CITATION: R. v. Brennan, 2022 ONSC 5618
COURT FILE NOS.: CR-19-16 (Parry Sound); CR-19-020 (Parry Sound); CR-21-08 (Parry Sound); CR-19-1190 (Peterborough); CR-20-1353 (Peterborough); CR-20-8332 (Sault Ste. Marie); CR-21-1202 (Sudbury); CR-21-1203 (Sudbury); CR-22-12570MO (Sudbury)
DATE: 2022-10-04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HIS MAJESTY THE KING Applicant	A. Hauk, J. Plamondon and A. Francis, for the Crown/Applicant
– and –	
David Brennan, Sarah McQuabbie, Harley Hill, Clayton Hill, Chadwick McGregor, Michael Nolan, Dennis Wigmore, Derek Roque, Noble Boucher & Luke Klink Accused/Respondents	M. Swinwood and J. Lloyd, for the Accused/Respondents **HEARD via Zoom:** September 26, 2022

DECISION ON APPLICATION FOR SUMMARY DISMISSAL

BOUCHER J.

Introduction

[1] For the second time the Crown brought a summary dismissal application with respect to the accused's Notice of Constitutional Question (the "NCQ"). The background with respect to this matter and my reasons on the first application are reported at *R. v. Brennan*, 2022 ONSC 1986.

[2] Briefly stated, I dismissed four of the five NCQ's after the first hearing. The remaining NCQ, under s. 35 of the *Constitution Act, 1982*, is framed as follows: 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.

[3] Despite active case management, the anticipated defence expert reports had not been delivered at the time of the first hearing.[1] Since the release of my reasons the accused have delivered the following additional evidence in support of their remaining NCQ and in accordance with the orders made during Ellies RSJ's case management judicial pre-trials:

a. Dr. W.J. Newbigging's undated report titled "The People of the Amikwa Nation";

[1] Although no witnesses have been qualified as experts in this proceeding, counsel used this term to refer to the non-lay witness reports that have been produced. I use this term at this stage as well simply to distinguish them from the lay witnesses.

b. Dr. K. Koutouki's report titled "Evidence of Cannabis in Pre-Columbian Canada" dated June 14, 2022;

c. Stacy Amikwabi's affidavit sworn August 29, 2022; and

d. Chief Delbert Riley's affidavit sworn August 29, 2022.

[4] This new evidence, together with the Agreed Statements of Fact (the "ASF") as well as the affidavits sworn by each of the accused will form, subject to admissibility determinations, the accused's evidence at trial. With respect to lay witnesses, there may be some brief questions permitted in chief at trial, but the framework established through case management anticipates that most of the time at trial will be concerned with cross-examination and submissions.

Issues

[5] The issues in this second application remain the same as in the first; namely:

a. When is summary dismissal appropriate? and

b. Should the NCQ be summarily dismissed?

When is summary dismissal appropriate?

[6] I reviewed the relevant law in my previous reasons, which were released about six months ago, and I adopt that review for the purposes of this application. In summary, r. 34.02 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)* (the "Rules") allows the court to dismiss an application, after a preliminary assessment of the merits, if there is no reasonable prospect it could succeed. Recent jurisprudence from the Supreme Court of Canada, and our Court of Appeal, has referred to this summary dismissal power as an important tool to be used, in appropriate circumstances, in preventing unnecessary delay. Some of the important principles gleaned from these cases include:

a. Trial judges should screen and dismiss applications that **have no reasonable prospect of success or that are frivolous** (*R. v. Cody*, 2017 SCC 31, [2017] 1 SCR 659, at para. 38);

b. Trial judges may summarily dismiss *Charter* applications where there is a **lack of merit** to the application (*R. v. Greer*, 2020 ONCA 795, at paras. 107-108);

c. Motions that advance constitutional claims should be addressed on their merits unless the broader interests of justice clearly demand otherwise (*R. v. Kazman*, 2020 ONCA 22, at para. 15);

d. The basic purpose of s. 35 of the *Constitution Act, 1982* is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (*R. v. Van der Peet*, , [1996] 2 S.C.R. 507, at para. 31);

e. Courts should be cautious about dealing with s. 35 claims in the early stages of proceedings (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 32 and 35); and

f. "The existence and scope of Aboriginal rights, protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders." (*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 12);

Should the NCQ be summarily dismissed?

[7] Subsection 35(1) of the *Constitution Act, 1982* provides as follows:

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

[8] The Supreme Court and our Court of Appeal have provided guidance on how trial courts are to apply this section. In *Lax Kw'alaams* the Supreme Court set out the following four-stage analysis at para. 46:

> With these considerations in mind, and acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows:
>
> 1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
>
> 2. Second, determine whether the First Nation has proved, based on the evidence adduced at trial:
>
> (a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
>
> (b) that this practice was integral to the distinctive pre-contact Aboriginal society.
>
> 3. Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the

> court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.
>
> 4. Fourth, and finally, in the event that an Aboriginal right to trade commercially is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:
>
> > Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment. [Emphasis in original; at para. 75.]

[9] In *Beaver v. Hill*, 2018 ONCA 816, 428 DLR (4th) 288 the Court of Appeal set aside a motion judge's summary dismissal of a s. 35 *Constitution Act, 1982* claim in the family law context. The court held that the dismissal was premature because the pleadings had not been properly constituted and the evidence had not been adequately developed: at para. 69.

Analysis

[10] In the present case, the Crown argues that the accused have not provided sufficient evidence to adjudicate the s. 35 issue and accordingly there can be no reasonable prospect of success. The Crown submits that while Dr. Newbigging sets out evidence that the Amikwa engaged in trade, he does not specifically mention cannabis or hemp. The Crown further submits that while Dr. Koutouki reviews potential evidence of the existence of cannabis in Canada pre-contact, she does not specifically mention it was traded by the Amikwa.[2] Stacy Amikwabi simply asserts the trade in cannabis and hemp always existed, the Crown argues, without any further evidence to support this claim. Chief Delbert Riley, the Crown notes, only refers to pre-contact trade generally, not specifically with respect to the Amikwa.

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[2] The Crown conceded the existence of the Amikwa Nation only for the purposes of their summary dismissal application.

[11] Simply put, the Crown argues, this evidence cannot satisfy the *Lax Kw'alaams* four-stage s. 35 analysis, even viewing it in its best light. This accordingly means, it is suggested, that there is no reasonable prospect of success and the NCQ must be dismissed.

[12] The accused correctly characterize the test for summary dismissal as involving a balancing of the right to a fair trial against the public interest in efficient trials or proceedings. The defence reminds me that I am not to apply the s. 35 *Lax Kw'alaams* test at this stage; rather, I must ask myself whether the remedy claimed could reasonably be granted after a preliminary review of the evidence. The defence further argue that s. 35 claims should properly be decided by the trial judge, after an assessment of the full evidentiary record presented at trial.

[13] Summary dismissal of an application "without further hearing or inquiry" is a discretionary case management tool. After a preliminary assessment of the merits of the s.35 claim based on the defence evidence, I find the Crown has not met its onus on this application. The Crown has not established that there is no reasonable prospect of success, that the claim is frivolous or that it patently lacks merit.

[14] In my previous reasons I reviewed extensively the case management that has taken place in this matter, and I adopt that review for the purposes of the present application. The accused have now delivered their evidence because of that case management. The public interest in efficiency of court proceedings, and in seeing criminal matters decided in a timely fashion, have been carefully considered and applied in this case. Ten accused from several judicial districts and counties have consolidated their trials into one. The evidence supporting the Crown's allegations in the trial has been admitted. The only task remaining for the court in the trial is to determine the s. 35 claim.

[15] The Supreme Court has on many occasions emphasized the unique nature of these complex claims. It has encouraged courts to determine them based on a full trial record. That said, the Court of Appeal in *Beaver* did not close the door to summary dismissal of s. 35 claims in the appropriate circumstances. Those circumstances are not present here.

[16] I am reminded of the Supreme Court's direction in *Lax Kw'alaams* that the "pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same": at para. 46. Without deciding the s. 35 claim now, my preliminary assessment is that there is some evidence of the existence and location of the Amikwa and their trading behaviour. There is also some evidence, the subject of scholarly debate, that cannabis was present in pre-contact North America.

[17] With respect to the existence and location of the Amikwa, Dr. Newbigging's report sets out references to them in approximately 12 different primary sources, over a period of more than 100 years. These sources begin with Champlain in 1615 and end with Charlevoix in the 1720s. The sources include writings as well as maps and a drawing of a contemporary Amikwa. The writings detail their non-horticultural lifestyle in the vicinity of the French River, as well as their participation in the Feast of the Dead, attended by many different Indigenous groups. The Feast was an opportunity to celebrate family that had passed during the year and to engage in trade. The writings also detail the alliance the Amikwa formed with other Algonquins and the French.

[18] With respect to the presence of cannabis and hemp in pre-contact North America, Dr. Koutouki's report includes the following:

a. cannabis pollen has been found at the Viking settlement (a.d. 1021) at L'Anse Aux Meadows in Newfoundland;

b. both Cartier and Champlain wrote that Indigenous people used wild hemp in fishing lines, clothing, and rope; and

c. pipes have been found with traces of hemp residue.

[19] This is not the time to conduct a thorough s. 35 *Lax Kw'alaams* analysis of the defence evidence. That analysis is properly conducted on a full record at trial, with the benefit of fulsome submissions. After my preliminary review of the merits, I conclude that there is enough evidence such that the Crown is unable to meet its burden for summary dismissal of the remaining NCQ.

[20] For these reasons, the Crown's application is dismissed.

[21] A copy of this decision shall be placed in each of the following court files:

a. CR-19-16 (Parry Sound);

b. CR-19-20 (Parry Sound);

c. CR-21-08 (Parry Sound);

d. CR-19-11900 (Peterborough);

e. CR-20-1353 (Peterborough);

f. CR-20-8332 (Sault Ste. Marie);

g. CR-21-1202 (Sudbury);

h. CR-21-1203 (Sudbury); and

i. CR-22-1257-MO (Sudbury)

The Honourable Mr. Justice P.J. Boucher

Released: October 04, 2022

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