

CANADA

Case Nos. 06472410

PROVINCE OF NEW BRUNSWICK

IN THE PROVINCIAL COURT NEW BRUNSWICK

BETWEEN:

HIS MAJESTY THE KING

(as represented by Public Prosecution Service of Canada)

-and-

CHRISTOPHER LABILLOIS

DECISION

(Constitutionality of CC s. 802.1)

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Agent for the Defendant

1. On June 17, 2025, the defendant filed a Notice of Application, 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.

2. I am satisfied on a balance of probability that section 802.1 is in violation of section 35 of the *Constitution Act, 1982* as it relates to limiting the use of elder or delegate representation of Mi'kmaq peoples. The infringement is not saved by section 1 of the *Charter*.

3. The remedy applied is to “read in” section 802.1 to include an additional exception for a defendant who is a Mi'kmaq person asserting an Aboriginal right to be represented by an elder, delegate or sachem. Therefore, the section will apply as follows for the applicant:

802.1 Despite subsections 800(2) and 802(2), 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;

(c) the agent is authorized to do so under a program approved — or criteria established — by the lieutenant governor in council of the province; or

(d) the defendant is a Mi'kmaq person asserting an Aboriginal right to be represented by an elder or delegate.

4. I agree with the crown that the applicant has failed to show that he is a beneficiary of the 1752 Treaty. However, the oral history that I accept, and the overall context show on a balance of probability that the applicant has an Aboriginal right to agent representation by an elder or delegate in a summary conviction prosecution.

5. The court was presented with persuasive oral history of the aboriginal right to elder or delegate representation by many chiefs from local Mi'kmaq communities. The court was particularly impressed by the evidence of Hereditary Chief Nicholas Prisk who the parties agreed was a knowledge holder for the local Mi'kmaq community.

6. The crown historian Dr. Béreau did not contradict any of the oral history evidence presented by the applicant on this point. In fact the expert evidence of Dr. Béreau reinforced the oral history evidence of elder or delegate representation from a neighboring Mi'kmaq communities.

7. Aboriginal rights: An aboriginal right must be properly characterized, and the historic and contemporary right bearing communities identified as well as the claimant's membership in the relevant community.

8. The relevant time period for the examination of the activity is prior to European contact. The claimant must demonstrate that a practice, custom or tradition was integral to the indigenous community's distinctive existence and relationship to the land in the period before European contact. That requires meeting the "integral to a distinctive culture test" set out in *R. v. van der Peet*, [1996] 2 S.C.R. as modified in *R. v. Powley*, [2003] 2 S.C.R. 207.

9. A claimant must establish continuity between the practice, custom or tradition which constitutes the aboriginal right that existed pre-contact. "The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and trading post conduct; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre contact." (*van der Peet*, at para. 62-65).

10. There is also a need to consider whether the proposed aboriginal right was extinguished, and if so, was the extinguishment an infringement of the right, and justified.

11. The persuasive or legal burden of proof requires each claimant to establish that the claimed right is a logical evolution of the pre contact practice - "claims must still be established on the

basis of persuasive evidence demonstrating their validity on the balance of probabilities” (*Mitchell v. MNR*, [2001] 1 S.C.R. 911. Also see: *R. v. Sappier*, [2006] 2 S.C.R. 686, *R. v. Gray*, [2006] 2 S.C.R. 686 and *van der Peet*).

12. Treaty rights: In the case of Treaty rights, the persuasive or legal burden of proof is also on each claimant to establish, on a balance of probabilities, the existence of a Treaty right. Among other things, a claimant is required to prove that they are relying on a specific treaty right that extends to the practice at issue. That means there must be evidence that the historic community engaged in the practice before the Treaty. Finally, if there is an existing Treaty right to the practice at issue, that right has been infringed by the application to the complainant of the restriction imposed by the statutory or regulatory provision contravened.

13. Treaty rights are site specific and generally restricted to the territory traditionally used by the historic aboriginal community at the time of European contact. (*Sappier, Gray, R. v. Adams*, [1996] 3 S.C.R. 101, *R. v. Cote*, [1996] 3 S. C. R. 139, *Powley*).

14. Treaty rights can be established based on oral history and oral tradition evidence. The rules of evidence for the admission of such will be applied flexibly and, in a manner, commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in section 35(1) of the *Constitution*. (*van der Peet, Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911).

15. In *Mitchell*, the court addressed such evidence, “in this case, the parties presented evidence from historians and archaeologists. The aboriginal perspective was supplied by oral histories of elders such as Grand Chief Mitchell. Grand Chief Mitchell’s testimony, confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence credible and relied on it. He did not err in doing so and we may do the same. (paras. 937 and 938).

16. Because aboriginal and Treaty rights issues are complex, it is the case that historians, anthropologists, archaeologists, and genealogists are regularly called to testify. The court interprets the law.

17. The Supreme Court of Canada expanded on oral history evidence in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* 2020 SCC 4 at par 226:

226 Section 35 of the *Constitution Act, 1982* constitutionalizes the right of Indigenous peoples to claim Aboriginal rights and title in Canada. Aboriginal rights claims are complex, lengthy, and involve prodigious amounts of evidence: see, for example, *Delgamuukw*, at para. 89. Such evidence may include oral histories and other testimony based on the personal knowledge of witnesses. As aptly summarized by Satanove J. in *Kwakiutl Nation v. Canada (Attorney General)*, 2006 BCSC 1368(B.C. S.C.), at para. 26 (CanLII):

I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.

18. In *R. v. Marshall* 2005 SCC 43 at par 68 and 69:

68 Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.

69 The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world

and value system? Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

19. In *Mitchell v. Minister of National Revenue*, 2001 CSC 33 at pars 31 to 34:

31 In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

32 Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned [...].

33 The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

34 In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facetiously rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

20. I now turn to the evidence presented. I do not believe it is necessary to recite or set out in detail the respective testimonies. Instead, I will refer to the salient parts of the evidence during my analysis of the principal issue to be determined.

21. The applicant called 5 witnesses to support its Notice of Application.

22. Chris Thomas George is the current Eel River Bar Chief (aka Ugpi'ganjig). He was a past counselor. He received various levels of education in indigenous history.

23. He Identified the applicant as a Mi'kmaq member of the Eel River Bar first nation. The applicant comes to counsel often. The applicant provides food and wood for the community. The applicant is a sweat lodge keeper. Finally, the applicant wishes to become a medicine man.

24. Peace and Friendship Treaty provided for district leadership divided into 7 districts of Mi'kmaq territory. This area was the northernmost district from Matapedia to Miramichi. There was a series of villages and clans. The Mi'kmaq were governed by a Grand Counsel. There was a formal government structure prior to European contact.

25. Leaders were chosen by voting. Elder means knowledge and wisdom. Elders were chosen by consensus through conversation. Elders were to display their knowledge. Elders are also known as knowledge holders. Elders dedicate their lives to indigenous law.

26. The TRC considered the violence and trauma informed approach going forward not to re-traumatize the individual. Elder representation mitigates violence. It is common tradition to include elders, and it is in line with Mi'kmaq tradition.

27. Chief Del Riley from the Chippewa nation in ON great lakes American nation. He was a traditional chief and not paid. He is the author and chief negotiator of section 35 of the *Constitution Act, 1982*. Chief Riley gave a historical account of his youth, education as well his opinion on the *Indian Act*.

28. The original treaty process involved elders. Chiefs at the time did not hold authority, it was the knowledge keepers. The systems in each first nations similar, excepts the Iroquois. Everyone participated in disputes. They use the silver covenant chain process.

29. There is no formal process to determine elder. The elder is to work with its people. There is no certificate. Chief Riley has a long history of agent representation. The Mi'kmaq Rights Association requested his assistance as an elder. Many lawyers are dismissed before his assistance was requested by the applicant.

30. Christopher Labillois the Applicant, is a Ge'tipineu harvester of multiple things. To provide for his people that have a need. He prepares sweet grass. He harvests moose and shares half. He fishes lobsters and provides for events in his community.

31. Before the Applicant received the agent to represent him, he refused to make a plea. He felt under duress. The applicant felt fear of the Department of Fisheries and Oceans. In past charges the applicant was frustrated and self-represented. Many judges recommended lawyers. Every lawyer comes to the same conclusion, that they are not educated in aboriginal law. The applicant requested the assistance of Chief Del Riley.

32. Elder means holder of knowledge and teacher. They make me stand stronger. Most of my teachers are afraid to speak as they are afraid of repercussions. The applicant is confused why he is not allowed to have elder representation. The applicant cannot find a lawyer to use the right words.

33. Thomas Durfee is part of the Mi'kmaq national board of directors. He gave an account of his history and his current legal issues in NS. He is involved with the Mi'kmaq Rights Association. The applicant is a member of MRA. He is involved in structuring the constitution of the MRA.

34. MRA has a mandate to educate non-indigenous and protect the indigenous rights. Mr. Durfee has used lawyers in the past. The lawyers do not understand fully the workings of treaty rights. Mr. Durfee has sought the assistance of Chief Riley and has self-represented.

35. Hereditary Chief Nicholas Prisk from Papineau First Nation (aka Oinpegitjoig). He has self-represented many times in the past. He detailed his family history and his past legal issues.

36. Mr. Prisk continued to detail his understanding of the history of the Mi'kmaq. He indicated that elders got together to resolve the disputes. The Mi'kmaq would do workshops on restorative justice and healing circles.

37. The goal was harmony in the community, restorative harmony. If reconciliation was not possible the perpetrator was banished. The perpetrator could be reintegrated as if you never left. Mi'kmaq laws different from European law. Used Matriarchal system.

38. Sufficient age contributes to being an elder. Some are more knowledgeable than others. Elder system is broken down and eroded; however, people are still going to elders with problems. Elders are there to guide the people. Elders don't charge, they receive freely, and they freely give.

39. Elders are knowledge holders. That is part of Mi'kmaq history for thousands of years. Present at time of European contact. The people went to the elders. Elders give direction.

40. The usage of elders has eroded because of atrocities and lifestyles in communities. Alcohol and drugs. Families visit families less and less today. However elder use is on a comeback. More and more young people are turning to the elders.

41. Mr. Prisk then gave his view of the effect of colonialism on the Mi'kmaq people and the effect of the *Indian Act*.

42. Mr. Prisk said a putus is a native legal representative. He was responsible for interpretation of agreements with other first nation. Along with wampum belts. Mi'kmaq had their own governments. Meeting held in circular form on the hill side. The warriors would face backwards for protection.

43. He grew up knowing the system and they got rid of that system. The knowledge holders represent the people involved in disputes. Personal disputes in community or different territory. Mi'kmaq territorial limits NF NB NS PEI.

44. He said indigenous lawyers are licensed by the same crown. The Mi'Kmaq are an independent sovereign nation able to defend themselves.

45. Hector Pictou held the title of national chief. Mr. Pictou gave an account of his past activities as national chief. He is a member of the Eel River Bar Chief (aka Ugpi'ganjig) and a friend of the applicant.

46. Mr. Pictou said that the word elder should not be used but putus. Putus means knowledge holder that would advance indigenous law.

47. Mr. Pictou then gave his views on colonialism and the history of the Mi'kmaq people.

48. The Crown offered the evidence of historian Dr. Béreau. Dr. Béreau prepared a detailed report on the context of the signing of the 18th century treaties with the Shubenacadie tribes' part of Nova Scotia.

49. The signatories and beneficiaries of the 18th century treaties were Jean-Batiste Cope and his 3 delegates. Cope undertook to consult the other Mi'kmaq tribes to make peace.

50. On cross-examination Dr. Béreau indicated that prior 1713 the Mi'kmaq maintained relationship with the French. The historical record is established through treaty. The relationship the Mi'kmaq had with the French and English was not the same.

51. The 1760-61 treaty was a new start as British gained full power over the land. Activate and re-activate the submission. Dr. Béreau indicated that the 1725-26 Treaty is not a continuing relationship.

52. Article 8 of 1752 Treaty carried forward the redress mechanism. Imposed British laws on new territory. Aimed to prevent acts of private retaliation. Dr. Béreau offered one account of British violence toward the Mi'kmaq in 1753 that received redress.

53. The delegates of the 18th century Treaties were from the Shubenacadie tribe. The Mi'kmaq were picking people to speak on their own behalf.

54. British were pragmatic and wanted a peaceful relationship aimed at consolidating their settlements. The Mi'kmaq were hoping to consolidate and confirm their rights. The Mi'kmaq learned to be skeptical and the British were skeptical as well. The British were more practical.

55. Mi'kmaq engaged chosen representative as delegated. The British wanted to make peace with other tribes and communities. British took particular attention to be sure the person acting for the communities were representative. The Mi'kmaq did have their own structure of regulating themselves to resolve tensions.

56. Chief chosen by hereditary transposition old chief. Chief is chosen by skills of eloquence, hunting, fishing and generosity. Spiritual dimension added to the power and representativity to become chief. For delegates a valuable individual that understands the community. Elders not able to go all the time. The knowledge keepers know the traditions and history of their communities. There is consistent practice of delegates.

57. During the 18th century, Mi'kmaq were aware that a paper was required for the British crown to be bound. Made difference between an encounter and a treaty. An encounter was less important and used to pacify or redress a situation.

58. 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.

59. Section 802.1 is a relatively new piece of legislation enacted in 2002 and in *R. v. May*, 2008 ABPC 59 at par 21:

Section 802.1 came into effect in 2002. I have been unable to find any Parliamentary debate or commentary in Hansard or Committee Minutes speaking to this particular section. Neither have I been able to find any other commentary on this section and its purpose so as to assist in deciding the limits of its application.

60. Section 802.1 has survived constitutional scrutiny in the case of *R. v. Frick*, 2010 ABPC 280 following a bill that increased the maximum penalty of impaired offences over 6 months.

61. This legislation has never been challenged with respect to an infringement of aboriginal law. This procedural legislation appears to have been enacted without any debate or input on prospective effects on indigenous justice participants.

62. This issue is a novel issue as section 802.1 has never been challenged under Aboriginal law. Parliament has already 3 exceptions included in the section. The third exception provides for a program approved — or criteria established — by the lieutenant governor in council of the province.

63. I was not offered any submissions or evidence on the available programs available in the Province of New Brunswick. In any event all parties are not alleging that the proposed agent in this case is part of the 3rd exception.

64. I am satisfied on a balance of probability that the evidence in this case has properly characterized the Aboriginal right to agent representation on summary conviction prosecutions by an elder or delegate in the Mi'kmaq community.

65. I am satisfied that the historic and contemporary procedural right to agent representation by an elder or delegate was present pre contact with the Europeans and practiced in the Applicant's specific Mi'kmaq community of Ugpi'ganjig as indicated by Hereditary Chief Prisk.

66. Dr. Béreau confirmed on cross-examination that the Mi'kmaq practice of agent representative by an elder or delegate was used in the context of Treaty negotiations and encounters to resolve disputes.

67. I am satisfied that the practice of agent representation by an elder or delegate was integral to the Applicant's indigenous community of Ugpi'ganjig.

68. I am satisfied that the practice of agent representation by an elder or delegate to resolve disputes in the indigenous community of Ugpi'ganjig has continued over the last 3 centuries. As indicated by Hereditary Chief Prisk the use of elder or delegates has been eroded over the years but is now on a comeback as he says.

69. I am satisfied that elder or delegate representation has not been extinguished. I am satisfied that elder or delegate representation in summary conviction prosecutions is an aboriginal right that is a logical evolution of the pre contact practice.

70. The oral history evidence of Hereditary Chief Prisk indicated he has personal knowledge of this aboriginal right. I am using a generous approach to the evidence as instructed in *R. v. Marshall*, supra. Oral history evidence must be accepted on the conditions of usefulness and reasonable reliability.

71. I find that the evidence of Hereditary Chief Prisk was a credible historian of the local Mi'kmaq community practice of elder or delegate representation and held a strong convictions in his account. The oral history evidence was detailed and non-speculative.

72. I find that no other means than oral history evidence was available to the Applicant to detail the specific aboriginal procedural right.

73. Evaluated from the aboriginal perspective I find that elder or delegate representation in summary conviction prosecutions is a natural translation to the facts found and interpreted into a modern common law system while respecting the aboriginal perspective.

74. I am also satisfied that the proposed agent Chief Del Riley and his delegate Mr. Keefer meet all the requirements to be an elder or delegate.



Martin A. Goguen. J.