts on behalf of Mi'kmaq accused and he has helped win multiple rights cases, including fisheries and treaty rights defenses. This track record not only speaks to his competence, but also to the acceptance (by the courts in which he has appeared) that his participation is valuable.

39. Chief Riley is regarded as an Elder-Statesman among Indigenous peoples across Canada. His presence in the courtroom brings a measure of trust and understanding for Mi'kmaq defendants that would otherwise be lacking. Being represented by an elder such as Chief Riley helps the defendant feel that their Indigenous perspective is heard by the court, rather than risking the misrepresentation of their positions that a stranger to their rights, culture and politics might make. This is crucial in a system where Indigenous people often feel alienated. Denying Mi'kmaq defendants the ability to have Chief Riley or a similar elder represent them would thus create a double harm: it would violate a specific treaty/customary right, and it would undermine the fairness and perceived legitimacy of the proceedings for the Indigenous accused.

Section 35 Rights and Constitutional Supremacy

40. Both the treaty right (to equal court privileges) and the related Aboriginal custom (elders speaking for the accused) are "existing rights" recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. As such, they have constitutional supremacy. Section 35 is not

part of the Charter, but the Supreme Court has made clear that laws or government actions that unjustifiably infringe s.35 rights are invalid to the extent of the inconsistency. Unlike Charter rights, s.35 rights are *not* subject to the s.1 override; instead, any limitation of them must satisfy the justificatory test from *R. v. Sparrow*. The Sparrow test involves two stages:

a. Has a *prima facie* infringement occurred? – i.e., does the law or action have the effect of significantly interfering with an Aboriginal/treaty right? In this case, we assert that s. 802.1's prohibition on non-lawyer agents does interfere with the Mi'kmaq right at issue: it outright prevents the exercise of the right to have an elder represent the accused. The effect of the law is to force the Mi'kmaw person to proceed without their chosen representative, directly undermining the promised "benefit" of Article 8 and the customary role of elders. This interference is not trivial or incidental – it strikes at the very manner in which the accused would defend themselves. The Mi'kmaw individual is effectively told they cannot exercise their right in the way their tradition prescribes. Therefore, a *prima facie* infringement of s.35 is established (the purpose of s.802.1, while well-intentioned for general cases, *"unnecessarily infringes"* the ability of Mi'kmaq to exercise their right).

b. Can the Crown justify the infringement? – The onus shifts to the Crown to show that (a) the law has a valid, compelling objective, and (b) the infringement is consistent with the honour of the Crown, meaning it is necessary, minimally impairing, and accommodates the Indigenous interest to the extent possible. We acknowledge that the objective of s. 802.1 – ensuring competent representation and the proper administration of justice in more serious summary conviction matters – is a serious and valid objective. Courts do have a legitimate interest in making sure that accused persons facing the prospect of substantial jail time are properly represented (or knowingly waive representation), to avoid miscarriages of justice. Public safety and the integrity of court proceedings can be considered substantial objectives. However, even a substantial objective cannot be pursued by means that needlessly trample a constitutional right. The *Sparrow/Badger* framework requires the Crown to demonstrate that the restriction is necessary and minimizes impairment of the right, and that there was adequate consultation with the rights holders about the restriction.

41. In this case, the Crown cannot meet that burden. First, the infringement (a blanket ban on non-lawyer representation in cases where the defendant is facing imprisonment for a term of more than six months) is far from minimal. It is absolute in its terms – s.802.1 makes no exception for Indigenous accused or for any circumstances (other than an agent authorized by a Lieutenant-Governor in Council program, which in practice refers to designated paralegals or courtworker schemes). The law does not attempt a narrower tailoring such as requiring a case-by-case competency approval or limiting the scope of what an agent can do. It simply prohibits all representation by non-lawyers. For Mi'kmaq defendants, this is a drastic impairment: it completely disqualifies their preferred

representative. A minimally impairing approach, by contrast, might have been to allow an elder to represent the accused with leave of the court, or to certify certain community representatives, or at least to allow it where the accused expressly waives any procedural objections. None of these accommodations exist in the text of s.802.1. There is no indication that Parliament ever considered the situation of Indigenous accused with treaty rights when enacting this restriction – certainly no consultation with Mi'kmaq communities about its impact has occurred. The Honour of the Crown requires the government to diligently fulfill treaty promises in a purposive manner, not to legislate so as to nullify them. Yet by imposing s.802.1 on Mi'kmaq defendants without any accommodation, the Crown has done the latter.

42. Second, while ensuring competent representation is a valid objective, it must be balanced against the Indigenous right in question. Here, competence and cultural appropriateness are not mutually exclusive. Chief Riley (and elders like him) can provide competent representation, especially in matters heavily involving treaty rights and Indigenous issues, where they may have *greater* expertise than many lawyers. The assumption that only a licensed lawyer can effectively represent someone is not absolute – indeed, in less serious cases the *Criminal Code* allows agents freely. The blanket ban for >6 months cases might make sense for the average accused person, but for a Mi'kmaw person who *trusts their elder* far more than a stranger lawyer, having the elder may actually yield a better-informed and more credible presentation of their case.

43. The court retains inherent jurisdiction to supervise the proceedings – if an elder representative were truly unable to provide proper assistance, the court could intervene. Thus, a case-by-case assessment is a feasible alternative to a blanket prohibition. However, the Crown has not shown that it is "necessary" to absolutely bar elders from representing accused in order to achieve the goal of fair trials. Less impairing measures (like allowing elders with some degree of support or oversight), were available but not pursued.

44. Third, the law as applied here actually undermines the fairness and integrity of the process – which is ironic given that fairness is purportedly what the rule seeks to protect. Forcing a Mi'kmaw accused to either self-represent or to take legal counsel they don't trust can lead to alienation or miscommunication. By contrast, allowing an elder to speak for them can aid the court in hearing the full story and context of the offence (including any assertion of Indigenous rights, treaty defense, etc.). This aligns with the Supreme Court's encouragement in *Restoule* that the Crown and courts take a "broad and purposive" approach to implementing treaty rights.

45. The *Restoule* decision (2024 SCC 27) is instructive: it dealt with the Crown's long-standing failure to uphold a treaty promise (the augmentation of annuities under the Robinson Treaties). The SCC emphasized that treaty promises are not discretionary or aspirational – the Crown must diligently carry them out in good faith, and courts can enforce them. The Court in *Restoule* rejected the idea of an unfettered Crown discretion to withhold treaty benefits, holding that any discretion must be exercised in line with the

intent and honour behind the treaty. By analogy, the Crown (and Parliament) should not be free to effectively nullify the Mi'kmaq's treaty-guaranteed court privileges by a rule of criminal procedure. If s.802.1 is applied to bar elder representation, it treats the treaty right as a dead letter. Such an outcome would be contrary to *Restoule*'s teaching that Indigenous treaty beneficiaries must not be left with an "empty shell of a treaty promise". The courts have authority – indeed, a duty – to step in and ensure the treaty promise is kept.

46. In summary, the infringement caused by s.802.1 is unjustified. The objective, while valid in general, cannot override the specific constitutional rights at stake without accommodation. The means chosen (an absolute ban) are not minimally impairing and do not reflect any reasonable balance with the Mi'kmaq right. No effort at consultation or tailoring is evident in the Crown's request. Therefore, under the *Sparrow* test, s.802.1 cannot be upheld as applied to the Mi'kmaq context. The consequence in constitutional law is clear: a law that fails justification is "of no force or effect" to the extent of the inconsistency. Here, that means s.802.1 cannot be enforced to bar a Mi'kmaw treaty-rights holder from being represented by an elder.

The Crown's Own Stated Principles Require Accommodation of Indigenous Legal Traditions and Representation

47. In addition to constitutional and treaty-based arguments, this Court should consider the Government of Canada's own published policy framework titled *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Department of Justice Canada, 2018). These principles, though not a binding law, provide persuasive evidence of the Crown's current understanding of its constitutional obligations, its interpretation of section 35 of the *Constitution Act, 1982*, and its approach to reconciliation, treaty implementation, and respect for Indigenous legal traditions.

48. The stated goal of these principles is to ensure that the Crown's laws and actions are aligned with the recognition of Indigenous rights, the implementation of historic and modern treaties, and the integration of Indigenous governance and legal systems into Canada's constitutional order. The Crown has committed to renewing its relationship with Indigenous Peoples through a foundation of recognition, respect, cooperation, and partnership. These commitments are directly relevant to the Court's analysis of whether the application of section 802.1 of the *Criminal Code* is consistent with the Crown's constitutional obligations.

49. *Principle 1: "All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government."* This principle affirms that Indigenous Peoples have the right to govern themselves in accordance with their own laws, legal traditions, and institutions. In the context of criminal proceedings, this principle requires that courts recognize the right of Indigenous communities to define how they wish to participate in legal processes,

including the right to designate traditional representatives – such as respected elders or leaders – to speak on their behalf.

50. *Principle 2: "Reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982."* Section 35 must be interpreted and applied in a manner that furthers reconciliation. A rigid application of s. 802.1 to bar non-lawyer Indigenous agents – despite their cultural legitimacy and treaty basis – would frustrate this constitutional purpose. Allowing Indigenous accused to be represented by culturally grounded spokespeople advances, rather than impairs, reconciliation.

51. *Principle 3: "The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples."* The Crown must act honourably and in good faith when interpreting and applying laws that impact Indigenous Peoples. Applying s. 802.1 without regard for treaty rights, Mi'kmaq legal traditions, or the representative roles of elders – such as former National Chief Del Riley – would violate the Crown's honour and breach its commitment to just and respectful dealings.

52. *Principle 4: "Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government."* Referring to the *United Nations Declaration on the Rights of Indigenous People*, the Government of Canada notes that "Recognition of the inherent jurisdiction and legal orders of Indigenous nations is...the starting point of discussions." This principle explicitly recognizes that Indigenous legal traditions and forms of governance are not external to Canadian law, but are foundational within it. Elders speaking for their communities in court – an expression of Mi'kmaq legal practice – is not a privilege to be granted by state law but a right flowing from Indigenous jurisdiction and is protected by section 35.

53. *Principle 5: "Treaties, agreements, and other constructive arrangements...are intended to be acts of reconciliation based on mutual recognition and respect."* This principle reinforces the Crown's obligation to interpret and implement treaty provisions in good faith. Article 8 of the Treaty of 1752 is one such agreement: it must be given a generous and purposive interpretation that reflects both historical context and contemporary expressions of Mi'kmaq governance, including the use of elders as courtroom advocates.

54. *Principle 6: "Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent...through their own representative institutions."* This directly supports the Mi'kmaq position that, where legal proceedings affect their rights, they are entitled to participate through representatives of their choosing, consistent with their governance structures – not merely through state-sanctioned professionals such as licensed lawyers.

55. *Principle 7: "Any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives."* If the Crown attempts to justify the application of s. 802.1 as an infringement of a s. 35 right, this principle clarifies that the bar is high: Indigenous perspectives must be included, and any infringement must meet the standards laid out in *R. v. Sparrow* and *R. v. Badger*. A blanket prohibition on traditional representation, without accommodation or consultation, cannot meet this standard.

56. These principles, while non-binding, are a public expression of the Crown's current legal and constitutional understanding. They reinforce the proposition that courts must interpret and apply statutory provisions, including s. 802.1 of the *Criminal Code*, in a manner that affirms and accommodates Indigenous legal traditions – particularly where those traditions are rooted in constitutionally protected treaty rights.

57. To deny Mi'kmaw defendants the right to be represented by an elder such as Chief Del Riley, under a statute that does not contemplate Indigenous legal systems, is inconsistent with the principles of reconciliation, the honour of the Crown, and the Crown's own stated commitments. The Department of Justice's own principles support our interpretation that s. 802.1 must be read down or held inapplicable in this context to give effect to the Mi'kmaq constitutional rights.

Possible Counter-arguments by the Crown

58. The Crown may argue that s.802.1 is a law of general application aimed at protecting the administration of justice for all accused, and that Mi'kmaw individuals are not being singled out – they are merely being held to the same standard (requiring a lawyer) as any other accused facing a certain penalty. However, this "equal application" argument ignores the distinctive constitutional status of Mi'kmaq people as rights-holders under the Covenant Chain of Peace and Friendship treaties and s. 25 and s.35. Formal equality in treatment can amount to substantive inequality when one group has distinct legal rights. In *R. v. Sparrow* and many subsequent cases, courts recognized that general laws, even if neutrally worded, can unfairly infringe Aboriginal or treaty rights and must yield to those higher rights. Here, what the Crown calls neutral "standard procedure" actually has a disproportionate adverse effect on Mi'kmaw accused, because it directly conflicts with their treaty entitlement and tradition of representation. Section 35 was enacted to ensure that Indigenous rights are not casually suppressed by general legislation as they often were in the past. The Crown's position essentially asks the Court to prefer an ordinary statute over the *Constitution Act* – which is impermissible.

59. The Crown might also raise concerns about floodgates or precedent: if Mi'kmaw accused can insist on elders as advocates, will this open the door to others requesting non-lawyer representatives, or create parallel systems? The answer is that the Mi'kmaw situation is constitutionally unique. They are not simply choosing an agent for convenience; they are invoking a right grounded in a historic treaty and a living legal tradition. Section 802.1

itself recognizes exceptions (e.g. agents under provincial programs, like courtworkers). In fact, Indigenous courtworker programs exist in many provinces to assist Indigenous accused – a tacit acknowledgment that Indigenous people have special needs in the justice system. In theory, a province could authorize elders as agents via the s.802.1 provincial program exception. The fact that Nova Scotia (or the relevant province) has not done so is part of the problem – but the Court can fill that gap by directly recognizing the constitutional exception. This would not mean every accused person can bring any layperson as advocate; it would mean that where a constitutionally protected Indigenous practice is engaged, the court makes an allowance. That is a limited category and a proper function of constitutional adjudication.

60. Finally, the Crown might argue that an accused always has the right to self-represent, so a Mi'kmaw defendant could still have their elder sit with them as a "McKenzie friend" or advisor while technically representing themselves, maintaining compliance with s.802.1. Such a workaround is inadequate. It would muzzle the elder's voice (since an unsworn "friend" cannot address the court on the accused's behalf) and place the burden back on the accused to articulate legal arguments – precisely what the treaty sought to avoid by guaranteeing equal "benefit" of representation. A Mi'kmaw person may not have the formal education to comfortably conduct a trial alone, and forcing them into that role – even with their elder only whispering advice – is not equal to the situation of a represented non-Indigenous accused. The reality is that most non-Indigenous accused in serious summary matters will have a lawyer speak for them; equal benefit requires the Mi'kmaw accused be similarly spoken for, even if the spokesperson is not a lawyer by profession.

Remedies and Relief Sought

61. Section 52(1) of the *Constitution Act, 1982* provides that any law inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect. We ask this Court to so declare with respect to Criminal Code s. 802.1 in its application to Mi'kmaw treaty rights holders. In practical terms, the Court can fashion an appropriate remedy as follows:

    a. **Reading Down / Constitutional Exemption:** The Court can rule that s.802.1 does not apply to bar an accused who is a Mi'kmaw person (and beneficiary of the 1752 Treaty or another relevant treaty) from being represented by an elder or traditional representative of their choice. The section should be read down to include an exception *"unless the accused is an Indigenous person asserting a treaty or Aboriginal right to representation by a non-lawyer"*. This ensures the law is brought into compliance with s.35 by carving out the protected scenario. This kind of group-specific reading down is consistent with how courts handle Aboriginal rights – for instance, in *R. v. Morris*, certain provincial hunting regulations were found inapplicable to members of a treaty nation because they infringed that nation's treaty rights. The regulation remained valid for others but

could not be enforced against the rights-holders. A similar approach here leaves s.802.1 intact for the general population but renders it inoperative for the Mi'kmaw in these circumstances.

b. **Declaration and Allowing Representation:** The Court should issue a declaration that Mi'kmaw accused have a right, by virtue of s.35, to be represented by an elder or knowledgeable community leader in criminal proceedings, notwithstanding any statutory or common law rule to the contrary. Consequently, the specific Mi'kmaw defendants in these *Cannabis Act* cases must be allowed to have former National Chief Del Riley (or another approved elder) act as their advocate in court. The judge can set reasonable limits (for example, requiring the elder to promise to uphold courtroom decorum and follow procedure as directed by the Court), but must not bar the elder from speaking on the accused's behalf. In essence, the Court's order would give effect to the constitutional right by treating the elder as the equivalent of counsel for the accused in this context. This remedy accords with the principle from *Sparrow* that if an infringement is not justified, the law is void as against the Aboriginal group and the *protected activity can continue unimpeded*. Here, the protected activity is being represented by an elder; the remedy is to allow it to continue (i.e., allow the trial to proceed with the elder appearing).

c. **Charter s.24(1) Relief (Alternative):** If for any reason the Court declines to read down s.802.1, then in the alternative it should exercise its remedial power under s.24(1) of the Charter (as read with s.35 rights, or under its inherent jurisdiction to prevent an abuse of process) to stay the proceedings or quash the Crown's attempt to enforce s.802.1. Proceeding with a trial while a Mi'kmaw accused is denied their chosen representation would bring the administration of justice into disrepute and violate the accused's constitutional rights. Canadian courts have inherent power to prevent abuses of process, especially where minority rights are at stake. It would be an abuse to continue a prosecution in a manner that contravenes a treaty right. Therefore, the charges should be halted unless and until the accused's treaty right is respected. However, we emphasize that the preferable course is not to permanently stay the charges (since the accused are prepared to answer to them) but rather to adjust the procedure to remove the constitutional violation. That adjustment is simply permitting the elder's representation.

d. **Structural or Ancillary Remedies**: The Court might also consider a broader declaratory remedy to guide future cases. For example, it could declare that provincial governments should utilize the s.802.1 "program approved by the Lt. Governor in Council" exception to formally authorize Indigenous Elders or court workers to represent Indigenous accused in appropriate cases. (Section 802.1 itself anticipates such programs – e.g., some provinces allow paralegals or law students under supervision to act in certain cases. It would be consistent with the spirit of reconciliation to explicitly include Indigenous Elders in those exceptions.)

While the Court cannot rewrite legislation, such a declaration would spur the executive and legislative branches to proactively harmonize s.802.1 with s.35 rights. The recent enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act (SC 2021, c.14)* also obliges the government to align laws with Indigenous rights, and *UNDRIP* Article 40 affirms Indigenous peoples' right to access justice "in a manner that gives due recognition to their… customs and traditions." A court declaration in this case would reinforce that mandate.

62. In crafting a remedy, this Court should be guided by the overarching purpose of s.35: the promotion of reconciliation between the Crown and Indigenous peoples. As Justice Martin wrote in *Restoule*, reconciliation is not achieved by one side unilaterally imposing its will; it requires a "[reparation] of the treaty relationship" and meaningful measures to give life to promises. Allowing Indigenous elders to partake in the courtroom in a representative capacity is a reconciliation-based accommodation – it bridges the gap between two legal cultures. It costs the Crown nothing in terms of justice or safety, yet it affirms to the Mi'kmaq that their treaties and laws are respected.

Conclusion

63. For the foregoing reasons, we submit that s. 802.1 of the *Criminal Code* cannot constitutionally be applied to prevent Mi'kmaw defendants from being represented by their Elders or traditional leaders in summary conviction trials, even where the potential sentence exceeds six months. The section, as invoked by the Crown, violates Mi'kmaq treaty rights under the 1752 Treaty (Article 8) and their broader Aboriginal right to customary legal practices, which are protected by s.35 of the *Constitution Act*. Under the supremacy of the *Constitution*, the Court must decline to apply any law (here, s.802.1) that is inconsistent with those rights. We ask this Court to uphold the honour of the Crown by ensuring that the promise of equal court "privileges" for the Mi'kmaw is honored in substance, not just in words.

64. **We propose the following order:** "It is declared that s.802.1 of the *Criminal Code* is of no force or effect insofar as it would bar a Mi'kmaw treaty-rights holder from being represented by a non-lawyer Elder or traditional representative in court. The Mi'kmaw accused in the present case are entitled to have former National Chief Del Riley and his assistant Tom Keefer act as their agent and spokesperson during the trial. The court and all parties shall treat Mr. Riley and M. Keefer as the authorized representatives of the accused, with full standing to speak for them, examine and cross-examine witnesses, make submissions, and otherwise perform the functions of counsel. This order is a reading down of s.802.1 to prevent an unconstitutional result and is effective immediately."

65. Such a remedy respects both the rule of law and Indigenous rights. It allows the trial on the *Cannabis Act* or *Excise Act* charges to proceed on the merits – including any defenses based on Mi'kmaq rights – with the benefit of advocacy that the accused trust. In doing so, it upholds Mi'kmaq treaty rights, the promises of the Crown, and the integrity

of Canada's justice system. The Supreme Court has repeatedly stated that reconciliation is not an abstract notion but "a process flowing from rights guaranteed by s.35(1)" *Haida Nation v. British Columbia (Minister of Forests)*. This Court, by granting the relief sought, will be engaging in that very process – reconciling the Crown's administration of justice with the Mi'kmaq Nation's rightful place within it.

66. In addition to reading down or declaring section 802.1 of the *Criminal Code* of no force or effect, this Honourable Court may also consider a procedural remedy grounded in its inherent jurisdiction: the appointment of an *amicus curiae* to assist the accused in understanding legal procedures and ensuring the fair presentation of their constitutional defence. This request arises from the Crown's solemn obligation under Article 8 of the Treaty of 1752, which guarantees that "all Disputes whatsoever… shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Priviledges, as any others of His Majesty's Subjects."

67. The appointment of *amicus curiae* offers a practical, rights-affirming solution. The appointment of *amicus curiae* in this context would serve four essential purposes:

    a. To provide legal guidance to the accused *without* displacing their chosen Indigenous representative;

    b. To assist the Court in navigating complex constitutional and evidentiary issues arising from s. 35 defences and treaty interpretation;

    c. To uphold the procedural fairness of the trial and support effective participation by a self-represented Indigenous defendant utilizing the assistance of an Indigenous elder;

    d. To ensure that the Mi'kmaw accused receives the full "benefit and privilege" of His Majesty's courts as promised under the treaty.

68. The role of *amicus* would be supportive and non-adversarial. This approach is consistent with the Court's inherent jurisdiction and is recognized in case law as a vital tool to protect trial fairness: see *Ontario v. Criminal Lawyers' Association*, 2013 SCC 43; *R. v. Imona-Russell*, 2013 ONCA 232. The use of *amicus curiae* in this context would not only advance procedural fairness but also give contemporary meaning to the treaty relationship, consistent with the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27. In *Restoule*, the Court affirmed that treaty implementation is not optional, and that the Crown must act diligently and purposively to uphold its commitments. Here, where legislative and administrative mechanisms have failed to accommodate Indigenous legal participation, the Court is empowered – and, we submit, constitutionally obliged – to fill that gap. The judicial appointment of *amicus curiae* gives effect to the "living tree" doctrine of constitutional interpretation and serves the overarching objective of reconciliation.

69. Accordingly, we respectfully propose that the Court adopt the following remedy: That the Court appoint an *amicus curiae* to assist the self-represented Mi'kmaq accused in the conduct of their trial, with the following mandate:

    a. To provide independent legal advice to the Court on procedural and constitutional matters arising from the case;

    b. To assist the accused in understanding legal process and the conduct of trial;

    c. To act in a non-adversarial role, in parallel with the accused's chosen Indigenous representative or Elder, and not to replace or override their role;

    d. To remain available to the Court to ensure the continued fairness of proceedings where cultural, constitutional, or procedural issues may require clarification.

70. This judicially crafted remedy reflects the Court's constitutional responsibility to give effect to treaty rights in a living legal system, to respect Indigenous governance and representation structures, and to uphold the honour of the Crown in all dealings with Indigenous Peoples.

All of which is respectfully submitted.

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Connor Peter Paul
20 Polchies Ct,
Fredericton, NB
E3A 5R8
<copaul04@gmail.com>
506-478-1044

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14. *R v Sioui*, [1990] 1 SCR 1025.
15. *R v Sparrow*, [1990] 1 SCR 1075.
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17. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

II. Statutes and Constitutional Instruments

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
2. *Criminal Code*, RSC 1985, c C-46, s 802.1.
3. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

III. Treaties

1. Treaty of 1752 (Mi'kmaq–British Treaty), 22 November 1752.
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IV. Government Publications

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