

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF LONGUEUIL

No : 505-01-137394-165

**SUPERIOR COURT**  
(Criminal Division)

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**HER MAJESTY THE QUEEN**

Prosecution

v.

**DEREK WHITE & HUNTER MONTOUR**

Applicants

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**AMENDED CONSOLIDATED CONSTITUTIONAL PLEADING**  
**(Consolidation of the Notice of Constitutional Question filed on July 27, 2018 and**  
**Motion to Stay Proceedings (Constitutional Challenge) filed on September 28, 2018)**

(Ss. 35 and 52 of the *Constitution Act, 1982*,  
UN Declaration on the Rights of Indigenous Peoples,  
s.24(1) of the *Canadian Charter of Rights and Freedoms*,  
ss. 12 and 13 of the *Rules of Practice of the Superior Court of the Province of Quebec*,  
*Criminal Division, 2002*)

**TO THE HONOURABLE JUSTICE SOPHIE BOURQUE, OR SUBSIDIARILY TO ANOTHER  
HONOURABLE JUSTICE OF THE SUPERIOR COURT SITTING IN THE CRIMINAL  
DIVISION, THE APPLICANTS DEREK WHITE AND HUNTER MONTOUR RESPECTFULLY  
PETITION AS FOLLOWS:**

**A. OBJECT**

1. The Accused-Applicants Derek White and Hunter Montour (hereinafter referred to as the Applicants), request the Court to stay the proceedings against them on the basis that the indictment, and the prosecution based thereon, are in violation of their constitutional,

inherent and international rights, that such violations cannot be justified and that the laws on which the indictment and prosecution are based are of no force and effect in respect to Applicants.

2. In particular, sections 380(1)(a), 465(1)(c), 467.11 and 467.12 of the *Criminal Code*, on which the charges against the Applicants are formally based, are constitutionally inapplicable and inoperative in respect to the Applicants in the context and in the circumstances of the present proceedings.
3. Furthermore, to the extent that they are relied upon as the basis for the charges, section 42 of the *Excise Act, 2001*, S.C. 2002 c. 22, ~~section 212 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, and sections 17.2, 17.3, 17.4 of the *Tobacco Tax Act*, C.Q.L.R. c. I-2,~~ and any other statutory provisions relied on by the prosecution as a basis of the charges, all of which will sometimes be referred to herein as the “contested provisions”, are constitutionally inapplicable and inoperative in respect to the Applicants in the context and in the circumstances of the present proceedings.
4. The Applicants assert that their constitutional, inherent and international rights take precedence over the contested provisions in the context and circumstances of these proceedings, that these rights have not been extinguished, that these rights have been violated, and that their constitutional rights have been infringed by the contested provisions and the implementation thereof, and that such infringements cannot be justified.
5. In addition, the charges against the Applicants based on the contested provisions, in the context and circumstances of these proceedings, constitute a breach of constitutional obligations imposed upon the Queen, including a breach of the Honour of the Crown and a failure to consult the Haudenosaunee, the Mohawk Nation and the Mohawk community of Kahnawake.

#### **B. THE CONSTITUTIONAL, INHERENT AND INTERNATIONAL RIGHTS INVOKED**

6. The constitutional, inherent and international rights of Applicants which are invoked and which have been violated include the following:
  - a. the unextinguished treaty rights of free trade of the Mohawks of Kahnawake as a component of the Mohawk Nation and the Haudenosaunee (Iroquois Confederacy), and particularly rights under the treaties of 1664, 1677, 1735, 1742,

1754 and the two treaties of 1760, all of which are existing treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. These treaty rights, which also form part of the Covenant Chain (hereinafter described), provide, *inter alia*, for the right of the Mohawk Nation including the Mohawk community of Kahnawake and the Haudenosaunee and their members to acquire, transport, exchange and trade goods, including tobacco, free of any taxation, including duties, and free of any regulation or constraint by the Crown including any duty of collection for or on behalf of the Crown;

b. the unextinguished aboriginal right of free trade of the Mohawks of Kahnawake as a component of the Mohawk Nation and the Haudenosaunee, which is an existing aboriginal right within the meaning of section 35 of the *Constitution Act, 1982*. This aboriginal right includes, in particular, the right to acquire, transport, exchange and trade goods, including tobacco, free of any taxation, including duties, and free of any regulation or constraint by the Crown including any duty of collection for or on behalf of the Crown;

c. the rights of the Applicants, as members of the Mohawk Nation, an independent, self-governing nation with (as a minimum) residual sovereignty, which is immune from taxation, tax measures and any obligations respecting the collection or remittance of taxes, duties or amounts in relation thereto, imposed by other governments including those of Canada and Quebec; and

d. the rights of the Mohawks of Kahnawake, part of the Mohawk Nation and the Haudenosaunee, pursuant to the United Nations Declaration on the Rights of Indigenous Peoples, including the right to freely determine and freely pursue their economic development (which extends to free trade and commerce).

7. Applicants specifically submit that they have constitutionalized treaty rights as well as constitutionalized aboriginal rights to acquire, exchange, distribute, transport and trade goods, and particularly tobacco, from, with and to aboriginal and non-aboriginal persons, free of any regulation, imposition or constraint by the Crown or non-aboriginal legislative bodies and without any obligation to obtain permits or certificates nor any obligation to pay, collect or remit federal or provincial duties or taxes in respect to such goods, and particularly tobacco in the circumstances of these proceedings.

8. Applicants further specifically submit that the contested provisions are inconsistent with,

and inoperable and inapplicable to the Applicants in the circumstances of these proceedings, as infringing, without justification, the treaty rights, the aboriginal rights, the rights of the Applicants as members of the Mohawk Nation and the Mohawk community of Kahnawake, their right to be exempt from tax and related tax collection obligations, and their rights under the United Nations Declaration on the Rights of Indigenous Peoples.

## C. FACTUAL GROUNDS

### a. THE CHARGES AND ALLEGED OPERATION

9. In these proceedings, the Applicant, Derek White, is charged with fraud and conspiracy to commit fraud against the Government of Canada and against the Government of Quebec, and with committing these indictable offenses for the benefit of, at the direction of or in association with a criminal organization. The Applicant, Hunter Montour, is charged with having participated in or contributed to the activities of a criminal organization ("**the Charges**").
10. In his interlocutory judgment of June 7, 2018, the case management Judge, the Honourable Michel Pennou, J.S.C., describes the Applicants as allegedly involved in the fraudulent import and trade of cases of chopped tobacco, for which the (allegedly) applicable taxes and duties were not paid, collected and remitted to respective Governments (paragraph 6 of the judgment). He goes on to mention that Jason Hill allegedly acquired and received delivery of Applicant Derek White's "contraband" tobacco at his cigarette manufacturing plant located in Ontario, on the Six Nations reserve.
11. Justice Pennou in footnote 4 of the same judgment specifically refers to the allegedly applicable ~~taxes and duties as section 42 of the *Excise Act, 2001*, section 212 of the *Excise Tax Act* and sections 17.2, 17.3 and 17.4 of the *Tobacco Tax Act*.~~
12. The Prosecution alleges that the Applicants would have been involved in the import of chopped tobacco from the United States onto the Kahnawake reserve for shipment to the Six Nations of the Grand River reserve in Ontario between November 17, 2014 and March 30, 2016 (the "**Alleged Operation**").
13. As such, they would have imported and distributed wholesale tobacco without holding the allegedly required federal ~~and provincial~~ licences and would have failed to remit ~~the various duties and taxes~~ to the competent tax authorities pursuant to federal ~~and provincial tax and tobacco~~ legislation applicable to the import and sale of tobacco products.

## **b. THE APPLICANTS**

14. The Applicants are members and citizens of the Mohawk Nation and the Haudenosaunee. They are also members of the Mohawk community of Kahnawake, one of the communities of the Mohawk Nation, and are authorized and entitled to invoke the aboriginal and treaty rights, inherent rights, and international rights that ~~ensure~~ enure to their benefit as members and as citizens of the Mohawk Nation and the Haudenosaunee.
15. The Applicants are also Indians within the meaning of the Royal Proclamation of 1763, s.91(24) of the *Constitution Act, 1867*, and s.35 of the *Constitution Act, 1982*, and indigenous individuals within the meaning of the *United Nations Declaration of the Rights of Indigenous Peoples* (“UNDRIP”).
16. The Applicants are also Indians within the meaning of the *Indian Act*, RSC 1985 c. I-5 and have significant rights and interests in Kahnawake, a reserve within the meaning of the *Indian Act*.

## **c. THE MOHAWKS OF KAHNAWAKE, THE MOHAWK NATION AND THE HAUDENOSAUNEE**

17. The Mohawks of Kahnawake constitute a distinct community of Mohawks with its own laws and governing institutions and has at all times been an integral part of the Mohawk Nation.
18. The Mohawk Nation is a distinct people and the Mohawks have, since prior to the arrival of Europeans in North America, continuously occupied, possessed and used a territory which includes a significant part of what is now known as Quebec, Ontario and the United States, and which encompass the lands and waters of Kahnawake (“**traditional Mohawk Territory**”).
19. At the time of contact, the traditional Mohawk territory included at least an area bounded by the Delaware River to the south, the Richelieu River, Lake Champlain and the Hudson River to the east, Lake Ontario and the Oswegatchie and Unadilla Rivers to the west, and the Saint-Lawrence River to the north, with settlements in the Mohawk Valley in present day upstate New York and in the Saint-Lawrence valley.
20. Since prior to contact, the Mohawk Nation has belonged to a confederal system of other Iroquois nations - Oneida, Onondaga, Cayuga, Seneca and, since the eighteenth century, the Tuscarora – known as the Haudenosaunee or the Iroquois Confederacy.

21. The Iroquois Confederacy and their allies controlled a vast part of the continent stretching, north to south, from approximately the 48<sup>th</sup> parallel north to the borders of the present day Carolinas, and west to east, from the Great Lakes to beyond the Adirondack Mountains. The Tuscarora Nation, which entered the Confederacy in 1722, originated in an area in present-day North Carolina.
22. The Mohawk Nation and the Iroquois Confederacy have had their own system of government since prior to contact with Europeans, as well as their own laws, institutions, customs, practices and traditions, and the Mohawk Nation has throughout and to this date functioned as an independent nation with its own government. The Mohawk Nation and the Iroquois Confederacy have validly maintained this status to the present.
23. As the easternmost nation of the Confederacy, the Mohawk Nation has always been the guardian of the Eastern Door responsible for ensuring the territorial integrity and sovereignty of traditional Mohawk and Iroquois territory.
24. Since prior to contact with Europeans, and at all relevant times, the Mohawks have exercised their traditions, values, customs, spiritual practices and economic activities, have carried on their particular way of life and used and benefited from the lands and resources and earned their livelihood in and from the traditional Mohawk Territory.
25. The Mohawk community of Kahnawake is linked with other communities of the Mohawk Nation as well as with the other components of the Iroquois Confederacy by a common culture, a common language, common ancestry, common history, family relations and a shared responsibility, imposed by their laws, to protect and enhance the jurisdiction, rights, lands and interests of the Mohawk Nation.
26. The Mohawk community of Kahnawake exercises jurisdiction within and over the territory of Kahnawake. The Mohawk Nation continues to exercise jurisdiction over the whole of the traditional Mohawk territory.
27. As members of the Mohawk Nation and particularly as members of the Mohawk community of Kahnawake, the Applicants are beneficiaries of, and entitled to exercise, and exercise, the collective rights of the Mohawk Nation and the Mohawk community of Kahnawake. They also benefit from rights as members of the Haudenosaunee.
28. Historically, the French and the British Crowns recognized the Mohawk Nation as an independent nation capable of maintaining relations of peace and war, and of governing

itself under the protection of the French and the British Crowns, and both the French and British Crowns made treaties with the Mohawk Nation, the obligations of which they acknowledged, and which remain valid, operative and binding on the Crown.

29. Thus, the Mohawk Nation became party to several treaties with the European powers and such treaties recognized the right of the Mohawks as a nation to govern themselves and to carry out trade and other economic activities within the traditional Mohawk territory and beyond it, without restriction, regulation or obligation imposed by the European powers, including the British Crown.

30. Since prior to contact with the Europeans, the Mohawk Nation has also entered into agreements and treaties with other Aboriginal Nations.

**d. TRADE AS AN INTEGRAL PART OF IROQUOIS AND MOHAWK CUSTOMS, TRADITIONS, AND PRACTICES**

31. Since prior to contact with the Europeans, trade in goods, including tobacco, and transport thereof over large distances, have been an integral part of Iroquois and Mohawk customs, traditions, and practices. This trade and transport are integral to the distinctive society of the Mohawks and a central and significant part of that society's distinctive culture. They are a defining feature of Mohawk society.

31A. As tradesmen and tradeswomen, the Iroquois, including the Mohawks, had a firm grasp of self-interested economic pursuits and effectively understood the notion of trade on a "for-profit" or "commercial" scale.

31B. For the Iroquois and the Mohawks, trade represented one practice through which forms of status could be achieved by persons perceived to bring about a public benefit through their individual initiative. Influence could be gained within an Iroquois community through the redistribution of goods acquired in trade through gift-giving and even the internment of valuable "exotic" goods in burials of community members. Thus, individuals had a perceived self-interest in accumulating wealth through the commercial trading of goods.

32. The strategic position of the Iroquois territory, and of the traditional Mohawk territory therein, combined with the military power of the Confederacy, enabled the Mohawks and the members of other Iroquois nations, to circulate free of hindrance and acquire, exchange, distribute, and transport goods and thus thrive as traders throughout a vast territory, prior to and subsequent to contact with the Europeans.

#### e. MOHAWK TOBACCO PRODUCTION AND TRADE

33. Members of the Mohawk Nation have engaged in the production, use and trade of tobacco and tobacco products on a continuous basis and on a commercial scale since prior to contact with the Europeans.
34. Tobacco formed a highly valued item of trade for Aboriginal Peoples and was transported over immense distances. The species of tobacco cultivated by the Iroquois at the time of contact (*Nicotiana Rusticarustica*) was originally native to Central or South America. It was brought to the Northeast gradually along continental trading routes and cultivated along those routes through the intentional efforts of dedicated aboriginal farmers during the Woodland period (roughly 1000 BCE to 1000 CE).
35. During the Woodland period, tobacco became a fixture of the agricultural system of Iroquoian-speaking peoples. This agricultural system also included the growth of corn, beans and squash, the latter known as “the Three Sisters”.
36. At the time of contact with the Europeans, the Iroquois, including the Mohawks, practiced a mixed agricultural and trade economy, which included drawing upon surpluses of tobacco which could then be traded for other items and acquiring tobacco from other Aboriginal Nations. Tobacco was traded by the Mohawks over large distances, beyond their traditional territory.
37. A common Iroquoian relationship with tobacco can be demonstrated linguistically, as the root words for tobacco exist in the languages of the Mohawks, the Oneidas, the Onondaga, the Cayugas, and the Senecas. Similarly, pipe style and construction dating to the fifteenth and sixteenth centuries demonstrate significant and lasting cultural contact between these communities and a shared material culture of tobacco consumption.
38. The writings of the French, Dutch and English explorers, tradesmen, missionaries and colonial officials describe not only the cultivation of tobacco by the Mohawks as an important element of a large scale agricultural complex, but also the trade of tobacco between Mohawk individuals, between the Mohawks and other First Nations and between the Mohawks and the non-aboriginal subjects of European powers.
39. The tobacco which was cultivated by the Mohawks was not only produced exclusively for personal consumption and for spiritual, medicinal or diplomatic purposes, as emphasized in ethnocentric European accounts of Mohawk culture. Rather, tobacco cultivated by

Mohawks or otherwise acquired by them was predominantly a valuable item of trade in and of itself that was used by Mohawks and the Iroquois to obtain various goods from other First Nations, including the furs which were subsequently traded to colonial merchants and on which much of the colonial economies were based.

40. The cultivation and trade of tobacco as well as the trade itself of tobacco by the Iroquois and the Mohawks were to a significant degree commercial. Individuals pursued their economic self-interest by producing surplus amounts of tobacco (in addition to the quantities needed for personal consumption) and, in turn, exchanged such surpluses or traded tobacco otherwise acquired for other trade items with a view to making a profit, which often served to heighten their status within their community. Tobacco was not merely bartered or given in non-reciprocal fashion for spiritual, medicinal or diplomatic purposes. To the contrary, many Iroquois and Mohawks actively participated in the trade of tobacco for profit.
41. After first being introduced to it in the sixteenth century, both the French and the English understood the value of tobacco as an item of trade and made great use of tobacco in their commercial and diplomatic relations with Aboriginal Nations, including the Mohawk Nation.
42. Europeans began their own large-scale tobacco cultivation in their colonial plantations and traded tobacco for furs and other items of commercial value. Mohawks, who operated as intermediaries in the fur trade, traded furs for tobacco.
43. The European tobacco traders relied on trade networks in which the Mohawks and Iroquois were traders, intermediaries and consumers. Thus, in addition to cultivating and trading tobacco, the Mohawk and Iroquois also became tobacco importers, carrying this valuable commodity over vast distances.
44. The commercial character of the tobacco trade is indicated by references to price fluctuations observed by Jesuits who report at times that tobacco was “very high priced” or “very scarce”.
- 44A. The free trade of tobacco on a commercial basis among the Mohawks, between Mohawks and the members of other Aboriginal Nations, and, after contact, between Mohawks and non-aboriginal persons, continued without restriction into the nineteenth century and to this day.

45. The centrality of tobacco and tobacco products to the culture, economy and society of the Mohawks Nation, the Iroquois Confederacy and other Aboriginal Nations was such that tobacco was accepted as a form of currency.

**f. POST-CONTACT TREATMENT AND THE REGULATION ISSUE**

46. Mohawk and Iroquois trade [was/were](#) beyond the regulatory and administrative ambit of European powers. Such trade instead was regulated and administered by the Mohawk and Iroquois themselves. Thus, Mohawk trade was self-regulated. It was governed in accordance with Mohawk land and trade law and free of interference and imposition by or obligations to foreign governments.

47. A fundamental aspect of the independence of Mohawk and Iroquois trade was the absence of any obligation to pay duties, tributes, and other fiscal payments, and the absence of any tax collection obligation toward, or fiscal regulation by, European powers or the English Crown. As independent entities carrying on open and free trade, the Iroquois Confederacy and the Mohawk Nation and their members neither paid, nor collected nor remitted any taxes to the English Crown or other European powers.

48. By contrast, the trade of the subjects of European powers was regulated and taxed by the European authorities and their colonial governments.

48A. The system of separate regulation of trade for European subjects provided for in treaties was also entrenched or, as a minimum, reflected in the wording of the Royal Proclamation of 1763, which provided that “the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief or any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit [...]”

49. A regulatory and fiscal system applicable solely to Crown subjects eventually emerged to govern trade in the colonies, but did not regulate the trade of Mohawks or other Indians, who were not Crown subjects.

49A. Moreover, once the British and French Crowns began to vie for control of the New World by establishing settler colonies and military outposts, the Iroquois (and Mohawk) territory assumed a heightened importance as it soon became a buffer zone between the two colonial rivals.

49B. The English trading system also came to rely heavily on the capacity of the Iroquois to trade with distant First Nations located to the west of Iroquois country (and thus difficult for the English merchants to gain access to), especially with regard to the fur trade. The formidable military power of the Iroquois effectively ensured that, in order to trade with nations located to the west of the Iroquois, the English were forced to secure their goodwill and cooperation.

49C. Whereas the French *coureurs des bois* sought to gain a direct access to these First Nations, the English merchants relied on the Iroquois, including the Mohawks, to effectively act as middlemen with these groups.

49D. Thus, the English merchants traded their goods and wares almost exclusively to the Iroquois who, in turn, traded these goods and wares against furs and other items both amongst themselves and to other First Nations.

49E. In light of their privileged position, the Mohawks, being the Iroquois nation that was closest to the English trading outpost of Albany (following the Dutch relinquishing control thereof in 1664), considerably benefited from this trading system as it effectively enabled them to control the prices of English goods and wares that were traded to other First Nations as well as the price of furs (and other commodities) that were sold to the English.

#### **D. LEGAL GROUNDS**

##### **a. TREATY RIGHTS**

50. The Mohawks, including the Applicants, are the beneficiaries of the obligations under treaties concluded with the colonial powers, including the Covenant Chain, as well as under other imperial instruments. These obligations were never extinguished nor replaced and are still valid and binding. The Mohawks, including the Applicants, therefore possess a treaty right to free trade, which includes the right to trade tobacco and tobacco products on a commercial scale in their traditional Mohawk territory and in other territories contemplated by the treaties, without any regulation, imposition or duty or tax or collection obligation to the European powers and their successors.

##### **i. TREATIES CONCLUDED BY THE MOHAWK NATION AND THE IROQUOIS**

51. From the time of contact, European powers and Aboriginal Nations coordinated their separate systems of trade by virtue of treaties in a colonial context of economic interdependence and political and military alliances between these distinct nations. The

treaties described in the present application all meet the criteria established in Canadian jurisprudence for the existence of treaties.

52. From the early seventeenth century onward, the Iroquois Confederacy, and more particularly the Mohawk Nation, concluded numerous treaties with the colonial powers, namely the Dutch, the French and, following the cession of the Dutch possessions in the New World, the English. These treaties were essentially diplomatic and commercial in nature, trade being at the forefront of the preoccupations of the Iroquois and the Mohawks in their dealings with the colonial powers. These treaties were a continuation of pre-contact practices.
53. The treaties between ~~newly-arrived~~newly arrived European polities and the Iroquois Confederacy and the Mohawk Nation were negotiated and concluded on a nation-to-nation basis, with parties to the written and oral agreements being equals. Such treaties were, moreover, continually renewed and reaffirmed in diplomatic and trade meetings involving the native and newcomer signatories or parties.
54. From the beginning of the colonial encounter, trade and diplomatic treaties between Europeans and the Haudenosaunee or Mohawk Nation and its members were considered indispensable to the European powers and settlers to secure economic and other relations with aboriginal trading partners and thus access to new resources, markets and trade items.
55. The majority of these treaties were concluded according to the diplomatic language understood at the time by the Iroquois and the Mohawks. These treaties were memorialized by the exchange of wampum belts which conveyed different meanings, such as trade or peace or war. Knowledge of these treaties has been passed down from generation to generation in the oral tradition of the Iroquois and the Mohawks.
56. The treaty relationship is expressed by the well-known Two Row Wampum, which symbolically illustrates two paths or two vessels travelling down the same river together. One, a birch canoe, was to be for the Indian people, their laws, their customs and their ways. The other, a ship, was to be for the white people and their laws, their customs and their ways. Each travelled the river together side by side but in their own boat. Neither was to try to steer the other's vessel.
57. Several treaties, though not a majority, were also recorded in written form by colonial

officials. Other treaties are known through the writings of these colonial officials. The Iroquois and Mohawks had their own system of recording treaties.

58. Although treaties were also concluded with the Dutch and the French, the Mohawks and the other nations which formed the Iroquois Confederacy negotiated the bulk of these treaties with the British Crown, forming what is today known as the “Covenant Chain”, which to this day symbolizes the alliance between the Iroquois Confederacy, including the Mohawks, and the Crown.

### **ii. LA GRANDE PAIX**

59. Before turning to the Covenant Chain, and although there were a number of treaties made between the French and the Iroquois Confederacy and its constituent nations, it is appropriate to deal with a major treaty of the French regime. The signing of the “Grande Paix de Montréal” in 1701 (known in English as the “Great Peace of Montreal” or “Grand Settlement of 1701”) was a peace and trade treaty concluded between France and numerous First Nations of North America, including the Mohawk Nation. The settlement ended several decades of more or less continuous warfare over land, resources, trading partners and trade between the Iroquois and the Aboriginal Nations allied to the French. The Iroquois made their adherence to the treaty as neutrals in relations between European powers in the specified territory contingent upon, notably, the recognition of their freedom to trade in territories controlled by the French and their aboriginal allies.

60. The Grande Paix de Montréal was concluded in accordance with the above-mentioned protocolary items and procedures affirming, through the oral and written terms, the renewal of peace between the parties to the settlement and the recognition of longstanding Mohawk trade practices and routes.

### **iii. THE COVENANT CHAIN**

61. The Mohawks entered into trade relations with the Dutch when Dutch merchants established Fort Nassau in the vicinity of Albany in 1614. In the Mohawk oral tradition, the first commercial treaty was concluded with the person referred to as “Jacques,” a reference to a well-known Dutch trader. In 1642, Arent Van Curler, who is known in Mohawk oral tradition as “Old Corlaer,” undertook a diplomatic mission to the Mohawks which led to expanded trade treaties between the governors of New Netherland and the Iroquois Confederacy. When the English took control of New Netherland in 1664, they

built their treaty relationship with the Iroquois Confederacy and its allies on the foundation of the Dutch-Iroquois treaties. The British-Iroquois treaty relationship came to be known as the Covenant Chain.

62. The Covenant Chain is a series of treaties that were meant to record military and trade alliances (and, in some cases, neutrality pacts) between the British Crown and the Mohawk nation and other nations of the Iroquois Confederacy, especially in the context of the ongoing colonial rivalry between the French and British Crowns in the seventeenth and eighteenth centuries which ultimately culminated in the conquest of New France in 1760.
63. Thus, these treaties were also intended to record and formalize the commercial and trading system that existed between the English Crown and the Iroquois Confederacy, including the Mohawk Nation, free from interference the one by the other. Trade, especially the ability to trade free of hindrance, remained a vital and intricate component of the relationship between the Iroquois and the English. This trade included tobacco.
64. The Covenant Chain was often renewed and strengthened over the course of the seventeenth and eighteenth centuries and trade continued to remain at the forefront of the preoccupations of the Iroquois and the Mohawks.
65. The treaties of the Covenant Chain thus expressly recognize the rights of the Mohawks (and the Iroquois) to trade freely not only with the colonial powers but also amongst themselves as well as with other First Nations. Such trade included the free trade of tobacco.
66. These treaties contain oral terms (which include promises) as well written terms, or terms otherwise recorded symbolically. In addition to express or written and oral treaty terms, or terms otherwise recorded, other relevant historical circumstances surrounding the conclusion of the treaties of the Covenant Chain further confirm an Iroquois and Mohawk right of free trade (including commitments during the negotiations, the comprehension of Mohawk and/or Haudenosaunee members at the time of conclusion of the treaties and thereafter, and the subsequent conduct of the signatories post-treaty).
67. Invitations from representatives of colonial powers to Haudenosaunee or Mohawk leaders to negotiate treaties such as those in the Covenant Chain, and the other earlier treaties concluded with the Dutch, French and English Crowns were made on the basis that any

treaty would recognize the Mohawk and Iroquois right to trade goods, including tobacco, free of imposition by or obligations to foreign powers or the Crown within their traditional territory as well as beyond it. The same applied to trade with other Aboriginal Nations (i.e. no restrictions by either party). For example, in 1700, the Commissioner of Indian Affairs in New York invited the Iroquois to trade at Albany and affirmed that they would “have the same freedom of trade as our selves, so when ever you or any of our people design the like, you shall allwayes have the same protection.”

68. Preliminaries and events leading up to the ceremonies of renewal of the Covenant Chain and other treaties indicate the imperative of trade concessions and trade rights for the Mohawks, and such invitations and pre-treaty interactions are essential in interpreting the written treaties and determining the intentions of the parties and the nature and scope of agreed provisions.
69. Similarly, treaty negotiations and oral terms of peace and trade treaties also reflect the longstanding trade practices of the Haudenosaunee and the Mohawk Nation and their members, and crystallized such customary trade practices into treaty rights to acquire, exchange, distribute and trade goods without interference from or obligations to foreign Crowns, consistent with the practice of trade with other Aboriginal Nations before the colonial encounter.
70. By expressing their assent to the treaties and the Covenant Chain, it was the understanding of the Mohawk parties that they would have the right to acquire, exchange, distribute and trade goods, including tobacco, without interference from or obligations to foreign Crowns. The Crown had the same intention and understanding.
71. The commercial and trading system recognized by the treaties which constitute the Covenant Chain also recognized the complex commercial and trading system between the First Nations which existed prior to the time of contact with the Europeans and in which the Iroquois and the Mohawks played a vital and dominant role in light of the key geographic position of the territories under their military control.
72. The treaties of the Covenant Chain invoked herein are briefly described in the following paragraphs.

Treaty of Trade and Mutual Aid, 1664

73. On September 24, 1664, representatives of the British Crown, having recently taken

control of Dutch possessions in North America, concluded a treaty at Albany with the Iroquois Confederacy represented by the Mohawks and Seneca. The very first article of the treaty referred to the English continuing to trade the same wares and commodities as the Dutch previously had. More significantly, the Iroquois and the Mohawks actually proposed and insisted upon including an article to secure the right to free trade that they had enjoyed with the Dutch. This provision, which was accepted by the English, stated: "That they [the Iroquois] may have free trade, as formerly."

#### Treaty of 1677

74. After the English took definitive control of New York from the Dutch in 1674, the governor of New York, on behalf of several of the British colonies, renewed and expanded the treaty relationship with the Iroquois Confederacy at treaty conferences held in Albany in 1677. The term "Covenant Chain" appears in the memorials of two treaties concluded at this time, including that which confirmed the Anglo-Iroquoian alliance in the north-east. Nearly a century after its conclusion, Sir William Johnson described the treaty as one "for the common safety of you & us [...] for our mutual advantage, of which trade is a considerable part."

#### Treaty of Peace Trade & Amity, 1735

75. The "Treaty of Peace, Trade & Amity" of 1735 was concluded at Albany on August 2nd, 1735, the Commissioners of Indian Affairs of New York and Chiefs of the Mohawks of Kahnawake, among other nations. The Mohawk Chiefs travelled to Albany with the intention of renewing the "Antient Peace Friendship and Intercourse" between the Iroquois and the British. According to the written record of the treaty, the Commissioners undertook as follows: "[...] we should then forever live in good unity together and have free Recourse to & from your habitations at all times as well on acct. of trade as otherwise [...]". A copy of the treaty was sent to the Governor of the colony of New York on August 14th, 1735 and a wampum belt sent to Onondaga for preservation and ratification by the Six Nations - "as a memorial to posterity of this solemn treaty."

#### Treaty and Covenant, 1742

76. The Commissioners of Indian Affairs invited the Mohawks of Kahnawake to renew the Treaty of 1735 as tensions grew between the French and British in North America. This treaty reaffirmed the covenants of previous treaties, explicitly stating that, in exchange for their neutrality in the event of renewed war between the British and French Crowns, the

Mohawks of Kahnawake were granted liberty of trade, which would be conducted “always free and clear without any manner or interruptions from each other”.

#### Onondaga Conference of 1748

77. The earlier treaties of the Covenant Chain between the Crown and the Iroquois Confederacy were affirmed once again at the Onondaga Conference of 1748. The conference was attended by Sir William Johnson, the Commissioner of Indian Affairs, and representatives of the Iroquois Confederacy. An extract from the speech of Johnson given at the conference invokes their longstanding treaty relationship: “[...]. But I tell you I found out some of the old Writings of our Forefathers which was thought to have been lost and in this old valuable Record I find, that our first Friendship Commenced at the Arrival of the first great Canoe or Vessel at Albany [...].”

#### Treaty of 1754

78. The treaty of 1754 is another treaty forming the Covenant Chain between the English Crown and the Mohawks of Kahnawake. The treaty was concluded after the British representatives invited the Mohawks to Albany to renew the terms of peace and trade of earlier treaties. The treaty was concluded with the Mohawks of Kahnawake, stating: “Brethren we now again, renew the old Covenant Chain with you and all your allies, which has been made by our forefathers [...] We of our side, will keep the said Covenant Chain bright, clear & free from rust and filth, and the Road between us and you clear from all filth and dirt, and the fire burning. [...] Gave a large belt of wampum.”

#### Treaties of 1760

79. The Treaty of Swegatchy of August 1760 was a treaty often described as a treaty of peace and friendship, but it contemplated the renewal of the Covenant Chain. It was concluded between representatives of the Mohawks of Kahnawake and Akwesasne and Sir William Johnson as the British advanced toward Montreal. The terms of the Treaty of Swegatchy were confirmed at the treaty conference held at Kahnawake on the 15<sup>th</sup> and 16<sup>th</sup> of September 1760, days after the capitulation of Montreal. The Treaty of Kahnawake was ratified by Sir William Johnson on behalf of the British Crown, and by the representatives of the Mohawks of Kahnawake, witnessed by the Iroquois Confederacy whose representatives took part in the negotiations.

80. It was the intention of the parties to the treaties of 1760 to explicitly reconfirm the Covenant Chain binding the British Crown and its colonies, the Iroquois Confederacy

including the Mohawk Nation and the Mohawk communities in New France, and to formally extend the Covenant Chain to all of the Aboriginal Nations represented by the Mohawks of Kahnawake at the treaty conference.

81. Although no formal document was signed, the terms of the Treaty are known from the response given by the Mohawks of Kahnawake on September 16<sup>th</sup> to the speeches of the British and Iroquois representatives delivered on September 15<sup>th</sup>. Certain significant terms of these oral treaties were summarized in the papers of Sir William Johnson in articles 3, 4 and 13, for which wampum belts were given. Article 3 provides for the “renewing and strengthening of the old Covenant Chain.” Article 4 provides for the “opening of the Road from this to [Albany] you country we on our parts assure you to keep it clear of any obstacle and use it in a friendly.” Article 13 of the treaty provides that the English Crown: “[...] will regulate Trade so that we may not be imposed upon by yr [sic] people.”
82. The trade terms of the Treaty and the Mohawk right of free and open trade are subsequently reaffirmed and recorded in post-treaty conferences, oral history, and in the subsequent conduct of the Mohawk, as well as in other historical and diplomatic records from 1760, 1764, 1765, 1769, 1770, 1788, 1795, 1796, and 1828.

#### Royal Proclamation of 1763

83. The pre-contact trade system of the Mohawk and Iroquois which was recognized in the free trade provisions of treaties with European Powers was once again formally and unilaterally recognized by the British Crown through the Royal Proclamation issued by King George III in 1763 in the wake of the Seven Years War. The Royal Proclamation not only provided for the recognition of aboriginal title, but also acknowledged, at least implicitly, by the regulation of non-aboriginal persons only, the open and free trade rights of the Indians, including the Haudenosaunee and the Mohawk Nation and its members
84. To this day, the treaties of the Covenant Chain have never been extinguished or replaced and subsist as binding bilateral instruments, the rights of which are now constitutionalized. The continuing validity of the peace and trade treaties concluded between the Mohawk Nation or the Iroquois Confederacy and European powers has been invoked regularly by the Mohawk Nation and its members from the time of their conclusion, regardless of the subsequent unilateral and arbitrary lack of respect and lack of implementation by the Crown of the treaties and of the Royal Proclamation of 1763.
85. The Crown is deemed to have knowledge of its treaty obligations to the Mohawks of

Kahnawake as a component of the Mohawk Nation and the Iroquois Confederacy, yet the governments of Canada and Quebec have continuously violated the treaties by the imposition of borders, by the enactment of legislation such as the *Excise Act, 2001*, the *Excise Tax Act*, and the *Tobacco Tax Act*, and by the administrative and prosecutorial measures undertaken pursuant to that legislation, none of which alter the binding and superior force of the constitutionalized treaties of which the Applicants are beneficiaries.

#### The Jay Treaty of 1794

86. During the late 18<sup>th</sup> century, Great Britain and the United States of America had an uneasy truce following the end of the American Revolutionary War and the ratification of the Treaty of Paris in 1783. The imposition by Great Britain of high duties and other restrictions on American traders in the midst of the French Revolutionary Wars led to negotiations between John Jay (for the United States) and William Grenville (for Great Britain) in London in 1794. These negotiations resulted in the Treaty of Amity, Commerce, and Navigation, better known as the Jay Treaty, being signed on November 19, 1794. It was ratified by the United States Senate on June 24, 1795 and by the British Government on October 28, 1795. The treaty came into effect on February 29, 1796.

87. First Nations were included in the treaty and Article III of the Treaty states that “it is agreed that it shall at all time be free to His Majesty’s subjects, and to the citizens of the United States, and to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America...and freely to carry on trade and commerce with each other...nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians”. Article 28 of the Treaty says that the “first ten articles of this treaty shall be permanent”.

#### **b. ABORIGINAL RIGHTS**

88. In addition to their treaty rights, the Applicants as members of the Mohawk community of Kahnawake (a distinct aboriginal society) also have and invoke an aboriginal right of free trade in a range of goods which they have acquired, used and traded since prior to contact with Europeans.

89. For the purpose of these proceedings, the Applicants assert that their aboriginal right of

free trade, confirmed by section 35 of the *Constitution Act, 1982*, includes the right to acquire and use tobacco and tobacco products, and to engage in the trade of such tobacco and tobacco products with other Mohawks and Aboriginal Nations or with non-aboriginal persons, without any imposition by or related obligation to the Crown.

90. The aboriginal right of the Applicants to freely trade in tobacco on a commercial scale shields the Applicants from any regulation, imposition or constraint by the Crown or non-aboriginal legislative bodies. The Applicants therefore have no obligation to obtain permits or certificates, nor any obligation to pay, collect or remit federal or provincial duties or taxes in respect to tobacco, in the circumstances of these proceedings.
91. To the extent that there is any involvement of the Applicants in the Alleged Operation, which is expressly denied, it is submitted that they acted and conducted themselves pursuant to their aboriginal rights (as well as pursuant to the treaty rights and other rights mentioned herein).
92. Since prior to contact between the Europeans and the Mohawk Nation, the use and trade of goods, and particularly tobacco, has been always been a defining and integral feature of Mohawk culture, traditions and practices, and is an integral part of the distinctive culture of their aboriginal society.
93. Members of the Mohawk Nation have continuously used and traded tobacco, with other Mohawks as well as the members of other Aboriginal Nations, including on a commercial basis, since prior to contact with Europeans. The post-contact trading activities and conduct of the Mohawks of Kahnawake provides substantial evidence of the extent and importance of the exercise by the Mohawks of their trading rights, which endures to this day and has formed, since prior to contact, a distinctive feature of Mohawk culture, traditions and practices, including for the Mohawks of Kahnawake.
94. At the time of contact, Mohawk traders expanded their trading practices and traditions to trade with Europeans who profited immensely from the trade goods delivered to them by the Mohawks, particularly fur, and who introduced their own products, including tobacco grown in European plantations, into the traditional trading networks of the Iroquois Confederacy.
95. The alleged import of tobacco products by the Applicants constitutes the modern expression of an aboriginal right and the logical evolution of a longstanding commercial

practice which was already firmly established prior to contact between the Mohawks and the colonial powers.

96. All of the impugned activities of the Applicants occurred within the territorial ambit of their aboriginal rights. The tobacco at issue originated within and at all times remained within the trading territory of the Haudenosaunee, of which the Mohawk Nation is a part.
97. Until well into the 18th century, there were no borders or boundaries which affected the exercise by the Mohawks of their aboriginal rights which, in any event, trump the effect of any borders or boundaries.
98. The aboriginal right of the Mohawk Nation to free trade, including the trade of tobacco and tobacco products on a commercial scale, was never extinguished and has never been abandoned by the Mohawks. Therefore, the Mohawks of Kahnawake, including the Applicants, have never lost or ceded their aboriginal rights, whether through extinguishment, surrender, abdication or in any other manner.

**c. SOVEREIGNTY AND SELF-DETERMINATION**

99. The Mohawk Nation is a sovereign nation under international law with its own people, territory, government and foreign relations and has and exercises its authority and rights *inter alia* in and over a significant part of what is now known as Quebec, Ontario and the United States.
100. The Mohawk Nation has functioned continuously as a distinct nation and society with its own government, laws and institutions.
101. The laws of Canada and Quebec do not apply to the Mohawk Nation and its members to the extent that they are inconsistent with the sovereignty, authority, and jurisdiction of the Mohawk Nation and its members.
102. Under reserve of the assertion by the Mohawk Nation of its full and inherent sovereignty, the Mohawk Nation has retained, and for the purpose of these proceedings the Applicants invoke, as a minimum, the residual sovereignty of the Mohawk Nation.
103. As part of its residual sovereignty, the Mohawk Nation has exercised continuously and continues to exercise its authority, jurisdiction and control over its own members and territory with its own society, values, customs, traditions, spirituality, resources, economy, government, laws and institutions.

104. Since prior to the time of first contact with the colonial powers, the Mohawk Nation has never ceded or abandoned its residual sovereignty. To this day, the Mohawk Nation still possesses and exercises the right to govern, control and administer its own society, its institutions and its economy and exercises its self-determination, including in respect to the exclusive control and management of the production and trade or distribution of tobacco by its members.
105. Any sovereignty of Her Majesty in Right of Canada or in Right of Quebec cannot be exercised in respect to the Mohawk Nation to the extent that it is incompatible with the residual sovereignty of the Mohawk Nation.
106. The residual sovereignty of the Mohawk Nation includes the immunity of the Mohawk Nation and its components from any regulation or constraint imposed by the Government of Canada or the Government of Quebec. Such residual sovereignty extends to an immunity from tax payment and tax measures, including tax collection, whether such taxation or tax measure arises under federal or provincial law.
107. The residual sovereignty of the Mohawk Nation also includes the control of trade and commerce between its members and the economic activities which occur on the Mohawk Territory, including within and without the boundaries of the Kahnawake reserve.
108. Moreover, as an independent and self-governing society and nation, the Mohawk Nation has always had and exercised its self-determination, including in respect to economic activities comprising, *inter alia*,— the trade of tobacco for personal and commercial use.
109. The Mohawk community of Kahnawake exercises authority, jurisdiction and control in respect to the members of the Mohawk community of Kahnawake and the territory of Kahnawake.
110. The Mohawk Nation and thus the Mohawks of Kahnawake have never lost or ceded their sovereignty and jurisdiction, whether through extinguishment, surrender, abdication or in any other manner.
111. As such, the alleged actions of the Applicants in relation to the import, sale and distribution of tobacco would have occurred outside the jurisdiction and authority of the Government of Canada and the Government of Quebec and within the exclusive jurisdiction and authority of the Mohawk Nation.

112. The Charges against the Applicants and the contested provisions are therefore incompatible with and in violation of the residual sovereignty (as a minimum) of the Mohawk Nation and its component the Mohawk community of Kahnawake, and the contested provisions are inapplicable to the members of the Mohawk community of Kahnawake, including the Applicants.
113. The Supreme Court of Canada has recognized that the European powers treated the Indian nations, including the Mohawk Nation, as independent nations capable of entering into treaty relationships and as virtually independent nations. The treaties described herein represent an acknowledgment by the Crown of such a nation-to-nation relationship.
114. The right of self-determination is inherent and not dependent on specific constitutional recognition by Canada or Quebec.
115. Nonetheless in 1985, the Government of Quebec recognized through the “Résolution de l’Assemblée nationale portant sur la reconnaissance des droits des autochtones” the status of the Mohawks as a nation and the rights of a constitutional order of the Mohawk Nation.
116. Furthermore, it is submitted that, even under Canadian constitutional law, the Mohawk Nation enjoys the status of a third order of government, distinct from that of Canada and the provinces (and territories).
- 116A. The self-determination of the Mohawk Nation encompasses the right to the exclusive control, management and administration of all facets of the trade of tobacco in Kahnawake and elsewhere in the Mohawk Territory by members of the Mohawk Nation, including the Accused.
- 116B. As such, the Mohawk Nation and its members enjoy immunity from any obligation of the Government of Canada or the Government of Québec to be subject to registration to carry out tobacco activities on the Kahnawake reserve or to carry out on behalf of the Government of Canada or the Government of Québec any duty of collection or remittance.
- 116C. The Mohawk Nation has no duty to carry out the administration of any statute of Canada or Québec unless it has given its prior consent to carrying out such administration, and, in particular, no obligations under constitutionally inapplicable and inoperative statutes.
- 116D. In this respect, section 87 of the *Indian Act* is a partial recognition of the right of the

members of a distinct nation, the Mohawk Nation, to be exempt from all forms of taxation and related tax collection mechanisms.

116E. Indians were not considered to be Canadian citizens until the middle part of the twentieth century and did not even have the unconditional right to vote in federal elections until 1960. However, this was consistent with the status of the Mohawks as citizens of a distinct nation, the Mohawk Nation, enjoying a tax immunity.

**d. INFRINGEMENT**

117. The charges against the Applicants under the contested provisions, being sections 380(1)(a), 465(1)(c), 467.11 and 467.12 of the *Criminal Code*, section 42 of the *Excise Act, 2001*, ~~section 212 of the *Excise Tax Act*, and sections 17.2, 17.3 and 17.4 of the *Tobacco Tax Act*~~, as well as the contested provisions themselves, infringe without justification the treaty rights and the aboriginal rights of the Applicants as members of the Mohawks of Kahnawake, part of the Mohawk Nation. Moreover, the administrative mechanisms and actions of the Government of Quebec and the Government of Canada relating to the collection of taxes pursuant to the relevant taxation statutes, are, in the context of these proceedings, constitutionally inapplicable and inoperative in respect to the members of the Mohawk Nation, more particularly to the members of the community of Kahnawake, including the Applicants.
118. The infringement of the constitutional rights of the Applicants cannot be justified by the Crown under the criteria established by the jurisprudence, because there is no compelling and substantive legislative objective which can trump the rights of the Mohawk Nation and the constitutional, inherent and international rights, exemptions and immunities of its members.
119. As a minimum, the contested provisions are a *prima facie* infringement of the rights of the Applicants, particularly for the reasons set out herein and in the Notice of Constitutional Questions filed herein.
120. The Applicants must only establish a *prima facie* infringement of their constitutionalized treaty, aboriginal and other rights. Moreover, the questions asked in *R. v. Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place.
121. Given the *prima facie* infringement of the aboriginal and treaty rights of the

Applicants, the onus on the Crown is to justify the infringement on the basis of the *Sparrow* test, as refined in the subsequent jurisprudence of the Supreme Court. In summary, the government must first demonstrate that it was acting pursuant to a valid legislative objective. Second, the government must demonstrate that its actions are consistent with the fiduciary relationship between the Crown and aboriginal peoples. In its analysis of the latter requirement, the court will determine if there has been as little infringement as possible in effecting the legislative purpose, whether fair compensation is available, and whether the aboriginal group has been consulted, among factors to be considered in assessing justification: see *R v Gladstone*, [1996] 2 SCR 723 at paragraphs 54-55.

122. With respect to the first branch of the *Sparrow* test, the Applicants take no position on the general legislative objectives pursued by the governments of Canada and Quebec in the enactment of the contested provisions of the *Criminal Code*, ~~and the *Excise Act, 2001*, the *Excise Tax Act*, and the *Tobacco Tax Act*~~, and in respect to their general application. However, the Applicants assert that the legislative objectives had to take into account the constitutional, inherent and international rights of the Mohawks of Kahnawake as a component of the Mohawk Nation and the Iroquois Confederacy, which the Crown, ~~and Parliament, and the Legislature of Quebec~~ failed to do. Consequently, the Crown has not met the first branch of the *Sparrow* test in respect to any justification of the infringement of the constitutional rights of Applicants.

123. With respect to the second branch of the *Sparrow* test, the Applicants deny that the governments of Canada and Quebec have taken any steps to ensure that the contested provisions infringe their asserted rights as little as possible. Rather, these governments denied or ignored and have breached these rights.

124. The application of fiscal legislation to the trading activities of the Applicants and other members of the Mohawk Nation and the Haudenosaunee deprives the Applicants of substantially the whole value of their aboriginal and treaty right to trade in tobacco and tobacco products.

125. In any event, the operability and applicability of the contested provisions constitute an incompatible interference with the fundamental nature and extent of the constitutionalized rights of the Applicants, are an unreasonable limitation thereof, particularly in the historical circumstances and solemn treaty commitments and honour of

the Crown, impose undue hardship and deny the Applicants the preferred means of exercising their rights, and cumulatively violate the essence of those rights.

126. The Charges and the contested provisions also violate the residual sovereignty and self-determination of the Mohawk Nation in the circumstances of these proceedings, and are constitutionally inapplicable and inoperative in respect to the members of the Mohawk Nation, more particularly the members of the community of Kahnawake, including the Applicants.

**e. INTERNATIONAL LAW**

127. The Mohawks of Kahnawake, of which the Applicants are members, constitute an Indigenous People within the meaning of the United Nations Declaration on the Rights of Indigenous Peoples of September 13, 2007 (hereinafter “UNDRIP”).

128. The UNDRIP was endorsed by Canada on November 12, 2010, and supported without qualification by the Minister of Indigenous and Northern Affairs on May 2016. The UNDRIP was also adopted as government policy when Prime Minister Justin Trudeau issued a Mandate Letter in 2015 to the Minister of Indigenous and Northern Affairs which provided as a priority that the Minister “support the work of reconciliation, and continue the necessary process of truth telling, healing, work with provinces and territories, and with First Nations, the Métis Nation, and Inuit, to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

129. On May 30<sup>th</sup>, 2018, the House of Commons adopted Bill C262. This Bill, also known as “An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples” affirms the Declaration as a universal, international human rights instrument with application in Canadian law, and requires the Government of Canada to take all measures necessary to ensure that the laws of are consistent with that Declaration, which laws would include the *Criminal Code*, and the *Excise Act, 2001*, ~~the *Excise Tax Act*, and the *Tobacco Tax Act*~~. The Bill has received first reading in the Senate of Canada.

130. The Applicants, as members of the Mohawk Nation, hold and assert all of the rights of the Mohawk Nation and the Mohawks of Kahnawake affirmed in UNDRIP, notably in articles 3, 4, 5, 11, 18, 19, 20, and 37, which include the following:

- a. The right to autonomy and self-government in relation to their internal affairs;
- b. The right to freely determine their economic, social and cultural development, and to be secure in their enjoyment of their means of subsistence and development;
- c. The right to engage freely in their traditional activities and to maintain, strengthen and revitalize their distinct customs, traditions and institutions;
- d. The right to participate in decision-making in matters that affect their treaty, aboriginal, inherent and other rights.

131. Article 37 of UNDRIP confirms the right of the Applicants, as members of the Mohawks of Kahnawake, part of the Mohawk Nation and the Haudenosaunee, to the recognition, observance and enforcement of all treaties, agreement and other constructive arrangement concluded with States, which clearly includes treaties entered into by the French and British Crown. The governments of Canada and Quebec have an international obligation to honour and respect the treaties of the Covenant Chain as well as the treaties concluded by the Mohawk Nation with the French Crown including the Grande Paix of 1701.

132. The Governments of Canada and Quebec have an international obligation to obtain the free, prior and informed consent of the Mohawk Nation prior to the enactment and implementation of legislative and administrative measures that affect their treaty, aboriginal, inherent and other rights.

133. The international law rights of the Applicants as members of the Mohawks of Kahnawake pursuant to articles 3, 4, 5, 11, 18, 19, 20, and 37 of the UNDRIP are not subject to the judicial tests for infringement and justification that apply to existing aboriginal and treaty rights affirmed by s.35 of the *Constitution Act, 1982*.

134. The Crown has violated all these rights of the Mohawks set out in UNDRIP.

135. The charges against the Applicants in the present proceedings and the contested provisions are a violation of international law and the rights of Applicants under international law.

#### **E. CONCLUSIONS REGARDING INAPPLICABILITY AND INOPERABILITY**

136. Sections 380(1)(a), 465(1)(c), 467.11 and 467.12 of the *Criminal Code* and the

charges based thereon, and section 42 of the *Excise Act, 2001*, ~~section 212 of the *Excise Tax Act*, and sections 17.2, 17.3 and 17.4 of the *Tobacco Tax Act*~~, in the context of the present proceedings and in respect to the Applicants and their conduct, violate and are incompatible and inconsistent with:

- a. the unextinguished treaty rights of the Mohawk Nation and the Haudenosaunee and the members thereof, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute an unjustified infringement of the constitutionalized treaty rights of the Applicants, particularly the treaty rights under the treaties of 1664, 1677, 1735, 1742, 1754 and 1760, which provide, inter alia, for the right of the Mohawk Nation and its members to acquire and trade goods free of any regulation or constraints by the Crown;
- b. the unextinguished aboriginal rights of the Mohawk Nation and the Haudenosaunee and the members thereof, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute an unjustified infringement of the constitutionalized aboriginal rights of the Applicants, and particularly the right to acquire and trade goods free of any regulation or constraints by the Crown;
- c. the status of the Mohawk Nation as an independent, self-governing nation with at least residual sovereignty, as well as the self-determination of the Mohawk Nation, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute a breach as well as an infringement without justification of the authority, jurisdiction and powers of the Mohawk Nation;
- d. the immunity and exemptions of the Mohawk Nation and its members from taxation and tax-collection;
- e. the rights of the members of the Mohawk Nation contained or reflected in the United Nations Declaration on the Rights of Indigenous Peoples, including the right to freely determine and freely pursue their economic development, which extends to free trade and commerce.

## **F. OTHER EVIDENCE**

137. In support of the present Motion to Stay Proceedings, Applicants will present the evidence of aboriginal witnesses, including testimony based on oral tradition, in addition

to expert reports and expert evidence.

**FOR THESE REASONS, ACCUSED-APPLICANTS REQUEST THE COURT:**

**TO GRANT** the present motion;

**TO DECLARE** sections 380(1)(a), 465(1)(c), 467.11 and 467.12 of the *Criminal Code* as constitutionally inapplicable and inoperative in the respect to the Accused-Applicants Derek White and Hunter Montour in the context and in the circumstances of the present proceedings;

**TO DECLARE** section 42 of the *Excise Act, 2001*, S.C. 2002 c. 22, ~~section 212 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, and sections 17.2, 17.3, 17.4 of the *Tobacco Tax Act*, C.Q.L.R. c. I-2,~~ are is constitutionally inapplicable and inoperative in respect to the Accused-Applicants Derek White and Hunter Montour in the context and in the circumstances of the present proceedings; and

**TO STAY** the proceedings against Derek White and Hunter Montour.

**TO MAKE SUCH OTHER ORDERS AS THE COURT MAY DEEM JUST.**

**THE WHOLE RESPECTFULLY SUBMITTED.**

Montreal, ~~August 30, 2019~~April 2, 2020

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FOR

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