PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Marshall et al.*, 2024 NSPC 33

Date: 2024-06-07
Docket: 8496822 – 8496823, 8521871 – 8521876
8521813 – 8521818 and 8521957 - 8521968
Registry: Truro

Between:

His Majesty the King

v.

Matthew Alexander Cope, Darren Charles Marshall,
Alisha Dawn Brooks and Jason Robert Brooks

Application to summarily dismiss Treaty and/or aboriginal rights defence

Judge: Associate Chief Judge Ronda van der Hoek

Heard: May 10, 2024, in Truro, Nova Scotia

Decision: June 7, 2024

Charge: Sections 9(2), 10(2), 9(1)(a)(iv) and 10(2) of the *Cannabis Act*, and Sections 218.1(1) x 2, 214 x 2 of the *Excise Act*, 2001 (S.C. 2002, c.22)

Counsel: Michael Taylor, for the Crown
Jack Lloyd, for the Defendant

By the Court:

Introduction

[1] The Crown established the *actus reus* of various *Cannabis Act* and *Excise Act* offences involving the defendants. Now the defendants intend to argue the existence of an aboriginal and/or Treaty right attaches to their cannabis dispensary operations, and they are not required to pay cannabis duties under the *Excise Act*. They intend to lead evidence that the legislation requiring sales of cannabis be conducted *only* from approved Nova Scotia Liquor Commission outlets, and all such cannabis products be stamped to confirm payment of both provincial and national duties, do not apply to them.

Decision:

[2] Despite the passage of time since the issues were first raised, the intended foundation for the arguments finds no support in the reports of two proposed expert witnesses, and information regarding oral traditional evidence from the Mi'kmaq is completely unknown.

[3] The Court cannot allow the matter to proceed on such a foundation given its role to protect scarce judicial resources and in light of the Crown meeting the test to summarily dismiss, in the words of the Supreme Court of Canada, "manifestly frivolous" applications. This decision is not taken lightly. Instead, it is clear that

court time allotted to such an exercise will surely result in *Jordan* stays being granted in other matters scheduled to proceed in this court. 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.

Background:

[4] Mr. Marshall provided a *Notice of Constitutional Question* [*NCQ*]: "[I]n this proceeding the statutes of the Parliament of Canada and the legislative assembly of Nova Scotia are constitutionally inapplicable, and the case should be dismissed", for the following reasons:

> (i) Prior to enacting the *Cannabis Act*, the government failed to consult the Mi'kmaq.
>
> (ii) The statutes are an infringement on the aboriginal right to trade pursuant to the Treaties of 1752 and 1760, trading for moderate livelihood. The former, at article 4, says "the said Indians shall have free liberty to bring for sale to Halifax or any other settlement within this province … Any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage".
>
> (iii) The land on which the cannabis dispensaries operated has not been ceded to the Crown, and as such aboriginal title exists.
>
> (iv) The continuity of indigenous jurisdiction to create their own laws governing themselves and their beneficial interests is confirmed (*Connolly v. Woolrich*, (1897), 11 LCL 197), and the Mi'kmaq have the right to maintain and regulate their

> own laws within their territory pursuant to the United Nations Declaration on the Rights of Indigenous Peoples.

[5] Mr. Cope and the Brooks also filed an *NCQ*, similar but in some ways different in focus. They question the applicability of the relevant legislation to retail cannabis operations located on lands belonging to the Millbrook First Nation. They too intend to base support for rights granted by the Treaties of 1752 and 1763, section 88 of the *Indian Act*, and section 35 of the *Constitution Act*, as interpreted in *R. v. Sparrow*, [1990]1 S.C.R. 1705, *R. v. Badger*, [1996] 1 S.C.R. 771, *R. v Marshall* [1999] 3. S.C.R 456, etc. They frame the question as such: **Do the defendants have an individual right to retail cannabis as opposed to a collective right belonging to the band as an entity**?

[6] They also say the government failed to consult with indigenous bands prior to the implementation of the *Cannabis Act* and, as an indigenous business operating on the reserve, they are exempt from the application of federal laws governing the sale of cannabis. They are entitled to operate a parallel system of cannabis sales based on their status as band members.

[7] Now, having set out the *Constitutional* issues the parties seek to raise, I turn to the Crown's application to summarily dismiss these applications as "manifestly frivolous" in nature, as that test is described in *R. v. Haevischer*, 2023 SCC 11.

[8] The Crown says the application is unsupported by the contents of the two proposed expert witness reports, or the as yet unknown lay evidence defence says he intends to call. For that reason, the application is frivolous. While several criteria are not established in those reports, the Crown says most importantly there is a lack of evidence that the historic Mi'kmaq community even used the psychoactive cannabis plant, let alone traded in it. The other arguments including those related to Canadian sovereignty are simply not justiciable and have no chance of success. Before applying *Haevischer,* it is important to explain the law related to aboriginal and Treaty rights claims, and I do so very briefly, having regard to the Supreme Court of Canada decisions on the matters.

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] 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 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)

[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] 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*).

[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.

[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. (Crown's brief at para. 54)

[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] 3 S.C.R. 101, *R. v. Cote*, [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] 3 S.C.R. 1010, and *Mitchell v. M.N.R.* [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.

[20] With that background, I now consider the application to dismiss based on the test in *Haevischer*, *supra*. That case involved an appeal of a trial judge's decision to summarily dismissal an application for a stay of proceedings based on abuse of

process. The Crown opposed the application and sought a *Vukelich* hearing. In considering the correctness of the trial judge's decision, the Supreme Court of Canada identified the appropriate threshold for summary dismissal. Martin J. explained that the standard “will be based on the two sets of underlying values at play in such proceedings: trial efficiency and trial fairness. (para. 46)

[21] In her view, these were best served by requiring a rigorous standard be met before a prospective application can be summarily dismissed: para. 60. 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": para. 61. She concluded “manifestly frivolous” best reflects the objectives. The use of the term “frivolous” was intended to weed out those applications that will necessarily fail (para. 67), while “manifestly” connotes that "the frivolous nature of the application should be obvious": para. 69.

[22] On the application the Court should assume the facts alleged by the applicant are true with no need to weigh evidence or make findings of facts. As such, “the manifestly frivolous threshold also protects fair trial rights by ensuring that those applications which might succeed, including novel claims, are decided on their merits”: (para. 73). Generally speaking, “the greater the consequences associated

with a given application, the greater the possible impact on the accused rights if the application is summarily dismissed". So, 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: 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 applicant 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: (para. 84).

[23] The Crown references *R. v. Brennan*, 2022 ONSC 1986, wherein some similar arguments raised in the instant case were subject to a largely successful motion for summary dismissal. All the arguments were dismissed except for one in which counsel was still awaiting expert reports. The rejected arguments included, (i) whether the laws under which the charges have been brought do not apply because the lands in which the offences occurred are not part of Canada: In dismissing that

aspect of the *NCQ* the court referenced the *Sparrow* decision, “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown”... “This legislative authority and sovereignty are unaffected by the existence of treaties” … “Courts do not have the authority to adjudicate upon challenges to Canadian sovereignty”. As such, the court in *Brennan* concluded, “I find this question not only does not have a reasonable prospect of success- I would go as far as saying it cannot succeed. I also lack the jurisdiction to determine questions of Canadian sovereignty. Indeed, this very question has been unsuccessfully litigated by counsel for the respondents in several other cases. I am accordingly exercising my case management power to summarily dismiss this question.”

[24] The court in *Brennan*, also summarily dismissed the second question: (ii) “whether the laws under which the charges have been brought do not apply because they interfere with the accused persons economic well-being in relation to the trade of cannabis and hemp”. In doing so the court said “the Supreme Court has held on several occasions that this section does not protect the economic interests advanced by the respondents. There being no reasonable prospect of success, I must accordingly summarily dismiss this question.”

[25] With respect to the (iii) duty to consult, the court in *Brennan* concluded, “the crown also suggests the duty to consult does not extend to the enactment of legislation, and thus cannot apply to a criminal prosecution pursuant to that legislation. The Supreme Court recently clarified that the exercise of legislative authority (not executive authority) in and of itself does not trigger the duty to consult (*Mikisew Cree First Nation v. Canada (Governor General in Council*) 2018 SCC 40 at para. 50). The duty to consult does not extend to the enactment of the subject legislation that criminalizes their conduct. They are unable to advance the duty to consult argument based on the exercise of legislative authority alone.”

[26] As previously stated, the only question (iv) “whether the laws under which the charges have been brought do not apply because they infringe the accused persons traditional use and trade of cannabis and hemp, was permitted to progress as expert reports were imminently expected. The court concluded it was reasonable to allow a few more weeks to receive same.

[27] The Crown in the instant case says the only issue that this Court can consider is whether there is an aboriginal or treaty right to trade in cannabis. It is the only argument that could possibly proceed under section 35. The other arguments are doomed to fail, because this Court has no jurisdiction to grant the requested remedy,

such legal arguments have already been rejected, and the application depends on legal propositions that are clearly at odds with settled and unchallenged law.

[28] As such, the only issue for the Court to determine is whether the proposed expert reports meet the low threshold set out by the Supreme Court of Canada which could allow the argument to proceed. It is useful to examine those reports.

Dr. Konstantia Koutouki's report:

[29] The Crown takes the position the report filed by defence counsel, written by Dr. Konstantia Koutouki, a professor at the faculty of law of the Université de Montréal, Québec, Canada, is not a peer reviewed paper and it cannot be a foundation for the legal arguments the defence seeks to present to the court. It is rife with speculation and unsupported conclusions that do not, in any event purport to establish that the Mi'kmaq had any connection to cannabis pre-contact or even after contact.

[30] The Crown says the report identifies the principal issue as: "is there available evidence of access to cannabis by indigenous nations before European contact?". This is of course one of the key criteria to establish an aboriginal right under section 35.

[31] Dr. Koutouki begins her report stating, "the easy answer to this question and one that is rampant on the Internet and even many academic circles is that there was

no cannabis in Canada or the United States pre-contact". She says this conclusion is based on biased notions and misconceptions, and the limitations of archaeology. Taking those deficiencies into account, she says, "there is enough evidence of the existence of cannabis in Canada and the United States to fulfil the requirements for giving the benefit of a legal doubt to the nations claiming historical use". She continues: "If we are looking for scientific certainty, like in most cases, we will not find it. However, there is enough evidence related directly to cannabis and evidence related to widespread historical oversights in research concerning indigenous Peoples in general. This combination leads to the very plausible conclusion that cannabis was very well known by Indigenous Peoples before the 1500's. It would be an injustice should Indigenous Peoples be denied yet another benefit because scientific queries into this topic are either biased towards mainstream notions of Indigenous Peoples' capacity to, for instance, carry out cross-Atlantic or trans-Pacific voyages, the value of cannabis for pre-Columbian societies or because science itself is presently incapable (or not developed enough) to provide scientific certainty of the existence of cannabis in this part of the world before the 1500's."

[32] Dr. Koutouki cites numerous articles on the historical use of cannabis, both as hemp, and as a psychoactive substance based on literature almost entirely from Asia, but also, to some degree, Africa and Europe. The Crown says it is not controversial

that hemp was used in North American by Europeans, and likely by the indigenous population pre-contact. While the doctor cites primary and secondary material that hemp was cultivated and used by the indigenous peoples of North America, it is not clear when the plant was first used by those populations. Based on the material cited by the doctor it seems to be uncontroversial to say that it certainly was used by the time of Cartier and Champlain. She does, however, acknowledge a lack of evidence of where and how cannabis was used before European contact. She concludes, "*creating an accurate register of where and how cannabis was used in pre-Columbian Canada is impossible due to the built in (sic) inaccuracies about indigenous peoples before (and many would argue after) contact with the Europeans that decided to stay here permanently*."

[33] She fills the gap in evidence by placing her opinions in the context of "cultural genocide", and the Crown argues that this is certainly a noble idea, however not one that can establish the criteria required for the rights being argued by the defendants. In the end, the doctor provided no evidence that cannabis was used by the indigenous population in Mi'kma'ki before European contact, nor at any time. Her report is quiet with respect to whether cannabis was traded at any time and in relation to any treaty, in fact no treaties are referenced in her report.

[34] As such, the Crown argues the statements in Dr. Koutouki's report do not meet the threshold required, on a balance of probabilities, to allow this application to proceed. And while the record on summary dismissal applications "should normally be of a minimal and summary nature", and compiling extensive evidence threatens to undermine the efficiency that the procedure is intended to promote (para. 93), the application cannot proceed on the foundation of this report.

Dr. W. Newbigging's report:

[35] The report is entitled, *Some Observations on the Traditional Mi'kmaw Economy*, and documents trade involving Europeans and aboriginal people since 1534. With respect to the Mi'kmaq, it notes the absence of horticulture, the growing of crops, but hunting and fishing are described in great detail and by season. Dr. Newbigging says trade was important to the Mi'kmaq but hunting and fishing "could not compensate for the lack of horticultural crops". He says they traded with their neighbours to the west, the St. Lawrence Iroquoian, who did practice horticulture. He says the latter farmed corn, squash, tobacco, and hemp. His report focused in great detail on the use of tobacco by indigenous peoples, and it is only on the second last page of the report that he mentions the use of hemp. He says the product was of *great value to the people* and was used for fishing nets, rope and perhaps bowstrings. The Crown does not dispute that this report could stand for the

proposition that the Mi'kmaq traded with their neighbours to obtain hemp. But there is no evidence the Mi'kmaq in turn traded hemp with Europeans, and no mention at all of the cannabis plant being used other than as hemp.

[36] The Crown points out that the *NCQ* also appears to support an argument of aboriginal title, however notes there is no mention in either expert report about continuous and exclusive possession of the land in question.

[37] The Crown says, neither expert report provides evidence or foundation to conclude that the Mi'kmaq cultivated the cannabis plant or used the plant other than as hemp. There is evidence that they traded to obtain hemp, but they did not trade hemp themselves. The historic use of cannabis as a psychoactive substance is not supported at all, nor continuity between a historic practice and the contemporary right asserted. None of the essential criteria for advancing an aboriginal or Treaty right can be established based on the reports, and the section 35 argument should be dismissed.

Position of the respondent:

[38] The threshold for ordering a *voir dire* is low, and *Haevischer* creates a two-stage test for a summary dismissal application. At stage one the question is whether, taking the facts and inferences alleged to be true, the party seeking a summary dismissal has demonstrated that the underlying motion is manifestly frivolous. At

stage two, if the matter proceeds to an evidentiary hearing, a judge must decide the ultimate question of whether the underlying motion succeeds or fails on its merit. Apart from the separate legal standards applied at the two stages, the trial judge must also consider whether to entertain a summary dismissal application at all. The Supreme Court of Canada made it clear that a *Vukelich* hearing should only be conducted when it will ensure a proportionate process: one which respects the applicant's right to be heard, ensures trial fairness, actually saves resources, and avoids undue delay.

[39] Mr. Marshall submits that prior to enacting cannabis laws, consultation around aboriginal title and Treaty rights were never specifically engaged with Mr. Marshall's community. Same is required according to *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 at paras. 70 and 71.

[40] Mr. Marshall says the statutes infringe an aboriginal right to trade pursuant to the Treaties of 1752 and 1760, and in particular the right to trade for a moderate livelihood.

[41] He also says the territory where the violations occurred has not been ceded to Canada.

[42] Getting to the crux of the issue, the respondent says, at paragraph 35 of his brief, "the same argument has been sustained in both *R. v. Montour* and *R. v.*

Brennan". The problem with these positions taken by the respondent, is that he fails to fairly explain or state what he is talking about.

[43] This Court is concerned about the use of court time and scarce resources. The Court does not have time to try to figure out what the respondent is saying in brief and vague references. Likewise, the Court has reviewed the expert reports and the respondents have failed to make a link between those reports and their arguments. It is not the job of the Court to figure out the foundation for such serious issues as Constitutional exemptions. That is the role of counsel. The vague allusions to cases without more, is not to be supported. Allow me to explain.

[44] The respondent says the "legal outline provided above" makes it very clear that such a treaty right exists". He further says this issue as it relates to cannabis has not been decided previously in any decision which is considered binding on this Court. He says that the evidence to be called has been provided to the Crown and in the proposed expert reports. The respondent then says that the Crown has indicated that its evidence will not be ready until late 2024. As such, the low threshold explained by the Supreme Court of Canada in *Haevischer* should permit the matter to proceed. Of course, what is missing is a nuanced understanding of exactly what the "legal outline above" provided.

[45] So, there was no consultation prior to the government enacting the relevant legislation. There is an aboriginal right to trade arising from 1752 and 1760 Treaties. The territory where Millbrook is located has not been ceded to the government. Mr. Marshall is a member of that First Nation. Aboriginal rights are territorially based. The Crown has the burden to prove territory has been ceded. The nation has sovereignty over the territory. The nation has a right to maintain and regulate their own laws within their territory. While the respondent mentions the cases *R. v. Simon,* [1985] 2 S.C.R. 387, *R. v. Denny*, (1990), 94 NSR (2d) 253 NSCA, and *Marshall*, what he fails to appreciate is that those cases were based on sound evidentiary foundations to establish the existence of Treaty and/or aboriginal rights, in those cases, to fish.

[46] While the respondent says “the legal outline provided above” makes it very clear that such a Treaty right exist, he is wrong.

[47] I agree with the Crown’s perspective on the proposed expert evidence, it is incapable of supporting the intended next step to determine if there is a Constitutional exemption for the defendants. I reach that conclusion on a careful review and consideration of the expert reports. Taken at its highest the report of Dr. Koutouki suggests just because there is no evidence of cannabis and a connection of that substance and the Mi’kmaq, a lack of evidence should not rule out the

existence of such a connection. Such an argument cannot be taken seriously and be considered anything other than an indication of the manifestly frivolous nature of the application.

[48] Unfortunately, the Court reaches the same conclusion with respect to the report prepared by Dr. Newbigging. His report says the Mi'kmaq traded furs and other items for hemp used in the making of rope and fishing lines. There is no information whatsoever to support a Mi'kmaq trade in cannabis, a psychotropic drug.

[49] Counsel's suggestion they are the same thing simply misses the point. The respondents have provided no argument whatsoever to support a modern interpretation of such trading evolving to include the sale of cannabis and the avoidance of duties pursuant to the *Excise Act*.

[50] In addition to the problems with the intended foundational information, the Cope and Brooks NCQ fails to appreciate that aboriginal and Treaty rights are collective rights, and not individual rights. So, a questioning whether such rights are individual rights and not collective rights, demonstrates a fundamental misunderstanding of such rights.

Conclusion:

[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.

[53] Judgment accordingly.

van der Hoek ACJ