CANADA Case Nos. 8829116, 8829117, 8829126-8829131
PROVINCE OF NOVA SCOTIA

IN THE PROVINCIAL COURT NOVA SCOTIA

BETWEEN:

HIS MAJESTY THE KING
(as represented by Public Prosecution Service of Canada)

-and-

CONNOR PETER PAUL AND SCOTT JAMES PAUL

CROWN SUBMISSIONS ON SUMMARY DISMISSAL
(Constitutionality of CC s. 802.1)

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OVERVIEW

1. Section 802.1 of the *Criminal Code* bars the defendants from being represented in Court by lay agents. They have brought a Notice of Constitutional Question, alleging that the section breaches both an aboriginal right and a treaty right. The Crown seeks summary dismissal of the portion of the challenge that alleges a breach of a treaty right.

2. The defendants propose to tender evidence from a series of lay witnesses asserting, generally, that they will be assisted by the representation of an Elder. Though they assert that the Peace and Friendship Treaty of 1752 confers the treaty right which they say s.802.1 infringes, they do not propose to call expert evidence to establish the nature of the treaty, the historical context of the treaty, the application of the treaty, or the intentions of the parties to the treaty. They rely on the mere assertion of its applicability.

3. The absence of an evidentiary foundation provides a basis for this Court to protect judicial resources by summarily dismissing the application. The Crown's position is that, without a proper evidentiary foundation, neither the Crown nor the Court can properly assess the merits of the application. Where, as here, the defendants cannot point to any anticipated evidence that is capable of establishing the factual foundation necessary to support their application, the application should be rejected as manifestly frivolous until such time as the defendants propose evidence capable of supporting their application. [1]

[1] *R. v. Haevischer*, 2023 SCC 11, at para. 83

FACTS

4. The defendants were charged on July 23, 2024, with offences under the *Cannabis Act*, and *Excise Act, 2001*. The Crown proceeded summarily. The maximum sentence for each charge is as follows:

Offence	**Maximum Sentence**
Cannabis Act s. 9(2)	6 months imprisonment
Cannabis Act s. 10(2)	6 months imprisonment
Excise Act, 2001 s. 158.11/218.1(1)	18 months imprisonment

5. To date, the defendants have been represented by agents Tom Keefer and Elder Delbert Riley. On April 17, 2025, the Crown brought section 802.1 of the Criminal Code to the attention of the defendants. That section prohibits representation by an agent on summary conviction matters where the defendant is liable to imprisonment of more than six months. It reads, in part:

> 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, unless
>
> (a) the defendant is an organization;
>
> (b) the defendant is appearing to request an adjournment of the proceedings;
>
> or
>
> (c) the agent is authorized to do so under a program approved — or criteria established — by the lieutenant governor in council of the province.

6. On April 29, 2025, the defendants filed a Notice of Constitutional Question, seeking the following remedies:

i. A declaration that s. 802.1 of the *Criminal Code* is of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, insofar as it would prohibit Mi'kmaq defendants, as beneficiaries of the 1752 Treaty and holders of s.35 Aboriginal and treaty rights, from being represented in court by their traditional Elders or leaders.

ii. In the alternative, an order reading down s. 802.1 to recognize an exemption for Mi'kmaq defendants asserting a constitutional right to be represented by an Elder or traditional representative.

iii. In the further alternative, a stay of proceedings under s.24(1) of the Charter where such representation is denied, as continuation would amount to a breach of constitutional rights.

iv. Such further and other relief as this Honourable Court may deem just.

7. The defendants therefore claim a treaty right and an aboriginal right to representation by Elder. The Crown's application for summary dismissal is in relation to the treaty right claim.

8. The defendant's reference to "the 1752 Treaty" in their NCQ is a reference to the Peace and Treaty Friendship of 1752, which contains the following language at Article 8:

> That all Disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province 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.[2]

The same language appears in the 1760-61 Peace and Friendship Treaties[3].

9. The evidence the defendants intend to call about the 1752 Treaty consists of two references in the affidavit of Chris Googoo:

a. At para. 9, Mr. Googoo refers to his "right to open a trading post and sell hemp/cannabis" under the Treaty of 1752.

b. At paragraph 22:

> The removal or exclusion of Elders like Chief Riley from being able to represent Micmac Rights Associations members such as Connor and Scott Paul would severely undermine the ability of the Association to defend our rights and would be in violation to our treaty with the Crown in which, according to the Treaty of 1752, "the Indians shall have the same benefit, Advantages and Priviledges, as any others of His Majesty's Subjects" to

[2] *R. v. Simon*, [1985] 2 S.C.R. 387, at para. 6.
[3] *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456, at para. 5.

> have "all Disputes whatsoever" resolved in the courts. My interpretation of this section of the treaty (written at a time when women and Indians were not considered persons under British law) is that the treaty guaranteed to Mi'kmaw people that there would be no racism or discrimination directed towards them in his Majesty's courts. To me, that would mean that we would have the right to be represented by our own advocates to explain our own ways of doing things as treaty partners to the Crown.

10. The balance of the anticipated evidence can be summarized as follows:

Connor Paul (defendant)

- He was born in Fredericton and originally registered as an Indian Brook First Nation band member (now known as Sipekne'katik and located in Shubenacadie, NS).
- He switched membership to Sitansisk Wolastoqey (St. Mary's First Nation) when he was adopted by his stepfather in 2013.
- His father owns and operates a "treaty truck house" in St. Mary's First Nation which sells cannabis.
- He worked in his father's store before opening his own store on Crown land in Amherst (subject of current charges).
- His sister is an executive member of the Micmac Rights Association (MRA) and she recommended Chief Del Riley to assist him with indigenous rights defence.

Melvin Paul

- He is a status Indian registered to St. Mary's First Nation.
- He is the stepfather of the defendant Connor Paul.
- He believes that Connor Paul is of Mi'kmaw heritage through his father.
- He has been active in the past in the exercise of treaty rights.
- He operates a cannabis shop on St. Mary's First Nation and gives back to his community.
- He assisted Connor Paul with starting his cannabis shop in Amherst.
- He believes that Connor Paul's cannabis truckhouse is consistent with Mi'kmaw rights.

Jessica Felicia Starleen Haji Mohamad

- She and Connor Paul share the same father, but different mothers.
- Their father is David Michael McDonald, a registered member of Sipekne'katik First Nation (Indian Brook).
- Their paternal grandfather was Sandy Morgan McDonald, also member of Indian Brook.
- Band members of Indian Brook and Millbrook are descendants of the Mi'kmaw people who signed the 1752 Treaty.
- Connor's mother is not indigenous. She later remarried Melvin Paul, a Maliseet man (with Mi'kmaq lineage from Lennox Island), who is registered to St. Mary's First Nation.
- Melvin Paul adopted Connor who became registered to St. Mary's First Nation.

- Members of their Mi'kmaw family in Indian Brook and Millbrook recognize Connor as related to them.
- She is an executive with the Micmac Rights Association (MRA) and recognizes Chief Del Riley as an asset to their cause.
- She supports Chief Del Riley's representation of Connor in this constitutional case.

Chris Googoo

- He is a status Indian registered to Millbrook First Nation and is currently serving on Band Council.
- He is a founder of the MRA and owner/operator of the High Grade Smoke Shop & Trading Post.
- He is an heir and beneficiary of the Treaty of 1752 and a descendant of Jean Baptiste Cope.
- He can explain the importance of elders throughout Mi'kmaw culture.
- After his cannabis stores were busted, he reached out to Chief Del Riley. He learned about Chief Riley through his public work shared on social media.
- He believes that elder representation is essential and treaty-protected
- The MRA wrote to Lieutenant Governor Mike Savage on July 3, 2025, asking that Elder representation be authorized by a program under the *Criminal Code* s. 802.1(c)

Albert Marshall Sr.

- He is a Mi'kmaw Elder of Moose Clan and resides in Eskasoni First Nation.
- He has a background as an Elder and advocate.
- He can explain the importance of Elders in Mi'kmaw society.
- He knows Chief Del Riley and believes he would be an appropriate representative in the courts.
- "The Canadian courts have begun to recognize the importance of Indigenous legal traditions and the necessity of engaging in genuine reconciliation as envisioned in the Truth and Reconciliation Commission's Calls to Action and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), now affirmed in Canadian law."
- He believes that denial of Elder representation "would amount to a serious infringement on Mi'kmaw custom and the right to fully and effectively participate in the legal process."

11. The evidence, in general, relates to Connor Paul's status as a Mi'kmaw and Chief Del Riley's experience and reputation in the community. Mr. Marshall Sr.'s affidavit addresses, to

some extent, the aboriginal custom of representation by Elder. But for Mr. Googoo's affidavit, the evidence is silent about the Treaty of 1752.

LAW AND ARGUMENT

12. The status of the 1752 Peace and Friendship Treaty in 2025 is uncertain – either to whom it applies or whether it applies. In *R. v. Simon* (1985), the Supreme Court of Canada held that the Crown had not led sufficient evidence at trial for the Court to reach a finding that the treaty had been terminated for breach of its core provisions.[4] Compelling evidence was led in *R. v. Marshall* ("*Marshall 1"*) causing the defendants to abandon their reliance on that treaty at the Nova Scotia Court of Appeal and Supreme Court of Canada.[5] At least one Court has held that the 1752 treaty had been terminated by subsequent hostilities.[6] Following *Marshall 1*, the 1760-61 treaties are clearly in effect today.

Evidence in Aboriginal Claims

a. The form of evidence

13. Evidence in aboriginal claims need not take a particular form and need not comply with strict colonial standards of admissibility. Instead, the rules of evidence must be applied flexibly. *Mitchell v. Minister of National Revenue*, 2001 SCC 33 at para. 39. Rules of evidence should be adapted so that other types and forms of evidence can be accommodated and placed on equal footing with the types of historical evidence with which courts are familiar. See *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 87.

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[4] *R. v. Simon*, [1985] 2 S.C.R. 387, at para. 31.
[5] *R. v. Marshall*, 1997 NSCA 89, at paras. 79-92; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456 at para. 16.
[6] *R. v. Drew*, 2003 NLSCTD 105, at paras. 1033-1034.

b. ***The necessity for historical and context evidence***

14. In cases with a treaty right claim, the s.35 claim usually requires the calling of historical evidence through documentation, expert witnesses and community witnesses. In *R. v. Morris*,[7] SCC, the Court said:

> 18 The language of the Treaty stating "we are at liberty to hunt over the unoccupied lands" exemplifies the lean and often vague vocabulary of historic treaty promises. McLachlin J., dissenting on other grounds, stated in *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at para. 78, that "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed". This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time.

15. In *Badger*, SCC, the Court said:

> . . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui*, *supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.[8] [Emphasis added.]

[7] *R. v. Morris*, 2006 SCC 59 (CanLII), [2006] 2 SCR 915.
[8] *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771, at para. 52.

16. The ultimate goal of treaty interpretation is to choose from the various available possible interpretations of common intention the one interpretation which best reconciles the interests of the parties at the time the treaty was signed. See *Sioui* [9] at pages 1068-169. Evidence of intention when interpretating vague clauses, or clauses with more than one possible interpretation, is therefore essential.

17. This need for historical evidence in treaty interpretation has been recognized in a variety of contexts. For example, in *R. v. Francis*, 2007 NSPC 28, the Court considered an application for state-funded counsel by accused charged with *Fisheries Act* offences and who intended to make s.35 claims. The accused cited the Treaty of 1752 as the infringed treaty (paras. 33, 77) and, elsewhere, a general treaty right.

18. The Court in *Francis* cited both *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at page 1111 and *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 SCR 393, with respect to the importance of context in addressing treaty right claims:

> 75. The Supreme Court of Canada, in *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075 at page 1111, states:
>
> *We wish to emphasize the importance of context and a case by case approach to section 35(1) [of the Constitution Act] given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.*
>
> …
>
> 77. Further at para. 25 of *R. v. Sundown*, (1999) 1999 CanLII 673 (SCC), 132 C.C.C. (3d) 353 (S.C.C.), Cory J., says:
>
> *Treaty rights, like Aboriginal rights, are specific and may be exercised exclusively by the first nation that signed the treaty. The interpretation of each treaty must take into account the first nation signatory and the circumstances that surrounded the signing of the treaty.*

[9] *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 SCR 1025

The Court dismissed the applications for state-funded counsel in relation to the accused which identified a treaty right to fish, finding that there was no evidence "to link their status as Aboriginals living in Indian Brook, to their claim to fish for lobsters in St. Mary's Bay," *supra* at para. 78. The Court said that the accused "do hold a belief, even passionately, in their Aboriginal or Treaty rights to do so. That does not equate to evidence for such claim."

19. Similarly, in *Soldier v. Canada (Attorney General)*, 2009 MBCA 12, the Manitoba Court of Appeal upheld a decision to reject the representative plaintiffs to a proposed class action relating to a treaty right because the plaintiffs did not intend to adduce any expert evidence regarding the treaty's context or history. About the application judge's decision, which with the Court agreed, the Court of Appeal said:

> 94 In the court's view, given the complexity of treaty interpretation and the need for evidence related to the intention and understanding of the treaty signatories as well as the circumstances surrounding the signing of the treaties, such evidence was required. The Supreme Court of Canada has affirmed that the negotiation context cannot be ignored in treaty interpretation.

20. The lack of proffered evidence has also lead to the summary dismissal of s.35 claims. This was the result in the very recent, *R. v. Marshall*, in which Associate Chief Judge of the Provincial Court van der Hoek dismissed an application that was similarly lacking in evidence (though there were two expert reports):

> It cannot be understated that decisions affirming and defining, or denying and restricting, aboriginal and Treaty rights are significant for the communities who advance them and Nova Scotians. The Court is aware that we are all Treaty people, but how the Treaties are interpreted must be based on a foundation that warrants consideration. At this time, that foundation has not been established for cannabis sales outside the lawful regime, and the existing regime applies to all Nova Scotians.[10]

[10] *R. v. Marshall*, 2024 NSPC 33, at para. 3.

The Court noted that the cases cited by the applicants were distinguishable, because they "were based on sound evidentiary foundations to establish the existence of Treaty and/or aboriginal rights, in those cases, to fish." (para. 45)

21. Though the rules of evidence are flexible and adaptive in s.35 claims, there should be at least some evidence of historical, political and/or cultural context into which the treaty can be placed and from which the parties' intentions can be determined.

Applications for Summary Dismissal

22. The test for summary dismissal of an application in a criminal proceeding was recently revised and explained in *R. v. Haevischer*, 2023 SCC 11. In *Haevischer*, the Court considered two underlying and coexisting values: trial fairness and trial efficiency (para. 46). Nothing that trial fairness is a constitutional imperative, the Court recognized that summary dismissal of applications can, in some circumstances, curtail the accused's rights (para. 56). Accordingly, most applications are heard on their merits.

23. The Court concluded that the appropriate standard for summary dismissal "is whether the underlying application is manifestly frivolous" (paras. 66, 71). An application will be frivolous if it will necessarily fail: "inevitability or necessity of failure is the key characteristic of a 'frivolous' application." (para. 67). An application will be manifestly so if the application's inevitable failure is plain and obvious (para. 69).

24. The manifestly frivolous standard protects fair trial rights and ensures that applications which might succeed are heard on their merits.

25. The Court set out the general process by which a summary dismissal application is heard:

> [83] On the summary dismissal motion, the judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest [citations omitted]. While there is no need to weigh the evidence or decide any facts on the summary dismissal motion, the applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous.
>
> [84] Likewise, the judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered. The judge should only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference. This might be the case where a necessary fact underpinning the inference is not alleged or if the inference cannot be drawn as a matter of law (e.g., if the proposed inference is based on impermissible reasoning).
>
> [85] A similar approach is taken to the overall application. Because the truth of the facts alleged is assumed, an application will only be manifestly frivolous where there is a fundamental flaw in the application's legal pathway: the remedy cannot be reached. For example, an application may be manifestly frivolous because the judge has no jurisdiction to grant the requested remedy. Alternatively, the application could put forward a legal argument that has already been rejected: applications that depend on legal propositions that are clearly at odds with settled and unchallenged law are manifestly frivolous.[11] [emphasis added]

26. The summary dismissal judge accepts the facts and the inferences suggested by the claimants and if it is plain and obvious that the application must fail, the application may be summarily dismissed.

Treaty Rights

27. Section 35 of the Constitution Act, 1982, recognized and affirmed existing aboriginal and treaty rights "of the aboriginal peoples of Canada."

28. In order to assess whether a treaty right is being infringed, the Court must first:

[11] *R. v. Haevischer*, 2023 SCC 11, at paras. 46-85 (citations omitted)

a. Characterize the right at issue, by reference to the treaty, the historical context and the common intentions of the parties;

b. Determine the beneficiaries of the right, including who are the signatories to the treaty and whether the treaty right is being exercised under the authority of the community succeeding the signatories;

These matters relate to establishing the exercise of a right which is being infringed, and the burden of proof is on the claimant on a balance of probabilities.

29. After determining the right at issue, the Court determines:

a. Is there prima facie infringement of the right? (Is the limitation unreasonable; Does the regulation impose undue hardship; Does the regulation deny to the holders of the right their preferred means of exercising that right?) See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, pp. 1111-1112.

b. Is the infringement justified? The burden at this stage is on the Crown and considers whether there is the protection of a valid legislative objective; the Honour of the Crown; the minimization of the impact of the infringement; and the prioritization of the treaty right.

Application: the lack of evidentiary foundation frustrates the court's ability to determine the merits

30. The defendants' application with respect to their claim of a treaty right infringement is, based on their anticipated evidence, obviously going to fail. The Crown asks that it be summarily dismissed, with the Court's leave to reapply with a sufficient evidentiary record.

31. The defendants rely on the Treaty of 1752 to establish a treaty right. The Crown notes the following:

a. Article 8, on which they rely, is a general term which does not plainly say that which the defendants claim it does.

b. In order to characterize the right or rights afforded by Article 8, the Court needs evidence of historical context and the intention of the parties.

c. In order to know whether the Treaty of 1752 applies, the Court needs the evidence of experts.

32. The Crown position is not currently that the treaty claim is incapable of success on a full evidentiary record. That could not be the Crown's position; the Crown would need to assess the evidence. However, on the anticipated evidence of this application, the Court is simply incapable of determining that which must be determined: does the treaty apply and, if so, what is the right at issue?

33. The only anticipated evidence relating to the 1752 Treaty is the opinion of the meaning of Article 8 from a non-expert and with no historical context to support the opinion. It is incapable of supporting the application.

34. It is essential that treaty claims be heard, but also that they be heard on a proper evidentiary foundation. As van der Hoek ACJ said in *Marshall*:

> [51] It is necessary to say, this Court strongly supports the advancement of the law on aboriginal and Treaty rights. Truth and reconciliation require this much; however, the Court also has a clear understanding that such rights must be supported by proper foundational proof and rest on a connecting legal analysis. All courts should permit a fairly significant amount of time for defendants to gather their intended evidence. Despite a significant passage of time passing in this matter, that has not occurred, and as a result, I grant the application to summarily dismiss the Constitutional issues, *based on the information before me at this time.*
>
> [52] The matter cannot proceed on this foundation. I welcome a stronger one. [Emphasis in original]

CONCLUSION AND RELIEF SOUGHT

35. The Court should not hear the application on its merits, because it cannot determine the merits of the application on the evidentiary record before it. The complexity of treaty rights claims demands a more thorough consideration.

36. The Crown requests that the treaty rights constitutional challenge to s. 802.1 be dismissed for lack of evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

MacKay, Leonard

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