

By the Court:

Cody Bowser-Knockwood, the Respondent in this matter, is charged with offences contained in three separate informations contrary to the *Revenue Act*, SNS 1995-96, c. 17; the *Tobacco Access Act*, SNS 1993, c. 14; the *Cannabis Act*, SC 2018, c. 16 and the *Controlled Drugs and Substances Act*, SC 1996, c.19, all allegedly committed in Amherst, Nova Scotia between the 27 August and 17 October 2024.

Mr. Bowser-Knockwood has pled not guilty to all charges and trial on these matters is scheduled for November 17 and 18, 2026. A *Notice of Constitutional Question* was filed, raising a s. 35 *Constitution Act* defence and challenging the provisions under which he was charged.

An agreed statement of facts was filed pursuant to s. 655 of the *Criminal Code* which stipulates that “On August 27, 2024, Cody Edward Joseph Bowser-Knockwood was the owner and operator of the business known as the Mi’Kma’ki Truck House, located at 60 South Albion Street, Amherst, Nova Scotia.”

In August and October 2024, police investigated suspected illegal cannabis sales at 60 South Albion Street, Amherst, Nova Scotia. The investigation led to the issuance of *Cannabis Act* search warrants, which revealed quantities of illicit cannabis, tobacco and psilocybin products, as well as related paraphernalia.

On October 6, 2025, Mr. Bowser-Knockwood brought a *Notice of Constitutional Question (hereinafter NCQ)* alleging that section 802.1 of the *Criminal Code*, breaches both an Aboriginal right and a Treaty Right.

s. 802.1 of the *Code* bars agents from representing defendants on summary matters for which the maximum penalty exceeds six months.

Mr. Bowser-Knockwood has been assisted thus far by agents Tom Keefer and Chief Delbert Riley and wishes for them to continue to act as his representatives throughout the trial process.

The Respondent, Mr. Bowser-Knockwood seeks the following relief:

1. 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.

2. 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.
3. 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.

Mr. Bowser-Knockwood is therefore claiming a treaty right and an Aboriginal right to be represented by an elder.

The Crown has made a motion for summary dismissal of the *NCQ* in relation to both the Aboriginal right and treaty right claim, but for different reasons. The Crown submits that the Aboriginal rights claim should be summarily dismissed because the claim, as it is framed, is incapable of success or because the Court cannot determine the merits of the application on the evidentiary record before it.

The Crown, in their application for summary dismissal takes the position that this application cannot be founded on an Aboriginal right, as Aboriginal rights must relate to practices of central significance to the pre-contact culture of the Indigenous society in question and that the s. 35 claim is not capable of success on any evidence and should therefore be dismissed.

The Crown further submits that the treaty rights claim should also be dismissed because the Court cannot determine the merits of the application on the evidentiary record before it, and that the complexity of treaty rights claims requires a more thorough consideration.

The position of the Crown is that no expert evidence was led to establish the nature of the Treaty, the historical context of the Treaty, or the application of the Treaty or the intentions of the parties to the Treaty when it was signed, and that the Respondent relies on its assertions of the applicability based on the evidence of lay witnesses Chief Delbert Riley, Chief Susan Levi-Peters, Chris Googoo and the Respondent, Cody Bowser-Knockwood.

The Crown contends that in the absence of an evidentiary foundation that provides a basis for the Constitutional/treaty challenge, the application should result in summary dismissal of the application to protect scarce judicial resources.

The Crown's position is that without the proper evidentiary foundation, neither the Crown, nor the Court, can properly assess the merits of the Application, and that the Respondent, Mr. Bowser-Knockwood cannot point to the anticipated evidence that is capable of establishing the factual foundation necessary to support the application. As a result, the application should be dismissed as being "manifestly frivolous" as that test is described in *R. v. Haevischer*, 2023 SCC 11.

The maximum penalties for the offences Mr. Bowser-Knockwood stands charged under the *Revenue Act*, the *Tobacco Access Act* and the *Cannabis Act* do not exceed a 6-month maximum penalty of imprisonment when, as in this case, the matters are proceeded with summarily. The charge under s. 5(2) of the *Controlled Drugs and Substances Act* alleging possession of a Schedule III substance, specifically psilocybin, for the purposes of trafficking carries a maximum penalty on summary conviction of 18 months incarceration, thereby precluding agent representation in accordance with s. 802.1 CC.

In addition to appearing as a witness for the Respondent in this matter, Chief Riley is also a proposed Elder/agent representative in this matter, in addition to Mr. Keefer whom the Respondent wishes to represent him at trial. In addition to witness testimony, one exhibit was also entered into the record. The Court heard submissions on Mr. Bowser-Knockwood's *NCQ* application and the Crown's application for summary dismissal. I have also received and considered written submissions from both parties. Although I may not reference all of the evidence led by witnesses or the submissions that were made both orally and in writing in the course of of this decision, I have considered them fully.

Chief Riley gave evidence from a position of substantial knowledge regarding Indigenous governance, treaty relationships, and the constitutional recognition of Aboriginal and treaty rights based on his own extensive experience as a provincial and national leader and through his own learning journey. There is no doubt that he provided evidence informed by extensive knowledge and experience respecting Aboriginal rights, treaties, and the interpretation of s. 35 of the *Constitution Act, 1982*."

Chief Riley's testimony spanned several hours. The Court does not propose to attempt a comprehensive summary of his testimony, nor could a brief recitation adequately capture the breadth of his lifetime of personal experience and knowledge concerning Aboriginal and treaty rights and their historical development, and his personal role in advancing these rights.

It is important to note that Chief Riley was not called as an expert witness, but as a lay witness and as a potential agent/Elder representative for Mr. Bowser-Knockwood, and consequently as an advocate for him over the course of the hearing of the matter before the Court.

The Court accepts that Chief Riley possesses extensive knowledge and experience concerning Aboriginal and treaty rights and their historical context. However, Mr. Bowser-Knockwood did not propose to call Chief Riley as an expert witness, nor was any application made to have him qualified as such.

In any event, one of the requirements for the admission of expert opinion evidence is that the proposed expert be willing and able to provide independent and unbiased assistance to the Court and that he or she appear to do so. While the Court does not question Chief Riley's sincerity or the depth of his commitment to the advancement and protection of Aboriginal rights, the evidence establishes that he has devoted much of his professional life to advocating for those rights. In these circumstances, the Court could not be satisfied without further investigation into his qualifications, which is achieved through the expert qualification process that Chief Riley could reasonably be viewed as independent of the interests at stake in this proceeding. Accordingly, his evidence is considered as that of a knowledgeable lay witness and a proposed Elder/agent representative, rather than as expert opinion evidence.

Susan Levi Peters testified as a witness for Mr. Bowser-Knockwood. She is a member of the Elsipogtog First Nation, she is a prior Chief of that community who is descended from generations of Chiefs. Her family has served as leaders in her community for a very long time, and she is rightfully proud of her family's place in history.

Ms. Levi-Peters has carried on her father's work researching treaties and the relationship between the Miq'mak people and the Canadian government. She is a strong advocate for Aboriginal rights and spoke at length about the history of the Miq'mac and Maliseet people and how disputes have traditionally been handled within her community in the past and in dealing with the criminal justice system in more recent times. As with Chief Riley's evidence, the Court cannot do justice to her extensive experience as leader and her knowledge pertaining to her community.

She was not tendered as an expert witness, and accordingly, her evidence will be considered to be that of a knowledgeable lay witness.

Chris Googoo testified for the Respondent. He testified that he is a member of the Millbrook First Nation and can trace his lineage back to Jean Baptiste Cope, signatory of the Treaty of 1752. He has educated himself about Aboriginal rights and treaties.

Mr. Googoo has acted as a band counsellor and strong community advocate for Miq'mak rights. He is an avid fisher and hunter and he is also a business owner in his community, operating a local "truck house" selling tobacco and cannabis products. He has given back to his community and testified that he has started asserting his rights as an Aboriginal person and is exercising his right to self government and determination. His evidence was that there are two nations, the Miq'mak and Canadian nations, and that the Canadian government cannot define those rights. In furtherance of his quest for sovereignty and self-determination for his community, he founded the Miq'mak Rights Association (MMRA).

Mr. Googoo expressed a lack of confidence in non-native lawyers in their ability to represent clients dealing with Aboriginal rights issues in the colonial based system because they have not been educated about sovereignty and Aboriginal rights issues.

Mr. Googoo testified about the other Miq'mak rights organizations and provided his view on the role of band council and the various organizations and his belief that to some extent, the traditional organizations have been detrimental to the advancement of Aboriginal rights to sovereignty and self-determination.

The Court recognizes and accepts his evidence as that of a lay witness, as he was not proffered as an expert witness in this matter.

The Respondent, Cody Bowser-Knockwood testified about his upbringing and his relationship to the Fort Folly First Nation in New Brunswick and his close familial connection to the Sipekne'katik and Big Cove First Nations. He is a member of the Miq'mak Rights Association and has asserted his treaty rights as a fisher for most of his life.

Mr. Bowser-Knockwood heard about Chief Riley many years ago through his grandfather, who had great respect for him. He testified that he wanted Chief Riley to represent him in Court as and Elder/agent representative.

The Challenged Legislation – s. 802.1 C.C.

Parliamentary Intent

The original version of s. 802.1 was introduced through omnibus *Bill C-15A – Criminal Law Amendment Act, 2001*. As its title suggests, *Bill C-15A* contained multiple amendments and inclusions to the body of Canadian criminal law, including crimes against children, firearms offences animal cruelty and in this case, limitations on the use of agents. The original version reads as follows;

- Clause 79:

The Act is amended by adding the following after section 802:

Limitation on the use of agents

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 the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

Section 802.1 as contained in *Bill C-15* did not receive much attention or Parliamentary debate which would assist in determining the legislative intent.

The Legislative Summary entitled LS-410E – “Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts” – D. Goetz & G. Lafreniere – October 12, 2001 -Revised September 30, 2002 reads at page 16:

8. Restriction on Use of Agents

Clause 79 restricts the ability of non-lawyers (i.e., agents) to represent accused persons in summary conviction proceedings. In such cases, where an accused would be liable on conviction to a possible sentence of imprisonment for more than six months, an agent could act for the accused only where the accused was a corporation or where the agent was so authorized under a program approved by the province’s lieutenant governor in council. Agents are already precluded from representing accused persons in indictable proceedings. (4)

Footnote (4): Although sections 800(2) and 802(2) of the *Code*, dealing with summary conviction proceedings provide that an accused may appear and examine and cross-examine witnesses personally, by counsel, or by agent, section 650(3), dealing with indictable proceedings, provides that an accused is entitled to make full answer and defence to the prosecution’s case either personally or by counsel (i.e. no reference to agents).

More recently, *Bill C-75* amended s. 802.1. The current version has been in force since September 19, 2019 and included amendments that gave provinces and territories the additional ability to establish criteria for agent representation for summary conviction offences with a maximum penalty of greater than six months imprisonment and would also allow agents to appear on any summary conviction offence for the purpose of an adjournment of proceedings. The amended version of s. 802.1 which remains in force reads as follows:

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; 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.

2002, c. 13, s. 792019, c. 25, s. 317.1

The Department of Justice published a Legislative Backgrounder for Bill C-75 on October 19, 2019 (*Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)*)

- At pages 27 to 28:

Agents

(Clause 317.1)

Section 802.1 of the Criminal Code currently authorizes agents (personas other than lawyers such as paralegals, articling students and non-legally trained individuals) to represent defendants in summary conviction proceedings if the maximum penalty is six months or less, unless the accused is a corporation or the agent is authorized to do so under a provincially/territorially-approved program. **Where they exist, such programs include Indigenous Courtworker programs, student legal clinic/articling programs and paralegal programs.** (emphasis added)

This provides the Court with limited insight to Parliament's purpose in enacting s. 802., but a review of the caselaw is helpful.

In *R. v. May*, 2008 ABPC 50, Judge LeGrandeur provided an extensive analysis of Parliament's purpose in enacting s. 802.1. His analysis engaged statutory interpretation tools and the history and evolution of the law. Judge LeGrandeur found that when there is more than one charge, the six-month maximum should not be treated cumulatively, such that an agent is not prohibited per. s. 802.1.

The decision in *May* was contrary to a previous decision Judge Fradsham in *R. v. Spiry*, 2005 ABPC who decided that the six-month maximum should be treated cumulatively for multiple charges, thereby barring agent representation per s. 802.1.

The reasoning in *May* was affirmed and adopted in *R. v. Trudeau*, 202 ABQB 14. In that case, the Court was considering an Order of mandamus remitted the matter in question back to the Provincial Court. The Court included a direction that the accused be permitted to use an agent for two summary charges, each of which carried a six-month maximum punishment.

Justice Henderson in *R. v. D'Arcy*, 2015 ABPC 6 also reviewed the legislative history of s. 802.1 and stated at paragraph 66:

66. The purpose of s. 802.1 is to regulate agents who are permitted to represent defendants in summary conviction matters with enhanced penalties so as to minimize the risk of harm which can be caused by agents who are lacking in training or skill. Much of the risk to a defendant occurs at the trial proper. However, it is not correct to say that all docket appearances are simply routine and clerical functions involving no risk to the defendant. For example, a defendant is required to enter a plea in a docket court or at the CMO before a trial date can be confirmed. This is a substantive stage in the litigation and gives rise to consequences for the defendant period it puts the defendant in jeopardy and affects his or her rights: *R. v. Petersen*, [1982] 2 S.C.R. 493 (S.C.C.) at page 501. The jeopardy which arises in the docket court stage of criminal litigation argues against the narrow interpretation which the crown proposes for s. 802.1.

In *R. v. Laurie*, 2009 ONCJ 428 Speyer J. found that section 802.1 of the *Criminal Code* explicitly prohibits paralegals from representing accused persons in summary conviction cases where the maximum penalty exceeds six months' imprisonment,

unless authorized under a program approved by the lieutenant governor in council. The court rejected the argument that it had common law jurisdiction to override these legislative restrictions, as the legislation displaces common law in this context (paras 10-17, 20).

A Constitutional challenge to s. 802.1 was addressed in *R. v. Frick*, 2010 ABPC 280. The Court stated at para 27:

...this court has in this case characterized s. 802.1 in the following manner: In enacting s. 802.1, Parliament essentially stipulated that on certain offences, the accused is in greater jeopardy. In those cases, the only category of people that Parliament will permit before the court are lawyers, or agents that the Province specifically deems qualified. **Parliament is not attempting to govern the qualifications of those appearing, that power correctly remains with the province. Instead, Parliament is indicating that, as a matter of procedure, these are more serious matters and demand that the Province turn its attention to who is qualified to appear on these particular offences.** (emphasis added)

Most recently, in this jurisdiction, Justice Jeffrey R. Hunt in *R. v. Hillman*, 2015, NSSC 359 (CanLII) denied the accused the right to be represented by a lay agent on a charge contrary to s. 7(1) of the *Controlled Drugs and Substances Act*.

Justice Hunt found that the *Criminal Code of Canada* is silent on lay representation in indictable matters, while expressly permitting agents in some summary matters under s. 800(2). He noted that section 802.1 limits the agent's role in summary matters, including barring examination or cross-examination where the maximum period of imprisonment exceeds six months (para 4). Residual power exists to limit or forbid appointment of a particular agent even where s. 800(2) applies, noting that the court has exercised this power in appropriate circumstances to limit or forbid particular agents. (para 5).

Justice Hunt stated the following at paragraph 9:

have reviewed the case law, and I have considered the positions and arguments put by both parties. In my view this matter is determined by a common sense reading of s. 800(2) and s. 800(2.1). Section 802.1 precludes representation by agents in summary matters where the accused is liable to a

penalty of more than six months. This particular provision I conclude is critical to understanding Parliament's intention as it pertains to indictable offences.

Based on the foregoing, it would appear that Parliament's intention in enacting s. 802.1 was twofold. First, s. 802.1 was intended to protect the fairness and integrity of summary proceedings which carry a risk of significant incarceration (greater than six months). Where the maximum period of imprisonment exceeds six months, Parliament intended that the accused either appear personally or be represented by qualified counsel rather than by an unregulated agent. This reflects the increased complexity and significance of such proceedings that may result in lengthier periods of incarceration. Second, rather than imposing an absolute prohibition on agent representation, Parliament permitted provinces to authorize agents through approved programs established by the lieutenant governor in council. This indicates an intention to allow provinces to regulate competent non-lawyer representation while maintaining safeguards in more serious cases. (emphasis added)

From the foregoing, it is clear that the intention of Parliament in enacting the legislation was to protect the accused and the fairness of proceedings where the accused faces a greater potential period of incarceration, and also to permit a process whereby agents can represent accused person in such circumstances subject to regulation by the province.

Aboriginal and Treaty Rights

The Respondent argues that the *Peace and Friendship Treaty of 1752* confers a Treaty Right to permit agent or Elder representation, which section 802.1 infringes. The Respondent's reference to "the 1752 Treaty" is a reference to the *Peace and Friendship Treaty of 1752*, which contains the following language at Article 8:

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 tried in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Priviledges, as any other of His Majesty's Subjects. (*R. v. Simon*, [1985] 2 S.C.R. 387, at para 6).

Section 35 of the *Constitution Act* states:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired. (*Constitution Act*, 1982, s. 35)

Associate Chief Judge Ronda van der Hoek provided a helpful and succinct description of Aboriginal and Treaty rights in *R. v Marshall et. al.*, 2024 NSPC 33 at paras 9-19 which this Court adopts and has reproduced below:

General legal context:

[9] **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.

[10] 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 SCC 43 \(CanLII\)](#), [2003] 2 S.C.R. 207.

[11] 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 Respondent 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)

[12] 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.

[13] 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 SCC 33 \(CanLII\)](#), [2001] 1 S.C.R. 911. Also see: *R. v. Sappier*, [2006 SCC 54 \(CanLII\)](#), [2006] 2 S.C.R. 686, *R. v. Gray*, [2006] 2 S.C.R. 686 and *van der Peet*). (emphasis added).

[14] Courts cannot draw a positive inference that an aboriginal right exists in the absence of historical record. This has often been described as the “just because there is no evidence, does not mean it did not exist” argument.

Treaty Rights

[15] **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 to trade and the specific right to trade extends to the item or commodity at issue. That means there must be evidence that the historic community engaged in trading the item before the Treaty, or that it was a traded item reasonably contemplated by the parties to the Treaty. Finally, if there is an existing Treaty right to trade in the item or commodity at issue, that right has been infringed by the application to the complainant of the restriction imposed by the statutory or regulatory provision contravened. In *Marshall and Bernard*, the Supreme Court of Canada confirmed that the Mi’kmaq Treaties confirmed a specific right to trade but limits the right to those items traditionally harvested as part of their hunting, fishing, and gathering activities. In other words, items reasonably in the contemplation of the parties, or items traditionally gathered.

[16] 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 CanLII 169 \(SCC\)](#), [1996] 3 S.C.R. 101, *R. v. Cote*, [1996 CanLII 170 \(SCC\)](#), [1996] 3 S. C. R. 139, *Powley*.)

[17] Treaty rights can be established on the basis of 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 CanLII 302 \(SCC\)](#), [1997] 3 S.C.R. 1010, and *Mitchell v. M.N.R.* [2001 SCC 33 \(CanLII\)](#), [2001] 1 S.C.R. 911)

[18] 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)

[19] 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. (emphasis added)

Summary Dismissal

I now consider the Crown's motion to summarily dismiss Mr. Bowser-Knockwood's application based on the test in *Haevischer, supra*. In that case, the Supreme Court of Canada considered two co-existing and underlying values – trial fairness and trial efficiency (para 46). The Court noted that trial fairness is a Constitutional imperative and that summary dismissal applications must meet a rigorous standard before a dismissal will result (para. 60).

At paragraph 67, the Court noted that such a threshold is “also supported by the particular characteristics of criminal trials, including how the trial judge’s broad case management powers can help ensure the efficient, effective and proportionate use of court resources as well as the accused’s fair trial rights”.

The Court found that the term “manifestly frivolous” best reflects this objective. The use of the term “frivolous” was intended to weed out those applications that will necessarily fail, so if an application is frivolous, it has to fail (para. 67), while “manifestly” connotes that “the frivolous nature of the application should be obvious” (para. 69).

The “manifestly frivolous” standard protects fair trial rights and ensures that applications which might succeed are heard on their merits. The Court set out a process to apply when summary dismissal applications are heard (para 83).

First, on the application the Court should assume the facts alleged by the Respondent are true with no need to weigh evidence or make findings of facts. The judge must assume the facts to be true and take the Respondent’s arguments at their highest (*Haveischer*, at para 14, *R. v. Vukelich*, [1996 CanLII 1005 \(BC CA\)](#) at para 26.

The standard “manifestly frivolous” will be met if there is no anticipated evidence to establish a necessary fact; the facts required to support a necessary inference are absent or the inference being sought is impermissible; there is a fundamental flaw in the application's legal pathway; the remedy could never issue on the alleged facts; or key portions of the application are missing: *Haevischer*, paras. 83-89. It is important to note, “even if competing inferences are preferred, the judge ought to generally assume the inferences suggested by the Respondent are true. The court can only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference, for example, where a necessary fact underpinning the inferences is not alleged or if the inference cannot be drawn as a matter of law for example the proposed inference is based on impermissible reasoning: (*Haevischer*, para. 84).

The trial Judge’s power to summarily dismiss an application is ongoing. Even if the judge permits the application to proceed to a voir dire, the Judge retains the ability to summarily dismiss the application during the voir dire if and when it

becomes apparent that the application is manifestly frivolous (*R v Cody*, [2017 SCC 31 \(CanLII\)](#), [2017] 1 SCR 659 at para. 38, citing *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631 at para. 63) This may occur if the Respondent is unable to elicit any evidence, contested or otherwise, to prove a necessary fact.

While there is no need to weigh the evidence or decide any facts on a summary dismissal motion, the Respondent's underlying application should explain the factual foundation and point towards anticipated evidence that could establish their alleged facts.

Where the Respondent cannot point toward any anticipated evidence that could establish the necessary facts, the Judge can reject the factual allegation as manifestly frivolous.

In *R. v. Kazman*, 2020 ONCA 22 the Ontario Court of Appeal commented on the trial management power of judges in the context of constitutional challenges. At paras 15 and 16 the Court held:

[15] The power to dismiss motions summarily, especially motions involving constitutional claims, must be exercised cautiously. Motions that advance constitutional claims should be address on their merits unless the broader interest of justice clearly demand otherwise: *R. v. Loveman* (1992), 1992 CanLII 2830, 8 O.R. (3d), at pp. 55-56 (C.A.). In deciding whether to dismiss a motion summarily, the trial judge must have regard to the interests of the accused. The trial judge's focus cannot, however, be limited to the narrow specifics of the particular case. The trial judge must consider broader administration of justice concerns, including the need to conduct all litigation, including criminal litigation, in a fair, orderly, and efficient manner. It falls to trial judges to decide where the interests of justice lie in each specific case.

[16] The broader administration of justice concerns were placed front and centre in the powerful reasons of the majority in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 137-141. Speaking specifically about the constitutional right to a trial within a reasonable time and the litigation that claims based on that right have spawned, Moldaver J. for the majority stressed that all participants in criminal litigation have a joint obligation to

work co-operatively to effectively use limited available resources in order to ring cases to completion within a reasonable time.: see also *R. v. Cody*, 2017, SCC 31, [2017] 1 S.C.R. 659, at para 1. No one, including self-represented accused, can be allowed to ignore court orders and deadlines while the constitutional clock runs down and valuable court resources are consumed. After *Jordan*, trial judges must engage in proactive case management of criminal trials. Litigants must cooperate in those case management efforts. Appellate courts must support those proactive steps by showing strong deference to case management decisions: *Jordan*, at paras 138-139.

Aboriginal Rights Claims

In relation to Aboriginal rights claims, the analysis of whether a practice constitutes an aboriginal right is assessed according to the three-part test set out in *R. v. VanDerPeet*:

1. Characterize the right claimed in light of the pleadings and the evidence;
2. Determine whether the claimant has proven that a relevant pre-contact tradition or custom existed and was essential to the distinctive culture of the pre-contact society and;
3. Determine whether the claimed modern right is demonstrably connected to and recently regarded as a continuation of the pre-contact practice period. That the practice must have been integral to the pre-contact culture of the indigenous group is central to the test for establishing the aboriginal right.

The Supreme Court of Canada in *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para 60 affirmed that the practice must have been integral to the pre-contact culture of the Indigenous group to meet the test for establishing an Aboriginal right:

60. The time period that a court should consider in identifying whether the rights claim meets the standard of being integral to the aboriginal community claiming the right is the period *prior* to the contact between the aboriginal and the European society because it is a fact that distinctive Aboriginal societies lived on the land prior to the arrival of the Europeans that underlies the Aboriginal rights protected by s. 35(1) of the *Constitution*

Act. It is to that pre-contact period that the Court must look at in identifying Aboriginal rights. (emphasis added)

Precision in pleadings is critical to understand exactly how the Respondent is claiming the Aboriginal Right. The Crown noted that in other similar applications this has been framed in terms of post-contact practice, specifically that an Aboriginal right exists in the practice of having representation by Elders in legal matters with the British (Crown).

The Court agrees with the submissions of the Crown that this right, as asserted, is legally incapable of founding an Aboriginal rights claim. The practice of Elder representation in legal matters with the British does not relate to “the period prior to contact between aboriginal and European societies”, rather, it depends on the contact between Aboriginal and European societies and therefore falls outside the framework of the *Van der Peet* analysis.

Judge van der Hoek stated the following in *Marshall et al.*, *supra* at para 52:

[52] It is necessary to say, this Court strongly supports the advancement of the law of 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.

[53] *The matter cannot proceed on this foundation; I welcome a stronger one.* (emphasis added)

Mr. Bowser-Knockwood did not call any expert evidence to support a pre-contact Aboriginal right after being given a significant period of time to do so.

I find that the Respondent was given sufficient time to retain an Expert, if he chose to do so. The importance of compliance with the *Nova Scotia Provincial Court Rules* notice requirements was also reviewed and explained to the Respondent during pre-trial appearances.

The NCQ was filed on October 6, 2025, but the 802.1 issue was raised by the Crown much earlier. Chief Riley and Mr. Keefer filed a brief on April 24, 2025 titled “Representation of Mi’kmaq Defendants by Elders – Constitutional Brief”. The NCQ was filed five months after the brief and there were numerous pre-trial conferences following the filing of the NCQ prior to the hearing including:

17 November 2025 – Pre-trial conference held. Adjourned until December 9, 2025 to set dates for the hearing of the 802.1 NCQ.

9 December 2025 – Pre-trial held. Trial dates of February 24 & 25, 2026 to be used for NCQ 802.1 hearing. Filing date of January 24, 2026 set for Respondent’s Notice of Expert Testimony. Filing date for Respondent’s pre-hearing brief January 9, 2026; Crown reply due January 23, 2026.

23 December 2025 – Pre-trial held, filing deadlines confirmed, hearing dates confirmed.

24 February 2026 – s. 802.1 NCQ hearing day 1 adjourned per Respondent’s request due to poor weather (flights cancelled). Day 1 of application adjourned to February 25, 2026, April 22, 2026 set for day 2 of application.

25 February, 2026 – 802.1 NCQ hearing commenced.

Despite the passage of a fairly significant amount of time, no Notice of Expert Testimony was filed prior to the hearing, and no expert evidence was tendered by the Respondent in support of the NCQ application to support a pre-contact Aboriginal right. There is no evidence upon which the claimed practice could constitute an Aboriginal right under the *Van der Peet* test. I find that the application is manifestly frivolous as it would necessarily fail based on the information before me at this time, and it is therefore summarily dismissed, but as ACJ van der Hoek noted in *Marshall et. al.*, although the matter cannot proceed on the foundation put forward by the Respondent, I welcome a stronger one.

The Treaty Right Claim

The Crown, in their written submissions has questioned the status of the Treaty of 1752 – either to whom or whether it applies. In *R. v. Simon*, [1985] 2 SCR 397, at para. 31, the Supreme Court of Canada held that the Crown had not led sufficient

evidence at trial for the Court to find that the treaty had been terminated for breach of its core provisions.

The Crown submits that compelling evidence was led in *R. v. Marshall* (“*Marshall 1*”) which led the defendants to abandon their reliance on the 1752 Treaty at the Nova Scotia Court of Appeal and Supreme Court of Canada. (*R. v. Marshall*, 1997 NSCA 89, at paras. 79-92; *R. v. Marshall*, 1999 CanLII 655 (SCC), [1999] 3 SCR 456 at para. 16) Following *Marshall 1*, the 1760-1761 treaties remain and continue in effect.

The Crown noted that the Court in *R. v. Drew*, 2003 NLSCTD 105, at paras. 1033-1044 found that the 1752 Treaty had been terminated by subsequent hostilities.

The Form of Evidence in Aboriginal Claims

Evidence in Aboriginal claims need not take a particular form and need not comply with strict colonial standards of admissibility. In stead, 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. (*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 87)

In cases with a treaty rights claim, the s. 35 claim usually requires the calling of historical evidence through documentation, expert witnesses and community witnesses so that the promises in the treaty can be placed in the proper historical, political and cultural context to clarify the common intentions of the parties and the interests they intended to reconcile at the time (*R. v. Morris*, 2006, SCC 59 (CanLII), [2006] 2 SCR 915., at para. 18)

As previously noted, because Aboriginal and Treaty rights claims issues are complex, it is the case that experts including, but not limited to historians, anthropologists, archaeologists and genealogists are regularly called to testify.

The Crown cited several cases wherein the failure to call expert evidence in support of a treaty or Aboriginal rights claim resulted in the Court granting the Crown’s summary dismissal motion. These cases included the following:

R.v. Francis, 2007 NSPC 28. Summary dismissal motion granted on an application for state-funded counsel by accused charged with *Fisheries Act* offences claiming the Treaty of 1752 was infringed. The Court found there was no evidence to link their status as Aboriginals living in Indian Brook to their claim to fish lobsters in St. Mary's bay. The Court acknowledged that the accused held a strong belief in their Aboriginal and treaty rights, but that did not equate to evidence in their claim.

Soldier v. Canada (Attorney General), 2009 MBCA 12. The Manitoba Court of Appeal upheld the lower-court 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 context or history of the treaty. The Court said, at para 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.

The lack of expert evidence also led to the summary dismissal of s. 35 claims. In *R. v. Marshall et. al (supra)*, ACJ van der Hoek summarily dismissed an application that was similarly lacking. She noted the following:

13. 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.

More recently, there have been two cases decided in the Nova Scotia and New Brunswick Provincial Courts wherein Mr. Keefer and Chief Riley, acting as representatives for the accused have raised similar Aboriginal and Treaty rights challenges to s. 802.1. Additionally, I understand from submissions of both the Crown and the Respondent that there are numerous similar pending Applications

before Provincial Courts in Nova Scotia and New Brunswick and Prince Edward Island wherein the accused have initiated s. 35 *Constitution Act* and treaty rights challenges to various legislation, in addition to challenging the applicability of s. 802.1, which, if successful, would permit Mr. Keefer and Chief Riley to act as their agents. Two recent decisions were referenced by both the Respondent and the Crown.

R. v. Ward (unreported)

On July 13, 2026, Judge Alanna Murphy of the Nova Scotia Provincial Court delivered an oral decision (unreported) on the matter of *R. v. Cody Ward*. The case is very similar to the case at bar. Mr. Ward was charged with multiple offences contrary to the *Excise Act*, the *Cannabis Act*, the *Criminal Code* and the *Controlled Drugs and Substances Act*.

Mr. Ward filed an NCQ challenging s. 802.1 CC and alleging a breach of both an Aboriginal and a Treaty Right and sought the same remedy as in the case before this Court – a declaration that s. 802.1 is of no force and effect per s. 52 of the *Constitution Act*, or in the alternative a reading down of s. 802.1 to recognize and exemption for Mi'kmaq defendants asserting a Constitutional right to represented by an elder or traditional representative or a stay of proceedings under s. 24(1) of the *Charter*. Several witnesses were called in support of Mr. Ward's application. No expert evidence was tendered by the Respondent.

The Crown made a motion for summary dismissal of the application for the same reasons stated in this matter – that the application cannot be founded on an Aboriginal right, as they must relate to practices of central significant to the pre-contact culture of the Indigenous society in question and that the s. 25 *Constitution Act* claim is not capable of success on any evidence, and should therefore be dismissed.

The Court granted the Crown's motion for summary dismissal finding that without the assistance of expert opinion there was an insufficient record to support Mr. Ward's claim that an Aboriginal right is being infringed by the application of s. 802.1. The Court also summarily dismissed Mr. Ward's application that a treaty right was being infringed on a without prejudice basis, meaning that although there

was insufficient evidence on the record to ground the claim of a treaty right, but with the Court's leave, Mr. Ward could reapply with a sufficient evidentiary record.

R. v. Christopher Labillois, case Nos. 0672410 NBPC [CITATION MISSING]

R. v. Christopher Labillois, case Nos. 0672410 [citation required]. Mr. Labillois was charged with Fisheries Act offences in Campbellton, New Brunswick. Mr. Keefer and Mr. Riley appeared as representatives for the accused and challenged the operation of s. 802.1 as breaching both Aboriginal and treaty rights. The Crown made a motion for summary dismissal.

Judge Martin Goguen denied the Crown's motion for summary dismissal and found that s. 802.1 violated the defendant's s. 35 rights. The remedy that Judge Goguen applied was to "read in" section 802.1 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.

The Court in *Labillois* agreed with the Crown that the applicant failed to show that he is a beneficiary of the 1752 Treaty, but he accepted the oral history and the overall context as proof on a balance of probabilities that the applicant had an Aboriginal right to agent representation in a summary conviction proceeding.

The Crown in this case submits that the *Labillois* case can be distinguished and should not be followed by this Court for several reasons, including:

- The pre-contact Aboriginal right to representation by an elder or delegate found to exist by the Court in *Labillois* had not formed part of the *NCQ* filed in that matter, nor was it argued by the defendant, who argued an Aboriginal right based on a custom arising with European contact.
- Judge Goguen had the benefit of expert evidence called by the Crown, unlike the present case.
- That this Court cannot rely on the evidence that was called in the *Labillois* case.
- The same right that was found in the *Labillois* case did not specifically form part of the *NCQ* in this case, nor was it claimed at all in this case before the *Labillois* decision was released.

I have considered the post-hearing brief submitted by the Respondent wherein this Court is urged to follow the reasoning in *Labillois*, submitting that *Labillois* directly answers the Crown's central arguments concerning Aboriginal rights, Elder and oral history evidence and that the community-specific nature of the decision in *Labillois* supports a hearing and this Court should decline to summarily dismiss the application.

With respect, I do not agree. As noted by the Crown, I cannot rely on evidence that was called in the *Labillois* case to frame or provide foundation for the present application. I also note that expert evidence was called in that case, which was absent in this application. Specificity in pleadings is crucial, as previously noted, as it is not the role of the Court to "figure out" what right or infringement is being claimed or to amend and expand pleadings. In *Labillois*, it appears the Court found a breach of a right that did not form part of the original NCQ, and was not claimed in the original NCQ filed in that matter, not did it form part of the NCQ in the current application. There was also no expert evidence led to support any such claim, had it been made. I would distinguish the decision in *Labillois* for those reasons.

I find that the evidence in the *Ward* matter is very similar to this case both in the nature of the Aboriginal and Treaty rights claim, the remedy requested and the fact that no expert evidence was called in either case.

I would add a brief comment about the principle of *stare decisis*. It directs courts to adhere to prior rulings, particularly those of higher courts, when deciding cases with similar facts or legal issues. This principle ensures that similar cases are treated alike, promoting fairness and legal certainty.

While the Court is bound by the decisions of higher Courts ("vertical *stare decisis*"), it is not similarly bound by decisions made in an equivalent level of court ("horizontal *stare decisis*"), and this Court is entitled and bound to decide which of two conflicting decisions it will follow.

At the end of the day, after considering the evidence led in support of the Respondent's application, I find that however flexible and adaptive the rules of evidence are when addressing s. 35 *Constitution Act* and treaty rights claims, there should, at the very least be some expert evidence addressing the political, historical

or cultural context information into which the treaty can be framed or placed and from which the intention of the parties can be determined. There is no such evidence in this case.

When I consider the test for whether a treaty right has been infringed, I find that the right at issue (to representation by an Elder or other representative) has not been characterized or put into its historical context, and there is insufficient evidence on the record to determine the common intention of the parties to the Treaty (of 1752). For the same reasons, I am unable to determine the beneficiaries of the right, including who the signatories are and whether the treaty right is being exercised under the authority of the community succeeding the signatories. The burden is on the Respondent to establish this on a balance of probabilities.

Had I determined that the Applicant had established the exercise of the right, this Court would have to determine if there has been a *prima facie* infringement of that right, meaning - 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, per *R. v. Sparow*, [199] 1 SCR 1075, pp. 1111-1112.

This Court would also be required to determine if the infringement is 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.

Conclusion

After considering the evidence presented at the application, in addition to the oral and written submissions of the Crown and the Respondent, the Court finds that both the Aboriginal rights claim and treaty rights claim are incapable of success on the record before me, and are therefore “manifestly frivolous”, per the analysis in *Haveischer*.

Respecting the Aboriginal claim, the Court finds that the evidentiary record is insufficient to establish the merits of the application. The Court does not accept what is being sought in Mr. Bowser-Knockwood’s application. Specifically, the Court finds that being represented in a criminal or quasi-criminal trial by an agent is a practice that relates to the period *post-contact* between Aboriginal and

European societies, and the activity therefore falls outside the scope of the *van der Peet* analysis. There was no plausible evidence led to establish that the claimed practice would constitute an Aboriginal right under *van der Peet*, and accordingly, the Aboriginal rights claim must fail and will therefore be summarily dismissed.

In relation to the treaty right, the Respondent's application with respect to his claim of a treaty right infringement (Article 8 of the Treaty of 1752) is based on the testimony of the previously mentioned lay witnesses.

To characterize the rights afforded by Article 8 of the Treaty of 1752, the Court requires evidence of the historical context, the intention of the parties and whether the treaty still applies. Expert evidence is required to establish this.

As noted, the Crown is not taking the position that the treaty claim is incapable of success on a different evidentiary record - the position of the Crown is that neither the Crown nor this Court can make a determination based on the evidentiary record before this Court. The Court agrees with the Crown. Based on the evidence before this Court, I find that the Treaty of 1752 does not advance a treaty right which would supplant s. 802.1.

Without expert evidence and with only evidence about the historical context coming from lay witnesses I find that there is an insufficient evidentiary record to support the position of the Respondent with respect to agency/elder representation, even at this preliminary level of proceedings. The evidence provided in support of this application is insufficient and falls short of providing the foundation or the pathway to a foundation which would have a chance of success at a further stage in these proceedings. I therefore grant the Crown's motion for summary dismissal of this portion of the application based on the information before me at this time. Although the matter cannot proceed on the evidence before this Court, I welcome a stronger one.

This application will be dismissed on a "without prejudice" basis, meaning that if there was a proper evidentiary foundation to the claim, it could be reinstated.

The Court declines to read down the section or provide a remedy pursuant to s. 24(2) of the *Charter* and consequently the Constitutional challenge to s. 802.1 will be summarily dismissed.

Rosalind N. Michie