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2023 QCCS 4154 (CanLII)

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF LONGUEUIL

No.: 505-01-137394-165

DATE: November 1st, 2023

BY THE HONOURABLE SOPHIE BOURQUE, J.S.C.

HIS MAJESTY THE KING
Prosecutor
v.
HUNTER MONTOUR
DEREK WHITE
Accused
And
THE ATTORNEY GENERAL OF QUEBEC
Intervener
And
THE ATTORNEY GENERAL OF CANADA
Intervener
And
THE MOHAWK NATION COUNCIL OF CHIEFS
Intervener

JUDGMENT
ON THE FRESH AS AMENDED CONSOLIDATED CONSTITUTIONAL PLEADING[1]

[1] Consolidation of the Notice of Constitutional Question filed on July 27, 2018 and Motion to Stay Proceedings (Constitutional Challenge) filed on September 28, 2018.

(s. 35, s. 52 of The Constitution Act, 1982)

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SUMMARY[2]

The *Fresh as amended consolidated constitutional pleading* is allowed. Section 42(1) of the *Excise Act*, *2001*, unjustifiably infringes the Aboriginal right and the treaty right of the Applicants as guaranteed by sec. 35(1) of the *Constitution Act, 1982*. It is of no force and no effect against them. Consequently, the criminal procedures are permanently stayed.

I- INTRODUCTION

On May 9th, 2019, at the end of a two-month-long trial, a jury rendered a verdict, finding Derek White guilty of committing an indictable offense for the benefit of a criminal organization, conspiring to defraud the Government of Canada, and perpetrating fraud against the Government of Canada. He was acquitted of conspiring to defraud and committing fraud against the Government of Québec. The maximum prison sentence for these infractions is fourteen years.

Hunter Mountour was found guilty of the only offence he was charged with, to have participated in activities of a criminal organization. The maximum prison sentence for this infraction is five years.

All these infractions are connected to the scheme employed by the Applicants to bring in Canada substantial quantities of tobacco from the United States while evading the taxes mandated by the *Excise Act, 2001*.

Before the jury trial, they filed a *Notice of constitutional questions.* The present judgment is about the fourth and final version of this motion, filed on November 21, 2021, titled *Fresh as amended consolidated constitutional pleading* (hereafter the Notice).

They alleged that ten treaties (hereafter the Treaties) negotiated between 1664 and 1760, along with the Covenant Chain, an overarching oral meta-treaty, guarantee them the right to tobacco trade and to discuss any related issue with the Crown. Additionally, they asserted an Aboriginal right to tobacco trade. They are thereby seeking a permanent stay of proceedings arguing that their Aboriginal and treaty rights guaranteed by s. 35(1) of the *Constitution Act, 1982* (hereafter s. 35(1)) have been unjustifiably infringed.

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[2] The summary is prepared only to help the understanding of a lengthy judgment. It does not form part of the Court's reasons for judgment and is not for use in legal proceedings.

The judgment is divided in six sections: the Indigenous perspective, the treaty right, the Aboriginal right, the infringement, the justification, and the remedy.

The Summary will follow the same structure and the facts mentioned herein come from the evidence that the Court has found conclusive.

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II- THE INDIGENOUS PERSPECTIVE

Central to the context put forward in the Notice is the relationship that existed between the Mohawk and the British nations between 1664 and 1760.

The Mohawk Nation Council of Chiefs (hereafter the MNCC) was authorized to intervene to present evidence as to the perspective of the Mohawk nation in order to assist the Court in its analysis of the evidence. It was done through the testimonies of Dr. Amber Adams, Ph.D., and of Chief Curtis Nelson.

Despite the limits imposed by the Court on the MNCC's intervention, Dr. Adams and Chief Nelson provided an impressive amount of complex, relevant, and useful evidence on the perspective of the Mohawk nation and the Haudenosaunee. The Haudenosaunee family (the Indigenous name for Iroquois) is composed of six nations: the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora. They share a common culture relevant to the present judgment.

This evidence gave the Court a better understanding of the Haudenosaunee culture, history, and law. Of course, it is neither enough evidence nor enough time to develop a profound understanding of the culture of any nation.

Before the auditions, as the vast majority of the non-Indigenous Canadian population, the undersigned was ignorant of the Haudenosaunee and Mohawk cultures. It was a privilege to have it explained by two members of the Mohawk nation who came to the Court with their own personal experience, understanding and cultural knowledge of their Nation. It is important, for the parties, for the public and for the higher courts that may have to examine this judgment, to know what the Court understood and retained of this evidence and how it was used. That is why the Court has devoted a full section of the present judgment to the evidence presented by the MNCC.

Respect and attention for such evidence is part of the reconciliation process, a goal and an obligation for the courts.

This judgment and its conclusions cannot be understood without first reading the part on the Indigenous perspective. If it was a great challenge to condense and present this evidence in 65 pages, it would be impossible to do this task in the form of a summary. This said, essentially, the Court has retained the following from the evidence on the Indigenous perspective.

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The evidence of the Haudenosaunee perspective brought by Dr. Adams and Chief Nelson explained the traditional ways of the Haudenosaunee that have survived hundreds of years of colonisation and assimilation. This demonstrated how strong and vital culture is for this community and how rooted it is in the people of the Haudenosaunee nations.

Language is the heart, the soul, the lungs and the voice of a culture. It is so much more than just words. That is what Dr. Adams brought to the Court, an understanding of how the Mohawk language shapes the perception of the world, the philosophy, the conduct and the behaviour of Haudenosaunee people.

She also brought an understanding of the close connection between that language and the narratives and how family relationships are central and shape any relationship in the Haudenosaunee culture. She also shed light on the importance and the meaning of the symbols and metaphors of the Haudenosaunee culture, most specifically, the ones of the Covenant Chain and of the ceremonies. Her testimony set the table for Chief Nelson's participation in this case.

For his part, Chief Nelson brought his knowledge of the Haudenosaunee culture as a hereditary chief. He testified on numerous aspects of it, which, when put together, give a better understanding of the persistence of that culture over time, and of its continuity.

He gave life to the meta-narratives notably the Creation Story and The Great Law of Peace. From his testimony, the Court came to better grasp important aspects of the Haudenosaunee traditional ways that are key to the understanding of the treaty relationship with the British in the 17th and 18th centuries.

He explained how those traditions were the way of life of the Haudenosaunee at the arrival of the Europeans, and how they are still present in the Haudenosaunee communities. He showed us how, despite colonisation, the traditions have survived from generation to generation and how central they were and still are.

In the culture of the Haudenosaunee, there is a golden thread that runs through generations. It weaves together their desire, their efforts and their determination through all those years to live in peace.

For the Haudenosaunee, the need to have two sides for discussion in order to achieve peace is at the heart of the conflict resolution process. In a very real way, it is the equivalent of the *audi alteram partem* rule of the non-Indigenous justice system.

To implement this, they have structures and processes like the Condolence ceremonies and councils. These originated in the teachings of The Great Law of

Peace, where conflicting issues are discussed at all levels with the objective of “coming to one mind”.

These processes, that preceded the arrival of the Europeans, animated their relationship with them in the 17th and 18th centuries. Today, the Haudenosaunee still use it, albeit sometimes in different ways.

This transmission, which secures and guarantees the existence and exercise of this culture and its traditional ways today, confirms the undeniable probative value of this evidence. It is essential and unassailably credible for the purpose of understanding the motivation, the intentions and the objectives of the Mohawk nation during the treaty relationship with the British.

For the Haudenosaunee, this is not only history. It is also the present.

III- THE TREATY RIGHTS

The arguments of the Applicants on their treaty rights can be divided into two different but related issues: the right to free trade as guaranteed by the Treaties and the nature and the role of the Covenant Chain.

Position of the parties on the Treaties

The Applicants invoked ten Treaties. For them, these Treaties show that free trade, including the tobacco trade, was a central component of the relationship between the Haudenosaunee and the British. The Applicants considered that these treaties formed what is known as the “Covenant Chain”, a symbol of the alliance between the parties. In the words of the Applicants, 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 17th and 18th centuries which ultimately culminated in the conquest of New France in 1760.

The Attorneys General submit that the parties to the Treaties could not have intended to include a treaty right to trade tobacco, as the Mohawks had no tradition of trading tobacco at the time of their conclusion. None of the Treaties can be read as allowing the Applicants to import large quantities of tobacco without reporting them at the border and paying the excise duties. None of them expressly address the trade of tobacco, or trade on a commercial scale. What is more, there is no provision excluding the Mohawk from any regulation of trade.

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Where the Attorneys General recognize that certain Treaties refer to trade, they suggest that, given the historical context, this alludes to the trade of fur in exchange for the necessaries of life, and not for the accumulation of wealth.

Position of the parties on the Covenant Chain

The Applicants also plead that the Crown infringed the Honour of the Crown and the Covenant Chain relationship, because it failed to consult and negotiate in good faith with the Mohawks of Kahnawà:ke before legislating.

The Applicants have maintained throughout this proceeding that the protocols of the Covenant Chain require the Crown to consult and cooperate with the Mohawks of Kahnawà:ke in order to reach a negotiated resolution to the longstanding Crown-Mohawk dispute over the trading of tobacco.

For their part, the Attorneys General consider that the Covenant Chain is not a treaty, but more a symbol or a metaphor for the political and/or military alliance between Indigenous peoples and the British Crown in the 17th and 18th centuries.

The Attorneys General also provide an alternative argument that if the Covenant Chain is a treaty, it does not contain a right to a negotiated resolution of disputes outside courts.

As for the MNCC, it asked the Court to define the principles of the Covenant Chain in order to guide successful negotiations in the future.

The MNCC views the Covenant Chain as a relationship that has bound the Haudenosaunee and the Crown since 1677. It is the framework for the thinking and conduct of every treaty council from 1677 to the 1830s.

For the MNCC, the procedural right flowing from the Covenant Chain is not consultation, it is communication, listening and working together to resolve concerns. It is different from the common law right to be consulted. It is an obligation to actively work together to resolve a concern.

The Court will first examine the Applicants' argument on the Covenant Chain because it is presented as a meta-treaty of peace and friendship, overarching the treaty relationship between the Haudenosaunee and the British since the late 17th century, and as containing a conflict-resolution procedure.

Preliminary issues

The Court ruled as followed on the preliminary issues.

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The Crown in Right of Canada is bounded by the Treaties entered into at Albany between the British Crown and the Mohawks of Kahnawà:ke.

The Court will not rule on the issue of the criminal jurisdiction under the Treaty of 1664 that was introduced by the MNCC. This issue was not raised by the Applicants, and it is not one under which the MNCC was authorized to intervene. It is an important and very complex issue, one that should have the benefit of a full and complete hearing. In the context of this Notice, it was not the case, and the Court is thereby ill-equipped to address it.

The Court rejects the argument of tardiness raised by the Attorneys General on the issue of whether the Covenant Chain is a treaty that gives enforceable rights.

The Covenant Chain

Although the Attorneys General do not contest the existence of a relationship referred to as the Covenant Chain, they are strongly opposed to the argument that the Covenant Chain is a treaty.

The Court finds that the following elements are undisputed and supported by the evidence presented:

- The origin of the Covenant Chain can be traced back to the beginning of the relationship between the Haudenosaunee and the British in the 17th century.

- Throughout the core historical period discussed in this judgment, the nations involved in the Covenant Chain were independent, sovereign, and equal politically and militarily.

- Both parties were skilled in the art of diplomacy, engaging in negotiations with other nations on matters such as military alliances, neutrality, peace and trade.

- The metaphor of the Covenant Chain illustrates the relationship between the Haudenosaunee and the British, and it is represented by a vessel (British) and a mountain (Haudenosaunee) linked by a durable silver chain that symbolizes a lasting bond, requiring regular care and polishing to prevent tarnishing and potential breakage.

- This metaphor represents an alliance between the nations.

- The Covenant Chain originates with the Haudenosaunee and is deeply rooted in their law and diplomatic traditions, characterized by the practice of conducting councils.

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- Councils hold a central place in the political structure of the Haudenosaunee, utilized both within the Iroquois Confederacy and across various Haudenosaunee nations. This structure is deeply rooted in the Great Law of Peace and had been in existence long before the arrival of the first Europeans in North America.

- The Covenant Chain councils took place in Albany, NY and could be initiated by either one of the parties by sending a wampum belt as an invitation for the gathering.

- At council, wampum belts were exchanged, some of which served as a symbolic representation of the treaty concluded.

- The British followed that diplomatic structure in their relationship with the Haudenosaunee nations, including the Mohawks of Kahnawà:ke.

- The relationship between the Haudenosaunee and the British evolved through the Covenant Chain councils.

- The Covenant Chain diplomacy was conducted through councils that played a central role in maintaining the relationship. Regularly polishing the silver chain symbolized that any conflict or issue affecting the relationship should not be left unattended. Instead, the parties should address conflicts through discussions to find a mutually satisfying solution.

- The council's procedure involved a Condolence ceremony at the opening, which could sometimes last a few days. This was followed by speeches to introduce a proposition and an exchange of gifts to support it. Then there was a suspension for reflection on the answer, after which speeches were given to present the answer to the proposition, accompanied by an exchange of gifts. The proposition procedure was repeated until an agreement was reached.

- Depending on the subject of discussion, a council may or may not lead to a treaty. In the present case, all the Treaties except the first one of 1664 are oral treaties.

- At councils, the Covenant Chain was frequently renewed, as were the treaties concluded before.

- The relationship between the Haudenosaunee and the British was governed by the Covenant Chain diplomacy well into the 19th century.

- The Covenant Chain eventually became part of the British diplomacy with other Indigenous nations, such as the Anishinaabe.

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To decide if the Covenant Chain is a treaty protected by s. 35(1), the Court had examined the following issues:

1- What are the obligations of the Covenant Chain?

2- Did the parties intended to create mutually binding obligations?

3- Was it concluded with a certain measure of solemnity?

4- Is the Covenant Chain extinct?

To these questions, the Court answered as follows: The Covenant Chain is an unextinct Treaty that creates mutually binding obligations by way of military and friendship alliances that includes a conflict-resolution procedure.

The Covenant Chain is a peace alliance

All European nations recognized the importance and the advantages of securing alliances with Indigenous nations in North America. Over time, alliances were established with various Indigenous nations, with some enduring, while others failed to stand the test of time.

The nature of the peace alliance between the British and the Haudenosaunee varied over different periods. At times, they acted as allies, while at others, they took a neutral stance. Also, different Haudenosaunee nations had different alliances with the British.

The Covenant Chain is a friendship alliance

The evidence reveals that, while British written records refer to it as "friendship," the friendship alliance holds a deeper meaning for the Haudenosaunee, representing, in fact, a family alliance. The British were not merely seen as friends but were adopted and considered brothers. From the Haudenosaunee perspective, family relationships are meant to endure perpetually and are even stronger than mere friendship.

A friendship alliance, which creates a family tie, entails nurturing a relationship that benefits all parties across various spheres of activities. While a peace alliance primarily addresses the military aspects of a society, friendship or family pertain to its civil aspects.

This peace and friendship alliance is a fundamental cornerstone of the Covenant Chain, as well as of the relationship between the Haudenosaunee and the British.

The councils of the Covenant Chain: a conflict-resolution process

Within the context of the Covenant Chain, the pivotal element of the friendship alliance, or family, revolves around the utilization of councils as a conflict-resolution procedure.

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Originating in The Great Law of Peace, councils held a significance beyond mere gatherings. Within Haudenosaunee culture, ceremonies like Edges of the Woods or Condolence ceremonies were essential components of councils, each serving specific functions. Councils followed a structured format that was adhered to by all participants to effectively achieve their objectives.

While councils adhered to the Haudenosaunee diplomatic protocol and the principles of The Great Law of Peace, they were conducted on British territory in Albany. The fact that councils took place in Albany means that both parties adjusted to each other's customs, thereby establishing a framework to govern their relationship.

The evidence demonstrated that issues relating to peace, military alliance, neutrality, trade practices, and criminal offenses were all discussed. The council proceedings were conducted orally, with each party making proposals and supporting them with gifts. Responses were provided, generally later, excuses were made and accepted, and agreements were reached orally. There were no official written records, written agreements, or written treaties during these meetings, yet this orality persisted for over a century.

In the metaphor of the Covenant Chain, the act of holding regular councils served as a means to polish and keep the chain clean and bright. The importance of maintaining the brightness of the chain through regular meetings was duly acknowledged by all parties.

This framework originated from the meta-narratives initially narrated centuries previously. For the Haudenosaunee, the foundation of a treaty relationship is rooted in the belief that the parties possess the knowledge and understanding required to foster a successful and effective relationship. Indeed, the Covenant Chain epitomizes this principle by employing council meetings as a means to resolve conflicts between the parties. The councils serve as a platform used by the parties for maintaining and strengthening their relationship, thereby upholding the spirit of the treaty.

From the evidence provided, it can be reasonably inferred that the British were not only aware, but also agreed, that holding councils was the designated process for resolving conflicts and governing their relationship with the Haudenosaunee. The historical records demonstrate instances where conflicts were successfully addressed through these council meetings, reinforcing the understanding and acceptance of this conflict-resolution mechanism by the British.

The entire relationship is predominantly unwritten. Given that, the fact that the conflict-resolution process lacks written documentation should not be interpreted as a sign of non-agreement by the British but, rather, as a state of affairs that is consistent with the general rule of oral transactions within this unique relationship.

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Treaties can be either written or oral, and the lack of a written form does not invalidate the recognition of an agreement as a treaty.

The written records show that the parties relied on the council process for more than a century. By sending wampum belts as invitations to council meetings, they consistently utilized this mechanism to address conflictual issues. The longevity and consistency of the practice of holding councils to resolve disputes directly contradict the argument that the Covenant Chain lacked a conflict-resolution procedure. It is compelling evidence that the Covenant Chain did indeed include a conflict-resolution procedure through the vehicle of council meetings.

While acknowledging that colonization was indeed a primary objective of colonial powers, the Court is not convinced that agreeing to a conflict-resolution procedure within the Covenant Chain contradicts British colonial logic. Creating a conflict-resolution process might well have served the interests of the British in effectively managing relations with Indigenous nations, maintaining peace and securing their territorial interests. In this perspective, a conflict-resolution mechanism would be a pragmatic approach in pursuit of colonial objectives, as it allowed for the resolution of disputes without resorting to armed conflicts that might disrupt the British colonial efforts. Therefore, the presence of a conflict-resolution process within the Covenant Chain does not necessarily undermine or contradict British colonial logic, rather, it appears to be a practical means of achieving colonial goals more effectively.

In the present context, the Court considers the distinction between procedural and substantive rights as irrelevant. When parties enter into a treaty, they have the freedom to agree on any matter they deem necessary. If the parties have reached an agreement on a procedural aspect of their relationship, it becomes an integral part of the treaty. Consequently, if the parties have agreed on a conflict-resolution procedure and it is not respected such non-compliance would constitute a violation of the treaty. In such a case, both procedural and substantive aspects are equally enforceable and integral components of a treaty.

As a result, the Court concludes that the Covenant Chain is a peace and friendship alliance that includes a conflict-resolution procedure.

The intention of the parties to create mutually binding obligations

The Court concludes that the historic record of council meetings and the conduct of the parties demonstrate that both parties intended to enter into both a peace and a friendship alliance and to have their relationship governed and regulated through councils.

The Crown argued that the only reason the British employed the rituals of the Covenant Chain was to obtain the collaboration of the Indigenous nations. They submit that the protocols and rituals were understood by the British as necessary diplomatic protocols, but not as importing substantive or procedural rights or obligations. They argued that the process must be distinguished from the intention to create binding obligations and that s. 35(1) protects only the latter.

The inference to be drawn from this argument is that the British had no real intention to create mutually binding obligations with the Haudenosaunee through the Covenant Chain. They just pretended to do so in the pursuit of their colonialist agenda, which was certainly not an agenda common to both parties. It means that they hid their real intentions.

This interpretation raises doubts about the authenticity and sincerity of their words and actions.

The evidence demonstrates that the British consistently employed the language and the protocols of the Covenant Chain. They sent wampum belts to convoke the Haudenosaunee to councils and gave them at the conclusion of treaties, they actively participated to the Condolence ceremonies, before any proposition they addressed the Haudenosaunee as “Brethren”, they frequently spoke of renewing the Covenant Chain, they acknowledged the existence of the “ancient” Covenant Chain dating back to the time of their ancestors, and they emphasized the enduring friendship that has always existed between them and the Haudenosaunee nations.

This language used by the British was the language of Haudenosaunee councils, and it had been for generations.

The many years of engaging in a relationship based on the principles of the Covenant Chain convince the Court that the British were well aware of the significance and meaning behind its words and rituals for the Haudenosaunee. They deliberately used this language because they understood its importance to the Haudenosaunee, and they intended for the Haudenosaunee to take these words seriously and to act upon them. By using them, they sought to establish a genuine and lasting bond with the Indigenous nations, fostering trust and cooperation within the framework of the Covenant Chain alliance.

On these words, the Haudenosaunee relied.

The historical records and the historical context clearly indicate that the words and actions of the British conveyed their intention to establish mutually binding obligations with the Haudenosaunee. These obligations encompassed respecting the alliances forged and committing to resolve any issues arising in the relationship through council meetings. The British demonstrated a genuine willingness to honor the Covenant

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Chain alliance and to engage in a collaborative process with the Haudenosaunee, reinforcing their commitment to maintaining a strong and enduring partnership based on trust and mutual respect.

The argument presented by the Attorneys General suggests that the British words and conduct were insincere, misleading, and even dishonest for over a century. It evokes an enduring pattern of deception and insincerity in their dealings with Indigenous nations.

Such a suggestion should be rejected, because this would contravene the legal principle of the honour of the Crown.

The Crown is presumed to act, and to have acted, honorably in all its dealings with the Indigenous Nations, *urbi et orbi*, *heri et hodie*: here and everywhere, yesterday and today. The principle of the Honour of the Crown applies to its dealings with Indigenous peoples and obliges the Crown to act with integrity, good faith, and fairness in its dealings with them. Dishonorable conduct and sharp dealing would go against this principle and would not align with the Crown's legal duty toward its Indigenous partners.

Dishonorable conduct in the past cannot be used to escape obligations in the present. One cannot legitimize the past in this manner. Applying the law to the proven facts means holding the Crown accountable for its actions, irrespective of the time period, and ensuring that legal obligations are met in the current context.

This argument questioning the honor and sincerity of the Crown's historical conduct goes against the goal of reconciliation, which is at the core of s. 35(1). Reconciliation aims to address past injustices, acknowledge historical wrongs, and work towards a more respectful and equitable relationship between the Crown and Indigenous people. Reconciliation requires the cessation of dishonorable conduct or distrust of the past. The honour of the Crown requires a generous and purposive interpretation in furtherance of the objective of reconciliation. By embracing the principles of the honour of the Crown and recognizing the importance of honorable conduct in the present, the path towards reconciliation becomes more achievable. Rejecting arguments that hinder reconciliation efforts is essential to achieving that goal.

The Attorneys General also argued that the British could not have intended the Covenant Chain to be a treaty because its form is contrary to their culture of written treaties.

As the Court has said, the absence of written treaties during that period indicates that the British accepted and embraced the Haudenosaunee diplomatic protocol, which included treaties that were not put into writing.

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The evidence of the intention of the Haudenosaunee to engage in mutually binding obligations is also conclusive.

The evidence demonstrates that the Haudenosaunee adopted the British as a nation, and that the British actively and knowingly participated in these ceremonies. Such an adoption is not exceptional, since the Peacemaker in The Great Law of Peace proclaimed that the law is not exclusive to the Haudenosaunee but is open to anyone willing to embrace it. The Covenant Chain, of Haudenosaunee origins, reflects this inclusive approach.

Trade as an aspect of the Covenant Chain

Once the Court has concluded that the Covenant Chain is a peace and friendship alliance with a conflict-resolution procedure, the issues submitted to the Court require to determine if conflict about the regulation of tobacco trade should be submitted to council.

For the Applicants, trade is a central component of the Covenant Chain relationship. Indeed, from a Haudenosaunee and Mohawk perspective, “peace and trade were indivisible”. The Covenant Chain provides that the parties are in a relationship or alliance that is fundamentally about trade and peace. Therefore, they plead that trade was at the core of the Covenant Chain. The Treaties concluded between 1664 and 1760 were intended to create a permanent relationship of which trade was a central component.

Therefore, they argue that the Crown had a duty to discuss with the Mohawks of Kahnawà:ke when an issue relating to the free trade of tobacco was raised, a duty that it failed to respect.

The first argument of the Attorneys General is that there could be no obligation to consult under the Covenant Chain without first establishing the existence of a treaty right or Aboriginal right to trade tobacco.

Secondly, they argue that the Covenant Chain, being merely a metaphor for a political and military alliance between Indigenous peoples and the Crown, does not cover trade.

Moreover, the Treaties do not refer to tobacco trade or even to trade on a commercial scale. They add that the parties could not have intended to cover the trade of tobacco in them, since at the time the Treaties were concluded, the Mohawk had no tradition of trading tobacco. They were trading only pelts.

Regarding the first argument of the Attorneys General that the Applicants must first establish an Aboriginal or treaty right to trade tobacco, the Court must reject it in light

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of its previous conclusions on the Covenant Chain. The Court considers the Covenant Chain to be an independent source of obligations with no need for the party invoking it to first prove an Aboriginal or treaty right. It creates, by itself, a protected right to require that certain issues be discussed in councils. This decided, the question now becomes whether the regulation of the tobacco trade, and notably the imposition of excise duties on Indigenous participants in it, is covered by the Covenant Chain. The Court concludes that this is the case for the reasons set out below.

It appears clearly from the evidence, including the reading of the historical records relating to the Treaties that the requirement for council discussion is established, and this, with respect to at least two distinct topics: military alliances and trade.

An analysis of the historical records of the Treaties reveals that several aspects relating to trade were subjects to be addressed in councils in order to maintain the Covenant Chain relationship: the price, the free access to merchants, the choice of the trading partner, the behaviour of traders, the products that can be traded between the nations, etc.

For the parties, trade and peace were interlinked. Difficulties regarding trade could have an impact on their friendship and in turn, on peace. It is thus clear that trade was a sensitive subject that the parties wanted to resolve in councils.

Nothing in the historical records of the Treaties and the evidence leads to the conclusion that the parties intended to discuss solely issues relating to the fur trade. It would be contrary to the intention of the parties to limit the extent of the Covenant Chain to the exact same products that were exchanged in the 17th and 18th centuries. That is not the essence of the Covenant Chain. The intention of the parties was to create a lasting relationship of friendship and peace, which would flourish through the development of trade, and not just the fur trade, the whole aided by the application of the Covenant Chain and the discussion at councils. The councils aimed at resolving any difficulties that would come between the parties and endanger their relationship.

While the Court acknowledges that the evidence of the Mohawks of Kahnawà:ke selling tobacco to Europeans is weak, it does not necessarily follow that the intention of the parties was to freeze their trading relationship in the 18th century, i.e., with each party limited to trading only what it was offering at that time.

Their intention was to maintain their friendship and peace, and this required protecting and maintaining a trade relationship that benefited both sides. The fact that the fur trade has become less profitable, while the tobacco trade has become more lucrative should not be determinative of the parties' rights.

The solemnity of the promises

The law does not require any specific formality for the conclusion of a treaty. It only demands a certain degree of solemnity, which is to be analysed in its historical context.

Covenant Chain councils were held with a high degree of solemnity. This was reflected in the ceremonies preceding the discussions, their structure, and the exchange of wampum to support propositions, which all contributed to the solemnity of the councils.

The evidence also reveals numerous instances of Covenant Chain renewals, with both parties expressing solemn promises and mutual commitments. Words spoken on these occasions, such as "the chain that will not break" or "lasting and bright" as well as the promises to maintain its brightness all exude a sense of solemnity that underscored the gravity and significance of these engagements. The recognition that the Covenant Chain has endured for generations and will persist into the future further emphasizes the solemn nature of these commitments.

The nature of the Covenant Chain, the words used by both parties at its renewals, the extended period over which this was done, all combined to bestow a solemn character upon the Covenant Chain.

Conclusion on the constitutional status of the Covenant Chain

Amidst the turbulence of that era, two civilizations encountered one another and, in response to the challenge that this represented, they devised a distinctive mechanism to favour and govern a mutually beneficial relationship, the Covenant Chain.

Through their entry into and subsequent renewals of the Covenant Chain, the parties intended to establish a lasting relationship characterized by both a military and friendship alliance. This alliance was to be guided by the principles of Haudenosaunee diplomatic protocol and included a conflict-resolution procedure.

The Court concludes that the Covenant Chain is a treaty between the Haudenosaunee and the British, as recognized by s. 35(1).

Extinction of the Covenant Chain

In Canadian law, the burden to prove the extinction of a treaty lies with the party making the claim of extinction.

In Haudenosaunee law, there is no principle that either applies to or leads to the extinction of a treaty.

The evidence shows that the Covenant Chain is an agreement designed to last for perpetuity.

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The historical records contain numerous references where the parties expressed their intent to uphold, renew, or rejoin the Covenant Chain, with a desire for its longevity across generations to come. In line with that, the inclusion of a diplomatic forum for conflict resolution further supports the parties' intention to utilize it in a lasting relationship.

Canadian law requires the consent of both parties for the extinction of a treaty. Not only is there no evidence that the Haudenosaunee consented to the extinguishment of the Covenant Chain, but the evidence points to the contrary.

Breaking the Covenant Chain cannot result from mere negligence or dysfunction. To do that requires an explicit gesture from the parties expressing their intent to sever the relationship.

The Covenant Chain is thereby an unextinct Treaty.

IV- THE ABORIGINAL RIGHT

The Applicants also allege an Aboriginal right of participation in the tobacco trade.

The first issue that must be addressed is the applicable test to determine whether the right claimed by the Applicants is protected by s. 35(1). The Applicants ask the Court to depart from the *Van der Peet* test and offer a new framework that aims at protecting contemporary, rather than historic, practices.

The Court concludes that the conditions to depart from *stare decisis* are met.

After reviewing the historical background of the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007 (hereafter the *UNDRIP)* and the content of the Canadian *UNDRIP's Act* adopted in 2021, the Court concludes that the *UNDRIP*, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1). Therefore, the presumption of conformity, according to which the *Charter* should provide a protection at least as great as that afforded by similar provisions in international documents which Canada has ratified, applies. This presumption also applies to s. 35(1). As the presumption of conformity with the *UNDRIP* was not an issue raised before the Supreme Court in *Van der Peet*, the Court finds that the endorsement of the *UNDRIP* without qualification and the adoption of the *UNDRIP Act* bring a new legal issue into the debate that could have an impact on the s. 35(1) framework established by the jurisprudence.

Moreover, the Court comes to the conclusion that the endorsement of the *UNDRIP* without qualification and the adoption of the *UNDRIP Act* are more than additional instruments in the Aboriginal law landscape. They are also expressions of more

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profound changes. Since *Van der Peet*, knowledge about Indigenous peoples' life in Canada has tremendously evolved, notably through the contribution of several public inquiries. The raising of a collective awareness on the past and present situations of Indigenous peoples in Canada is palpable. Canadian society is starting to grasp the pressing need for a renewed relationship in which reconciliation is central. As well, the executive and legislative branches have made significant steps towards reconciliation. The Court thus concludes that the parameters of the debate have fundamentally changed. The notion of reconciliation, as referring to a work-in-progress to arrive at a mutually respectful long-term relationship between sovereign peoples, did not have the same importance at the time *Van der Peet* was delivered as it has nowadays. The question before the Court when elaborating a s. 35(1) framework is no longer, or at least not only, how to "conciliate" Aboriginal rights claims with Crown's sovereignty, but also how to reconciliate sovereign peoples through the recognition of Indigenous peoples' rights.

While certain aspects of the test offered by the Applicants are convincing, the Court cannot adopt it entirely. The Court is notably not convinced by the reference to the *UNDRIP* as the direct source of Aboriginal rights. They did not demonstrate, or really argue, that the substantive norms of the *UNDRIP* were integrated into the domestic legal framework. Also, the Applicants' test continues to espouse the notion of integrality. This notion does not conform to the current state of social sciences, and a court is ill-suited to determine from the outside, in the context of a trial, what is and what is not integral to a culture.

The Court's reasoning to elaborate a new test is informed by several concerns. One of them is that its analysis must be guided by the notion of reconciliation. The Court has also been particularly careful in the elaboration of a test to protect rights and not specific exercises of rights.

The Court concludes that the question it has to answer when faced with a notice to recognize an Aboriginal right is whether the activity or practice under consideration the exercise of is a right protected by the traditional legal system of the Indigenous peoples claiming the right. This question imposes the following three burdens on an Applicant:

1- It will require first to identify the collective right that the Applicant invokes;
2- Then, the Applicant will have to prove that such a right is protected by his or her traditional legal system; and
3- Finally, the Applicant will have to show that the litigious practice or activity in question is an exercise of that right.

First step: To identify the collective right invoked

The test puts the emphasis on the fact that s. 35(1) aims at protecting rights, and not specific exercises of rights.

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The reasoning of the Court is based on its reading of s. 35(1) in conjunction with s. 37 of the *Constitution Act, 1982*, and the observations made in dissent by Justices McLachlin and L'Heureux-Dubé in *Van der Peet*.

The test adopted by the Court tries to reconcile the judicial framework for applying s. 35(1) with the intent of the constituent power when adopting s. 37 and s. 37.1 of the *Constitution Act, 1982*. The Court is of the view that the aim of the constitutional conferences would not have been to catalog a list of specific practices, customs or traditions but, rather, to identify collective rights which a party could then have claimed before a court.

An approach centered on collective rights is more aligned with the judiciary's fundamental role of interpreting and enforcing legal norms in light of factual circumstances. It is also in conformity with the approach adopted in the *UNDRIP*.

Indeed, the *UNDRIP* recognizes inherent rights that Indigenous peoples have, as peoples. In the philosophy of the *UNDRIP*, Indigenous peoples do not have to prove their rights, right by right, group by group. They are generic rights inherent to Indigenous peoples by the sole fact that they are Indigenous and that they are peoples. The logic is much closer to other human rights instruments, such as the *Charter* or the *Universal Declaration of Human Rights*.

The majority in *Van der Peet* underlined the "aboriginal" aspect of the "aboriginal rights". The majority intended to define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

However, after nearly thirty years, the evolution of the jurisprudence shows that the notion of rights might have disappeared behind the notion of "aboriginality". It is now necessary to put more emphasis on the notion of rights in order to rebalance the two notions and offer an adequate protection for Aboriginal rights. For s. 35(1) to serve its function, it is necessary to put at the forefront of the test the fact that the Constitution protects rights with normative value.

Having said that, the test must also capture the "aboriginal" aspect of the right, and that is what is done at the second step of the test.

Second step: To prove that the right is protected by the traditional legal system

In the new parameters of the debate, reference to the Indigenous traditional legal system is a means of ensuring that the aboriginal aspect of "Aboriginal rights" is taken into account, while avoiding the stereotypes that accompany the notion of pre-contact practices.

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The majority stated in *Van der Peet* that the reference to the pre-existing legal rights would take "s. 35(1) too far from that which the provision is intended to protect". However, the purpose of s. 35(1) now encompasses the notion of reconciliation between sovereign nations, and the Court is convinced that the new test will better encapsulate what s. 35(1) aims to protect.

Indeed, by acknowledging and giving due recognition to the existence of the traditional Indigenous legal systems at the second step, the new test favour reconciliation. This is a clear departure from the doctrine of discovery and *terra nullius*. It fully recognizes that Indigenous peoples were not only occupying the land, but were and are nations with political, social, economical and also legal systems.

It is also in harmony with the *UNDRIP*, which calls for the due recognition of Indigenous legal systems.

For this stage of the test, Aboriginal rights must incorporate the notion of a certain continuity in time. Once the focus is on rights instead of on practices, the anchoring in time does not have the same negative impact. It will not prevent the evolution of the exercise of that right, nor will it favour a stereotyped vision of Indigenous rights.

If the Court is of the opinion that some continuity in time is essential to establishing constitutional rights, the "magic moment" of European contact is no longer relevant to determine the existence of an Aboriginal right. The reference to *traditional* legal systems will be sufficient to ensure continuity. Each claim should be dealt with on a case-by-case basis.

<u>Third step: To show that the litigious practice or activity in question is an exercise of that right</u>

Aboriginal rights are collective rights, but they are often pleaded before the courts by individuals. This can sometimes lead to tension, as the interests of the individual and those of his or her community might not align. The community might not necessarily want to embrace or support the litigious activity in question, but at the same time still want to defend its collective right.

The third step of the test would allow the Court to distinguish between the existence of a collective right, which has already been decided at step two, and the alleged exercise of that right by an individual. This distinction will make the justification analysis more acceptable since it will focus on the exercise of a collective right by an individual and not on the existence of the collective right itself.

In the end, in the spirit of reconciliation, the task should be eased for establishing the existence of an Aboriginal right. In most cases, the debate should no longer focus on the existence of the collective Aboriginal right, but on whether the individual practices

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at hand are protected by the collective right, and how to conciliate, at the justification step, the individual exercise of the Aboriginal right with other collective interests. The new test should avoid long historical debates unsuited to the judicial context and concentrate the efforts on the essential legal questions, notably, on how to conciliate the existence of the interests of two sovereign nations in a reconciliation perspective.

In this case, the Court applied the new test as followed.

First step: the identification of the collective right that the Applicants invoked.

The new test offers a different approach, starting with the first step. Rights are seen in a perspective closer to the approach adopted for *Charter* rights. Hence, at that initial step, the Court seeks only to identify the fundamental norm that the Applicants invoked which could deserve protection from State intervention. With this in mind, the right to transport tobacco across a frontier or the right to participate in the tobacco trade are not, in themselves, constitutional rights deserving to be protected from State intervention. They have no intrinsic normative value. The Court retains instead the right identified by the Applicants for the purpose of the test they offered: the right to freely determine and pursue economic development. That reflects the true foundation of the Applicants' position, as it emerged from a general perspective of their pleadings and the evidence they brought. They argued that their actions should not have been criminalized, since they were done in pursuance of the right of their nation to freely pursue economic development by their own chosen means.

Second step: whether this right is protected by the Applicants' traditional legal systems

The right to freely pursue economic development is arguably what is called a "generic" right. By their nature, there is a strong presumption that generic rights are part of the traditional legal system of the Indigenous group to which the individuals claiming the rights belong. The Court concludes that the right to freely pursue economic development is one of the generic rights shared by all Indigenous peoples. It is intimately tied to the survival and dignity of any nation. Without it, Indigenous societies are not only deprived of the opportunity to flourish, but they could also be threatened with the inability to meet their basic needs. Moreover, a myriad of other rights essential to the continuity of Indigenous societies depends on the right to pursue economic development, as the right to develop an education system, the right to develop independent Indigenous media, etc. This interpretation is supported by the *UNDRIP,* which illustrates that there is a consensus amongst the states that Indigenous peoples have the right to pursue economic development. The Court comes to the conclusion that the Mohawks of Kahnawà:ke benefit from this generic right in the same way as any other Indigenous people. In addition, there is evidence on the record for the Court

to conclude that the right to pursue economic development is indeed protected under the traditional legal system of the Mohawks of Kahnawà:ke, the Haudenosaunee law.

Third step: whether the litigious activities before the Court are protected under the right of the Mohawks of Kahnawà:ke to freely pursue economic development

The Court concludes that there is conclusive evidence on the record that the tobacco trade to which the Applicants participated improves the economic well-being and quality of life of the community as a whole. The evidence shows that a large part of the community sees the tobacco trade as the best way to economic self-determination, and that it is, indeed, a considerable source of income for a large number of members of the community.

The Applicants have not called witnesses to testify on how their own activities fit into the larger Mohawk tobacco trade. This is not surprising as the previous test did not require such evidence. It is worth reminding that the Notice was raised in the context of criminal prosecutions. Any evidence by the Accused to demonstrate how their trade involved the community could lead to criminal prosecution of the people involved and even to self-incrimination.

Still, the Court believes that there is enough undisputed evidence on the records to link the Applicants' actions with the right to economic development of their community:

- The Applicants are Mohawks of Kahnawà:ke;
- The tobacco was delivered to unlicensed manufacture on the reserves of Kahnawà:ke and/or Six Nations;
- The substance imported is bulk tobacco. It was presented in evidence to the jury that 23 fully load 53-foot tractor/trailers crossed the boarder, each containing 13, 172 kilograms of tobacco[3]. Eleven of those shipments were made under the surveillance of the police authorities. The evidence has shown that in Kahnawà:ke in the early 1990s, the tobacco trade started with the exportation of manufactured cigarettes to duty free zones which were then smuggled back into Canada. But then, in the 2000s, there was a transition with the development of manufacturing facilities instead.
- Dr. Alfred testified on the network of trade among Haudenosaunee communities from both side of the frontier[4].

Despite any reluctance one might have towards the tobacco industry, the evidence demonstrates that the actions of the Applicants that have been criminalized were done pursuant to the right of their community to freely pursue economic development.

The Court thus concludes that the Applicants have demonstrated on a balance of probability that their participation in the Mohawks' of Kahnawà:ke tobacco trade industry is protected by their Aboriginal right to freely pursue economic development.

[3] Jury trial, 2019-04-17, exhibit P-199.
[4] Transcriptions, 2021-09-16, p. 15-16.

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V- INFRINGEMENT

Infringement of the Covenant Chain

The Court concludes that the Crown has infringed its obligation under the Covenant Chain. The regulation of the tobacco trade was a well-known subject of disagreement between the Mohawks of Kahnawà:ke and the Crown, yet there was no attempt by the Crown to discuss the matter prior to the adoption of the *Excise Act, 2001* even though other interested parties - including representatives of the tobacco industry - were consulted. Where discussion or collaboration did take place between the Crown and the Mohawks of Kahnawà:ke, they dealt essentially with matters relating to criminal law enforcement. The evidence demonstrates that the Crown did not discuss tobacco-related issues with the Mohawks to any relevant degree, much less with an open mind, and even less with the intention of coming to one mind in accordance with the Covenant Chain's precepts.

Infringement of the Aboriginal right

The Court considers that the strongest argument of the Applicants is that the *Excise Act, 2001* violates their Aboriginal rights by giving broad discretion to the Minister to issue licences without providing any guidance regarding Aboriginal or treaty rights, thereby imposing an unreasonable limitation of the rights.

The *Excise Act, 2001* contains no exception or special guidelines or guidance for Aboriginal and treaty rights. The *Regulations* provide no precise grounds for the initial refusal to issue a licence. The issuance of a licence is not a right that an applicant automatically enjoys when certain conditions are fulfilled. It is more in the nature of a privilege, granted at the discretion of the Minister. There is a risk of infringement when a constitutional right is turned into a privilege, and despite this risk, the *Excise Act, 2001* contains no guidance on how this discretionary power should be exercised. In the current scheme, the Mohawks of Kahnawà:ke can only exercise their rights at the discretion of the Minister, who may refuse to deliver a licence on the nebulous ground of public interest. In a s. 35(1) context, this is unacceptable. It cannot be assumed that discretion will be exercised in a manner that will accommodate the Applicants' constitutional rights. In addition, the discretionary power of the Minister also allows him to "impose any other conditions" that he considers appropriate when issuing a licence. The imposition of conditions might be completely reasonable in the context of tobacco industry, and, indeed, might well be necessary to address public health and public security concerns. The difficulty arises from the fact that, in a s. 35(1) context, Parliament cannot give an unfettered power, without any guidance, where it is obvious that the legislation will apply to Indigenous applicants.

VI- JUSTIFICATION

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Justification of the infringement of the Covenant Chain

There is not much that needs to be said in a case such as this, where the infringement in itself is the absence of discussion. The Attorneys General fail at the first step of the test, i.e., the duty to consult and accommodate.

In general, it will be difficult for the Attorneys General to demonstrate that a violation of an obligation to discuss is justified. Of course, there could be exceptional circumstances, such as a situation of emergency requiring immediate action. Such circumstances, however, were not present here. The *Excise Act, 2001* was the modernisation of a provision that had existed for years. Moreover, the government found the time to meet other members of the industry.

The Court, therefore, concludes that the infringement of the Covenant Chain is not justified.

Justification of the infringement of the Aboriginal right

Even though the Court concludes that the Attorneys General have met their burden to demonstrate that the legislation pursues a valid, compelling, and substantial objective, the infringement is not justified. The evidence demonstrates that the Crown did collaborate, or at least tried to collaborate, with the Mohawks of Kahnawà:ke to enforce the *Excise Act, 2001* and fight organized crime. The evidence also shows important efforts to implicate Indigenous peoples in the elaboration of strategies to reduce tobacco use in their communities. That said, these efforts are not enough for the Crown to discharge its procedural duty to consult the Mohawks of Kahnawà:ke on the adoption of the *Excise Act, 2001* itself, and to find accommodation regarding the taxation scheme. It is not just any consultation about tobacco with just any Indigenous community that can fulfil the Crown obligation in this regard. There could not be adequate consultation, as any discussion was based on the premise that the Mohawks of Kahnawà:ke had no right regarding tobacco and that their current activities were criminal. The lack of consultation with the Aboriginal right holders is exacerbated by the fact that the government took the time to consult with industry associations and representatives to accommodate their needs.

As important as the public health objective might be, it does not override the Crown's obligation to consult in the absence of exceptional circumstances. The Court concludes that the Crown did not discharge its duties to consult - and even less to accommodate. But the honour of the Crown and its fiduciary obligations are not limited to consultation. Other factors must be taken into consideration.

In *Tsilhqot'in*, the Supreme Court established that the "Crown's fiduciary duty infuses an obligation of proportionality into the justification process". One of the elements of proportionality is that the incursion in the protected right must be necessary to achieve

the government's goal. The Court acknowledges that the price of tobacco is an efficient tool to reduce tobacco use. Still, the absence of consultation blocked the possibility of exploring avenues that might have led to achieving the government's goal, while limiting the infringement of an Aboriginal right. What is more, given that Indigenous peoples are amongst the first victims of tobacco use, their input on a law aimed at reducing the use of tobacco was even more critical to the quest to achieve the government's goal. Another important consideration in assessing the measures adopted by the Crown is that the benefits expected from achieving that goal must not outweigh the adverse effects on the Aboriginal interest. It goes without saying that the benefits expected are huge. Nonetheless, the adverse effects must not be underestimated. First, the legislation has an important impact on the criminalisation of members of the community. This is all the more important in the current context where the overrepresentation of Indigenous peoples in the criminal system is well known and alarming. Second, the impact on economic development cannot be minimised. Third, the evidence shows the importance of the tobacco industry in the eyes of the community, which sees it as a means of developing their capacity to govern themselves. Thus, there is a negative symbolic impact that results, which inevitably prejudices the relationship between the Mohawks of Kahnawà:ke and the Crown.

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VII- REMEDY

The jury, after the criminal trial, has found the accused guilty of offences based on a disposition which, by virtue of s. 35(1) and s. 52 of the *Constitution Act, 1982*, is of no force and effect with respect to the Applicants. The current jurisprudence defines very strictly the conditions to enter an acquittal once a jury has rendered a guilty verdict and has been discharged. These conditions are not met. The Court considers that the closest situation to the present circumstances is the case where an accused has been found guilty by a jury of a non-existent offence and that a Tribunal became aware of the situation before sentencing. In such circumstances, the solution is not an acquittal but an arrest of judgment.

The Court therefore concludes that the common law stay of proceedings is the adequate remedy and the criminal proceedings against Derek White and Hunter Montour should be permanently stayed.

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1- Treaty of 1664 ***Erreur ! Signet non défini.***

2- Treaty of 1677 ***Erreur ! Signet non défini.***

3- Council of July 14, 1701 ***Erreur ! Signet non défini.***

4- Council of July 15 and 16, 1702 ***Erreur ! Signet non défini.***

5- Council of March 13, 1725 ***Erreur ! Signet non défini.***

6- Council of September 26 to 29, 1725 ***Erreur ! Signet non défini.***

7- Treaty of 1735 ***Erreur ! Signet non défini.***

8- Treaty of 1742 ***Erreur ! Signet non défini.***

9- Council of April 24 to 26, 1748 ***Erreur ! Signet non défini.***

10- Council of October 30 and 31, 1753 ***Erreur ! Signet non défini.***

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11- Treaty of 1754 ***Erreur ! Signet non défini.***

12- Treaty of Kahnawà:ke, 1760 ***Erreur ! Signet non défini.***

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I. INTRODUCTION

[1] Derek White and Hunter Montour, two Mohawks of Kahnawà:ke[5] (hereafter the Applicants) were found guilty by a jury of different criminal infractions relating to the importation of large quantities of tobacco without paying the *Excise Act, 2001*[6] duties (hereafter the *Excise Act, 2001*).

[2] They are now seeking a permanent stay of proceedings arguing that their Aboriginal and treaty rights guaranteed by s. 35(1) of the *Constitution Act, 1982* (hereafter s. 35(1)) have been unjustifiably infringed. They allege that ten treaties negotiated between 1664 and 1760 (hereafter the Treaties), along with the Covenant Chain, an overarching oral meta-treaty, guarantee their right to tobacco trade and to discuss any related issue with the Crown. Additionally, they assert an Aboriginal right to tobacco trade.

A. AN OVERVIEW OF THE PAST

[3] In this case, the past is always present. It is a past that many are unfamiliar with, but it has been brought to the forefront for the purpose of this case.

[4] First and foremost, it is essential to present a succinct overview of the historical narrative pertaining to the matters under consideration, creating a framework for enhanced comprehension.

[5] The Haudenosaunee had been living in North America for thousands of years before the arrival of the Europeans. Haudenosaunee means People of the Longhouse. They are also commonly referred to as the Iroquois. They were residing in the northern part of what is known today as New York State, along the Mohawk River Valley, the largest tributary of the Hudson River. It was a strategic passage through the Appalachian and the Adirondack Mountains, flowing into the Hudson River just a few miles north of the state capital of Albany. The Haudenosaunee family was originally known as the Five Nations living along the river from east to west, starting with the Mohawk, then the Oneida, the Onondaga, the Cayuga and the Seneca at the western end of the territory.

[6] Before the arrival of the Europeans and after a dark period of fratricidal wars, the five nations of the Haudenosaunee finally attained peace and created the Iroquois

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[5] The court has opted to use the spelling of Kahnawà:ke as it appears on the Mohawk Council of Kahnawà:ke official website. Any variations in spelling occur either for historical context or within cited material.

[6] *Excise Act, 2001*, S.C. 2002, c. 22.

Confederacy (hereafter The Confederacy), also known as The League. The Confederacy is founded on The Great Law of Peace, one of the fundamental meta-narratives of the Haudenosaunee. In 1724, the Tuscarora joined the Confederation that became recognized as the Six Nations.

[7] These fratricidal wars, and the process of negotiating and maintaining the peace that followed, made the Haudenosaunee not only great warriors but also skilled diplomats.

[8] Despite the creation of the Iroquois Confederacy and the precepts of The Great Law of Peace, there were subsequent episodes of warfare among the Haudenosaunee, but this did not result in the break-up of the Confederacy. It still exists today and is composed of the same number of hereditary Chiefs, has the same political structure, and is governed by the same legal precepts.

[9] Due to its strategic geographical location, the Mohawk nation was the keeper of the Eastern door for the Confederacy. Therefore, in the seventeenth century, they hosted the European newcomers who arrived in North America. This began with the Dutch around 1610, followed by the British in 1664.

[10] The Haudenosaunee displayed a hospitable stance towards the Europeans, accommodating their presence on their land without resorting to conflict to remove them. They actively participated in trade with both the Dutch and, later, the British, demonstrating an eagerness for the European goods that could enhance the well-being of their people. This resulted in a robust diplomatic and commercial relationship that endured for centuries.

[11] At the end of the seventeenth century, an important contingent of Mohawk moved north, to what became known as Kahnawà:ke. They converted to Catholicism under the influence of French missionaries.

[12] The Mohawks of Kahnawà:ke nonetheless continued their diplomatic relationship and trade with the British in Albany. Positioned strategically, they entertained diplomatic and trade relations with the French as well.

[13] In 1664, the British arrived in Albany with the goal of colonizing the local populations and acquiring land and resources.

[14] Upon arrival, they quickly realized that they needed to establish agreements with the Indigenous population if their colonization project was to be successful.

[15] One of the reasons they sought to forge agreements with the Indigenous population was for military purposes. Wars in Europe between England and France frequently spilled over into the American theatre, like the Spanish and Austrian Succession Wars. While both the British and the French desired to gain the support of Indigenous nations as allies, maintaining their neutrality often became the preferred

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option for the Europeans, who were also concerned by conflicts between Indigenous nations.

[16] Another motive for forging agreements was the highly profitable fur trade. Both Britain and France were actively involved in the fur trade with the Indigenous nations and millions of beavers' and muskrats' skins were transported across the Atlantic during that era.

[17] The British and French employed distinct commercial trading systems. Under the French system, control of the fur trade was granted to a few companies, and sometimes even to a monopoly, with payments made once a year. In contrast, the British allowed their traders to conduct business independently, and payments were made at the time of each transaction.

[18] The Mohawks of Kahnawà:ke were strategically situated at the crossroads of the travel and trade routes between the St. Lawrence River Valley and the British colonies. Due to the more flexible nature of the British fur trading system, a parallel market to the French monopole emerged, involving both French merchants from Montreal and British traders in Albany. In this parallel market, the Mohawks of Kahnawà:ke acted as intermediaries, facilitating the transportation of furs from the French merchants to Albany, while also engaging in trade with the British merchants.

[19] Due to various factors, such as extensive hunting leading to a decline in animal populations and a waning European interest in beaver and muskrat fur, the fur trade gradually diminished during the nineteenth century.

[20] Shifting our focus to the relationship between the Indigenous nations and the British, following the British acquisition of New Netherland in 1664, they continued to use Albany as the primary center for commerce and diplomacy with the Haudenosaunee, much like it had been during the Dutch era.

[21] The relationship developed and evolved through council meetings, a vital component of the Haudenosaunee diplomatic system. These meetings took place in Albany. Whenever one party sought to convene a council, a wampum belt was sent as an invitation to the other party. The Haudenosaunee representatives then traveled to Albany, where they were warmly received, provided with food, and offered accommodation by the British. These councils typically took place from spring to fall, as winter posed challenges for long-distance travel.

[22] The councils followed a specific Haudenosaunee procedure, where one party present a proposal to the other. The recipient party would take the necessary time to consider the proposition, which could sometimes extend over several days, or even months. Once they were ready to provide a response, they reconvened at the council, where the proposition was frequently repeated, followed by their answer. The goal was to reach a consensus that would satisfy all parties concerned. These council sessions

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could extend for days or even weeks, depending on the time needed to achieve a mutually acceptable compromise. The attendance fluctuated, sometimes involving just a handful of representatives, while at other times they could draw hundreds or even thousands of individuals.

[23] From 1664 to 1755, the Albany Commissioners held the authority to hold councils and to negotiate agreements and treaties with the Haudenosaunee, including with the Mohawks of Kahnawà:ke. Initially, these Commissioners were primarily traders of Dutch descent. However, in 1755, Sir William Johnson took on the role of British Superintendent of Indian Affairs, becoming the key figure in negotiating treaties, including those relevant to this case.

[24] Sir William Johnson is known for his knowledge of the Mohawk language, culture and society. He was the common-law partner of Molly Brand, a Mohawk clan mother who held significant influence in the community. They had nine children, one of which, John, later followed in his father's footsteps and assumed the position of Superintendent of Indian Affairs.

[25] The Treaties invoked by the Applicants were concluded between 1664 at the arrival of the British and September 16, 1760, one week after the capitulation of Montreal. Of those Treaties, only the one of 1664 is written. All, expect the two last one, were concluded in Albany at council meetings.

[26] On August 30, 1760, as the British advanced toward Montreal in the final stages of the British campaign against France, Sir William Johnson secured the Mohawk's neutrality through the Oswegatchie Treaty. He guaranteed, among other things, the protection of all rights and privileges enjoyed during the French regime.

[27] Montreal capitulated on September 8, 1760. As part of the French surrender, a two-day treaty council was held in Kahnawà:ke on September 15 and 16, where the trade routes to Albany were reopened with the assurance that they will remain clear of any obstacle.

[28] The Mohawk and the British continued to held councils meeting well into the nineteenth century, until the relationship slowly erodes through demographic, sociological and political changes.

[29] Canadian policies of civilization and assimilation of Indigenous nations during the nineteenth and twentieth centuries are extensively recorded in the findings of the Royal Commission on Aboriginal People (1991-1996) and the Truth and Reconciliation Commission of Canada (2008-2015). While not the primary focus of this case, the events they documented are nonetheless part of the relationship between the Crown and the Mohawk and are the impetus for our current era of reconciliation, as will be further explained.

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[30] This is but a very brief description of the historical narrative.

[31] That being said, a few additional preliminary comments are necessary to help to the comprehension of this judgment. These comments pertained to an overview of the procedural history of the Notice's hearing, the methodology used, the Indigenous perspective, the challenges posed by the case, and the period of reconciliation.

B. THE PROCEDURAL BACKGROUND

[32] An outlined of the procedural background is helpful to the understanding of the overall context.

[33] In the aftermath of an extensive investigation known as "Mygale," which involved law enforcement agencies from both sides of the Canada-USA border, the Applicants, who both belong to the Mohawk community of Kahanawà:ke, were jointly charged, alongside several other individuals not concerned by this judgment, of multiple criminal offenses committed between 2014 and 2016. These offenses pertained to the failure to remit taxes following the importation of large quantities of tobacco from the United States.

[34] On May 9th, 2019, at the end of a two-month-long trial, a jury rendered a verdict, finding Derek White guilty of committing an indictable offense for the benefit of a criminal organization (s. 467.12 of the Criminal Code), conspiring to defraud the Government of Canada (s. 465(1)(c) of the Criminal Code), and perpetrating fraud against the Government of Canada (s. 380(1)(a) of the Criminal Code). He was acquitted of conspiring to defraud and committing fraud against the Government of Québec. The maximum prison sentence for these infractions is fourteen years.

[35] Hunter Mountour was found guilty of the only offence he was charged with, to have participated in activities of a criminal organization (s. 467.11 Cr. C.). The maximum prison sentence for this infraction is five years.

[36] All these infractions are connected to the scheme employed by the Applicants to bring in substantial quantities of tobacco from the United States while evading the taxes mandated by the *Excise Act, 2001*. The unpaid taxes on the eleven shipments of tobacco under police control presented in evidence amount to a total of 18,700,000$.

[37] On July 27, 2018, before the jury trial, they filed a *Notice of constitutional questions.* The present judgment is about the fourth and final version of this motion, filed on November 21, 2021, titled *Fresh as amended consolidated constitutional pleading* (hereafter the Notice).

[38] The initial filing of the Notice on July 27, 2018, came after an interim ruling by Justice Pennou, who was serving as the case management judge. This ruling stated that the Notice would be heard if the jury returned a guilty verdict[7].

[39] Originally, the Notice was also alleging infringement of their rights by the provincial government, reflecting the charges of fraud against the *Gouvernement du Québec*. Following the acquittal of Dereck White on all the charges involving that government, the Notice was amended to reflect the verdict. Only the federal *Excise Act, 2001*, remained under scrutiny.

[40] The Attorney General of Québec as well as the Attorney General of Canada intervened on the Notice.

[41] In October 2019, the Mohawk Nation Council of Chiefs (hereafter the MNCC), the traditional government of the Mohawk Nation that is part of the Confederacy, heard about the Notice. They first contacted the Applicants and asked them to refrain, as individuals, from making arguments involving Mohawk or Haudenosaunee treaty or Aboriginal rights that are collective rights. The Applicants refused to do so.

[42] On January 7, 2020, the MNCC sent a letter to the Court advising that, as the holders and stewards of the collective's rights, it wished to formally request the Court to refrain from considering the constitutional arguments presented by the Applicants.

[43] On February 11, 2020, the MNCC filed a *Communication of the Mohawk Nation Council of Chiefs.* On March 12, 2020, following a series of case management hearings, that procedure was amended and refiled as the *Mohawk Nation Council of Chiefs Motion in Support of Application for an Adjournment and an Order for Consultation.*

[44] In this motion, the MNCC alleged that the reception of the Notice by the Attorneys General triggers a duty to consult with the MNCC before they decide to intervene, because their intervention may adversely affect Aboriginal and treaty rights. The MNCC thereby requested a six-month adjournment of the proceedings on the Notice to permit good faith discussion to take place.

[45] For the case to move forward despite the COVID-19 pandemic, the parties and the MNCC identified a question of law that could be argued in writing only: whether the principle of the honour of the Crown, in a criminal trial, requires consultation with the holders of Aboriginal and treaty rights, where those rights are engaged in the trial.

[46] On September 18, 2020, the Court issued short conclusions in writing[8], holding that the reception of the Notice did not engender a duty to consult by the Attorneys General before intervening. However, the Court also concluded that the principle of

[7] *R.* c. *Hill*, 2018 QCCS 2635.
[8] The final judgment on that motion is yet to be filed.

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the honour of the Crown and the rule of natural justice, more particularly the rule of *audi alteram partem,* required that upon receiving a notice of a constitutional question concerning Aboriginal or treaty rights, the Attorneys General have to publicize it as to allow the Indigenous nations that are potentially concerned by the Aboriginal or treaty rights identified in the notice to make an informed decision about it.

[47] The Attorneys General conformed to this conclusion and the Notice was publicized on their websites.

[48] On November 30, 2020, the MNCC filed the *Motion to Intervene of the Mohawk Nation Council of Chiefs.* Beside the MNCC, no other Indigenous nation or organisation presented a motion to intervene. The MNCC motion was contested by both Attorneys General.

[49] On February 19, 2021, in a written judgment[9], the Court granted the motion, allowing the MNCC to present evidence about the perspective of the Mohawk nation. The MNCC was authorized to call two witnesses: one expert in Haudenosaunee historical and cultural research and a Mohawk chief recognized by the Haudenosaunee institutions. That evidence was presented by Dr. Amber Adams and Chief Curtis Nelson. The MNCC was also authorized to cross-examine the witnesses called by the parties and to file written notes and authorities and to make arguments within the scope of the authorization to intervene.

[50] The evidence on the Notice was presented mostly by experts during a four-month hearing, with oral arguments spanning 24 days and supplemented by 600 pages of written submissions. The historical evidence consists of hundreds of documents written in the language of the era, making their analysis and comprehension quite intricate. Since the Notice is part of a criminal jury trial, the presentation of evidence has been condensed. What would have taken maybe a year or even more in the context of a civil declaratory motion, was presented in four months. However, this does not imply that the issues at hand are any less intricate.

C. METHODOLOGY

[51] This judgment is notably extensive, and its length is attributed to the substantial quantity and complexity of the legal matters examined, encompassing both Aboriginal and treaty rights, as well as the vast historical context. A few words on issues of methodology are thereby necessary for a better understanding of the judgment.

[9] *R.* c. *Montour*, 2021 QCCS 714. To avoid further delay, the judgment was first filed in French on February 19, 2021, and the English translation was filed on April, 1st, 2021.

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C.1 The evidence

[52] As customary in s. 35(1) cases, a formidable amount of evidence was presented. Hundreds, if not more, of historical records were produced, as well as historical secondary sources. Expert witnesses testified for days, supporting their extensive written reports.

[53] It is of course impossible to summarize or refer to all the evidence presented. That is why only the evidence essential to its understanding found its way in the judgment. That being said, all the evidence was considered and has informed the analysis of the Court.

C.2 The languages

[54] Language has a significant place in this case. In addition to the use of both official languages throughout the hearing (with the explicit consent of the Applicants who have a right to a criminal trial in the language of their choice (s. 530 Cr.c.)), a third language, the Mohawk language, *Kanyen'kéha*, was prominently featured. It serves not only as a component of relevant evidence illustrating its influence on Mohawk culture, societal structures, and political organizations, but also because certain witnesses used it to convey its significance and deep meaning, thereby showcasing its connection to both the past and the present.

[55] Ideally, and as a mark of respect for all parties involved, the use of Kanyen'kéha should have been employed when referencing to Mohawk concepts, along with their English translation. However, Kanyen'kéha is an exceedingly intricate language, characterized as one of the most complex in the world, as highlighted by Dr Adams during her testimony. It is a language where individual words encompass entire phrases, and the grammar is both elaborate and intricate. As an example, the Kanyen'kéha word for Covenant Chain is *Tehontatenentshonteronhtáhkwa*, which signifies "They (males) together have attached the ends of one another's arms at some point in the past and continue to do so now."

[56] Incorporating both languages on every occasion would have significantly added to the complexity of the judgment, making it more cumbersome to read. Given that English is the more widely understood language among all parties, Kanyen'kéha terminology will be employed only when essential for comprehension purposes.

C.3 The historical terminology and spelling

[57] In a historical context as extensive as this one, it is unsurprising that the terminology used to describe events or entities, whether governmental or not, has evolved over time, and that some of them may have been referred to by different names. To stay as faithful as possible to the evidence as it was originally presented,

the Court is adopting the terminology employed by the witnesses, even if it varies from one witness to another. Despite these variations, it does not result in any confusion.

[58] The same principle applies to the spelling found in historical records. When reproducing historical documents, the Court replicates them exactly as they are written. Also, when referring to events or document of a certain era, the Court will use the terminology of that time to facilitate the comprehension.

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C.4 The structure of the judgment

[59] The judgment is divided in six sections: the Indigenous perspective, the treaty right, the Aboriginal right, the infringement, the justification and the remedy.

[60] This order was guided by the presentation of the evidence, the nature and the strength of the arguments presented and the internal logic of the decision. It is expected that the order of the sections will facilitate the comprehension of the judgment and will also help to reduce as much as possible the inevitable repetitions of such a lengthy judgment.

[61] Finally, because it is not easily accessible, the historical documentation directly relating to the Treaties invoked have been annexed to the judgment.

II. THE INDIGENOUS PERSPECTIVE

A. THE LAW

[62] The obligation to understand and consider the perspective of the Indigenous nations is well established in Canadian jurisprudence. It is a principle of equity.

[63] The concept of Indigenous perspective was incorporated in the Canadian jurisprudence by Chief justice Lamer in *Van der Peet*[10] to integrate in the decision-making process the perspective of a different society, culture and normative system.

[64] The Indigenous perspective is often, but not exclusively, brought to the courts through evidence coming from oral tradition. Since *Van der Pet,* the courts have adapted to the challenges of presenting evidence arising from oral tradition and the tension that this creates in a legal system where hearsay evidence is intrinsically suspicious and seen as unreliable.

[65] In *Van der Peet*, the Supreme Court recognized the challenges in aboriginal law cases where written evidence may simply not exist:

> 68. In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or

[10] *R.* v. *Van der Peet,* [1996] 2 SCR 507.

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> tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case[11].

[66] In *Delgamuukw,* the Court also stated:

> 84. This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights[12].

[67] The Supreme Court added that the evaluation of the evidence must be done on a case-by-case basis:

> 87. Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, supra, at p. 1068; *R*. v. *Taylor* (1981), 1981 CanLII 1657 (ON CA), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon* v. *The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge's findings of fact[13].

[68] The Supreme Court also cautioned trial judges on their approach to such evidence:

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[11] *Idem,* para. 68.
[12] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 84.
[13] *Id*em, para. 87.

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> 98. Although he framed his ruling on weight in terms of the specific oral histories before him, in my respectful opinion, the trial judge in reality based his decision on some general concerns with the use of oral histories as evidence in aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims[14].

[69] In *Mitchell*[15], the Supreme Court revisited the issue of the admissibility of oral tradition and its probative value. The Court reiterated that oral tradition is admissible if it is useful and reasonably reliable:

> 31. In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge[16].

[70] The Supreme Court suggests the following method to assess its admissibility and reliability:

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

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[14] *Idem,* para. 98.
[15] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911.
[16] *Idem,* para. 31.

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> 34. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted[17].

[71] In *R. v. Marshall*[18], Justice McLachlin stated that the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed. She added that, in this exercise, the court must be sensitive to the unique cultural and linguistic differences between the parties, and that the words of the treaty must be given the sense that they would naturally have held for the parties at the time they concluded the treaty[19].

[72] Finally, the Supreme Court reminds us that the admissibility of oral tradition should not be interpreted as the abandonment of all rules of evidence, and that the trial judge still must be convinced on the balance of probability:

> 39. There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R.* v. *Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, supra, at para. 68), neither

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[17] *Idem*, para. 33-34.
[18] *R. v. Marshall,* [1999] 3 R.C.S. 456.
[19] *Idem*, p. 512.

> should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated[20].

B. THE PARTICULAR HISTORICAL CONTEXT OF THE INDIGENOUS PERSPECTIVE IN THIS CASE

[73] Central to the context put forward in the Notice is the relationship that existed between the Mohawk and the British nations between 1664 and 1760.

[74] Rarely, even in a s. 35(1) case, does the Superior Court have to decide the outcome of a case based on facts that have occurred over a period of one hundred years, some three centuries ago.

[75] By 1664, when the British took over New Amsterdam, the Mohawk had been trading with the Dutch for several decades, but they did not know much about the British. Thus, an issue for them was to determine if their previous trading relationship would continue with the newcomers.

[76] When the British arrived, the Mohawk were living in a complex political and diplomatic structure. They had laws and a code of conduct established through meta-narratives further described herein, that had been orally transmitted from generation to generation for hundreds of years. They were skilled diplomats and seasoned warriors, and they were open to engage in a new relationship with the newcomers.

[77] England, for its part, was a dominant European nation engaged in a race with other nations from abroad to expand their sovereignty over new territories that they were beginning to covet. The British arrived on this side of the Atlantic Ocean with the intention to take possession of the land in order to establish colonies on it. They also brought with them their European wars.

[78] One of the issues before the Court is whether the Treaties currently bind the parties. The Applicants also submit that the Covenant Chain is a treaty that currently governs their relationship. They argue that it is a far-reaching agreement and a permanent alliance that is not extinct.

[79] In this regard, the Court is being asked to consider the effect of one hundred years of a treaty relationship between two nations. This analysis is all the more complicated by the fact that these parties had different cultures, languages, laws, interests, and social and political organisations. The fact that only one of the Treaties is written and that the Covenant Chain is expressed in a metaphoric form heightens the complexity of the task at hand.

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[20] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 39.

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[80] At the time of the Treaties, neither nation was asserting sovereignty over the other. The Royal Proclamation will be issued three years after the Treaty of September 1760. Nor were they at war, even though occasional conflicts arose between them, or between certain members of their respective communities.

[81] Considering this historical backdrop, it is easy to understand that the Court's analysis cannot be limited to an examination of the Treaties and the respective perspectives of each party on a particular treaty disposition. It must go deeper.

[82] This case involves two different cultures, each with its own separate context and with different interests, perspectives, and objectives, as well as their relationship that spanned over one hundred years. The Court must then keep these differences in mind and remain sensitive to the nuances brought by their lengthy relationship.

C. THE EVIDENCE PRESENTED BY THE MNCC

[83] To determine the perspectives of two quite different nations over a period of one hundred years starting more than 350 years ago is, to say the least, an evidentiary challenge. It is not an easy task to present this type of evidence in order for the Court to be able to reach the necessary conclusions on it. One might even question if it is possible at all, particularly in the context of a criminal jury trial. That question was addressed by the Mohawk Nation Council of Chiefs.

[84] Mtre. Paul Williams, counsel for the MNCC, argued that the obligation to consider the Indigenous perspective is unfair to the Court. He stated that it is impossible to acquire such a knowledge with a presentation made by only two witnesses, and without going into the communities. As a result, it is equally unfair to the Indigenous nation he said.

[85] He certainly has a point. But that does not relieve the Court from its duty to assess the evidence, even if confined by the limited time and evidence available.

[86] As previously said, the MNCC was authorized to present evidence as to the perspective of the Mohawk nation. It was done through the testimonies of Dr. Amber Adams, Ph.D., and of Chief Curtis Nelson.

[87] Despite the limits imposed by the Court on the MNCC's intervention, Dr. Adams and Chief Curtis Nelson provided an impressive amount of complex, relevant, and useful evidence on the perspective of the Haudenosaunee and of the Mohawk nation. The Haudenosaunee family (the Indigenous name for Iroquois) is composed of six nations: the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora. They share a common culture relevant to the present judgment. This evidence gave the Court a better understanding of the Haudenosaunee culture, history, and law. Of course, it is neither enough evidence nor enough time to develop a profound understanding of the culture of any nation.

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[88] One of the reasons the Court granted permission to intervene to the MNCC was for its unique position to bring to the Court the perspective of the collectivity and of the nation, something that the Applicants, who are arguing collective rights in their defence, are under no obligation to do.

[89] Having heard that evidence, the Court acknowledge that there is not only one Indigenous perspective. Nations and societies are too complex and plural to have only one sole perspective. The conclusions of this Court on the Indigenous perspective are drawn in the context of the legal issues submitted and based solely on the evidence presented. This is a very narrow and limited context compared to the actual relationship that exists between the Crown and the Mohawk Nation and the Haudenosaunee.

[90] The following words of Mtre. Williams in oral argument are worth repeating:

> The Mohawk Nation Council of Chiefs was allowed to become a full party intervenor in this matter to help the Court by providing the Indigenous perspective on some of the issues.
>
> There is no indigenous perspective. Amber Meadow Adams expressed her discomfort at being asked to write her report alone for that's not our way of working.
>
> She pointed out all she can provide is a perspective, a personal one, not the perspective.
>
> But there is Haudenosaunee law and history and knowledge, and I hope what we have brought to the Court has been of assistance. Within the rules, and I'll speak about them more, we've done our best[21].

[91] The Court will devote a full section of the present judgment to the evidence presented by the MNCC for the following reasons.

[92] At first glance, this section of the judgment may seem unduly long. Usually, a judgment tends to focus on the evidence necessary to deal specifically with the issues presented. This evidence is somehow different. Its purpose is not to establish material facts *per se*, but to help the Court to know better and to understand the culture of the Haudenosaunee and the Mohawk in order to determine the intention of the parties at the treaties concluded in the 17th and 18th centuries.

[93] Even if it is presented to show the perspective of the Mohawk and the Haudenosaunee at the time of the conclusion of the Treaties, this evidence can only be understood through the broader spectrum of the culture, the social organization,

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[21] Transcriptions, 2022-01-31, p. 3.

the laws and the codes of conduct of this society, all of which are different from the one non-Indigenous people know and live under. This is a lengthy process that takes time.

[94] Before the hearings, as, unfortunately, the vast majority of the non-Indigenous Canadian population, the undersigned was ignorant of the Haudenosaunee and Mohawk culture. It was a privilege to have it explained by two members of the Mohawk nation who came to the Court with their personal experience, understanding and cultural knowledge of their Nation. It is important, for the parties, for the public and for the higher courts that may have to examine this judgment, to know what the Court understood and retained of this evidence and how it was used.

[95] A few final remarks. As Dr. Adams reminded the Court, the Haudenosaunee perspective, comprised of the language, the culture, and the collective memory of a nation, was weakened because of decades of colonialism that prevented the Indigenous communities from maintaining those essential elements and, thus, their ability to adequately represent their version of historical events. This should be kept in mind in the analysis of this evidence.

[96] Europeans were the writers, and still are, while the Haudenosaunee were the tellers, and still are, who for years were deprived of the ability to tell. In her report Dr. Adams said:

> And, finally, before that beginning, I would respectfully ask the court to bear in mind that none of the people who taught me exercised their generosity without pain. Holding onto our onkwehonwenéha, our Haudenosauneeness — enough, at least, to present the court with a Haudenosaunee perspective — has cost us. Whether imprisonment for practicing our ceremonies when Canada made laws forbidding them, or removal of one's children to a residential school, from being beaten, starved, or raped for speaking a Haudenosaunee language in such schools, to the armed imposing of an elective system where a government still stood, real grief and real pain have been the price of keeping our voices. And so it remains. When an Indigenous person enters a Canadian court to talk about our communities, our families, our histories, and our lives, it's the rare witness who doesn't have to struggle to speak past their scars. These scars are the direct result of our fight to keep the very knowledge this court now requires. When we enter your court, our ancestors come with us, and with them, generations of accumulated pain. With humility, I invite the court to consider that pain as the quietest and the heaviest part of the Haudenosaunee perspective[22].

[97] Those are not just words. Tears were shed during this hearing, tears for what was endured personally and collectively by many Indigenous peoples of Canada. They flowed when Chief Curtis Nelson talked about his childhood and how, when just

[22] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 12, Exhibit MNCC-1.

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a child, he was sent to a residential-type school where he was beaten for speaking the only language he knew, the Mohawk language. This was a place where his hair was cut, where he was subject to multiple testing for every disease there was, where, under threats made to his parents of sending him to another residential school far away, he was put on a bus with other children to have his tonsils removed. He lost his language; he did not learn his traditions[23].

[98] Respect and attention for such evidence is part of the reconciliation process, a goal and an obligation for the courts.

[99] Finally, even though this section of the judgment puts the emphasis on the evidence presented by the MNCC, the evidence on the Indigenous perspective is not restricted to that proof. It also comes from other sources, such as historical documents and other witnesses, lay and expert, presented by the parties. Consequently, it is by studying all that evidence and all its specificities that the Court will analyze the issues before it.

D. DR. ADAMS TESTIMONY

[100] Dr. Amber Meadow Adams was declared an expert in Haudenosaunee cultural and historical research and narrative. The Mohawk nation is one of the six nations composing the Haudenosaunee family. Their culture and perspective are the same and the reference to one entity shall be understood as applying equally to the other, except for an indication to the contrary.

D.1 The Attorneys General's concern over Dr. Adams' evidence

[101] While not objecting to Dr. Adams' qualification as an expert nor to her evidence, the Attorneys General raised concerns about the probative value of her expertise related to oral tradition and narratives. The Court will address these concerns before analysing the evidence.

[102] Dr. Adams was declared an expert in Haudenosaunee cultural and historical research and narrative[24] and her qualifications were not contested. She presented an 89-page report (MNCC-1) and testified for two days.

[103] Her evidence dealt with the Haudenosaunee language and how it shapes their society, the structure of relationships between individuals or nations, narratives, the longhouse, the stories as law (the four meta-narratives), as well as the meaning of the Covenant Chain.

[23] Transcriptions, 2021-10-21, pp. 7-9.
[24] Transcriptions, 2021-10-18, p. 17.

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[104] Her *curriculum vitae*[25] and credentials speak for themselves. In 2013, she obtained her Ph.D. from the State University of New York at Buffalo. Her dissertation is titled *Teyotsi'tsiahsónhatye: Meaning and Medicine in the Haudenosaunee (Iroquois) Story of Life's renewal*, presented in the Department of Indigenous Studies. She has written fiction and non-fiction publications in different forms and is invited regularly to give presentations relating to the Haudenosaunee culture and stories both in Canada and the United-States.

[105] The Attorneys General raised a general concern as to the probative value of her evidence. The Court notes that the reasons for that concern changed somewhat between the voir-dire on her qualifications and the final arguments.

[106] Before the voir-dire, the Attorneys General focused on parts of her testimony relating to history, arguing that she is not an historian and that she even mentioned so herself in her report[26]. At that moment, the Court understood the argument of the Attorneys General to mean that, to testify about what is called history, you need to be an historian, which, in the non-Indigenous academic structure of knowledge, means that the person is trained to do research in archives and to have published material submitted to peer review, among other qualifications.

[107] In spite of her strong academic qualifications, the Attorneys General seemed to imply that her educational and professional background did not rise to the level required. While not objecting to her testimony and the production of her report, they argued that for that reason her report and testimony lacked probative value.

[108] In final argument[27], their position shifted to a concern about the probative value of the oral tradition and narratives reported by Dr. Adams, arguing that her expertise is not supported by identified written records or primary sources[28] of the oral tradition and narrative she brought to the Court. For the Attorneys General, the fact that Dr. Adams is presented as an expert and not as an elder, the kind of witness usually presenting the evidence of oral tradition, accentuates the impact of the absence of sources. They argued that, in the absence of those sources, their experts could not

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[25] Exhibit MNCC-1A.

[26] That comment is founded in Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, pp 77, fn 87, Exhibit MNCC-1: "My area of expertise is not history. I have however gained some knowledge of the procedure and the logic, if not all relevant details, of Condolence used to restore the Haudenosaunee after ruptures in the late seventeenth and early eighteenth centuries and the two wars that followed from listening to Hayadaha Rich Hill and Kayanesenh Paul Williams discuss these matters at great length. Darryl Thompson and Odatsehte Howard Elijah have also provided me with insight into how the Condolence can be used to heal minds and repair relationship."

[27] Transcriptions, 2022-02-02, p..21; Attorney General of Quebec written notes para. 58-59.

[28] The historians that testified related to the primary sources as the documents or material evidence contemporary to the events (exe: Les relations des Jésuites, Sir William Johnsons Papers) and secondary sources as works and studies done by historians or other experts.

respond or verify the evidence presented, which negatively affects the probative value of this evidence.

[109] Since the argument that Dr. Adams is not an historian was not repeated in final argument, the Court considers that it was abandoned and will not address it. In any event, considering Dr. Adams qualification and the evidence she presented, that argument has no merit.

[110] On the issue of the absence of primary sources, as a starting point it must be mentioned that Dr. Adams' report was communicated to all parties on June 4, 2021. On June 18, 2021, a summary was sent to the Court. On August 27, 2021, a copy of Dr. Adams' PhD dissertation was sent to the parties.

[111] Dr. Adams was scheduled to start testifying four months later, on Monday, October 18, 2021, and it was only two days before, on Friday, October 15, that the Attorney General of Quebec questioned her qualifications and raised a concern about the probative value of her evidence as an expert.

[112] The Attorneys General had more than enough time to raise their concern on this point with the Applicants, who could have reacted, if they deemed it necessary. Throughout the case management hearings and the trial, there was excellent collaboration between the parties, which assured that the hearings would not be delayed by questions of this nature, especially when it related to expert evidence.

[113] This concern should have been addressed promptly; it should not have been raised at the last minute. It should also be said that Dr. Adams' report does mention numerous sources, and that many of those are the same as those used by the Attorneys General's experts.

[114] In its written argument and final oral pleading, the Attorney General of Quebec raised general comments made by its experts (Profs. Von Gernet and Beaulieu) about what make oral tradition reliable evidence in their respective field of expertise. They questioned the scientific process used by Dr. Adams without identifying the content of the oral tradition or the narratives reported by her that were of concern in terms of probative value.

[115] Their argument was formulated in terms so general that it makes it impossible for the Court to deal with it in a meaningful manner.

[116] A trial judge is not a historian nor an anthropologist. Especially in cases such as this one, with voluminous expert evidence and where the essential facts are in large part established through the experts' reports, it is for the party raising a concern to identify and direct the Court to the specific evidence whose probative value is being challenged. This was not done.

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[117] The fact that oral tradition or narrative may be unreliable in certain circumstances is not enough to discredit all oral tradition and narrative presented in a specific case without substantiating the argument. Even though Prof. Von Gernet testified in general terms about the existence of a methodology to record, examine, and analyze oral history and traditions, the only part of his testimony that touched upon the evidence of Dr. Adams is his statement that he is not aware of claims made among the Mohawk in general that they had a cultural tradition resembling some of the other nations that he has seen, i.e., where there are internal checks and protocols that oral traditions have to go through, or that there is some kind of internal testing process to enhance their reliability[29]. As we will see, this is inexact.

[118] Furthermore, in cross-examination, the Attorneys General did not take the opportunity to explore those aspects of her testimony. Moreover, apart from the general comments of their experts, no contradictory evidence was presented.

[119] The content of Dr. Adams' evidence is also relevant here.

[120] Inevitably, Dr. Adams' evidence is a condensed explanation of complex notions about the Haudenosaunee as a people and as a nation. This is how she presented her contribution to this case:

> In writing this report, I've tried to present complex, multifaceted subjects — like Haudenosaunee grammar, ceremony, and masterworks of narrative — in terms simple enough (with all due respect to the court and to fellow parties to this action) for a stranger in Haudenosaunee country to understand, but not so oversimplified as to underrepresent the great substance and depth of our culture. My task, as I understand it, is to help the court. This requires to choose a few threads of the last 10,000 years of Haudenosaunee life in this land and braid them into a coherent perspective. There are, of course, worlds more knowledge on the subject that could be offered, some of which I have enough insight to discuss, but most of which I don't. A single report can't contain "the" Haudenosaunee perspective, because it can't be carried in one person's mind. The sheer scope of the matter would make such a thing impossible, and, even if that weren't so, Haudenosaunee languages (as we'll see below) always insist that the person speaking say where they're speaking from. To the extent that there's a "the" Haudenosaunee perspective, it's for the rotiyaneshon (Chiefs) and yotiyaneshon (Clanmothers) to offer, not for me. I can present only "a" Haudenosaunee perspective, which is the one I've developed in the place where I'm standing. This perspective is informed by graduate and professional work with primary sources written in English and several Haudenosaunee languages. It's also informed by work with people. This "work" has rarely meant formal interviews (which, I've found, has a chilling effect on spontaneous, friendly communication), but rather conversations, some unfolding over decades with people I've come to respect as teachers and love as friends.

[29] Transcriptions, 2021-11-08, pp. 100-101 (Prof. Von Gernet).

> When citing sources of information in this report, I'll identify the written documents from which they come, and also the people who've confirmed, clarified, and added to these documents in conversation[30].

[121] In her testimony, she explained the use of the term "narrative" and its place in the Haudenosaunee culture as well as her experience with it.

[122] A narrative traditionally means stories told and heard. It has a central place in Haudenosaunee culture. Narrative is where the Haudenosaunee keep their family structure, economy, and law. It is woven into every aspect of culture and is of enormous importance. Some has been put down in writing, but mostly not in their original language.

[123] The narratives on which Dr. Adams focused on her evidence are the four meta-narratives that have existed for hundreds of years and shaped the Haudenosaunee culture, society, family, and diplomatic relationships. They are: The Creation Story, The Story of the Clan System, The Great Law of Peace, and The Handsome Lake Code. She gave special attention to The Creation Story and The Great Law of Peace since they are more relevant to the present case. This type of evidence differs from the oral tradition that is used to establish a historical fact such as how a first nation was fishing hundreds of years ago.

[124] She also testified about her personal experience around narratives and why they are more accessible to her. She has an undergraduate degree in literature and writing, which gives her a background in how stories work and what makes them last and how a story might change over time in a culture that passes them on orally.

[125] For her PhD thesis, she examined one specific story amongst the thousands of traditional ones, and focussed on the Haudenosaunee Story of Creation, an old and long story. She worked from written sources in the Mohawk language, and in the Onondaga language, *Onoñda'gegá'*, from the 19th and 20th century. She spoke with elders in their language and asked them to explain certain scenes or words when she did not understand. She used text and knowledge that people shared with her. When she wrote her thesis, she brought her experience as a writer of fiction/non-fiction into how these stories were born.

[126] The testimony of Dr. Adams is largely on the importance of the Mohawk language, to understand fully and correctly the true meaning of oral tradition and the narratives.

[127] For Dr. Adams, it is vital to be able to understand the texts in the original written language. She understands the Mohawk language, but it is very complex, and she

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[30] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 10, Exhibit MNCC-1.

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asked for help to understand archaic words or apparent contradictions. She noted that, although some oral traditions and narratives were put down in writing, it was mostly done in English.

[128] The one existing written source of those stories in their original language became accessible only recently. It was in the late 1880's that a Haudenosaunee collector, J.N.B. Hewitt, began to record these narratives as retold by knowledgeable Haudenosaunee story tellers in Haudenosaunee languages.

[129] Hewitt was raised in Tuscarora, a Haudenosaunee community in upstate New York.

[130] He worked for the Bureau of American Ethnology in Washington D.C. Between 1888 and his death in 1937 he visited many Haudenosaunee communities and recorded thousands of pages of manuscript in the Haudenosaunee language. For over 60 years, he collected those narratives, interviewing some of the most knowledgeable and respected Haudenosaunee of the era. He collected over 10,000 manuscript pages of narrative, ceremony, vocabulary, and other vital Haudenosaunee cultural information, the great majority of which remains to this day unpublished and untranslated in English or French. Thus, only scholars with a sufficient knowledge of the Mohawk language or another Haudenosaunee language can use most of this unique source of information.

[131] Hewitt died in 1937 and William N. Fenton assumed his post at the Bureau of American Ethnology in 1939.

[132] Fenton did not understand Haudenosaunee languages. He exercised a strict control over Hewitt's records until his death in 2003. So strict was his control that for 66 years no scholars could access Hewitt's unique work. That situation was corrected after Fenton's death but, even today, Dr. Adams does not know if the process of scanning Hewitt's records to make them digitally available is finished.

[133] What this means is that this essential material has been accessible only for the last 17 years (excluding pandemic years), and still today, most of it is accessible only to a speaker of the Mohawk language.

[134] Dr. Adams had access to the parts of Hewitt's record relating to the four meta-narratives, which encompassed The Creation Story, The Story of the Clan-O'tara system, The Great Law of Peace, and materials related to the Condolence ceremony, as well as to aspects of medicine, vocabulary and other elements.

[135] She testified that she also obtained information from other people. Access to people having this knowledge is difficult. She did not grow up with Haudenosaunee people because of the early death of her Haudenosaunee father. It was as an adult that she began to try to find her relatives and other people in the community, starting through a small group of people studying the Seneca language in Buffalo when she

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was a student there. She eventually got to know and earn the confidence of elders and Haudenosaunee speakers.

[136] She considered Hewitt's record as an important source of primary material. In 2015, she made a presentation to the Native American Conference on the subject of the differences in the versions of the Creation Story that Hewitt collected, and what they mean, and why it is important that there are differences[31].

[137] In 2016, she was mandated by the Passamaquoddy Nation in the Maritimes to produce an expert report about their relationship with the Covenant Chain.

[138] She is also one of the authors, with colleagues from McMaster University, of a yet-to-be-published anthology about the Covenant Chain and the role of the Two-Row Wampum – *Tékini Teyohà:te*.

[139] She also explained that her PhD is not specifically in history, but in Indigenous studies, a multi-disciplinary field that includes history, linguistics, ethnography and ecology.

[140] As for her background in cultural research, she testified that she began acquiring this knowledge through studying research done by others, as most graduate students do. She looked at primary sources and then started talking to more people. In 2009-2010, she had a job that allowed her to drive to Mohawk communities and talk to people running language programs. This allowed her to understand how Haudenosaunee used language to tell stories and conduct ceremonies. It was through talking to people and reading primary sources and looking at scholarship produced in other fields that she acquired her expertise.

[141] This is the background against which the Attorneys General raised a concern formulated in very general terms.

[142] The expertise of Dr. Adams might come from different sources and academic traditions than those of Prof. Von Gernet and Beaulieu, but, in a judicial forum, this does not automatically reduce its probative value.

[143] Dr. Adams explained when and how she acquired her expertise. The content of her testimony demonstrated that she is a well-qualified expert in the field of Haudenosaunee cultural and historical research and narrative.

[144] The Court finds nothing in the evidence that raises a concern over the probative value of the oral tradition or the narratives she presented.

[145] In conclusion, considering Dr. Adams' credentials and expertise, the nature of the oral tradition and the narratives reported, that the testimony of Dr. Adams is

[31] Transcriptions, 2021-10-12, p. 32 (Dr. Adams).

confirmed by that of Chief Nelson, that the arguments are so general and without specificity, the Court concludes that the concerns raised by the Attorneys General are unfounded.

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D.2 The Mohawk language

D.2.1 The importance of Mohawk language in this case

[146] The evidence on the Mohawk language is relevant for different reasons.

[147] First, since the treaty relationship in this case started when the parties first met and were not speaking each other's language, it is essential to comprehend, to the extent possible, the impact of the Mohawk language on their culture and on their understanding of the world and treaty relationships.

[148] Secondly, because the parties were usually communicating through interpreters, we thus know that the Mohawk representatives were speaking the Mohawk language at the treaty conferences. As we will see, the Mohawk language is crucial to the understanding of the various forms of relationships in the community. Therefore, knowledge of the Mohawk language and its social and political role is critical to the determination of the intention and objectives of the Mohawk during this treaty relationship.

[149] Thirdly, because one of the key issues in this case centers on the Covenant Chain, which is not a written document but nonetheless, is very much part of the treaty relationship between the Mohawk and the British.

[150] Finally, because the true meaning of what the Mohawk representatives were saying is central to the analysis of the written documents prepared by the Europeans. Those documents record the understanding of the writer, necessarily through the filter of the interpreter and, hence, not necessarily what the Mohawk speaker said or meant. This is an additional difficulty in the interpretation of the Treaties.

D.2.2 The Haudenosaunee language structure

[151] The Mohawk name for the Mohawk language is *Kanyen'kéha*.

[152] There are six languages spoken by the nations of the Haudenosaunee Confederacy and they have some of the most complex grammar of all languages spoken in the world[32].

[153] Today, from a total population of 160,000 Haudenosaunee, approximately 5,000 people speak a Haudenosaunee language with proficiency and, of those, 2,500

[32] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 13, Exhibit MNCC-1.

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are Mohawk. This small number of speakers is the heritage of decades of colonisation and assimilation.

[154] Haudenosaunee languages are syncretic, meaning that morphemes (unit of meaning) can attach to a root, which in this case is almost always a verb root. This means that most words are based on actions.

[155] There is almost always a pronominal prefix attached to these morphemes that describes the relationship between actors. Where English has about 15 pronouns, the Mohawk language has more than 50. To illustrate the complexity, one needs only to consider that there are 18 different transitive pronominal prefixes for the word “they”.

[156] It is a language that puts relationship first, teaching its speakers to identify with precision who acts upon whom with almost every word they speak[33].

[157] As an example, *Rake’hina* is a verb phrase usually translated as the sentence “He is my father”. The pronominal prefix of *ra+ke* can be broken down further: *ra* identifies a male actor who is acting upon *-ke-*, meaning me, i.e., the speaker.

D.2.3 The verb tenses

[158] In her report, Dr. Adams explained that the Mohawk language has four basic tenses: the present (I go, I am going), the definite (I went), the non-definite (I would go, I may go) and the intentive (I mean to go), describing one’s plans. There is also a fifth verb form, the stative, that describes an action started at some point in the past and continuing in the present (I have gone and I am still going).

[159] Using the example of the intentive tense, Dr. Adams explained the interaction between the language and the culture in the following way:

> Even though the intentive verb, is often translated as “I will”, it really describes only one’s plans. “I intend to go” versus “I will go”, better acknowledges the limits of our own agency in a world filled with beings who think and act for themselves, and our total dependence upon the plans and intentions of the waters, winds, and weathers that determine human action much more than our plans or intentions do[34].

[160] She also adds that the “humility” of Mohawk grammar is reflected in the way people think, by allowing the speaker to communicate in suggestions and possibilities. In a society physically structured around the longhouse – *kanonhsehs,* where many families live under the same roof, this mode of communication soothes everyday human interaction[35].

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[33] *Idem*, p. 15.
[34] *Ibidem*.
[35] *Ibidem*.

[161] This humility in the Mohawk language also influenced the diplomatic relations of the Mohawk and the way they practiced diplomacy. Here is what Dr. Adams said:

> It also serves as a standard of etiquette and protocol in Council, easing the delicate work of negotiating with people of one's own and of other nations. Second, it enables hearers to hold multiple, sometimes conflicting, meanings and interpretations in their minds simultaneously. A royaner (Confederacy council Chief), for example, has a personal name given by his o'tara (Clan) as a small child, but also holds a title, such as Tehatkarine, which is also a name that goes back to the founding of Kayanerenhtsherakó:wa (the Great Law or Great Peace). Tehatkarine is supposed to embody all those who have held the title before him; yet we know that the person currently holding that title is also a unique being with his own personal name. He is both one, and everyone who has come before him and will come after him. In the same way, Kanyen'kéha speakers can think about Tékeni Teyohàte (the Two Row wampum) as both an object (a wampum belt, or a design on a tee shirt, or a bumper sticker) symbolising the idea of both distance between brothers and the love, respect, and compassion that continues to bind them to one another. In other words, verb tenses in Kanyen'kéha make room for diplomacy without compromising intellect or integrity[36].

D.2.4 No word for coercion

[162] One relevant aspect of the Mohawk language is the absence of a word for coercion.

> There are no words that can be translated as the English one like "have to", "made me", "must", "shall' or "shall not". The nearest equivalent to any of these is the verb phrase Tkakonte, usually translated as "it must be so", but is closer to "it's attached to what is", often describing a natural or biological phenomenon. An absence of compulsion in Haudenosaunee grammar characterises action - in relationships and, so, in law - as the product of one's choice. To do is to have chosen to do. Since no one's actions can be forced by another, one's freedom to act – well, or poorly – can be influenced only through persuasion and example[37].

[163] This distinctive feature reflects the tolerance of Mohawk society for individual actions, good or bad, and their consequences in the broader relationship.

[36] *Idem*, pp. 15-16.
[37] *Idem*, pp. 16-17.

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D.2.5 A language based on relationships

D.2.5.1 Much more than just biology

[164] Haudenosaunee languages prioritize relationships and identify all relationships with nature, between individuals and between nations, by words reflecting family relationships.

[165] Although the notion of family is a generic one, its concept, its structure, and who composed it vary greatly between societies and eras.

[166] Many Haudenosaunee family terms are prescriptive, naming the actions that represent an expected behaviour within the relationship[38]. This language pattern is also reflected in the relationship between generations, the elder providing protection and guidance and the younger responding with attentiveness and deference. The greater the generation gap, the more pronounced the reciprocal attitude. Generally, the brother-to-brother or sister-to-sister relationship is the default structure for people approximately the same age.

[167] The Mohawk language also distinguishes between older and younger brothers, not in terms of hierarchy but, rather, in terms of needs, desires, and capacity that change through the course of one's life. There is no term in Haudonausanee languages for just "my brother"; it is only "my elder brother" – *rakhtsi'a*, or "my younger brother" – *ri'kenha*.

[168] Another example of how descriptive of the action Haudenosaunee languages are is the word *rake'hiha*. It has been translated as "my father" but literally means "he is lent me". This is a reflection of the Haudenosaunee clan structure, where a father is a man lent to one woman's family by another woman's family, and whose clan the man retains throughout his lifetime. Through this structure, the primary responsibility of ensuring the safety and good conduct of children rested with their maternal uncles.

[169] Because family names reflect action and expected behaviour between individuals more than a biological link, family terms are also used to define relationships outside the biological link:

> Within the Haudenosaunee o'tara (Clan) system, one may consider the other members of that o'tara as siblings, aunts, uncles, and grandparents, even if they are none of these things in a strictly biological sense. A traveller from another village, or another nation, can seek shelter in the house of the same o'tara and expect hospitality, even if one has never before met the people inside[39].

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[38] *Idem*, p. 18.
[39] *Idem*, pp. 21-22.

[170] People address each other using family names, without the biological link:

> Father Joseph-François Lafitau observes in 1724 that "[u]sually, however, the Indians do not willingly hear themselves called by the name given to them and an inquiry as to what that is, is a kind of affront which causes them to blush. In addressing each other, they call each other by names of kinship, brother, sister, uncle, nephew etc. observing exactly the degrees of subordination and all the proper age relationship unless there is a real relationship by blood or adoption." Thwaites, The Jesuit Relations and Allied Documents, 72. Although Lafitau cannot refrain from seeing "degrees of subordination" where there are none, he does define "real relationship[s]" as resulting from "blood or adoption[40].

D.2.5.2 Adoption

[171] Adoption occupies a central place in the Haudenosaunee communities. A single person, a group or a whole nation can be adopted, and it is often, but not necessarily, marked by the ceremony of adoption.

[172] Ceremonies are a central part of the Haudenosaunee culture. We will come back to this aspect later. For the present, suffice it to say that the adoption ceremony resembles very closely the ceremony of presenting a child born to the clan, or as Dr. Adams said, giving a child born into the clan.

[173] This is how Dr. Adams described the adoption ceremony:

> Held at Anonhwaróri (Midwinter) or Okahseróta (Green Corn, taking place in midsummer), a representative of the adopting family (usually the person's closest male relative, his maternal uncle) walks the new member up and down the longhouse, arm in arm in the case of an adult, and held in arms in the case of a small child. People without biological siblings, or those who have formed a special bond with a peer, can become siblings or "medicine friends" with that person in a ceremony that resembles those for adoption and naming. All these ceremonies include an agreement between people wishing to become family, an exchange of gifts, and a public acknowledgement of the new form the relationship is taking and the responsibilities each party assumes. Family made through such formal processes are family, to no lesser or greater degree than those born into an o'tara (Clan). The relationship lasts the rest of one's life, and the secondary bonds created can persist for generations beyond. Informally, without the public acknowledgement of ceremony, sisterhoods, brotherhoods, aunt, uncle, and grandparent relationships are frequently created and sustained between people. This is true even in contemporary Haudenosaunee society, in which maintaining traditional patterns of extended — and extending —

[40] *Idem*, p. 21, fn 11.

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> family has been made harder by the replacement of kanonhsehs (longhouses) with single-family homes, urbanisation, and the restrictions on free movement through our territory by the Canada-United States border[41]."

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D.3 The longhouse – across the fire

[174] The longhouse – *kanonhsehs* - is a fundamental feature of the Haudenosaunee culture.

[175] So important is this feature that it reflects in the name Haudenosaunee. In the Mohawk language, Haudenosaunee is *Rotinonhsyón:ni*. In English, it is usually translated by "longhouse", but the exact meaning is more akin to "They have begun building the house and are still building it."[42]

[176] Taken from Dr. Adams' report, here is a description of the longhouse, both architecturally and sociologically.

[177] Metaphorically, the longhouse represents a "shelter of a house built from east to west across the core of traditional Haudenosaunee homelands"[43].

[178] This metaphorical longhouse is always in the process of being built. The traditional dome-shaped roof represents the earth, which must be continually taken care of. That links it with The Creation Story and it is also coming up in The Great Law of Peace, from which emerges a complex political system with a comprehensive set of laws that are, as we will see later, both substantive and procedural[44].

[179] This house is said to have an eastern door, guarded by the Mohawk, the nation at the easternmost of the Haudenosaunee, and a western door, guarded by the Seneca – *Onödowa'ga* nation – the westernmost of the Haudenosaunee. A central fire, kept by the Onondaga – *Onoñda'gegá* nation, located at the geographical center of the Haudenosaunee territory, acts as the political capital of this brotherhood of nations[45].

[180] Architecturally, between about 25 and 200 feet long, these houses were usually built on an east-west axis. The roofs were domed with several smoke holes and had two rows of platforms on each side with a central fire or fires between them, as seen from the picture below.

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[41] *Idem*, pp. 22-23.
[42] *Idem*, p. 38.
[43] *Ibidem*.
[44] *Idem*, p. 39.
[45] *Idem*, p. 38.

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[181] This photo (by Michael Chamberlin) of an interior of a longhouse reproduced at Ganondagan State Park near Victor, NY shows the domestic structure of traditional Haudenosaunee daily life. A central line of hearths produces heat and light. Lower platforms were used for sleep and work, upper platforms, for storage. Doors at each end were often protected by a shallow roof, anteroom, or the household's dogs. Families living across the fire from one another expected to help one another in daily tasks and times of difficulty[46].

[182] Small groups of family, perhaps a mother, father, and small children, would occupy the platforms on one side of a fire. Depending on the size of the house or village, the family across the fire might be of the same clan as their neighbours opposite, or of a different clan. Regardless, families living across the fire expected to work with and help one another. Gardening, gathering, hunting, cooking, childcare, and other daily activities could be shared, and moments of crisis, such as illness, an accident, or a death would also bring the support of the family across the fire.

[183] So deeply grounded was this daily reality that it has become a metaphor for many kinds of dualities in Haudenosaunee philosophy: between elder and younger, of

[46] *Idem,* p. 20.

course, but also between female and male, earth and sky, day and night, growing season and resting season, and, ultimately, life and death.

[184] That metaphor expands to include the nations of the Haudenosaunee when The Great Law of Peace came and when the Haudenosaunee formed treaty relationships with other nations. The Haudenosaunee understand these across-the-fire relationships as perpetual, heritable from one generation to the next, and fundamental to their identity. They are never, at least from a traditional perspective, one-time-only transactions[47].

[185] During the hearing, the metaphor of "bringing an issue across the fire" was used by different witnesses, demonstrating how deeply rooted and important that part of the Mohawk culture is. It also demonstrates how the concept of perpetuity in all kinds of relationships is not just metaphoric, but also a distinctive trait of Mohawk culture.

[186] The architecture of the longhouse, where everybody lives together without walls, forged the need to resolve conflict rapidly, efficiently and to everyone's satisfaction.

[187] In her report, Dr. Adams explained that families no longer reside in longhouses today. The transition from the longhouse to a single-family dwelling, which still often hosts the extended family, happened in the 1790's under pressure from the increasing European colonisation of Haudenosaunee territory. Nonetheless, longhouses still exist and are used mostly for ceremonies and other gatherings, political or social. That is a reflection as to the strength of Haudenosaunee society and culture. In the same vein, the reciprocity embedded in the longhouse, a distinctive component of this culture also survived[48].

D.4 The narratives or the oral tradition

D.4.1 The narratives, an overview

[188] In this case, evidence of the narratives was not presented to establish specific historical facts but, rather, to expose the aspects of the Mohawk culture and society relevant to the understanding and the determination of the intention of the Mohawk during the treaty relationship.

[189] For Dr. Adams, the narrative tradition, or what may be referred to as the oral tradition in the jurisprudence, is not something said by someone about something. It is composed of thousands of stories, some brief, some self-contained, some of epic length and scope. These stories are meant to be told rather than read and have been recounted for hundreds, if not thousands, of years in Haudenosaunee languages.

[47] *Idem*, pp. 19-21.
[48] *Idem*, p. 22.

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[190] They are traditionally told to gatherings of people, from elders to small children, by one or by a few very knowledgeable narrators. They are also preserved and transmitted in less formal settings, in the past, during the long winter evenings around the fires in the longhouse and, in more recent times, in long car trips or around someone's kitchen table.

[191] As Dr. Adams explains, these stories are meant to be told by different narrators, over and over again, and to be heard by as many people as possible and as often as possible in a lifetime.

[192] Repetition serves three purposes. First, it ensures equitable access to this publicly held information. The same principles illustrated by the same narrative episodes teach core concepts of Haudenosaunee society to everyone.

[193] Second, it preserves the consensus about the story that is being told. Differences between versions, even between retellings by the same narrator, are appreciated, even relished. Indeed, they can help the listener separate themes and principles from details, and so serve as a tool of healthy interpretative debate[49].

[194] In a courtroom environment, where differences between previous versions automatically raise a concern of reliability, it may seem counter-intuitive to cherish differences. But viewed in the broader sense as metaphors and that these stories are mostly important for the principles they teach, the wisdom and efficiency of such a procedure is better appreciated.

[195] Third, repetition keeps fresh an awareness of agreements made and mutual responsibilities undertaken together – relationships, in a word – in the personal and collective memory of the clan and the Haudenosaunee.

D.4.2 Oral tradition and ceremonies

[196] Narratives are stories, they do not stand alone. They are part of the broader culture, social organisation and the ceremonies central to the Haudenosaunee way of life; all of which have deep ties to the narratives. Ceremonies reinforce them and keep them accurate and alive in the community[50].

[197] It would be too long to expand on the Haudenosaunee ceremonies, what they refer to and how and when they are performed, but a few words need to be said in order to understand their importance in the Haudenosaunee culture and the place occupied by some of them during the treaty conferences of the 17th and 18th centuries.

[198] The annual cycle of ceremonies follows the cycle of nature and the seasons. Winter is a time to thank all parts of Creation. The spring ceremonies celebrate the

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[49] *Idem*, p. 23.
[50] *Idem*, p. 24.

wakening of nature after a long winter. The summer ones celebrate the height of the growing season. In the fall, the harvest and the closing for winter ahead are central. They center on specific elements like maple syrup, strawberries, corn, etc. as metaphors for the larger gifts of nature that support the survival of the community.

[199] These ceremonies are public, held in modern-style community longhouses. People work together to prepare the food shared by everyone. Music, singing, and dances are performed. Their substance is the same each time, each year. They are also the occasion to renew the connections with ancestors, a reminder of the profound dependence with mother Earth and the continues responsibilities to support her. Each ceremony is unique but by its repetition and continuity from year to year they unite people, families, clans and nations. It permits to continue to build and maintain relationships with one another[51].

D.4.3 The meta-Narratives

[200] Dr. Adams' evidence focussed on the four meta-narratives that have existed for thousands of years and that have shaped the Haudenosaunee culture and society. These four meta-narratives are: The Creation story, about the creation of Earth, The Story of the Clans system, The Great Law of Peace - *Kayanerenhtsherokó:wa* about the relation with other nations and The Code of Handsome Lake about the relation with Christianity[52].

[201] These meta-narratives are not one-time statements made by an individual and repeated by others. They comply with the Haudenosaunee culture of storytelling and its authentication process.

[202] The meta-narratives are where the Haudenosaunee keep the family structure, ecology and law. They can touch every aspect of culture possible and are of enormous importance in Haudenosaunee society[53].

[203] The Court understands that these are not only stories, but that they also relate history, code of conduct and law. Their authenticity and reliability come from a different process than the one that non-Indigenous people may be comfortable with. That does not mean that they are unreliable and have no value in the Canadian judicial process.

[204] As previously mentioned, there are four meta-narratives.

[205] These four meta-narratives, which are foundational to the relationships nurtured by the Haudenosaunee, were summarized by Dr. Adams as follows:

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[51] *Idem*, pp. 26-27.
[52] *Idem*, pp.27-29.
[53] Transcriptions 2021-10-18, pp. 21-22.

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> In very simple terms, the story of Earth's creation defines our relationship with yethi'nihstenha tsi yonhwentsyake, our mother the Earth, and how we can and cannot behave in this place if we wish to live in it. The story of how our o'tara (Clans) emerged defines our relationship with an organised society, and how we can and cannot behave with our families if we are to live in the large, stable groups that the bounty of our lands supports. The story of how Kayanerenhtserakó:wa (the Great Law of Peace) was made defines our relationships with one another as nations, and how we can and cannot behave if we wish to maintain a state of skén:nen (usually translated as "peace," but a term incorporating many levels of well-being) within our own lands and with our neighbours. The story of Karihwí:yo (the Code of Handsome Lake) defines our relationships with Christianity and Christians and how we might and might not choose to adapt to these rapid changes at a time when Europeans and their descendants were using their religion (and the political claims they derived from it) to justify the dispossession and death of many of our people[54].
>
> Each story builds the foundation for the one that comes after it, sequentially and chronologically. Some stories articulate conflicts that aren't fully solved without telling another story, creating many layers of the oral equivalent of intertextuality. The only story that can be precisely dated is Karihwí:yo, first told by a man holding the royaner's title of Skanyataríːyo (translated as "Handsome Lake") at the very end of the 18th century. The rest can be approximated through ecological details, linguistic archaisms and morphology, and, sometimes, physical setting. Treaty relationships, as they are articulated in sources from the 17th and 18th centuries, emerge directly from the relationship dynamics, conflicts, and resolutions detailed in stories first told centuries, if not millennia, earlier[55].
>
> Our family relationships to one another, told in the story of the Clan system, is the foundation for how we heal conflict within and between nations by reaffirming and making new family, as told in the story of Kayanerenhtsherakó:wa. Once we understand how to build skén:nen between our nations, we can work toward doing so with other nations. Approaches to other nations are explained in Karihwí:yo, as well as treaty relationships, (…)[56]

[206] Treaty relationships are therefore based on the idea that the parties know how to make the relationship work[57].

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[54] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 27-29, Exhibit MNCC-1.
[55] *Idem*, p. 28.
[56] *Idem*, p. 29.
[57] *Idem.* p. 67.

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D.4.3.1 Written version of the meta-narratives

[207] Although these stories have been told for hundreds if not thousands of years, only some of them and part of others have been put into writing.

[208] The earliest written version of the Creation Story was written by Jesuits missionaries in the 1630's in their *Relations des Jésuites de la Nouvelle-France*[58]. It was used to show the need for Christian evangelism and the monetary resources to support it. It also demonstrates that this meta-narrative was part of the Haudenosaunee culture a long time before the arrival of the Europeans.

[209] In the 19th century, very few other versions were put into writing, whether by Haudenosaunee narrators or guided by them. Dr. Adams reported specifically on two versions, but neither was written by a Haudenosaunee writer or in a Haudenosaunee language. They are drafted in an over-simplified manner either in Dutch, French or English, and take no heed of the Haudenosaunee interest[59].

[210] As previously seen, it was not until the late 1880's that J.N.B. Hewitt, a Haudenosaunee himself, started collecting the stories in Haudenosaunee languages and writing them down in their original language.

D.5 Haudenosaunee law

D.5.1 The meta-narratives are the law

[211] The Indigenous law[60] of the Haudenosaunee- *tsi niyonkwarihò:ten* is found in the meta-narratives. They are the pillars of Haudenosaunee law.

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[58] The *Relations des Jésuites de la Nouvelle-France* consists of 40 volumes of notes written by Jesuites missionaries in Nouvelle-France, collected in the fall of each year to be sent to France to be printed and used by the Jesuit authorities to raise funding for their missions. The Jesuits were usually very educated, and they reported their observations about the Indigenous people. They are a well-used primary source of information, albeit not free from bias.

[59] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 30. Exhibit MNCC-1.

[60] The difference between Aboriginal law and Indigenous law has been explained in *Iskatewizaagegan n°39 Independant First Nation* v. *Winnipeg (City)*, 2021 ONSC 1209, para. 48:

> The law that governs the relationship between Canada and Aboriginal peoples of Canada is what is now known as Aboriginal law. Indigenous law is not the same as Aboriginal law. Both before and after the arrival of European settlers, the Aboriginal peoples in North America had well-developed civilizations that had legal systems and legal customs. Those discrete legal systems are the source of Indigenous law, the law that governs the first cultures as discrete civilizations or civil societies. […]

[212] *Tsi niyonkwarihòten* means “the way of our business” [61] or “our ways of addressing matters”[62], that can refer to the aspects of Haudenosaunee culture, such as speech, protocol, ceremony, and law.

[213] As Dr. Adams stated, the meta-narratives “dramatize the relationships our languages identify, explaining and illustrating the ways in which these relationships work, or fail to work, for our survival all together, in this place”[63].

[214] As a code of conduct, the meta-narratives articulate the goals of Haudenosaunee society, such as to live sustainably on this planet (The Creation Story) or to maintain peace with other nations (The Great Law of Peace). They are both substantive, for example, agreeing that everyone has the right to use resources necessary for survival, and procedural, by establishing a decision-making process based on consensus and determining what consensus is and how exactly people can work to reach it.

[215] The meta-narratives are also consistent, details may change but the principles remain constant. One story reiterates, reinforces, and elaborates upon those that came before it or that are concurrent with it. No story unmakes or voids another.

[216] They are made accessible to everyone by being repeated throughout a person’s life, both through retellings and through the ceremonies, songs, natural phenomena, personal names, humour, and other allusions that weave the daily cultural texture of Haudenosaunee society, what they call *onkwehonwenéha*, our way of doing things. Thus, everyone can understand what behaviour is expected of them and why, and what the consequences of their transgressions might be[64].

[217] A valid objective, an identified conduct and the consequences of not respecting it, are all universal components of laws regulating relationships.

[218] The meta-narratives are more than laws. In Haudenosaunee, the word *tsi niyonkwarihò:ten* is the closest one to law. It touches upon spirituality, art and science.

[219] As seen previously, Haudenosaunee languages have no word for coercion, such as “must”, “have to”, “shall not”. As a result, Haudenosaunee law is not based on punitive consequences for unacceptable behaviour but, rather, is oriented toward finding the best possible action.

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[61] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 89 (Glossary). Exhibit MNCC-1.
[62] *Idem*, p. 33.
[63] *Idem*, p. 32.
[64] *Idem*, p. 33.

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[220] Haudenosaunee law, like Haudenosaunee leadership, is based on persuasion, on example, and on appeals to shared ethics. Important among these is the principle of *ka'nikonhriyo'tshera't*, a lifelong cultivation of intellect, character, knowledge, compassion, and generosity. It is because the Haudenosaunee investment in *ka'nikonhriyo'tshera't* is so fundamental, combined with personal freedom, choice, and responsibility for actions resulting from that choice, that the legal system's entire orientation does not need to focus on enforcing consequences for harmful action. It can emphasize a duty to work for the greatest good possible in a given situation[65]. In other words, Haudenosaunee law is not predicated on the question: "How much bad behaviour can I get away with before the legal system stops me?" but, rather, "What are my responsibilities in working for the greatest good?"[66].

D.5.2 The four essential legal principles

[221] Haudenosaunee law can be described as *yorihowaneh*, the Haudenosaunee Circle of Law, a structure far from being static.

[222] There are four essentials principles that are in constant interaction.

[223] The three first principles are *skén:nen* (peace), *ka'shatstenhsera* (power) and *ka'nikonhriyo'tshera't* (good faith).

[224] *Skén:nen* is often translated simply as "peace" but it unifies not only the absence of conflict but also the physical health, emotional wellness, social cohesion, ecological balance, and spiritual fulfilment of a multidimensional synchronous thriving. *Skén:nen* describes the whole-existence vibration. The best English equivalent might be "harmony."

[225] *Ka'shatstenhsera*, the second principle, is often translated as "power" or "strength." It includes both capacity of body, mind, or spirit, and ruggedness, toughness, and durability. It can also describe strictness and rigidity, and habits of demand, brutality, and violence. These positive and negative connotations demonstrate the distrust running through Haudenosaunee philosophy regarding power or capacity, at least when it is not balanced by any other force. This distrust appears in many Haudenosaunee narratives[67].

[226] A Haudenosaunee legal system with *skén:nen* as its object cannot function with a minimally-acceptable standard of behaviour as its baseline. It requires everyone's good-faith effort to develop and use *ka'nikonhriyo'tshera't*, the third principle[68].

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[65] *Idem*, pp. 33-34.
[66] *Idem*, p. 34.
[67] *Idem*, p. 36.
[68] *Idem*, p. 34, 36.

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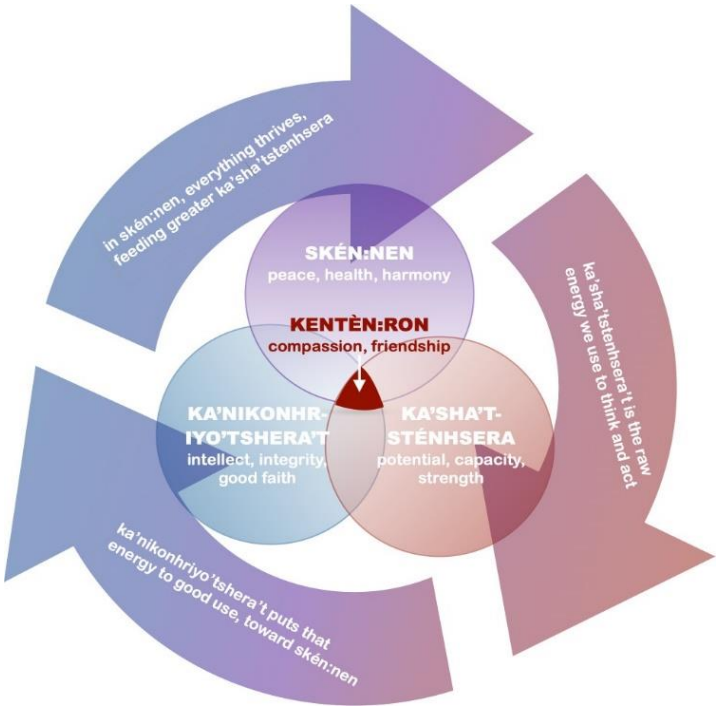
[227] At the center of this interaction is the force, *kentèn:ron* (compassion, friendship), which is the fourth principle. It represents the emotional response to another human being that prompts a practical response to that human being's needs. It involves compassion, kindness and gentleness. Consideration for others' needs and feelings is upheld and rewarded.

[228] If we imagine the three principles of Haudenosaunee law as they are presented in the Great Law of Peace as forming a circle in perpetual motion, *kentèn:ron* (compassion, friendship) is the centripetal force pulling them all toward the middle, and keeping any one of them from spinning away under the external forces of conflict.

[229] Dr. Adams in her report presents a good illustration of the synergy of these principles[69]:



Circle of Law, MNCC-1, p. 35

[230] Like many Haudenosaunee words, *kentèn:ron* differs from its English translations at its verb root. The phrase -*itenhr*- describes an action, something one does to help someone else. "Pity" and "compassion," its most common English translations, describe a feeling one has for someone else, but do not indicate whether or not that feeling is ever acted upon, or whether that action relieves the other person's suffering.

[69] *Idem,* p. 35.

[231] Like the other Mohawk language family terms, this fourth principle describes the fundamental act that creates and sustains an emotional bond. We hold, we carry, we lend, we care for, we love — this is living Haudenosaunee law[70].

[232] This, of course, is but a brief overview of Haudenosaunee law, but they are the core principles that are relevant to this case.

D.5.3 The Great Law of Peace, *Kayanerenhtsherokó:wa*

[233] Since these principles of the Haudenosaunee law system are found in the meta-narratives, it means that they were regulating Haudenosaunee society long before the arrival of the Europeans and that it was the system the Haudenosaunee knew when they engaged in treaty relationships with the Dutch, the French and the British.

[234] Again, the Haudenosaunee language reveals a lot about their perspective on treaty relationships. According to Dr. Adams, many speakers of Haudenosaunee languages, when asked the word for “treaty,” will say that the nearest equivalent is *orì:wa*. Usually defined as a matter of business undertaken by a group of people, *orì:wa* can refer to an agreement, an issue to be decided, an ongoing project, such as a marriage, or, in the vocabulary of the Canadian legal system, a law or treaty[71].

[235] *Orì:wa*, or treaty, whether between the nations of the Haudenosaunee, between the Haudenosaunee and other Indigenous nations or between the Haudenosaunee and European nations, derives from Haudenosaunee law, which, as discussed, is carried in Haudenosaunee meta-narratives[72].

[236] The Great Law of Peace is the meta-narrative at the heart of any treaty relationship involving the Haudenosaunee. Consequently, understanding its origin, its meaning and its importance for the Haudenosaunee is essential for anyone who must determine the intention of the parties between 1664 and 1760. This said, it is impossible to fully understand The Great Law of Peace in the context of this judgment.

[237] The Great Law of Peace is complex and rich in its many levels of symbolism[73]. It is also structurally and culturally different from non-Indigenous law.

[238] The Haudenosaunee still have an oral tradition. Contrary to the procedure under Canadian law, there is no legislative process for a governmental or political

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[70] *Idem*, pp. 36-37.
[71] *Idem*, p. 37.
[72] *Ibidem.*
[73] Kayanesenh Paul Williams, representing the MNCC in this case, is one of the 50 Chiefs of the MNCC. He is also a lawyer and a university teacher. He wrote a 454-page book titled *Kayanerenkó:wa The Great Law of Peace* that was presented to the Court but not filed in the record: Kayanesenh Paul WILLIAMS, *Kayanerenkó:wa – The Great Law of Peace*, Winnipeg, University of Manitoba Press, 2018. It is a doctrinal document on this Indigenous law. It demonstrates how complex and important The Great Law of Peace is.

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entity to adopt stories as law, and there is no official publisher. Narratives, like The Great Law of Peace, are told publicly, and the collective memory plays a role that can be compared to that of an official publisher in Canadian law.

[239] That is why the Court must look to a number of sources or witnesses to obtain the evidence needed for understanding it. These sources need not be jurists or juridical, provided that the Court considers them to have sufficient knowledge of The Great Law of Peace to educate and help it to understand the concept. In this case, Dr. Adams and Chief Curtis Nelson were two such sources.

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D.5.3.1 Overview of The Great Law of Peace

[240] The Great Law of Peace, describes the process of bringing the five Iroquoian nations out of an intractable war and the slow construction of finding peace, skén:nen, at all levels, whether personal, familial or national. It embodies both a process and a permanent goal[74].

[241] Even though what is important here is to focus on the meaning and principles of The Great Law of Peace, it worth saying a few words about the story itself.

[242] As previously mentioned, the Great Law of Peace is a complex story with many parts, far too long and intricate to deal with at length in this judgment.

[243] During her testimony, Dr. Adams gave the following short version of it, one that starts after The Creation Story:

> By the time we get to the beginning of the story of Kayanerenhtsherakó:wa, the Great Law, there are many more people. They're living in much more complex and larger groups. And the beginning of the story starts in what is usually called "the Dark Time", and it's this period — nobody knows exactly when it starts. It's something that happens well before Europeans arrive in North America, but nobody has a precise date. There have been different guesses about it. But what's important is there's a long period of major, profound conflict. There's murder between different clans between different nations, between different families. There's fear. There's, I think what it would be fair to call, terrorism. There's torture. There's even, possibly, cannibalism; it's referred to in the story. But this is a horribly destabilized, unsafe, destructive — not just destructive to these communities' people but also pretty destructive to the ecology, to the environment. People are not treating earth very well, and it's affecting their ability to survive. And so into this apparently endless horrible cycle steps a person usually referred to as "the Peacemaker". He has a name, but we don't use it outside certain ceremonial contexts. This young man, this very man, who's living removed from this conflict has an idea about how to begin to

[74] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 38. Exhibit MNCC-1.

> resolve it. So there — and again, this is a very long story. There are multiple episodes, multiple characters. This young man begins one person at a time to bring this message of peace, saying, “Listen, it’s not inevitable that people live this way. Here’s how we can begin to shape a system for resolving conflict that’s already happening and for avoiding or attenuating conflict that hasn’t happened yet.” And over the course of 40 or 50 years, a couple of generations, this is exactly what is created. And the culmination of the story is saying, “All right, we’re going to have this group of 50 roiá:ner, these 50 chiefs, that are going to be chosen by their families and put up by their yakoyaner, or their Clan mothers, but they’re going to have a very explicit, specific set of things that they’re responsible for. They’re going to have designated helpers, and those helpers will have a role. There will be a way to remove them office. There will be a way to run council so that there is no conflict, or at least there’s minimal conflict, and we’ll be able to have a political — a legal system that’s building on our clan system, that’s building on our ecological system, that will sustain peace, skén:nen, which is a slightly, again, different meaning in Kanien'kehá. But this whole system of establishing leaders, maintaining peace, reiterating relationships, using ceremony, is something that is extended almost whole cloth into treaty relationships that the Haudenosaunee developed with Europeans when they first encounter them[75].

[244] There is a special part in The Great Law of Peace where the five nations bind their arms together in brotherhood, creating a treaty relationship. This part carries the name of Haudenosaunee and the core of the name invokes the earlier Creation Story, reminding that this *orì:wa* (matter, business, treaty relationship) is built on those that came before it and that it remains in force[76].

[245] One of the objectives of the process put in place by the Great Law of Peace is to resolve conflict to everyone’s satisfaction. It adopts the process of first seeking agreement on relatively easy matters, thereby building a momentum of success and trust before addressing more difficult matters[77].

[246] Another principle is that everyone has the responsibility to use the resources of the earth carefully. The spoon is the symbol of that responsibility and of the commitment to share food peacefully, equitably, and sustainably[78].

[247] That brings us to the metaphor of The Great Law of Peace itself, represented by the great tree of peace, usually a white pine, with roots growing in the four cardinal directions. This symbolizes the principle that any nation finding these white roots of peace could follow them back to the tree, under which they could shelter if they so chose.

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[75] Transcriptions, 2021-10-18, pp. 70-72.
[76] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 39. Exhibit MNCC-1.
[77] *Ibidem*.
[78] *Ibidem.*

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[248] Trees are important symbols in the metaphoric culture of the Haudenosaunee, starting with the Peacemaker who uproots a great tree so that everyone can throw their weapons into the hole it left behind. Sometimes chiefs are also referred too as trees.

[249] At the end of the story, the Peacemaker declares that this law of peace is not just for the Haudenosaunee, but that it is open to anyone who wants to embrace it[79].

D.5.3.2 Conclusions about The Great Law of Peace

[250] The Great Law of Peace is part of the Haudenosaunee and Mohawk culture long before the arrival of the Europeans. It incorporates family relationships not only as a model, but also as a political and a diplomatic system. Because in the Mohawk language, the words used to describe a family relationship, is a description of the responsibility of each person in the relationship, those words were also applied in the treaty relationship.

[251] When the British arrived and entered into a relationship with the Haudenosaunee, The Great Law of Peace already formed the central part of their legal and diplomatic system. As we will see later, the evidence shows that this system was used both with the French and the British[80].

[252] For the Haudenosaunee, the principles of relationships between individuals, as well as between Haudenosaunee nations and Indigenous and non-Indigenous nations, are still today the governing law principles that apply to those relationships.

[253] The Haudenosaunee system of governance comprised of 50 hereditary chiefs designated by the clan mothers and installed by the Great Law of Peace continues to this day. This shows how deeply entrenched the precepts of the Great Law of Peace are in Haudenosaunee culture and society.

D.6 Treaty relationship and the language of family

[254] For the Haudenosaunee, treaty relationships, like any other relationship, are governed by the Haudenosaunee family relationship and its language[81].

[255] As already seen, words describing family members refer to more than just the position of one person toward the other. They also explain the responsibilities that the position in the "family" carries and the nature of the relationship, i.e., the responsibilities of one person towards another. "My child" means "I hold you"; "my father" is

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[79] *Idem*, p. 40.
[80] Transcriptions, 2021-10-18, p. 73.
[81] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 13. Exhibit MNCC-1.

understood as “he is lent to me”; and “brother” evokes a relationship of reciprocity that acknowledges that different people have different needs and capacities, while remaining equals[82]. This permits the expansion of family ties into other relationship, like the one between treaty partners.

[256] This evidence is important in the analysis of the treaty relationship between the Mohawk and the British.

[257] The objective of The Great Law of Peace is to maintain sustainable relationships of *skén:nen*, peace. This objective is and has always been a long-term one, intended for perpetuity. It applies to all relationship, including with non-Indigenous nations.

[258] Most of the primary sources about treaty conferences, all written in English, used the term “Brethren”, the old English word for brother, indistinctly for a Mohawk or a British speaker. It is important to be aware that, for the Haudenosaunee speaker, this word was more than just a greeting term.

[259] Chief Nelson testified about the importance of the use of the family terms in the treaty relationship with the Europeans:

> I remember being told that when one of the European parties arrived here we’re going to hold each other up as family. And they said, “We will be the fathers and you will be our sons.” And our leadership back then thought about that and said, “You know, that’s really nice. We thank you for that opportunity. However, we know that a father can punish his son or his children, and we don’t operate that way. We believe that it’s best that we be brothers of equal standing, as equals so that none of us can punish each other in any way, shape or form[83].

[260] In her report, Dr. Adams made reference to such a situation where at Albany, on September 18, 1688, Governor Edmond Andros of New England greeted the delegation of Haudenosaunee speakers with the term “children”. On the second day of council, he was corrected and reminded that they are brothers, and not children:

> The Maquase Sachems who spoke formerly with you are dead, and we have not so much knowledge as they had. Nevertheless, although they are buried, yet let the old Covenant that was made with our Ancestors be kept firm. Then we were called Brethren, and that was also well kept; therefore let that of Brethren continue without alteration[84].

[82] *Idem*, pp. 17-19.
[83] Transcriptions, 2021-10-21, pp. 140-141.
[84] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, p. 55. Exhibit MNCC-1.

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D.7 The Covenant Chain, its language, its symbolism

D.7.1 The meaning of the word Tehontatenentshonteronhtáhkwa

[261] Dr. Adams explained that *Tehontatenentshonteronhtáhkwa* is not really a word, it is a phrase that can be broken into several parts:

- *Te*, the prefix, describes something doubled, dual or done together;
- *Hontate,* the pronominal prefix*,* describes a group of people doing something to or with itself, or for one another;
- *Nentsh,* the root, refers to an arm, or specifically the forearm;
- *Onte*, the propositional infix, describes something attached to the end of something else;
- *Ronhtahkwa,* the ending, indicate that the action was undertaken sometime in the past, and continues into the present moment.

[262] Together, they might be translated as: “They (males) together have attached the ends of one another’s arms at some point in the past and continue to do so now”[85].

[263] For Dr. Adams, the term Covenant Chain in English and *Tehontatenentshonteronhtáhkwa* in Mohawk are not too far apart:

> The meaning of this verb phrase in Kanyen’kéha (the Mohawk language) lies some distance from the English phrase “Covenant Chain.” Covenant, meaning a solemn agreement or mutual promise, carried a specific dimension of meaning in the seventeenth and eighteenth centuries C.E., when it was first used regarding the Haudenosaunee. The word appears frequently in the King James Bible (1611), often referring to binding mutual promises between humanity and God; its widening distribution throughout England and rising literacy rates put covenant into more common usage. Chain, the word for interlocking closed loops, usually of metal, describes a European technology not in use by the Haudenosaunee at the time of European arrival in North America. The figurative meaning of chain as a series of related ideas or events comes close to the Haudenosaunee construction of law as an ordered, layered matrix of interlocking relationships. Covenants, too, in the sense of agreements or mutual, reciprocal commitments upheld over time, approaches Haudenosaunee definitions (linguistic, narrative, legal, etc.) of relationships. Thus, the spirit of the translation “Covenant Chain” doesn’t grossly differ from

[85] *Idem*, p. 44.

> Tehontatenentshonteronhtáhkwa, but some specific instructions about how the relationship works are missing from the English version[86].
>
> (References omitted)

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D.7.2 The metaphors of the Covenant Chain

[264] In addition to the meaning of the word *Tehontatenentshonteronhtáhkwa*, there are numerous metaphors that come from the Covenant Chain.

[265] There are the arms linked together and the rope that tied the vessel of the newcomers to the bushes that became a silver chain attaching it to the mountain in the heart of Haudenosaunee territory.

[266] Those metaphors reflect the evolution of the relationship. The stronger the relationship became, the stronger the metaphor of the link.

D.7.2.1 Arms linked together

[267] We shall begin with the arms linked together, because they are part of the name *Tehontatenentshonteronhtáhkwa*.

[268] Dr. Adams said that the metaphor originated in The Creation Story, which speaks of the process of extending a family not only by birth but also by a wilful decision to include a person as part of the same family.

[269] Then it comes back in The Great Law of Peace, where the Peacekeepers and other leaders build another layer of brotherhood by crafting a political structure of fifty Chiefs – *rotiyaneshon*. The chiefs become brothers, each gripping the others' arms so tightly that not even a falling tree can separate them[87].

[270] In the Haudenosaunee culture, arms linked together are meant to be unbreakable. The fact that this concept is included in the name *Tehontatenentshonteronhtáhkwa* is an indication that the Haudenosaunee considered this alliance unbreakable.

[271] The image of holding arms is also reflected physically in certain ceremonies, such as the naming of a child or the adoption of a child or of an adult as seen previously[88].

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[86] *Ibidem*.
[87] *Idem*, p. 46.
[88] *Idem*, p. 48.

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D.7.2.2 From the rope attached to the bushes to the silver chain attached to the mountain

[272] The metaphor of the European vessel tied to the mountain in the heart of Haudenosaunee territory in Onondaga represents the evolution over decades of the relationship between the Europeans and the Haudenosaunee to an unbreakable connection of friendship and alliance.

[273] In 1694, Sadakanahtie, an Onondaga speaker addressing Governor Fletcher of the colonies of New York and Maryland, referred to the relationship with the Crown by recounting that, from a bark rope attached to bushes, they are now attached together by an iron chain fastened to a great mountain at the center of the Haudenosaunee territory[89].

[274] Fifty years later, in 1744, Canesatego, addressing the governor of Maryland, reminded him that the Dutch had entered into the Iroquois League and Covenant with the Haudenosaunee and that, when the English replaced the Dutch, they also wanted to be part of the League. This is when the iron chain was replaced by a silver one to reinforce the relationship[90].

[275] In 1755, Sir William Johnson, Superintendent General of Indian Affairs of the British Crown, in an address to the Haudenosaunee referred again to the evolution of the relationship through its symbolism, starting with the first handshake when the British arrived and progressing to the securing of that handshake by a rope, then by an iron chain and, afterwards, by a silver chain fixed to the immoveable mountain. He also referred to the need to keep the chain shining through almost annual meetings held in public, a procedure that kept the chain unbroken, avoiding any spilling in anger of one drop of each other's blood[91].

[276] Dr. Adams recalled that the Haudenosaunee did not mine or work silver. But once it was included in the trade with the Europeans, they quickly adopted it. Silver is also charged with symbolism. It attracts light and it appears white, the color of peace, compassion and friendship in the wampum design. It is also associated with the long daylight of the growing season and the physical and spiritual protection for the one wearing it[92].

[277] What is important to understand from this symbolism is that it makes the relationship much stronger and more precious and reinforces the notion of a permanent character. Moreover, it was used by both parties.

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[89] *Idem*, p. 52.
[90] *Idem*, pp. 53-54.
[91] *Idem*, p. 57.
[92] *Idem*, p. 60.

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[278] The progression of the attachment of the link from the bushes, to the tree of peace in Albany[93], to the stone (the name of the Oneida Nation *Onyota'a:ka* means "a stone standing up on its end"), and ultimately to the mountain in the earth of Haudenosaunee in Onondaga territory (*Onoñda'gegá* means "place of the hill or the mountain") also symbolized the reinforcement and the growing intensity of the relationship.

[279] The Haudenosaunee linked themselves to the British prudently, leaving time to see if the relationship would resist the passage of time. By moving the attachment to the mountain in the heart of Haudenosaunee territory, they recognized that this relationship was meant to last. It is also a strong symbol of the integration of the British in the Haudenosaunee family, moving them from outside the house to inside[94].

[280] Onondaga was and still is the political center of the Haudenosaunee Confederacy. It is where the continual fire keeps burning. Moving the attachment to where both sides of the fire meet bring the British inside the house, thereby completing their transformation from strangers to brothers[95].

D.7.2.3 Brightening the silver chain through ceremonies

[281] The metaphor of polishing the silver chain represents the desire and the means to place the relationship in the long term. This acknowledges that all relationships have difficulties and that it requires will and efforts by all parties to keep them alive.

[282] This is done both through private contacts, like, for example, the adoption of non-Indigenous people in an Indigenous nation or inter-nations weddings, and through public Haudenosaunee ceremonies and diplomacy.

[283] In the primary non-Indigenous sources of treaty conferences, there are reference to the ceremonies performed on those occasions. Unfortunately, the mention is often quite short and non-descriptive, and this, despite the Europeans' acceptance of the Haudenosaunee model of diplomacy:

> The Iroquoianist William N. Fenton commented that "the patterns that had governed Iroquois life for centuries became compelling and forced the White people to approach the Indian in a highly ritualised way that was completely foreign to European ways and thinking." He further complained that:
>
> > *[t]he amazing thing in all of this literature of forest diplomacy is the degree to which the Indian flavor comes through the faulty chain of communication. As these scribes came to understand the native*

[93] *Idem*, p. 62.
[94] *Idem*, p. 63.
[95] *Idem*, p. 64.

> *customs, they often just refer to them without describing them, which is a source of frustration to the ethnohistorian.*
>
> These "scribes" frequently abbreviated meaningful parts of Haudenosaunee diplomacy as "the usual ceremonies." Derived from Haudenosaunee narrative, and echoing larger-scale ceremonies such as Condolence, Anonhwaróri (Midwinter), or Okahseróta (Green Corn), these "usual ceremonies" served the same purpose they do before Council and other gatherings: to prepare the bodies and minds of the participants for working together toward skén:nen[96].
>
> References omitted

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[284] Ceremonies are part of the "protocol" of the Covenant Chain, by which they polish the chain to keep it bright and alive. For Dr. Adams, the fact that the non-Indigenous primary sources do not describe the ceremonies does not diminish their importance for the parties to this relationship.

[285] It is important to describe some of the ceremonies in order to better understand their importance and what the brief refences in the primary sources really mean.

The Edge of the Woods – *Tsi Karhákta*

[286] This is the ceremony that welcomes visitors to a village or a meeting place.

[287] Travellers would announce their arrival by singing an identifying song. At the origin, this prevented a stranger from being killed upon entering a village unannounced.

[288] Hearing the song, the men of the village would build a fire at the edge of the clearing surrounding the village. When travellers approached the fire, the speaker of the village would pronounce the first three words of the Condolence ceremony: the Three Bare Words.

The Condolence ceremony

[289] Condolence ceremonies are an important part of the Haudenosaunee culture. They are used not only to relieve grief when someone dies, but also to relieve any kind of psychological, emotional, or spiritual hurt that may impede someone in any sphere of his life. As well, there are "big Condolence ceremonies", such as the one done when a Chief dies or when one is assuming the title, or "small Condolence ceremonies", for more mundane situations.

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[96] *Idem*, p. 65.

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[290] The Three Bare Words of the Condolence ceremony are meant to restore a person's physical as well as emotional comfort. It is part of the recognition that travellers may have faced dangers. The eyes are wiped; the ears are cleaned with a soft feather, and water is offered to clear and soothe the throat[97]. It is an act of compassion and welcoming.

[291] We will see the Condolence ceremony more in details with Chief Nelson's testimony. For the moment, suffice it to say that it is also performed before treaty conferences to put the participants in a good mood before commencing discussions.

The Thanksgiving Address

[292] The purpose of this address is to prepare the visitor's mind for the business ahead, by giving thanks to the elements of Creation. It is a shorter version of a much longer ceremony that takes place during the winter.

[293] The Mohawk language name for it, *Kanonhweratónhsera*, is a verb phrase describing a gesture outward of both mind and heart.

[294] At the beginning of a treaty council, it serves to remind everybody that, as human beings and brothers, all have agreed on what is most important to the people and their survival. It shows that every matter that has not been agreed on yet, is small and workable in comparison to the previous agreement.

[295] Today, Council meetings and any other large gathering are opened and closed with the Thanksgiving Address.

D.7.2.4 Telling the story of the Covenant Chain

[296] Retelling the Covenant Chain story is an essential activity for keeping the chain bright. It reminds everybody of their reciprocal responsibilities and brings the listeners back to one mind concerning their family commitments. As well, it teaches the younger generation about the commitments they will have to maintain and why that is desirable and necessary[98].

[297] It is not used as a reproach, even when there is conflict, but as a reminder of peace through the brotherhood.

[298] The story was retold both by Haudenosaunee Chiefs or speakers and by Europeans, such as Sir William Johnson in 1755[99]. Over the course of some 300 years,

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[97] *Idem*, p. 66.
[98] *Idem*, p. 69.
[99] See Section II.D.7.2.2.

the language and phrasing used by those speakers, as reported by European writers, remains consistent[100].

[299] That is significant, for repetition is essential to oral tradition: "it is a key tool to maintain an oral historic record, bringing all those listening to one mind and renewing unity of purpose"[101].

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D.7.2.5 Breaking the chain

[300] In the Haudenosaunee culture, relationships are meant to be permanent. They take a long time to establish, often generations. This long and patient work can be seen in the meta-stories themselves, as well as in the evolution of the Covenant Chain from the rope to the iron chain, and then to the silver chain.

[301] This explains why there is no easy way for the Haudenosaunee to dissolve a relationship, be it amongst family members or nations.

[302] Neither in the Mohawk language nor in the meta-narratives is there a word or mechanism for discontinuing a relationship, as there is in Canadian law and non-Indigenous societies: "No disinheritance, no disowning, no divorce, no dissolution of partnerships or corporations, no unfriending, cancelling or ghosting"[102].

[303] Through all meta-narratives, the Haudenosaunee sought to resolve conflict by mending, renewing and adding to family relationships. That process is not individual; it is found in ceremonies, law, social habits, narratives and language.

[304] This does not mean that it always works. There were tragic times where it failed, when there were fights between nations, between communities and between individuals within the communities. But none of these events destroyed the relationship-based Haudenosaunee society or changed the place of the four meta-narratives in Haudenosaunee culture. Solutions were found through this social fabric and, in a way, reinforced their relevance and importance. To this day they are the social and political foundations of the Haudenosaunee.

[305] There are only two ways to end a relationship, the dehorning of a Chief or the banishment of an individual[103]. It is not necessary to delve into the complex process of these occurrences. Suffice it to say that both processes are so rare that there are very few examples of them. Moreover, they will be put in motion only after multiple efforts to have the person change his behavior and engage in the path of reconciliation and retribution.

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[100] Amber Meadow ADAMS, *Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping the chain again*, pp.68-70. Exhibit MNCC-1.
[101] *Idem*, p. 70.
[102] *Idem*, p. 71.
[103] *Idem*, pp. 72-76.

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[306] Because of the high value the Haudenosaunee put on personal freedom, and because relationships are viewed as permanent, there is a great deal of tolerance for eccentricity and different habits or positions, as long as the behaviour does not threaten other people.

D.7.2.6 Restoring the chain

[307] If relationships are permanent, it does not mean that they are without conflict. In the real world, conflicts are inevitable, even in permanent relationships.

[308] That is why in The Great Law of Peace, the Covenant Chain and in the Two Row Wampum, there are "layers of etiquette, protocol, hospitality, ceremony, and many other measures designed to defuse conflict and set all parties up for successful negotiations between different sides of the fire in council and with other nations. When not even those measures prevent a relationship from deteriorating, [there] are still means of putting damaged relationships back together again"[104].

[309] Their repetition and the retelling at treaty councils, and through the exchange of gifts, through the sharing of song, food, lodging, dancing and games, are all part of the preventive and repair procedures, all consistent with Haudenosaunee law.

Condolence ceremonies

[310] We have seen that Condolence Ceremonies took place before treaty conferences in order to foster a favorable disposition for discussions. They fit well in such a setting since they can also apply in the context of conflict between nations. They are designed to heal grief, calm anger, and cover over the voices of the dead so that no revenge will be sought for their loss, with the goal of reintegrating the grieved into the totality of Creation. According to Dr. Adams, they are "a profoundly effective means of repairing even badly damaged relationships"[105].

The Two Row Wampum – *Tékeni Teyohà:te*

[311] Dr. Adams said that the Two Row Wampum is considered by many as the first treaty between an Indigenous nation of North America and a European nation.

[312] The word phrase *Tékeni Teyohà:te* would be more accurately translated by "the path two are on together" or "the double path that two travel":

- "Té" describes something double or dual in nature.
- "keni" refers to two women or female actors or as two people undertaking something jointly.

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[104] *Idem*, pp. 76-77.
[105] *Idem*, p. 77.

- “Teyohà:te” includes both –“hah”- meaning the path or way and “te” and “ate” indicate the location or placement of something.

[313] The inspiration for the Two Row Wampum is found in the Creation Story, where twin brothers, who were fighting one another to exhaustion, were so evenly matched, that they realized that there could be no winner and no loser. So, they made an agreement:

> (…) each will continue to create on Earth, but they will do so at different times, one brother taking responsibility for the nighttime, the resting season, and the sleeping parts of life, and the other taking responsibility for the daytime, the growing season, and the waking parts of life. Both parts are equally important and necessary, and so the brothers, as in all dualic relationships in Haudenosaunee philosophy, are bound by complementary reciprocity, and the love and compassion of the brotherhood they formed together in the womb. The Tékeni Teyohà:te agreement they formalise by the end of the story to reconcile their conflict, in which they continue to work together toward the same ends with the respectful distance of time between them, does not dissolve or replace the brotherhood they established before it[106].

[314] The Two Row Wampum then represents a form of preventive procedure that recognizes the existence of a conflict but permits the parties to move forward in their relationship. In that sense, it is both a repair and a preventive procedure[107].

[315] Relationships are meant to last, to be nurtured, to be maintained and to be repaired when needed. This is what the Covenant Chain brings to the relationship between the Haudenosaunee and the British[108].

D.7.2.7 Clearing the path

[316] Keeping the path clear or clearing the path is a metaphor found in numerous primary sources of treaty councils. It is connected both with the Covenant Chain and with the Two Row Wampum.

[317] As seen above, *Teyohà:te* (Two Row Wampum) includes both “hah”, meaning way, road or path, and “te”, meaning double.

[318] The double path is most often understood to describe the two purple rows of beads in the wampum belt. They represent the relationship between the Indigenous nation and the Europeans, one in a canoe and one in a ship. The three rows of white beads, with the colour white symbolizing peace, clarity and good mind, are the links of

[106] *Idem*, p. 78.
[107] *Ibidem*.
[108] *Ibidem*.

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the silver chain and the respect, trust and friendship that connect the two brothers in the Covenant Chain.

[319] Keeping the path, which is the space between the canoe and the ship, refers metaphorically both to maintaining and keeping the relationship between those nations and, literally, to maintaining the paths between villages or settlements so they remain practicable[109].

[320] In that sense, clearing the path ensures the movement of people between physical locations as well as the communications between the parties by enabling messengers to bring messages to the other parties and thereby maintaining communications directly between governments.

D.7.2.8 Dr. Adams' conclusion on the Covenant Chain

[321] For the Haudenosaunee, the Covenant Chain is a permanent relationship, the connecting of arms between brothers, the linking of a chain to the very heart of Haudenosaunee territory represents a commitment made for perpetuity[110].

[322] The decision to make the British brothers and to accept that nation in the Haudenosaunee family was taken after generations of observation, deliberation and diplomacy. The British then became the younger brothers, and everything that happened between them afterwards, councils, discussions, decisions, as well as conflicts, happened between brothers[111].

[323] She concluded by saying that "as long as both the Haudenosaunee and the Crown remain in this place, the relationship lives". There is always a path back to each other[112].

D.8 Names and titles

[324] Before moving to Chief Nelson's testimony, a few words about names and titles will be useful, given that they also reflect the importance of perpetuity in the Haudenosaunee culture.

[325] Both personal names and chief title names belong to the immediate family within the clan. They do not belong to the individual. They are passed on through generations and are meant to be carried by one person at a time.

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[109] *Idem*, p. 79.
[110] *Idem*, p. 80.
[111] *Ibidem*.
[112] *Ibidem*.

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[326] Without losing his individuality, the holder of the name also carries the stories, history, collective memory and the shadow of character that former holders of the name possessed, along with the same roles and responsibilities[113].

[327] What the Court understands is that the notion of perpetuity is reflected even in the carrying of a name or a title from the past to the future. This puts the emphasis on the long term, generation after generation, of any relationship, including the treaty relationship. Haudenosaunee Chiefs see themselves and their actions in terms of continuity, both before and after them.

E. CHIEF CURTIS NELSON TESTIMONY

E.1 Preliminary comments

[328] The second witness presented by the MNCC was Chief Curtis Nelson.

[329] Chief Nelson is the Chief of the Bear Clan, one of the fifty hereditary chiefs sitting at the MNCC and the Iroquois Confederacy. His Chief title is *Dehharagereneh*, which means “dragging horns” in Iroquoia. For the last fifteen years, Chief Nelson has also been the speaker for the Bear Clan at the MNCC and at the Iroquois Confederacy councils.

[330] Chief Nelson was not presented as an expert witness. He testified as a Chief, having been “bundled” by the MNCC to do so. Being bundled means that he has been authorized to speak in the name of all the Chiefs of the Council and that he can say only what he was authorized to say. After his testimony, he will be unbundled and will recover his free speech.

[331] The MNCC and the Iroquois Confederacy have existed for hundreds of years, and both are responsible for the preservation of the Haudenosaunee culture and traditions, which are based on orality. Chief Nelson has been working at those councils for more than 45 years. Although he is not an elder, he nonetheless has the experience and the knowledge to bring to the Court the perspective of the Haudenosaunee, including its political and social structures, its culture and its oral tradition.

[332] The first thing Chief Nelson did after being sworn in on the wampum was to transmit to everybody present the greetings of the MNCC, of the Clan mothers and of the faith-keepers. He presented their gratitude for the opportunity to talk to one another, to “cut the bushes that have grown between one another” out of the way so that all can be clear on who we are, what we are, where we are going, and what we would like to have happen. In this regard, he said that it is important that everybody feel that

[113] *Idem*, p. 49-50.

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they will be in a good place at the end of this session and for others to come. He concluded by wishing for everybody to have a good life[114].

[333] He explained later in his testimony that greetings and thanks are the first thing the Haudenosaunee do when they meet people.

[334] It is important to understand what these greetings really mean in the context of this case.

[335] From the evidence presented, one can see in these words the materialisation of the Haudenosaunee perspective. They present similarities with the Condolence ceremony. They acknowledge that the relationship between Indigenous and non-Indigenous people has deteriorated over time, and that we should listen to each other to get to know who we are and where we want to go, all in a serene and constructive manner.

[336] From a non-Indigenous perspective, they reflect what usually goes on in a courtroom, where past events that disrupted a relationship are recounted. It is a place for all the parties involved to express their perspective of the situation and to try to find a solution. These greetings from the MNCC are the expression of a desire to work towards reconciliation.

[337] In large part, Chief Nelson and Dr. Adams testimony corroborate one another. To avoid repetition, the Court has chosen to concentrate on additional information brought by Chief Nelson.

E.2 A few words about Chief Nelson

[338] Curtis Nelson was born in Akwesasne, but his family moved to Kanesatake when he was three years old, where he was raised. He grew up in the 1960's and went to an Indian residential-type school where he was beaten for speaking the Mohawk language. There, he had his hair cut and, as was the case with all the other students, he was forced to have his tonsils removed under threats to his parents that he would be sent away to a formal residential school if they did not consent to the surgery. Students were brought to the hospital five at a time to have the surgery performed. As a consequence of this education system, he lost his language. He also lost his tradition.

[339] On the importance of preserving and revitalizing the Mohawk language, Chief Nelson made the point that, if it is lost, it will disappear for ever. If French disappeared, it would always be possible to return to France to rejuvenate it, he said. But Mohawk people are from here and there is nowhere else to go to resuscitate the language[115].

[114] Transcriptions, 2021-10-21, p. 5.
[115] Transcriptions, 2021-10-21, p. 32.

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[340] He recalled that, at one point in time, the Mohawk language almost disappeared, but that it was saved by the Senecas. He recounted this example of the closeness between nations in the following terms:

> We were almost gone. The Mohawk situation was even probably one of the worst because we lost all of our songs, we lost a lot of our speeches within the early years of the arrival of the — I guess for lack of a better word, I'll say Europeans, and we lost all of that, or we had very little left. So I acknowledge gratefully the Seneca people. It's through them we relearned all of our ways. We relearned our songs and our dances and speeches. We were able once again to marry our children in the longhouse, bury our dead in the longhouse, and through the longhouse. And we were able once again to teach our children Kanien'kehá:ka[116].

[341] In the same breath, he made no secret of his sentiment of belonging:

> I am Kanien'kehá:ka. I will always be Kanien'kehá:ka. That is, I am a Mohawk, and I will always be one. I won't be a Canadian or an American[117].

E.3 The Iroquois Confederacy

[342] Chief Nelson talked about the Iroquois Confederacy as it exists today.

[343] The Iroquois Confederacy Council is composed of all the Six Haudenosaunee nations coming together: the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora. They assemble in Onondaga, near Syracuse, New York. Iroquoians from both side of the Canada/USA border sit at the Iroquois Confederacy[118].

[344] Each nation has clans, and these overarch and, in a real sense, connect the nations. If you are a Mohawk from the Bear Clan, any other member of the same clan in another nation is part of your family. Thereby the family is extended by your clan.

[345] The Iroquois Confederacy originated in The Great Law of Peace, which established the political structure of fifty chiefs, chosen by each clan's mother. As seen in Dr. Adams' testimony, the clan mother has the responsibility of the title, not the individual who carries it. Each of the fifty chiefs has a title that can be found in The Great Law of Peace[119]. A chief carries his title for life, and it is passed to his successor. It links him to all others who have carried it and who will carry it in the future.

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[116] *Idem*, p. 41.
[117] *Ibidem*.
[118] *Idem*, p. 33.
[119] *Idem*, p. 43.

[346] One becomes a chief through a Condolence ceremony. Chiefs of the nations on the other side of the house must accept the new chief. When someone is condoled as a chief, he receives a headdress with deer antlers on it. Only the chiefs wear those.

[347] At the Iroquois Confederacy Council, also called the Grand Council, there are two sides of the fire. On one side there are the Senecas, the Mohawk and the Onondaga, the older brothers, because they were there first. On the other side, there are their younger brothers: the Oneida, the Cayuga and the Tuscaroras. The same structure is also in place at the council of the MNCC, except that nations are replaced by clans, the Turtle, the Bear and the Wolf Clans.

[348] The Mohawk are the keepers of the eastern door, while the Senecas are the keepers of the western door. Metaphorically, Iroquoia is one big longhouse and is still perceived as such today.

[349] In polite terms, Chief Nelson talked about years of “civilisation” and assimilation, the decline of the authority of the Iroquois Confederacy that followed, the taking of the lands, the languages and the songs, and the decades of residential schools. He talked about the rules that were decided and imposed on them, referring to the *Indian Act,* and the creation of another form of government, the Band Council.

[350] Chief Nelson concluded on the efforts made in the last decades to rejuvenate the Confederacy Council, efforts that demonstrate how deep are the roots of the Iroquois Confederacy in the communities, and that despite all of this, Haudenosaunee are still here and are not going anywhere[120].

E.3.1 The Tree of Peace and the Iroquois Confederacy

[351] Chief Nelson holds the same understanding as Dr. Adams about the Tree of Peace, also called the Great White Pine Tree. He testified that it is a symbol of the place where any person or nation can find refuge. It has a physical representation in the form of a white pine tree because that is a species found all over Iroquoia. It is symbolically situated at the place where the Iroquois Confederacy council meet in the Onondaga Nation territory.

[352] The Tree of Peace has roots spreading out in the four cardinal directions. It is said that, if one follows any of those roots back to its source, he will be made welcome and will be brought into the family, i.e., into the Iroquois Confederacy. Metaphorically, not only individuals, but nations as well can follow a root to its origin.

[120] Transcriptions, 2021-10-25, pp. 31-32.

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E.4 Being a Chief

[353] In 1987, Chief Nelson temporarily replaced the Chief of the Bear Clan that suddenly passed away. He was formally appointed Chief of the Bear Clan in 2005. For nearly forty years, he has been learning from the older Chiefs about the Haudenosaunee traditions, the stories and the meta narratives and their meanings. He also learned about the governance system of the MNCC and of the Iroquois Confederacy.

[354] Being a chief should not be understood as a position of power and it does not come with a salary. What it really means is “People of the Good”. Chiefs are just doing their best to take care of their people.

[355] For 25 years he was the director of a treatment center for Indigenous people having substance-abuse problems, the Onen’tó:kon Treatment Center. He recently retired. For him, his engagement at the center harmonized with his duty as chief of his nation to take care of anybody showing up.

[356] He said that each chief’s position is composed of five people: the chief, his clan mother, a man and a woman faith-keeper and, what can be called in English, a sub-chief. The appointment process is conducted entirely by the clan mothers. All five are appointed at the same time, for life.

[357] As a Mohawk chief, he sits at the MNCC, which is composed of the Turtle, the Bear and the Wolf clan chiefs, and at the Iroquois Confederacy council, composed of the six Haudenosaunee nations.

E.5 Coming to one mind

[358] Haudenosaunee communities have a traditional decision and problem-solving process. When a decision has to be taken or a problem or a concern arises, the issue goes through a process based on dialogue and consensus whose objective is to “come to one mind” or s*katne ka’nidòn:ra.*

[359] Coming to one mind means that, after good-faith discussions involving everybody concerned, an agreement is reached between the parties. An issue may go through this process at the local representative’s level and then at the MNCC and can even be brought before the Iroquois Confederacy council.

[360] In this process, the whole community is called to discuss the issue. Every issue brought by a local representative goes through the chief, who examines it and consults with whomever may be concerned to see if it needs to be brought to the MNCC level. If it is decided that it should be, then the issue is put it in what is called the “well”. At the MNCC, the well is the Chief of the Turtle Clan.

[361] One after the other, each clan has an opportunity to study and discuss the issue. Once a clan has come to one mind, it is then passed to the other clan for discussions in order to come to one mind.

[362] In the process, they will never say: “This is what we have decided”, but, rather, “This is how we are looking at it, and these are our thoughts”. This is because it is not a decision until all the clans agree.

[363] In this process, after one clan expresses its thoughts, the other clans will think about it and return with their input. They will go back and forth as long as necessary until everybody agrees, i.e., “comes to one mind”. Once the issue is resolved, it can be said that they have “come to one mind”.

[364] As previously mentioned, the problem-solving process is the same at all levels.

[365] Where an issue is brought before the Iroquois Confederacy Council, it is first put in the well that is composed of the Seneca and the Mohawk nations, the elder brothers. Their chiefs get together to discuss and see what they feel should be done. They then propose their thoughts to the other side of the house, saying something like: “Brothers, younger brothers, here are our thoughts on this issue”. They then ask the other side if they are ready to speak to share their thoughts.

[366] When the council “comes to one mind”, a decision has been made and it is implemented.

[367] At both councils, the utmost is done to ensure that the other side of the house agreed and that everybody can walk away happy with whatever the decision might be. They will take the time needed to come to one mind and will discuss as long as is necessary to achieve that.

[368] In a case where the Council cannot come to an agreement, the issue will be “put under the pillow”, and rediscussed another day, usually at the next Council[121]. According to Chief Nelson, this is how it was always done and continues to be done today[122].

[369] The same process was followed at treaty conferences.

[370] For the Haudenosaunee, it is always important to have two sides participate in the process. There are two sides of the fire in the Longhouse; there are two sides at the MNCC and at the Iroquois Confederacy Council; there are two sides in a treaty. Without another side, no discussion can be held. Asked about the utility of having two sides, Chief Nelson responded:

[121] Transcriptions, 2021-10-25, p. 143.
[122] *Idem,* p. 144.

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> I guess the simple answer is it's hard to do business with oneself by yourself. When we make an agreement - and the treaties are agreements as well as living documents, if you will — when we make those agreements, we do it with the other side to make it clear that we want to work together. We're not separate. We're not singular.
>
> So when we make these agreements we have to have one mind between the two sides. When I say two sides, on the English side we would have whoever their representatives were. And on our side would be our chiefs[123].

[371] For the Haudenosaunee, this process is a win-win situation. They consider that, in a voting system, like the one favoured in the Canadian governing structure, there are winners and losers. This can create division in the community, even anger sometimes. That is a sentiment to be avoided. That is why councils do not vote but, rather, come to one mind.

E.6 The Condolence ceremonies

[372] Amongst all the ceremonies found in the Haudenosaunee culture, the Condolence ceremony is very significant and has been since immemorial times. Not only is it one of the main ceremonies used to help people and nations grieve, but it is also at the heart of conflict resolution, whether between individuals or between Haudenosaunee nations and non-Indigenous nations.

[373] Because Condolence ceremonies were part of the treaty conferences held between 1664 and 1760 and that there are numerous references to them in the historical documents, it is worthwhile to spend some time to understand them.

[374] Condolence Ceremonies are as old as The Creation Story and The Great Law of Peace.

[375] In the Creation Story, the Creator thought that the humans needed to know what grief is because, without that, they would think that they are immortals. To teach the meaning of grief, he took away a person's daughter. However, since there was no condolence process, people did not know what to do with their grief. Then, in The Great Law of Peace, the condolence process was brought to the grieving chief by the peacemaker.

E.6.1 Small Condolence ceremonies

[376] There are both small and big Condolence ceremonies. The small ones, done by the younger side of the Council, are shorter, but can still take up to six hours.

[123] Transcriptions, 2021-10-21, p. 142.

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[377] When a clan is grieving, the opposite side of the council takes charge of every aspect of the Condolence ceremony. For Chief Nelson this is rooted in the dynamic of family where people are taking care of each other.

[378] The small Condolence ceremonies are directed at the grieving family. The younger brothers offer words of condolence to the immediate and extended family with the goal of reminding them that they are still alive and that there are still things happening around them. They might say: "Uncles and aunties, we have heard your voices and we have heard his voice leave us. So now we will talk to you about what is happening"[124].

[379] There will be strings of condolence, which are strings of wampum hanging across a cane. Each string is about a different part of the grieving ceremony, and the younger brothers will say words based on each string of condolence.

[380] There are many wampum strings of condolence, but the only the first three were explained by Chief Curtis Nelson. They are called the Three Bare Words of Condolence.

[381] The first string is to clear tears from the eyes so that the grieving people can see again. The second string is to clear the ears blocked by the crying. The third string is to clear the throat so one can speak and eat again.

[382] With each string and word, the younger brothers recite ritual words, explaining the purpose of each of the Three Bare Words.

[383] In the Mohawk language, those Three Bare Words are *skén:nen̰ karihwí:iyo* and *ka'nikonhn'yo'tshera't*. The closest translation in English is "peace", "power" and "righteousness", but their meaning is more profound than what the translations may suggest. What is evoked is the need to have a clear and good mind to get to the others[125].

[384] Even today, when a small Condolence ceremony is performed, a feather and water are used, and there is a process to wash away the tears.

E.6.2 Big Condolence ceremonies

[385] A big Condolence ceremony occurs when an entire nation is grieving. It is usually held in one of the biggest longhouses in one of the six nations, and it involves singing and eating.

[386] The big Condolence ceremony is based on the same process as a small one, with nations on the other side of the grieving nation conducting the ceremony. Chief

[124] Transcriptions, 2021-10-21, pp. 45-46.
[125] Transcriptions, 2021-10-25, p. 12.

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Nelson used the example of the Condolence ceremony held after the death of a chief to illustrate this.

[387] At the beginning of the ceremony, the older brothers, the Mohawk, the Seneca and the Onondaga, will gather at one place and the younger brothers, the Oneida, the Cayuga and the Tuscarora, will do the same. At the beginning, all the chiefs, the faith keepers and the clan mothers of the group doing the condolence will walk to the other side, singing a traditional peace song, so that the other side can hear them coming. Once they get to their destination, near where the Condolence ceremony will take place, a small fire is built.

[388] They then wait for the speaker of the condoling side to come to the fire and say: "We have been made aware of a hurting. We have come here to help you get through that. We have come here to help you raise another chief, a new chief". And then he will turn around and he will start walking backwards.

[389] The nation grieving will come to the fire and usually answer: "Okay, you're here now. We thank you for coming here. We're now ready to move into the house to do the ceremony."

[390] Everyone then goes into the longhouse and takes their seat for the ceremony, which starts with a song. There is a part of the ceremony, composed of a series of songs called "The Edge of the Woods", that used to be done outside the house, but now is done inside.

[391] Once in the house, one chief of the consoling side will do the roll call of all the chiefs present. When he calls the name of the deceased chief and there is no answer, his clan mother will stand up and say: "He is gone now. He has passed on. But I'm ready now to put somebody else there. Can you help me do that?" Then all the chiefs will answer together that they will.

E.6.3 Condolence ceremonies in the conflict resolution process

[392] In Haudenosaunee culture, the Condolence ceremony is at the heart of conflict resolution, whether between individuals, communities or nations, Indigenous and non-Indigenous. Whenever a conflictual situation arises that requires resolution, the process will commence with a Condolence ceremony.

[393] Condolence ceremonies are used to put people in a good state of mind. Coming to one mind means that peace is restored and that everybody can live quietly and peacefully together[126]. It follows that these ceremonies are particularly useful in a conflictual situation. This applies to conflicts between nations, as well.

[126] Transcriptions, 2021-10-25, pp. 12-13.

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E.6.4 Example of the contemporary application of Condolence ceremonies

[394] Condolence ceremonies are still performed today, which testifies to their importance in the Haudenosaunee culture and society.

[395] Chief Nelson noted that Indigenous people never have a good tolerance for any type of what he called “mind changers”, such as alcohol or drugs. They are called mind changers because that is what they do, even to the nicest people, who, under their influence, can change completely and do things that break the peace in the community.

[396] Before the Europeans arrived, there were no mind changers in the communities. When the Europeans brought alcohol and gave it to Indigenous people, the community soon realized the effect of alcohol and the need to control it and to help those using it.

[397] When he started as director of the Onen’tó:kon Treatment Center, Chief Nelson saw that they were following a non-Indigenous approach to addictions, based on the Alcoholics Anonymous approach, and this, with very limited success. That brought him to consider implementing traditional ways of solving problems, like the Three Bare Words of Condolence described above. He decided to reintroduce the residents to the Mohawk language and to burn ceremonial tobacco, to name but two of the steps he took. This approach was more successful, as demonstrated by the higher number of resident graduating from the program after its implementation.

[398] Before leaving this topic, it is worth mentioning that the issue of the negative effects of alcohol on the Indigenous communities is nothing new for them. As we will see later, this issue was raised at councils as early as 1725, 1742 and 1760, by the Indigenous speakers to their British counterparts, asking them to restrict the selling of alcohol to their people because of the harms it caused[127].

E.6.5 Ceremonial tobacco

[399] Burning tobacco is a traditional way to help someone struggling with problems.

[400] The ceremonial tobacco is not *tobacco nicotina*, the one used in cigarettes, but *tobacco rustica*, called *oionkwaonweh*, a sacred tobacco that people grow at home. The parties agreed that *tobacco rustica* is not the object of the present procedures.

[401] Burning ceremonial tobacco is an offer to the natural world and the Creator. It is done by throwing tobacco onto an open fire so that the smoke goes up to the Creator. It is a way to talk with the Creator and the natural world. It is usually done by medicine people, faith-keepers and, sometimes, by a chief.

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[127] See Section III.D.2.3.

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E.7 The Great Law of Peace

[402] Chief Nelson provided a comprehensive and contemporary view of The Great Law of Peace, explaining where it comes from, how it shapes relationships between people and nations, and how and why the Europeans were welcome to join in when they arrived.

[403] Considering the importance of The Great Law of Peace in the Haudenosaunee perspective of treaty relationships, it is worth citing the following testimony at length:

> Q. (…) . Are there three principles or concepts associated with the Great Law that sort of lie at the core of it? Could you talk about them?
>
> A. Sure, okay. Before the — I will talk about — before the Great Law arrived, we were not one Confederacy. We were — at the beginning, we were five different nations. We still are five different nations, but back then we weren't working together. We were actually warring against each other for territory, for hunting and fishing rights, and all of those things that were made available. So we were not at peace.
>
> So when the Peacemaker came to us, he brought us a Law of Peace and how we could — how we would be able to work together. Now, over the course of many years — it took a while to put this together, but what he did was he created a process where we would accept each other as brothers and sisters regardless of which nation we came from so that, as a family, you have to find ways to work out whatever the difficulties are in a good way. And so the Great Law came to us for that purpose. And it brought the five warring nations together as one. So we're no longer just Mohawk, or just Oneida, or just Cayuga, Seneca, or Onondaga. We were the Haudenosaunee, the whole people of the longhouse, the whole house, all across Iroquoia. Some say, "It was from the rising sun to the setting sun." And at one time the power in North America were the Haudenosaunee because of this process, because the Great Law afforded us the words and the process to bring others into our fold, into our family, and share that, whatever it we have that we could share.
>
> So that's still there, and that's the same process that we still use. And part of that process means the creation of, how do we deal with each other in a positive way? And it's always the process to — the hope is to deal with each other positively, without violence and without anger. And so we create a process of — I talked to you earlier about the Three Bare Words and how important they were. And so at every council and at every meeting with each other, we would do those Three Bare Words to each other to make sure that we're all in the same place, all in the same head space, all in the same heart space, so that we can conduct the things that we need to talk about and the things we need to do. (…)

So part of that is we talk about the three important words we talk about. Our ultimate goal of being together, and the ultimate goal of that law, is what we call skén:nen. For lack of a better word, it's — the short version is it means peace. The Haudenosaunee people love peace. All the five nations at that time, all we sought was to be at peace with everyone around us. So whenever we could, we brought people into our group as family. We became family. So yes, families have squabbles, but there's a way to deal with them. So there was no more warring, no more bloodshed, no more fighting. To get to skén:nen, you have to have ka'nikonhri:oio. Ka'nikonhri:oio is a presence of mind. It means your mind is clear. Your thinking is clear. And your idea is based on how best can I help someone else to be at peace, because if you help someone else, then someone else will be helping you to arrive at peace. And then the third one is, if you have all of that together, then you have ka'shatsténshera. Some people say that that means "power". But it doesn't mean "power". Ka'shatsténshera means now we have a peace process, we have a way to be at peace. Having two out of three, you don't have peace. Having all three together, then you are at peace and there's no need for fighting.

Those are the things that we incorporate as part — the main parts of what we call our Great Law. The Great Law is a Law of Peace. So we're always looking for ways to be at peace with each other. And when the European people arrived, we utilized that same process, and we brought them in and made them part of us, made them family, made them feel welcome. Some of our young folk these days say things like, "Well, maybe we should have got rid of them as soon as they got off the boat." But that's not how we were made, because by then, we already had this peace, this process for great peace. So that's how it was applied, and that's how we still apply it, even today. So when we meet new people — and our goal as chiefs, and clan mothers, and faith keepers, and people of the longhouse, is to help them be part of who we were so that we are all of the same mind and the same thinking. And that still goes on today. And as much as we can, we try to make sure that everyone is at peace.

Q. Just briefly, the Three Bare Words, they are — they're what, because you've used that — well, what are the Three Bare Words, because you've described them already.

A. Okay. The Three Bare Words are a part of that Condolence ceremony that I spoke about this morning. And they're bare because usually when you do it, unless you're doing a full Condolence ceremony, you don't have any wampum with you. It's a process for creating a way to help people feel good and feel better again. So those Three Bare Words are, "We clean your ears, we clean your eyes, and we clean your throat." And then they're bare because there's no wampum in your hand when you do them. The only time there is, is when they're part of the bigger ceremonies.

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> Q. And you described ka'shatsténshera but you didn't explain or translate it.
>
> A. Okay. My understanding — and I've got to tell you now that I'm kind of young to know everything, but I've understood over the years that ka'shatsténshera means the capability of being together, working together, and being at peace. And a lot of people try to say, "Well, that means that's power, and that's righteousness," and all that good stuff. But really, it's a way of getting to a place where your heart is in a soft place; you're at peace; and you're not worried about anything. So if you have all the three together, then you have skén:nen, ka'shatsténshera, and ka'nikonhri:oio. And the most important part of that is what's going on up here. But you need the three to be together in order to arrive at peace.
>
> Q. So ka'shatsténshera is "capability"?
>
> A. Yeah. Basically, what they say it means, the process through which these two other things come together so that we're all being at a peaceful place, peaceful situation[128].

[404] One of the goals of Haudenosaunee chiefs is to carry the message that peace is a growing living body that can expand to other nations through The Great Law of Peace. To make peace grow means to bring people in to sit with the Haudenosaunee, to be with them and to work with them and to be at peace with them so that everybody can function.

[405] As an example of a nation becoming part of the Haudenosaunee family, he used the example of the Tuscarora nation that came from the southern United-States trough the western door. They were invited to take a place in the longhouse next to the Oneida nation. There were few conditions. Learning the language was one; building a longhouse was another one, because each nation must have at least one longhouse. The Tuscarora language, which almost disappeared, is now spoken in their longhouse.

[406] It is with the same spirit that, today, the Iroquois Confederacy Council has treaty relations with other Indigenous nations, such as the Sioux and the Cherokee.

[407] When the Europeans arrived on the continent, the Haudenosaunee had the same objective. That is why they strived to include them in The Great Law of Peace. They created a process and went through the Condolence Ceremonies with them and for them[129].

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[128] Transcriptions, 2021-10-21, pp. 96-101.
[129] *Idem,* p. 114.

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[408] Chief Nelson explained that his knowledge of the treaty relationship was learned over the years from older chiefs of other Haudenosaunee nations involved in the treaty process.

[409] He explained the origin of the treaty relationship with the Europeans:

> So at different times in our history, we came across people who wanted to be in our territories, wanted to live in our territories and wanted very much to be part, I guess, of what we were and we were doing. For the first 100 or so years — I guess about that —the first 100 or so years of non-Indigenous occupation of our territories, the people in question followed our rules, followed our processes, created treaties with us according to our process. And that was establishing how we would function and how we would do things. These were the nations of non-Indigenous people that came forward.
>
> (…)
>
> To be — there are several reasons and several ways in which you can create a treaty and how you can identify who is at the different ends of these treaties. For us, you had to be a nation, which means you had to have land. You had to have your own language, your own laws, your own way of doing things. And we have always maintained that. We've never changed that.
>
> And on the other side, we realized that there are new groups of people coming into our lands, and they were the people who was representing everybody else. So we created treaties with them[130].

[410] Chief Nelson testified that his understanding was that the Europeans "really wanted to be part of who we are"[131] and that, at one point, they were included as brothers.

[411] For Chief Nelson, there can be many words to describe a treaty, including an agreement or accord. What is central to the concept in any case is that a treaty is concluded between nations for the purpose of finding ways of coexisting and working together:

> My understanding of a treaty is that it is made between two groups of people with the intent of coexisting and working together in a manner that is acceptable to both sides. Has that happened? That's another question[132].

[412] For Haudenosaunee, a treaty is more than just an agreement:

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[130] Transcriptions, 2021-10-25, pp. 82-84.
[131] *Idem*, p. 83.
[132] *Idem*, p. 84.

> So as I learned about these treaties I learned that they are much more than just an agreement. They are a tie, a place where we can tie each other together so that we are one family so that the Five Nations which later became the Six Nations were tied together under one family. And everybody that came along — and we had treaties with, we made sure that they were part of us and they still are today. And we still view them as such. And has there been difficulties with that? Of course. There is no such thing as perfection, especially not when it comes to the issues that surround all of our people, both in Canada and in the United States. But we continue to push in that direction and continue to move with that. And we're still here so, I mean, something is working. It's working for me anyway I believe that something is working, still working right[133].

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E.7.1 Trade under The Great Law of Peace

[413] Trading is part of any equal relationship. Although Chief Nelson was not sure about trading between Haudenosaunee nations before The Great Law of Peace, he asserted that, once the Haudenosaunee achieved peace, they were constantly trading with each other.

[414] For Chief Nelson, any trading conflict must be resolved under the principles of The Great Law of Peace since it governs everything. It is who the Haudenosaunee are and how they function, as well as a measure of how they conduct themselves and how they are expected to be at peace with each other[134].

E.8 The Covenant Chain

[415] Chief Nelson's testimony used the same metaphors relating to the Covenant Chain as did Dr. Adams: the rope and the iron chain then the silver chain that needs to be polished on a regular basis to maintain the relationship between the Haudenosaunee and the British[135].

[416] While recognizing that there are a number of interpretations, for Chief Nelson the Covenant Chain was created in order to begin a process of discussion with the Europeans when they arrived. It is the process that led to treaty making, one of coming together and making sure that the other side is accepted fully as partner, as brother, so they can always talk to one another[136].

[417] Chief Nelson made it clear that for the Haudenosaunee, the Covenant Chain still binds them today with their non-Indigenous counterparts, both the British in former times, and the non-Indigenous Canadians of today:

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[133] Transcriptions, 2021-10-21, pp. 116-117.
[134] Transcriptions, 2021-10-25, p. 108.
[135] Transcriptions, 2021-10-21, pp. 135-137.
[136] Transcriptions, 2021-10-25, pp. 84-85.

> We know that that Chain has not been polished for a while even now. And as I mentioned earlier, it created a process that the bushes between us have grown up and we don't see each other very much anymore. So, we need to repolish this again and make it strong again because now we share this land. And even though our land is unceded territory we still share that with you today. And we shared it back then as well[137].

[418] The wish of the Haudenosaunee to continuously polish the chain is nothing recent. Chief Nelson reported that thirty years ago the issue of polishing the chain came up at the Iroquois Confederacy Council. One of the chiefs proposed changing the silver chain for a gold one, which would not have to be polished at such frequent intervals. They decided against that idea because if there is no need to polish the chain, there will be no need to meet, or to work together, or to talk to each other about any differences that may exist. Discussing issues is something must be done between brothers. So, it remains a silver chain. This episode demonstrates how the Covenant Chain has never been extinguished for the Haudenosaunee.

[419] Chief Nelson concluded by saying that, as long as the Haudenosaunee keep doing what they have to do under the principles of the Covenant Chain, the Chain is still ready to be polished and that it will be passed to future generations so that they, too, will hold the Chain as a sacred connection between brothers.

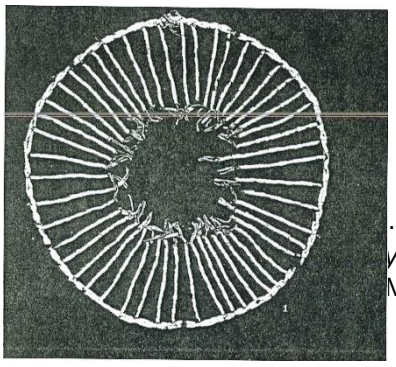
E.9 Wampum belts

[420] The importance of wampum in the Haudenosaunee culture is well established. Its symbolic origin is found in The Great Law of Peace where wampum was given to the grieving chief by the peacemaker. Wampum has been part of the Haudenosaunee culture for as long as it can be remembered.

[421] Wampum belts were also part of Haudenosaunee diplomacy, including in dealings with the British, as reported by numerous treaty conference primary sources.

[422] At trial, five pictures of wampum belts were shown to Chief Nelson[138]. The Court reproduces some of them below in order to better understand their significance.

E.9.1 The Circle wampum



. 137.
yakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa – Grasping
MNCC-1.

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MNCC-1, TAB 9, p. 1

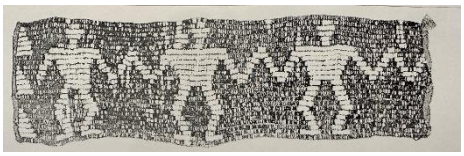
[423] The Circle wampum symbolizes the fifty chiefs of the Haudenosaunee, with each string of wampum representing a chief.

[424] The longest string represents Tadodaho, the Onondaga chief, who is also called the Firekeeper of the Confederacy.

[425] On the outside, a band of wampums encircles all the wampum strings. It symbolizes that all the chiefs are bound together, holding each other by the arms, and all the way around they hold steadfast. Inside the circle, there is everything that makes up the Haudenosaunee nation: the language, the songs, the teachings, the way of doing business, the customs, the traditions, the people, the land, the waters and the animals.

[426] There is an important principle to the effect that no one is forced to remain in the circle. If a chief wants to leave, he must pass under the arms of the chiefs and symbolically leaves naked, meaning that he cuts the ties with his family, his clan and his name. He may come back, but there will be conditions. That is because, once you are appointed, you are a chief for life. That being said, Chief Nelson does not know of any chief that has ever left the circle, and of only one that was dehorned by his clan's mother, thereby being forced to leave the circle.

E.9.2 Wampum belt of Three Chiefs Holding Tight



MNCC-1, TAB 9, p. 2

[427] This wampum belt represents three chiefs, tightly holding each other, thereby being strong together.

[428] Normally, there will be five chiefs, each one representing a nation, but this belt has only three. The three nations represented would be the Mohawk, the Onondaga and the Seneca. Missing are the Oneida and the Cayuga.

[429] The absence of those two nations is explained by their participation in the American revolution. The Iroquois Confederacy decided to remain neutral in that conflict, taking the position that it was a war between brothers in which they did not want to get involved. But people and nations are free, explained Chief Nelson, and if some wanted to leave the circle and help one side, they were free to do so.

[430] That is what happened when the Oneida and the Cayuga went fought during the American revolution. But even when a nation leaves, this does not mean that it is gone forever. It is still family, and it only must follow the roots of the Tree of Peace back to the circle to be welcomed again.

[431] In fact, the departure of the Oneida and the Cayuga was not long. They were rapidly brought back as family members.

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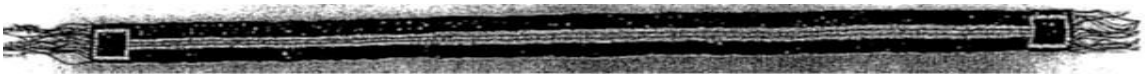
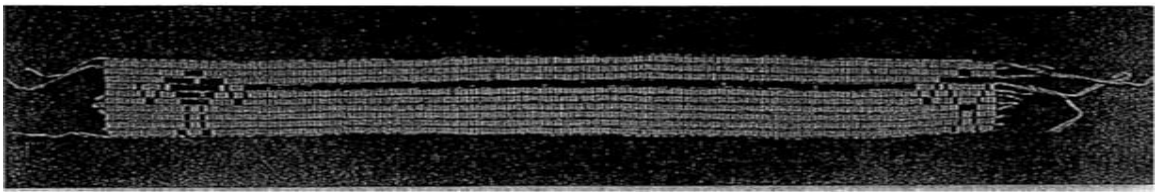
E.9.3 The Two Nations Wampum Belt



MNCC-1, TAB 9, p. 3

[432] Admitting that he is less familiar with this wampum belt, Chief Nelson believes that the three strands in the middle of the belt connecting two rectangles at each end represents two nations connected the Covenant Chain. Being connected that way means that the two nations are brothers.

E.9.4 The Covenant Chain Belt



MNCC-1, TAB 9, P.5

[433] On this belt there are two persons at each end linked together by a line of wampum. One person represents the Haudenosaunee and the other the British. They are tied together by the silver Covenant Chain, representing a coming together of the two nations and the acceptance of each other as brothers.

E.9.5 Sir William Johnson's seal

MNCC-1, tab 9, p. 1 1

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MNCC-1, tab 9, p. 6

[434] Chief Nelson understands Sir William Johnson's seal as a representation of what the Englishman believed while he was in charge of Indian Affairs. In his opinion, it also demonstrates that, for the longest time after the arrival of the Europeans, business was conducted according to the Haudenosaunee ways.

[435] According to him, the hand with a sleeve represents Johnson holding the silver Covenant Chain, which is also held by six Haudenosaunee nations. By that, Johnson would have meant that he accepted the Covenant Chain and that he held it tightly with the six nations, as one.

[436] The seal also contains the symbols of the Two Rows Wampum. One showing a sailing ship, which represents the British or the Crown, and the other showing two Indigenous people in a canoe, representing the Haudenosaunee. It it symbolizes that the two nations will travel down the road of life together and work together[139].

[437] There is also a pipe depicting the burning of tobacco. This symbolizes the confirmation of all the other representations through the burning of tobacco.

[438] The Tree of Peace can also be seen at the top of the seal.

[439] The reason for Johnson's depiction of a teepee in the seal is not clear since the Haudenosaunee did not live in teepees. He surmised that it represents the Haudenosaunee and that the smoke coming from its top symbolizes the fire that burnt in the longhouses, as it still does today.

[440] He stated that Johnson fixed the seal as a mark of authenticity to every document he issued. He also noted that Johnson's successors continued to use it[140].

[441] He concluded that Johnson's use of Haudenosaunee metaphors and symbols in his seal shows his deep understanding of their culture and the place it occupies in his relationship with them.

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[139] In his testimony, Prof. Beaulieu disagreed with this interpretation. For him, it is just a representation of a canoe and a vessel, not of the Two Row Wampum: Transcriptions, 2021-11-23, pp. 135-136.
[140] Transcriptions, 2021-10-21, pp. 133-134.

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E.10 Polishing the chain and coming to one mind in the 21st century

[442] Over the period that Chief Nelson has been involved with the MNCC and the Iroquois Confederacy, there has been only one occasion where discussions took place between the Mohawk and the Crown. That was at the time of the Oka crisis. Although the Mohawk thought that this was the beginning of a process and that the discussions would continue after the barricades went down, to their surprise, this was not the case.

[443] Nonetheless, Chief Nelson's message from the MNCC is an optimistic one. It is a message of hope that the communication lines with the Crown will be re-established and that they will be used on a regular basis so that the three parties, the Haudenosaunee and the provincial and federal governments, will be able to work together to come to a process and an agreement in a win-win-win situation[141].

[444] As Chief Nelson put it:

> I would like to believe that it's polishing the present treaties we have. It's important for me to say that we still believe that we are holding up our end of the treaty. And as I mentioned last week, we still believe that there is room for discussion on both sides to make things better, and that there is room for us to sit with Canada and the provinces in order to make sure that we are all of good mind and in a good way working towards the betterment of our peoples, both sides. As far as new treaties go, I imagine that if we ever get to the table again, and there are no bushes between us, that we will be able to sit down and look at how best we can come up with a process or a decision on a type of issue that might be helpful to both sides. But once again, it really has to do with responsibility and authority. And we're not there yet.[142]

E.11 Closing comments

[445] As a bundled hereditary chief, Chief Nelson presence in court was exceptional and carried an important symbolic content, which was voiced in the greetings he transmitted. That message is a desire to walk the path of reconciliation.

[446] Before leaving at the end of the first day of his testimony Chief Nelson said:

> This might sound a little strange but I want to thank you for this opportunity to be able to explain some of these things because if you know, if you understood a lot of what I have talked about today, we don't have a lot of opportunity to share that with people who are not longhouse. So I feel — I'm tired but I feel really good about the opportunity to share that with all of you here today. It's who I am; it's where I come from. That's something I live

[141] Transcriptions, 2021-10-25, pp. 29-30.
[142] *Idem*, pp. 114-115.

> with, and I live this way. This is me; this is what I'm all about. This is what my family is all about. Thank you.[143]
>
> (…)
>
> I would also like to thank you for extending the way we functioned here. I want to thank all of you sitting here. I know I tend to ramble from time to time but that's just how I am. But I also want to make sure that if there are things that need to still be — if there's bushes that need to be taken apart between us, I look forward to that, an opportunity at some point. And I want to thank all of you for listening and hearing me, and hearing the voices of the Haudenosaunee and especially the voices of the Mohawk Nation Council of Chiefs. Thank you.[144]

[447] The Court thanks Chief Nelson for his testimony. The Court acknowledges that it was a difficult endeavour for him, but his contribution was unique and essential. Despite his own reluctance and that of the chiefs of the MNCC to bundle him to testify in this non-Indigenous setting in which they have limited trust, he came forward with dignity and respect for all present. He showed a sincere desire to communicate the Haudenosaunee perspective, hoping to be listened to and understood.

[448] Chief Nelson's credibility was unchallenged in cross-examination. His knowledge of the meta-narrative was not questioned, nor was his source of that knowledge.

[449] When he was expressing his own opinion, as opposed to that of the MNCC, he made sure that this was clear for the Court. When he was not certain of what he was reporting, he said so.

[450] The Court finds Chief Nelson to be a credible and reliable witness. His testimony was particularly useful and instructive.

[451] It was an honour and a privilege to receive Chief Nelson and to hear his testimony.

F. CONCLUSION

[452] The evidence of the Haudenosaunee perspective brought by Dr. Adams and Chief Nelson explained the traditional ways of the Haudenosaunee that have survived hundreds of years of colonisation and assimilation. This demonstrated how strong and

[143] Transcriptions, 2021-10-21, p. 146.
[144] Transcriptions, 2021-10-25, p. 132.

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vital culture is for this community and how rooted it is in the people of the Haudenosaunee nations.

[453] Language is the heart, the soul, the lungs and the voice of a culture. It is so much more than just words. That is what Dr. Adams brought to the Court, an understanding of how the Mohawk language shapes the perception of the world, the philosophy, the conduct and the behaviour of Haudenosaunee people.

[454] She also brought an understanding of the close connection between that language and the narratives and how family relationships are central and shape any relationship in the Haudenosaunee culture. Additionally, she shed light on the importance and the meaning of the symbols and metaphors of the Haudenosaunee culture, most specifically, the ones of the Covenant Chain and of the ceremonies. Her testimony set the table for Chief Nelson's participation in this case.

[455] For his part, Chief Nelson brought his knowledge of the Haudenosaunee culture as a hereditary chief. He testified on numerous aspects of it, which, when put together, give a better understanding of the persistence of that culture over time, and of its continuity.

[456] He gave life to the meta-narratives, notably the Creation Story and The Great Law of Peace. From his testimony, the Court came to better grasp important aspects of the Haudenosaunee traditional ways that are so key to the understanding of the treaty relationship with the British in the 17th and 18th centuries.

[457] He explained how those traditions were the way of life of the Haudenosaunee at the arrival of the Europeans, and how they are still present in the Haudenosaunee communities. He showed us how, despite colonisation, the traditions have survived from generation to generation and how central they were and still are.

[458] In the culture of the Haudenosaunee, there is a golden thread that runs through generations. It weaves together their desire, their efforts and their determination through all those years to live in peace.

[459] For the Haudenosaunee, the need to have two sides for discussion in order to achieve peace is at the heart of the conflict resolution process. In a very real way, it is the equivalent of the *audi alteram partem* rule of the non-Indigenous justice system.

[460] To implement this, they have structures and processes like the Condolence ceremonies and councils as the one hold under the Covenant Chain. These, originate in the teachings of The Great Law of Peace, where conflicting issues are discussed at all levels with the objective of "coming to one mind".

[461] These processes, that preceded the arrival of the Europeans, animated their relationship with them in the 17th and 18th centuries. Today, the Haudenosaunee still use it, albeit sometimes in different ways.

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[462] This transmission, which secures and guarantees the existence and exercise of this culture and its traditional ways today, confirms the undeniable probative value of this evidence. It is essential and unassailably credible for the purpose of understanding the motivation, the intentions and the objectives of the Mohawk nation during the treaty relationship with the British.

[463] For the Haudenosaunee, this is not only history. It is also the present.

[464] Now that the Court has a better understanding of the Indigenous perspective, it is now possible to turn to the analysis of the Applicants' claims, taking the perspectives of all parties into account.

III. THE TREATY RIGHTS

[465] The arguments of the Applicants on their treaty rights can be divided into two different but related issues: the nature and the content of the Covenant Chain, and the right to free trade as guaranteed by the ten historical treaties concluded between 1664 and September 16, 1760.

[466] The Applicants argued that the Covenant Chain is a meta-treaty of peace and friendship, overarching the treaty relationship between the Haudenosaunee and the British since the late 17th century, containing a conflict-resolution procedure. Because of its broad implications, it is logical to first examine the Applicants' argument on the Covenant Chain to further address the issue of the Treaties.

[467] For a better understanding, the Court will first set the general position of the parties on the larger issue of treaties, to be followed by their positions on the Covenant Chain.

A. POSITION OF THE PARTIES

A.1 Position of the parties on the Treaties

A.1.1 The Applicants

[468] The Applicants claim that the Mohawks are the beneficiaries of several treaties concluded with the colonial powers (the Dutch, the French and the British), including the Covenant Chain. They claim that these agreements were never extinguished or replaced, and, therefore, are still valid and binding today.

[469] They include the right to trade tobacco and tobacco products on a commercial scale on the traditional Mohawk territory and other territories contemplated by the treaties, without any regulation, duty, tax, or collection obligation in favour of the colonial powers. According to the Applicants, the "right of free trade of the Mohawks in the various treaties was understood by both the aboriginal parties and the Crown as confirming

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for the Mohawks unrestricted free trade in respect to all articles and goods"[145]. It was also the understanding of all parties that this right extended to the lack of regulation by the Crown upon the Mohawk party and the lack of regulation by the Mohawk party of non-Indigenous peoples. They add that "there were no restrictions over the territory over which free trade could occur and the control of trade and commerce by the Mohawks in all trade and articles was to be in the governmental entities of the Haudenosaunee, the Mohawk Nation and the Mohawks of Kahnawà:ke"[146].

[470] For the Applicants, these treaties were both diplomatic and commercial. At the time they were negotiated, the relationship with the Europeans was one where the parties were seen as equals. Treaties were continually renewed and reaffirmed. The promises made in treaties could not be unilateral. The Mohawks were also obtaining a gain from them, namely, "the right to preserve their own laws and way of life, including developing their own economies through domestic trade, which included trade in tobacco"[147].

[471] The Applicants invoke ten Treaties. For them, these Treaties show that free trade, including the tobacco trade, was a central component of the relationship between the Haudenosaunee and the British. The Applicants considered that these treaties formed what is known as the "Covenant Chain", a symbol of the alliance between the parties. They argued that 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 17th and 18th centuries which ultimately culminated in the conquest of New France in 1760.

[472] They plead that oral, written or symbolically recorded terms, as well as historical circumstances surrounding the conclusion of the treaties assert a right of free trade that was clearly understood by the Mohawk and Haudenosaunee both at the time the treaties were concluded and subsequently, as seen from the post-treaty conduct of the parties.

A.1.2 The Attorneys General

[473] The Attorneys General submit[148] that the parties to the treaties could not have intended to include a treaty right to trade tobacco, as the Mohawks had no tradition of trading tobacco at the time of their conclusion. None of the treaties can be read as allowing the Applicants to import large quantities of tobacco without reporting them at the border and paying the excise duties. None of them expressly address the trade of

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[145] *Consolidated closing memorandum of fact and law of the Applicants*, para. 553.
[146] *Ibidem*.
[147] *Applicant's opening*, para. 29.
[148] As the Attorneys General share a common position, the Court will refer to them collectively, unless the context requires specific differentiation.

tobacco, or trade on a commercial scale. What is more, there is no provision excluding the Mohawk from any regulation of trade.

[474] Where the Attorneys General recognize that certain Treaties refer to trade, they suggest that, given the historical context, this alludes to the trade of fur in exchange for the necessaries of life, and not for the accumulation of wealth. The Attorneys General consider that "[a]t best, these general trade clauses could be interpreted as granting a right to trade the traditional goods that the Indigenous parties exchanged with Europeans at the time the alleged treaties were concluded" [149]. The Attorneys General plead that, according to the Marshall and Marshall/Bernard decisions, a general treaty right to trade protects only the traditional trading activities at the time of conclusion of the treaties, which, in the case at hand, do not include a tradition of acquiring tobacco surpluses for the purpose of trade.

[475] Subsidiarily, even if they argue that the Court should not embark upon the analysis of the nature and scope of each treaty, as none of them could reasonably be interpreted as protecting the commercial importation of tobacco, the Attorneys General contend that the treaties do not apply to the Mohawks of Kahnawà:ke and cannot be construed to shield the Applicants from the charges.

[476] Regarding that last point, the Attorneys General also consider that "none of the treaties or historical facts invoked by the Accused support the idea that the French (1609-1760) or British (1760-1860) Crowns recognized Indigenous sovereignty in their colonies, nor a broad right to trade goods without regard to the application of French or British laws, rules and regulations in the territories the Europeans claimed"[150]. The Attorneys General rely on the fact that "excise and customs duties were imposed on European goods at the time they were imported in the colony – including tobacco -and which were traded to Indigenous Peoples for furs. The duties formed part of the cost and price of the goods traded to Indigenous Peoples, just like today"[151].

[477] The Attorneys General contend that the Applicants base their interpretation on a modern understanding of the term "free trade", which does not consider the meaning of the expression at the time the treaties were signed[152]. For them, "free trade" must be understood to mean that "in times of peace or neutrality, trade was open to all and not limited to the holders of monopolies", but it was nevertheless regulated[153]. For the

[149] *Attorney General of Québec Final Pleadings (redacted)*, para. 225.
[150] *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings*, para. 67.
[151] *Idem*, para. 67.
[152] *Plan of arguments of the Attorney General of Canada*, para. 91, 108, 111.
[153] *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings*, para. 74-75.

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Attorneys General, "free trade" in that context meant only "access to trading posts and merchants of one's choice, and access to local accommodations"[154].

[478] Alternatively, the Attorneys General submits that, "if a relevant treaty right did exist, the importation of large quantities of tobacco for the cigarette industry would not constitute the logical evolution of any 17th or 18th century treaty right"[155]. Essentially, trade of *N. tabacum* on a commercial scale is not the logical evolution of traditional trade of *N. rustica* or of a general right to trade for necessaries of life. The Attorneys General emphasizes that "[t]he Applicants are not growing tobacco themselves nor are they selling tobacco grown by other Mohawks, neither are they transporting the kind of tobacco that Mohawks were used to grow and consume (*N. rustica*)"[156]. The Attorneys General add that the Applicants' activities, using trucks, highways, elevators lifts, wire transfers and encrypted phone messages, are far too remote from the Mohawks' practices surrounding the fur trade of the 17th and 18th centuries.

[479] The Attorneys General also pleads that the treaties of 1735, 1742, 1753-1754 were extinguished by the resumption of hostilities[157].

A.1.3 The MNCC

[480] The main claim of the MNCC is that to "understand and interpret the terms of individual transactions, one must see them in the legal ecosystem in which they were made"[158]. This requires the understanding of several concepts of Haudenosaunee law, such as the structure of the language, the meta-narratives, like the story of Creation and the Great Law of Peace, the formation of relations with other nations or the central concept of family relations.

[481] Although concentrating on the Covenant Chain relationship, the argument of the MNCC is that the terms "treaty rights" found in s. 35(1) of the *Constitution Act*, 1982 should embrace all form of treaty relationships, and not be confined only to individual, separate transactions.

[482] Also, the MNCC strongly rejects the position of the Attorney Generals who see the treaties as irrelevant and obsolete, and no longer binding. It was said in 1754 that the relationship could not be undone as long as the sun and the moon shall last, and that as brothers and sisters, the nations are joined so tightly that nothing can break them apart.

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[154] *Plan of arguments of* the Attorney General of Canada, para. 132.
[155] *Attorney General of Québec Final Pleadings*, para. 343.
[156] *Idem*, para. 347.
[157] *Idem*, para. 263-265, 350-352; Final pleadings, 2022-02-11, p. 120, l. 2- p. 127, l. 18.
[158] *MNCC, Final pleadings*, para. 102.

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[483] The MNCC explains that in Haudenosaunee law and culture, "relationships are permanent"[159]. As "across-the-fire" relationships, the Haudenosaunee understand the relationship as perpetual and intended to last indefinitely. This is illustrated by the story of the Creation, in which the twin brothers who created the world fought and nearly killed each other, but in the end, they agreed that they had to live apart, but that they cannot live far apart. The MNCC makes a parallel with the relationship between the people in the Mohawk Valley and Kahnawà:ke from the 1680's to the 1760's: they were apart politically, but they were still brothers. And so, in 1760, they easily reunited.

[484] An important point for the MNCC is that due weight must be given to Haudenosaunee law with respect to understanding the treaties. The MNCC strongly asserts that the Haudenosaunee were not a "weak and dependant people, unskilled in diplomacy"[160]. On the contrary, "[a]t the beginning of the relationship, they were military powerful and economically independent"[161]. They assert that "the creation and operation of the Covenant Chain was conducted under Haudenosaunee law, because that was the law of the dominant partner"[162]. Evidence also shows they were skilled in diplomacy. According to the MNCC, "[t]he treaty councils were conducted entirely within the metaphors, processes, protocols and principles of Haudenosaunee law, by people on both sides of the council fire who knew exactly what they were doing in the legal system"[163]. For the MNCC, the treaties are not written with technical and legal terms that would not have been understood, but they are agreements made in council. The written records are only a part of the evidence of those agreements. They plead that, as the common law of England was not a factor in the treaty councils, it should not be accorded equal weight when interpreting the terms of the treaties.

[485] In fact, the MNCC arrives at the same conclusion as the jurisprudence of the Supreme Court it quotes, namely, that the treaties should be interpreted as the Indians "naturally" understood them, but not because the Haudenosaunee had trouble understanding a foreign legal system, or were unskilled in diplomacy, or were weak and dependent. On the contrary, the Haudenosaunee valued their independence, and they were not weak, as proven by the fact that they were courted as military allies. They were represented by master diplomats and skilled orators. The interpreters were acceptable to both parties. Their illiteracy is irrelevant, as the process was memory-based and not document-based. In addition, the treaties were made in the legal ecosystem of Haudenosaunee law, so it did not matter that they did not know the legal system of the other party. It is for all these reasons that, in its view, the treaties should be interpreted in accordance with Haudenosaunee law. In a treaty context, it is important to understand in which legal system the treaty was negotiated. In this case, the treaties were concluded under the Haudenosaunee legal system, therefore, more weight should be given to that system, and this, despite the Supreme court

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[159] *Idem*, para. 125-128.
[160] *Idem,* para. 230.
[161] *Ibidem.*
[162] *Ibidem.*
[163] *Ibidem.*

jurisprudence saying that equal weight must be given to the common law and the Indigenous perspective.

A.2 Position of the parties on the Covenant Chain

A.2.1 The Applicants

[486] The Applicants plead that the Crown infringed the Honour of the Crown and the Covenant Chain relationship, because it failed to consult and negotiate in good faith with the Mohawks of Kahnawà:ke before legislating.

[487] The Applicants have maintained throughout this proceeding that the protocols of the Covenant Chain require the Crown to consult and cooperate with the Mohawks of Kahnawà:ke in order to reach a negotiated resolution to the longstanding Crown-Mohawk dispute over the trading of tobacco. They argue that the evidence produced at trial has shown repeated efforts by the Mohawk Council of Kahnawà:ke to engage the Crown on the issue, but the Crown has, instead, chosen to rely on restrictive and punitive law enforcement measures in an attempt to impose its unilateral will to monopolize the regulation of the tobacco trade and effectively exclude all Indigenous traders from that activity, with a single exception in Six Nations territory.

[488] The Applicants draw a distinction between the individual treaties, which provide for substantive rights, and the general treaty relationship, which provides for procedural rights[164] and for which the Covenant Chain is the legal backdrop[165]. They consider the Covenant Chain as a "constitutional-like treaty instrument"[166], which provided a normative framework for relations between the Haudenosaunee and Mohawks and the Crown. The Applicants go further and consider that it "may be an unwritten constitutional instrument of Canada"[167]. In their oral final pleadings, they agree with the position of the MNCC describing the Covenant Chain as an instrument that defines the relationship between the Mohawks and the Crown and as being in the nature of a super-treaty[168].

[489] The Applicants insist on the importance of the Covenant Chain which "reflects the common intention of these treaty partners to create a permanent or reliable framework for governing relations between two distinct political communities"[169]. The use of the word "Covenant" instead of treaty implies a greater sense of solemnity and seriousness[170].

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[164] *Consolidated closing memorandum of fact and law of the Applicants*, para. 184.
[165] *Idem*, para. 185.
[166] *Idem,* para. 185.
[167] *Idem,* para. 188.
[168] Final pleadings, 2022-01-24, p. 2, l. 21-p. 3, l. 4.
[169] *Consolidated closing memorandum of fact and law of the Applicants*, para. 194.
[170] Final pleadings, 2022-01-24, p. 7, l. 18- p. 8, l. 2.

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This "treaty mechanism capable of responding to evolving circumstances […] reflects […] the Haudenosaunee and Mohawk worldview of the perpetual nature of relationships"[171].

[490] The Applicants invite the Court to be careful with the decision *Restoule*[172], in which it is suggested that the Covenant Chain is simply an alliance rather than a treaty and it is described as a cross-cultural merging of diplomatic protocols and legal orders. That case concerns the Anishinaabe, a different Indigenous group, who had the Covenant Chain extended to them in 1764. Accordingly, they did not have the prior hundred-year history of Covenant Chain interactions with the Crown that the Mohawks had[173].

[491] For the Applicants, to characterize the Covenant Chain as merely a metaphor or an alliance that is political rather than legal would bring us back to a time where the honour of the Crown or reconciliation were not seen as legal obligations[174]. For them, the Covenant Chain is akin to a treaty between the parties[175].

[492] In oral pleadings, the Applicants expounded on the notion of reconciliation, arguing that there are three approaches to it and that the evolution of the notion has a significant bearing on how to look at the Covenant Chain[176].

[493] The first stage of reconciliation in Canadian jurisprudence is "reconciliation as tolerance". It is illustrated in *Sparrow*, where it is seen as the reconciliation of Aboriginal rights with the Crown power. In cases like *Sparrow*, *Van der Peet* and *Gladstone*, reconciliation is an accommodation of Indigenous peoples' way of life within the laws of Canadian society. The purpose of s. 35(1) is to reconcile these societies with the broader political community they are in[177].

[494] The second stage can be described as "reconciliation as consistency". Reconciliation starts to have a more legal meaning and to be more than just accommodating ways of life and Aboriginal rights. It is about reconciling Aboriginal and common law perspectives, about translating these rights in a way that is consistent with European conceptions of law. Aboriginal legal traditions are translated so that they become comprehensible to the common and civilian system[178].

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[171] *Consolidated closing memorandum of fact and law of the Applicants*, para. 195.
[172] *Restoule* v. *Canada (Attorney General)*, 2021 ONCA 779; *Restoule* v. *Canada (Attorney General)*, 2018 ONSC 7701.
[173] Final pleadings, 2022-01-24, p. 9, l. 4-p. 10, l. 17.
[174] Final pleadings, 2022-03-30, p. 84, l. 4- p. 86, l. 21.
[175] *Idem*, p. 126, l. 4 – p. 127, l. 23.
[176] *Idem*, p. 130, l. 4- p. 131, l. 3.
[177] Final pleadings, 2022-03-30, p. 131, l. 7- p. 132, l. 22, quoting notably *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, para. 73; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 31.
[178] Final pleadings, 2022-03-30, p. 132, l. 23- p. 133, l. 15, quoting *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; *R.* v. *Marshall*; *R.* v. *Bernard*, 2005 SCC 43, para. 127, 130.

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[495] The third stage, the current one, is to see reconciliation as a constitutional and legal relationship, with jurisdictional implications. The idea is to reconcile peoples and their respective claims, interests and ambitions. It is no longer a vertical relationship between a people and the Crown, but a horizontal relationship between equivalent humans[179].

[496] In their written arguments, the Applicants describe the issues the following way:

- Is the Covenant Chain Treaty relationship an unwritten Treaty which benefits from constitutional protection under s. 35 of the *Constitution Act, 1982*?

- If so, what are its ongoing effect in the 21st century?

A.2.2 The Attorneys General

[497] For the Attorneys General, the *Covenant Chain* is not a treaty and, therefore, does not provide any right to consultation or to a negotiated resolution of disputes. In addition, the principle of the honour of the Crown does not create a duty to consult when charges are laid[180].

[498] Essentially, the Attorneys General consider that the Covenant Chain is not a treaty, but more "a symbol or a metaphor for the political and/or military alliance between Indigenous peoples and the British Crown in the 17th and 18th centuries"[181]. For the Attorneys General, "[i]t represents an evolving web of diverse diplomatic relationships between the English Crown and various Indigenous communities"[182]. The Attorneys General also see the *Covenant Chain* as a "metaphor used from the late seventeenth century onwards to refer to the network of alliances or friendships that formed between the British and certain Indigenous nations, most notably the Iroquois League"[183].

[499] The Attorneys General state that the English and the Indigenous would use the metaphor of a rope that became an iron chain and then a silver chain to describe their relationship when they entered into a treaty[184]. This metaphor would reflect the friendship between the nations[185]. The metaphor then evolved to symbolize the group

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[179] Final pleadings, 2022-03-30, p. 133, l. 16- p. 140, l. 5, quoting *Haïda Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, para. 20, 25; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 1; *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 140.

[180] *Attorney General of Québec Final Pleadings*, para. 39-41.

[181] *Idem*, para. 303, Final pleadings, 2022-03-24, p. 3, l. 15-22.

[182] *Attorney General of Québec Final Pleadings*, para. 303.

[183] *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings,* para. 83; *Plan of arguments of the Attorney General of Canada*, para. 173.

[184] *Attorney General of Québec Final Pleadings*, para. 304.

[185] *Idem*, para. 306.

of nations allied to or friends with the English[186], with the Covenant Chain describing ties of friendship or alliances"[187].

[500] In this sense, the Attorneys General recognize that the Covenant Chain could refer to "a series of treaties" between the British Crown and some Indigenous nations, however, they refuse to consider it as "a separate, unwritten or implicit treaty which conveyed a set of discrete rights and obligations"[188]. The Attorneys General also refutes that the Covenant Chain and the Two Row Wampum tradition have been incorporated into the unwritten principles of the Constitution[189]. Being more a symbol of a political process or relationship, they plead that the Covenant Chain is not a binding instrument protected by s. 35(1)[190].

[501] The Attorneys General criticize the approach of the Applicants through the testimony of Dr. Adams, who did not try to "uncover the mutual understanding that the Mohawks and the English would have had about the Covenant Chain"[191]. For the Attorneys General, "[t]he rituals and the protocols are separate from the terms of the treaties, and they were understood by the English as necessary diplomatic protocol, but not as importing substantive or procedural rights or obligations[192]". From the English and French point of view, the adoption of Indigenous protocols "reflect a pragmatic approach more than an adoption of Haudenosaunee laws"[193]. More generally, the Attorneys General refute the postulate that treaties were adopted within Haudenosaunee law and were subject to a particular legal system, arguing that it is a concept of private law that has nothing to do with nation-to-nation treaties. In this context, there is no need to supplement the treaties by referring to the legal traditions of one party. Treaties are self-standing[194].

[502] The Attorneys General also consider that the evidence does not demonstrates that the Europeans agreed that the practices adopted were agreements themselves and that these practices were binding[195]. They refuse to recognize the *Covenant Chain* as a treaty that creates obligations and consider it more as a process that can lead to the conclusion of treaties[196]. Consequently, the determination of the existence of a treaty right of free trade must be sought in specific treaties[197]. For the Attorneys

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[186] *Idem*, para. 308.
[187] *Idem*, para. 309.
[188] *Idem*, para. 310.
[189] *Idem,* para. 406, referring to *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34, para. 54-56, 59, 62.
[190] *Idem*, para. 333.
[191] Final pleadings, 2011-02-11, p. 136, l. 17- p. 139, l. 13.
[192] *Ibidem.*
[193] *Ibidem*.
[194] Final pleadings, 2022-02-11, p. 142, l.7 – p. 144, l. 12.
[195] *Idem,* p. 52, l. 6- p. 53, l. 17.
[196] *Plan of arguments of the Attorney General of Canada*, para. 174.
[197] *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings,* para. 85.

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General, the Court must distinguish the process itself from the intention of creating binding obligations regarding specific matters. s. 35(1) protects only binding obligations, but not the process to get to them[198].

[503] The Attorneys General also provide an alternative argument. If the Covenant Chain is a treaty, it does not contain a right to a negotiated resolution of disputes outside courts. There is no evidence to support the submission of the Applicants in this regard, and, moreover, it is highly improbable that the English would have agreed to such terms, which would have been at odds with the British imperial logic at the time[199]. And even if it were admitted that the Covenant Chain contains a treaty right to negotiate a settlement of disputes outside of courts, the Applicants would still have to demonstrate an infringement of that right, and the Attorney General would still have the opportunity to justify that infringement.

A.2.3 The MNCC

[504] For its part, the MNCC asks the Court to define the principles of the Covenant Chain in order to guide successful negotiations in the future.

[505] The MNCC views the Covenant Chain as a relationship that has bound the Haudenosaunee and the Crown since 1677. It is the "framework for the thinking and conduct of every treaty council from 1677 to the 1830s"[200].

[506] The MNCC explains the specificity of Haudenosaunee languages, which put relationships first, having more than 50 pronouns. For the MNCC, the languages inspire a legal system based on relationships and relations with other nations that use the metaphor of family. With that in mind, the MNCC sees the Covenant Chain as a family relationship, where parties are brothers and equals, with obligations to help each other and pay attention to each other's needs and concerns. For the MNCC, it is not just an alliance. Such a relation requires constant collaboration, "like families living across the fire from each other in a longhouse"[201]. The MNCC insists on the concept of family, as the metaphor of family relations is the basis of Haudenosaunee law, which, in turn, is the architecture of the treaty relationships. Seen through the lens of family, the Covenant Chain relationship "provides not only for constant communication, for maintenance and reaffirmation of peace, for reciprocity, and mutual aid and alliance. It also requires attention to concerns before they become disputes, and efforts to resolve those concerns between brothers, and not in an adversarial criminal setting"[202]. For the MNCC,

[198] Final pleadings, 2022-02-10, p. 86, l. 15- p. 94, l. 23.
[199] Final pleadings, 2202-03-24, p. 3, l. 23- p. 4, l. 9.
[200] MNCC*, Final pleadings*, para. 115.
[201] *Idem*, para. 112.
[202] *Idem*, para. 123.

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with brotherhood come principles such as equality, reciprocity, respect, trust, affection, and mutual aid.

[507] From the MNCC perspective, "when the Constitution of Canada recognizes and affirms, and therefore protects, "treaty and aboriginal rights", the intention must be to affirm the treaty relationships like the Covenant Chain"[203]. The terms "treaty rights" should embrace those relationships, and not only be confined to individual, separate transactions. The MNCC reminds that the purpose of s. 35(1) is reconciliation, and that "[a]t the core of reconciliation are relationships, not single events"[204]. Thus, the MNCC urges the Court to avoid adopting a narrow interpretation of s. 35(1), limited to individual transactions. The Haudenosaunee legal system is based on relationship rather than on individual events or transactions that take place within the relationship. Besides, the individual transactions are only explainable as part of the larger relationship.

[508] The MNCC also addresses the signification of the Two Row Wampum. For the MNCC, the Two Row Wampum came after the Covenant Chain, perhaps as an addendum to resolve potential conflicts. For the MNCC, the "logical explanation of the gradually increasing prominence of the Two Row Wampum is that, as conflicts between the Haudenosaunee and their neighbours intensified, they sought to accentuate the separateness of the sailing ship and the canoe depicted on the belt"[205].

[509] For the MNCC, "the procedural right flowing from the Covenant Chain is not consultation, it is communication, listening and working together to resolve concerns[206]". It is different from the common law right to be consulted. It is an obligation to actively work together to resolve a concern. The Covenant Chain creates (1) an obligation to raise concerns, to listen carefully and consider what to do about the concerns on the other side, (2) an obligation to meet and work together to resolve the concerns before they become a dispute, (3) an obligation to follow a process according to Haudenosaunee law, which was actually respected from 1677 to 1830.

[510] Regarding the creation of the Covenant Chain, if there must be a specific event involving participation of representatives, exchange of commitments and a degree of solemnity, then the ceremonies in 1677 stand out as the moment when the colonial governors were made brothers of the Haudenosaunee.

[511] For the MNCC, the principles of the Great Law of Peace guide and define the relationships between the nations of the Haudenosaunee, on one hand, and between the chiefs, on the other, and became the rules of the Covenant Chain relationship.

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[203] *Idem*, para. 130-131.
[204] *Ibidem.*
[205] *Idem*, para. 117-118.
[206] Final pleadings, 2022-01-31, p. 63, l. 20-23.

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[512] The MNCC reminds that each council between the Haudenosaunee and the Crown would involve the same process. It considers that "[u]sing the process is itself a periodic reaffirmation of the relationship"[207]. The MNCC describes this process as "the set of procedural law governing the conduct of the Covenant Chain relationship"[208]. These rules aim at promoting consensus and minimizing conflict.

[513] The MNCC underlines the fact that the Covenant Chain was, in practice, the Crown's preferred mechanism to implement the process of reconciling between 1677 and 1766. The MNCC takes as examples the creation of a distinct Covenant Chain relationship with the Western Confederacy at Niagara in 1764 and the invitation to Kahnawá:ke and the rest of the Haudenosaunee elements of the Seven Nations of Canada to revert back into the Covenant Chain. Thus, as it was the Crown's preferred mechanism for reconciling through the treaty relationship, the Covenant Chain relationship requires respect and protection under the constitution of Canada.

[514] Regarding the arguments of the Attorneys General that the Mohawks of Kahnawà:ke were not beneficiaries of several of the treaties, the MNCC pleads that it is for the Haudenosaunee to decide who their people are, and they consider that Kahnawá:ke is a Haudenosaunee community, "entitled to the entire panoply of Haudenosaunee treaty rights and relations"[209]. The MNCC contends that what is central is whether Kahnawá:ke is part of the Haudenosaunee today to determine if they are the beneficiaries of Haudenosaunee treaty relations and rights. Otherwise, it would be "tantamount to asserting that Newfoundland cannot be a beneficiary of Canada's membership in the United Nations or the North Atlantic Treat Alliance"[210] because Newfoundland was not part of Canada at the time of conclusion of those treaties.

[515] Kahnawá:ke reunited with the Haudenosaunee in 1760 and resumed the Covenant Chain relationship with the Crown at that time. As noted, for the MNCC, the question is not whether Kahnawá:ke was part of the Haudenosaunee in 1677 or "onward", "but whether it is a Haudenosaunee community today"[211]. The notion of family is still central for the understanding: "the people of the communities, no matter their estrangement, were still related, still family, and always capable of returning and reuniting"[212]. On several occasions, "the Haudenosaunee were divided when individuals or nations took side in wars, and then reunited, using the ceremony of condolence to bury the conflict in oblivion"[213], for example after the American revolution or after the War of 1812.

[207] MNCC. *Final pleadings*, para. 179.
[208] *Ibidem.*
[209] *Idem*, para. 216.
[210] *Idem*, para. 225.
[211] *Idem*, para. 223.
[212] *Idem*, para. 224.
[213] *Ibidem.*

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B. GENERAL PRELIMINARY ISSUES

B.1 The Crown in Right of Canada

[516] The Attorney General of Canada argues that the Crown in Canada is not bound by treaties concluded by the British Crown outside Canadian territory. Thereby, the treaties concluded in Albany NY, not being "Canadian treaties", do not bind Canada. As a result, only the two last treaties concluded in August and September 1760, after the British forces conquered Montreal, should be the object of discussion.

B.1.1 Position of the parties

[517] The Attorneys General of Canada argued that the Crown in right of Canada is not bound by treaties or actions of the British Crown in relation to colonies that are not (and in the case of the colony of New York, never did) form part of Canada. Canada is a sovereign state and cannot be obligated by treaties concluded or actions taken in former colonies of the British Crown that do not form part of its territory[214].

[518] For the Applicants, the issue of succession of rights and obligations is not dealt with expressly by the treaties. Nevertheless, they argued that the treaty rights of the Mohawks and Haudenosaunee are not conditional on any continuity in the status of the Crown or the dimensions of the territory of the Crown or state. Even if they recognize that there has been some gradual change in sovereign authority over the territory occupied by the Mohawks of Kahnawà:ke in what is present-day Canada, they insist that the authority of the Crown has continued unaltered. There has been no dissolution or diminution of the English Crown and the treaty obligations are still binding today. The Government of Canada or the Crown in Right of Canada is thus the continuation or successor of the English Crown of past centuries. As a successor state, Canada is bound by the treaties concluded by the Albany Commissioners and the Superintendent of Indian Affairs in the 17th and 18th centuries on behalf of the English Crown.

[519] The MNCC takes no position on this issue.

B.1.2 The law

[520] The principle that "the Crown is one and indivisible" is not one that has endured in modern constitutional law.

[521] The concept of the situs of the rights of the Crown, as argued by the Attorneys General, may aid in determining which Crown is involved (in right of Canada or in right of the United Kingdom). However, it is just the initial step in establishing who is

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[214] *Attorney General of Canada final pleading*, para. 100 and 136.

accountable for the treaty obligations entered into by the British Crown throughout its colonial history.

[522] The 1982 decision of the House of Lords in *R. v. Secretary of State for Foreign and Commonwealth Affairs*[215] (hereafter the 1982 Decision) governs the first step of this analysis. That case was brought before the House of Lords by Canadian First Nations who were concerned about safeguarding their rights during the patriation of the Constitution. They argued that, even after the patriation, the British Crown remained bound by its obligation towards the nations with whom it had entered into treaties.

[523] The 1982 Decision is based on the constitutional history of the British Crown and its colonies and had established the present-day responsibility for obligations undertaken during the colonial period, whether by the former colony or the metropole.

[524] While the concept of territories is closely tied to the decision, its essence lied not in territorial matters but in the political evolution of young nations that attained independence from their metropoles. The decision also delved into the legal implications of this emancipation for both entities.

[525] The 1982 Decision unequivocally established that during the process of emancipation, treaty obligations were not extinguished. Instead, they were transferred from the Crown in right of the United Kingdom to the Crown in right of the former colony that had emerged as a new independent country.

[526] As Lord Justice May explained:

> Another consequence of this process of evolution from a single undivided Imperial Crown, to which Mr. Blom-Cooper frequently but as I think erroneously referred in the course of his submissions, to the multi-limbed Crown of the British Commonwealth, it that as different territories within the Commonwealth attained self-government to a greater or less extent, acquired the right to legislate on some and ultimately all matters within and affecting that territory, and thus to raise to finance to enable them to manage their own affairs, so pro tanto did any rights or obligations of what had been the Imperial Crown, that is to say the Crown in right of the United Kingdom, devolve upon the Crown in right of the particular territory concerned. [216]
>
> (The Court's underlining)

[215] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118, [1982] 2 W.L.R. 641, [1982] Q.B. 892.
[216] *Idem,* p. 15 of the Westlaw edition.

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B.1.3 Analysis

[527] For the following reasons, the Court concludes that the Crown in Right of Canada is bounded by the treaties entered into at Albany between the British Crown and the Mohawks of Kahnawà:ke.

[528] The 1982 Decision does not support the conclusion that the Crown in right of Canada is responsible only for treaty obligations where the treaty was signed within modern Canadian borders. To the contrary, it confirms the transfer to the Crown in Right of Canada of all treaty obligations that affected Canadian territory even if the treaty was not concluded within current Canadian borders.

[529] The Attorney General of Canada has admitted that the Mohawks of Kahnawà:ke were a party to the treaties in 1724, 1735, 1742, 1753 – 1754, and to the two treaties of 1760 with the other party being the King of England. The Attorney General of Quebec agreed, with the exception of the Treaty of 1724. During that period, neither Canada nor the United States of America existed as independent political entities.

[530] Were the argument of the Attorneys General to be upheld, it would mean that only the September 1760 Treaty concluded in Kahnawà:ke is binding on the Crown in right of Canada, and that all other treaties concluded in what is today New York State would be considered extinct.

[531] As we shall see later, the post-treaty conduct of the British authorities contradicts this argument, since the relationship after the Montreal capitulation was the continuation of the one that took place in Albany in the previous decades.

[532] Despite the shifting dynamics of history that influenced the possessions and authority of the British Crown in North America, the Mohawks of Kahnawà:ke still reside where they did when they concluded those treaties with the British Crown. Those treaties governed the relationship between the parties, a relationship that persists to this day.

[533] In *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*[217], the Supreme Court "reiterated that the legal source of Aboriginal rights and title is not state recognition, but rather the realities of prior occupation, sovereignty and control". The Supreme Court rejected "that the later establishment of provincial boundaries should be permitted to deprive or impede the fight of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights"[218].

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[217] *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4.

[218] *Idem,* para. 49.

[534] Access to justice, according to the Supreme Court "requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land"[219].

[535] The same principle of fairness should also apply when Indigenous peoples invoke historical treaties between nations that have maintained an ongoing relationship since those treaties were concluded.

B.2 The issue of criminal jurisdiction under the Treaty of 1664

[536] The MNCC asks the Court for a declaratory judgment to the effect that the Treaty of 1664 and the 1764 Niagara Treaty establish that the criminal law jurisdiction over crimes other than murder, rape and robbery, committed by citizens of one side upon citizens of the other, belongs to the government whose citizens committed the crime. "They are to be addressed through meetings between the Crown and the Haudenosaunee."[220]

[537] They are not seeking a stay of proceedings but, rather, an adjournment to permit the necessary negotiations[221].

[538] Essentially, the MNCC deplore the fact that, since the 1830s, the Crown ceased to abide by the treaty clauses dealing with criminal responsibility and jurisdiction, in particular, those in the first treaty of 1664.

[539] The MNCC argues that, even though the MNCC still exists and continues to resolve matters within the Mohawk society, the Crown has actively undermined its authority and capacity regarding criminal jurisdiction. It denounces that discrimination, racism and harm are systemic in the Canadian criminal justice system, painting a picture of a broken system beset with troubled relations with police, excessive guilty pleas in court, and massive overincarceration of Indigenous people, with release and parole at half the rate of other people. They remind the Court that every royal commission has concluded that there is a need for distinct Indigenous justice systems, using traditional processes and values of restorative, community-based justice[222].

[540] The Attorneys General reject the idea that the Mohawk Nation could claim residual sovereignty or exclusive jurisdiction over criminal matters. They plead that it would be inconsistent with Canada's constitution, including s. 35(1). It would also be contrary to consistent jurisprudence that has rejected attempts to recognize immunity against the application of *Criminal Code* and other legislation[223].

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[219] *Idem,* para. 50.
[220] MNCC, *Final pleadings*, para. 370 and 429 b).
[221] *Idem,* para. 376, 378 and 429 d).
[222] *Idem*, para. 19-24, para. 243 *ff*. (part five), para. 380 *ff*. (part six)
[223] *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings,* para. 6.

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[541] While it is true that this is a live issue in the relationship between numerous First Nations and the Crown, and one of growing importance, the Court will not rule on this question, which was introduced by the MNCC as an intervenor. This issue was not raised by the Applicants, and it is not one under which the MNCC was authorized to intervene.

[542] In its *Judgment on the motion to intervene of the Mohawk nation council of chiefs*, the Court authorized the MNCC to assist it by presenting the Haudenosaunee perspective[224].

[543] This intervention is limited by the questions raised by the parties. The question of determining whether treaties, notably the Treaty of 1664, contain a clause about separate criminal jurisdiction was not raised by the parties[225] and it is not one that is necessary to decide on the Notice. It would amount to a trial within the trial.

[544] It is an important and very complex issue, one that should have the benefit of a full and complete hearing. In the context of this Notice, it was not the case, and the Court is thereby ill-equipped to address it.

B.3 The Two-Row Wampum

[545] Evidence was adduced and arguments made on the subject of the Two-Row Wampum. There was question of its significance, the date of its appearance, its representation of the sovereignty of the nations involved in the relationship, its relationship with the Covenant Chain, and its constitutional status.

[546] The Two-Row Wampum holds an important place for the Haudenosaunee nations. In 2023, it is one of the precepts known by most Haudenosaunee people. In this case, it was invoked by a number of prospective jurors as an obstacle to jury duty, since it would force them to get involved in another nation's jurisdictional sphere. The Court respected their position, and they were excused from serving on the jury. It is thus clear that the Two-Row Wampum has a place in the history and in today's life of the Haudenosaunee and in the relationship they have with the Crown.

[547] The Court considered that the importance and the sensitivity of the Two-Row Wampum call for a prudent approach. In this case, it was the object of limited evidence and served as a supportive argument only. As such, it is not central to the position of the parties.

[548] Judicial restraint and respect for the nations concerned cause the Court to decide not to engage in a profound analysis of the Two-Row Wampum. In spite of the

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[224] See Section I-B of the judgment, also *R.* c. *Montour*, 2021 QCCS 714, para. 23-26, 181.
[225] That was recognized by the MNCC in its *Final pleadings*, para. 373.

fact that it was part of the arguments, the Court will refer to it only if necessary to understand an issue, but no further. Any deeper analysis will be left to another forum.

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B.4 The argument of tardiness of the issue of the Covenant Chain as a treaty

[549] The Attorneys General argue that the question of whether the Covenant Chain is a treaty that gives enforceable rights was only introduced at the end of the trial and, consequently, they were deprived of the opportunity of presenting evidence on the infringement of that alleged right. They contend that neither party offered detailed evidence on the political discussions surrounding the tobacco issue during the last decades[226].

[550] The Attorney General of Canada pleaded that the Court should not decide this issue, because it was not validly before the Court. They considered that, in the judgment of February 19, 2021 granting the right to intervene to the MNCC, the Court rejected the conclusion of the MNCC's motion for a hearing to address whether procedural treaty rights exist, which would require that the rights invoked in the constitutional pleading be negotiated rather than argued in court. In its decision, the Court held that this conclusion could not be granted, as it is entirely independent from both the constitutional pleading and the criminal proceeding and has no impact on the outcome of either[227].

[551] The Applicants answered that their motion with respect to the Covenant Chain is sufficiently broad to embrace different types of treaty rights. The procedural treaty right invoked relates to renegotiating the trade component of the free trade clauses. For the Applicants, there is no major issue over whether they invoke a procedural or a substantive aspect: they are both treaty rights. The Applicants plead that they are not introducing a new right, but they are simply presenting different components of the right[228]. Certain of the November 22, 2021 amendments to *The Amended Consolidated Constitutional Pleading* of April 2, 2020 were in response to a request by the Attorneys General for clarifications[229]. In addition, these amendments had to have been obvious to the Attorneys General when Prof. Walters' expertise was filed. They even commissioned Dr. Beaulieu to reply on this subject[230]. The case law relating to amendments to pleadings in Aboriginal rights cases shows a certain degree of flexibility[231]. Moreover, the Applicants underline that the Attorneys General did nothing to contest the amendment in a timely manner and never presented a motion to strike[232].

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[226] Final pleadings, 2022-02-02, p. 15, l.8- p. 16, l. 9; Final pleadings, 2022-03-24, p. 4, l. 23- p. 5, l. 14.
[227] Final pleadings, 2022-04-07, p. 3, l. 10-p. 4, l. 8.
[228] Final pleadings, 2022-03-30, p. 140, l. 17- p. 144, l. 2; and p. 145, l. 19-24.
[229] *Idem*, p. 144, l. 3-14.
[230] *Idem*, p. 148, l. 6-20.
[231] *Idem*, p. 144 - p. 152, referring to *Tsilhquot'in Nation v. British Columbia,* 2014 SCC 44, para. 65.
[232] Final pleadings, 2022-03-30, p. 152, l. 15-18.

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[552] For the following reasons, the Court rejects the argument of tardiness raised by the Attorneys General. From very early in the process, they had sufficient information to know that the issue of the nature and content of the Covenant Chain was a live issue.

[553] Although the argument on the issue evolved with the presentation of evidence, the Covenant Chain was an obvious part of the proceeding from the beginning.

[554] In the July 28, 2018 *Notice of Constitutional Question*s, a number of arguments relating to the Covenant Chain are put forth, i.e., that the treaties are part of the Covenant Chain, which symbolized the alliance between the Iroquois Confederacy, including the Mohawk, and the Crown (para. 44), that it was often renewed and strengthened in the 17th and 18th centuries (para. 48), that the treaties of the Covenant Chain recognized the right to trade of the Mohawk (para. 49), that the preliminaries and events leading up to the ceremonies of renewal of the Covenant Chain 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 (para. 52, 53), that the parties expressed their assent to the treaties and the Covenant Chain (para. 54), and that, to this day, the treaties of the Covenant Chain have never been extinguished (para. 62).

[555] These arguments are repeated in subsequent proceedings, i.e., the September 28, 2018 *Motion to stay proceedings (Constitutional Challenge)* (para. 62-65, 68-69, 84), the *Consolidated Constitutional Pleading* of August 30, 2019 (para. 61-62, 64-65, 68-69, 84)[233]. the *Amended consolidated constitutional pleading* of April 2, 2020 (same paragraphs), as well as in all amended version of the first *Notice of Constitutional Questions.*

[556] The Applicants communicated Prof. Walters' Report on the Covenant Chain treaty relationship in pre-Confederation Canada on August 30, 2018. Prof. Beaulieu's *A Response to Mark D. Walters* is dated February 14, 2020. Prof. Walters testified from September 27 to 29, 2021 and Prof. Beaulieu, for a total of 11 days, from November 16 to 30, 2021.

[557] Peggy Mayo testified for the Applicants on October 28, 2021, that is, between the appearances of the two experts. She was a member of the Kahnawà:ke Band Council in the 1990s and recounted discussions with provincial and federal government about the tobacco industry. She also filed a number of documents relating to the control of the tobacco industry in Kahnawà:ke as well as letters exchanged between the Band Council and the governments. She was not cross-examined by the Attorneys General.

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[233] The purpose of this amended motion was to consolidate in one written procedure the *Notice of Constitutional Question*s and the *Motion to stay proceedings (Constitutional Challenge)* to simplify the procedural written record and the unfolding of the audition.

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[558] In the *Fresh as amended consolidated constitutional pleading* of November 22, 2021, the previously mentioned paragraphs are reproduced (para. 69-70, 72-73, 76-77, 92), the argument of the constitutional status of the Covenant Chain is added at paragraph 94, and the violation of the treaties by the enactment of the *Excise Act,* 2001 without consultation and accommodation is specified. This "Fresh as amended" pleading was filed at the request of the Attorneys General.

[559] Evidence was declared closed on December 2, 2021. Written pleadings were filed, followed by 24 days of oral arguments from January to April 2022.

[560] The argument of defects in proceedings was addressed by the Supreme Court of Canada in *Tsilhquot'in Nation v. British Columbia* [234]. There, the Supreme Court agreed with the British Columbia Court of Appeal that a functional approach should be taken with respect to pleadings in Aboriginal cases:

> The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice.[235]

[561] The Supreme Court justified this functional approach by the fact that the legal principles and the evidence are often unclear at the outset of a file, making it difficult for the lawyers to draft the initial pleadings[236].

[562] The Court concluded on that point the following way:

> [23] Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

[563] Applying this functional approach, the Court considers that the Attorneys General knew or should have known from the beginning that the nature and content of the Covenant Chain would be a live issue in this matter. Even though the precise content of the Covenant Chain argument evolved with the evidence, Prof. Walters' Report of August 2018 should have alerted the Attorneys General to the argument of

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[234] *Tsilhquot'in Nation v. British Columbia,* 2014 SCC 34.
[235] *Idem,* para. 20.
[236] *Idem,* para. 21-23.

the Applicants that the Covenant Chaim constituted an agreement that established a procedure of conflict resolution.

[564] Paragraphs 13 and 14 of his report are illustrative of this:

> 13. The Covenant Chain relationship was shaped by Indigenous legal traditions, one of which was the requirement of regular gift-giving. From the mid-1750s until the late-1850s, Indian affairs in British North America were managed directly by the Imperial government in London rather than by colonial governments responsible to local colonial legislatures. Superintendents General for the British Indian Department were appointed by the Crown, and one of their principal tasks was to "polish" the Covenant Chain through regular council meetings with Indigenous chiefs at which matters of common concern were discussed and determined, wampum belts were exchanged, and "presents" distributed.
>
> 14. The Covenant Chain provided a framework for governance for and between peoples with fundamentally different understandings of social, religious, political, economic, and legal ideas. Any attempt to understand the Covenant Chain treaty relationship through the lens of European conceptions of 'sovereignty', 'state', or 'law' will produce misleading conclusions unless larger historical and ethnohistorical contexts are understood.

[565] With the presentation of the evidence by the Applicant and the MNCC, the Attorneys General could not have been unaware of this issue, yet they made no request for an extension of time to present evidence on the subject.

[566] The Attorneys General argue that the February 19, 2021 *Judgment on the motion to intervene of the Mohawk Nation Council of Chiefs* had the effect of foreclosing the presentation of this argument.

[567] In that interlocutory judgment, the Court said:

> [169] However, the Court cannot grant the third conclusion of the motion to intervene requesting that a hearing be held to address whether procedural treaty rights exist so that the rights invoked in the constitutional pleading can be negotiated rather than argued in court, since this issue is entirely independent from the constitutional pleading and the criminal proceedings and has no impact on the outcome of either.

[568] It is not for the Court to interpret its previous interlocutory decisions, and it is not necessary to do so. Every decision must be viewed in the proper context, which is sufficient for present purposes to reject this argument.

[569] The decision on the Motion to intervene by the MNCC preceded the presentation of evidence on the Applicants' Notice and related to a demand made by a potential intervenor.

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[570] The context is different today. Evidence was presented; the argument is one made by the Applicants, and the Court has already held that the Attorneys General are not taken by surprise by this argument. Thus, today's context is entirely different, and our decision of February 19, 2021 is not an obstacle to the presentation of this argument now.

[571] As well, the Attorneys General had to know that in *R. v. Badger*[237] the Crown did not present evidence on the issue of justification and that the Supreme Court returned the case to the court of first instance for the presentation of such evidence. To avoid such an outcome here and considering that the Notice is presented in a criminal trial, the Attorneys General should have raised the issue at the earliest possible time.

[572] The Court considers that the Crown took a strategic decision not to demand more time to present evidence if the Court was to conclude that a conflict-resolution procedure existed as part of the Covenant Chain.

[573] The Court notes that evidence of consultation with Indigenous peoples was already relevant to the analysis of justification in order to determine whether the actions of the Crown were consistent with the honour of the Crown, which may indeed require such consultation[238]. It is thus difficult to imagine why, in a case such as this, the Attorneys General would not adduce all possible evidence of consultations, with the goal of showing that an infringement of the treaties or Aboriginal right was justified. As previously mentioned, the decision not to make such evidence could only result from a strategic decision.

[574] The Crown must now live with its decisions.

[575] For these reasons, the objection is overruled.

C. THE LAW

C.1 Governing principles of treaty interpretation

C.1.1 The principles applying to determine whether an agreement or document constitutes a treaty

[576] What is a treaty in Canadian law? In 1964, the British Columbia Court of Appeal wrote:

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[237] *R.* v. *Badger,* [1996] 1 SCR 771.

[238] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, p. 1119; *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 110; *Mikisew Cree First Nation* v. *Canada (Governor General in Council)*, 2018 SCC 40, para. 64.

> […]"Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied[239].

[577] Later, the law governing the determination of what is a treaty was crystalized by three decisions of the Supreme Court: *R.* v. *Simon*[240]*, R.* v. *Sioui*[241] *and R.* v. *Badger*[242]*.*

[578] These decisions establish the principles for determining whether an agreement is a treaty. Those principles can be summarized as follows:

- What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity[243].
- Formalities are of secondary importance in deciding on the nature of an agreement between Indigenous nations and the Crown[244].
- The historical background, including subsequent conduct of the parties and how the parties were understanding the agreement at the time, is an important element for deciding the nature of an agreement[245].
- Treaties with Indigenous nations are unique; they are agreements *sui generis* which are neither created nor terminated according to the rules of international law[246].
- Treaties are agreements whose nature is sacred[247].
- Treaties are analogous to contracts, albeit of a very solemn and special, public nature[248].

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[239] *White & Bob*, 1964 CanLII 452 (BC CA), 50 D.L.R. (2d) 613 (B.C.C.A.) (aff. in 1965 CanLII 643 (SCC), 52 D.L.R. (2d) 481)
[240] *R.* v. *Simon* [1985] 2 S.C.R. 387.
[241] *R.* v. *Sioui*, [1990] 1 S.C.R 1025.
[242] *R.* v. *Badger,* [1996] 1 SCR 771.
[243] *Simon*, p. 401, *Sioui,* p. 1044, *Badger*, para. 76
[244] *Sioui*, p. 1045
[245] *Sioui*, p. 1045, *Simon,* p. 410.
[246] *Simon*, p. 404.
[247] *Badger,* para. 51.
[248] *Idem,* para.76.

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C.1.2 The principles applying to the content of a treaty

[579] The rules of interpretation of the content of a treaty adopt a two-step approach. The words of Justice McLachlin in *Marshall*[249] are worth repeating:

> 82. The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.
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> 83. At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-3; *Sundown*, *supra*, at paras. 30 and 33.
>
> (The Court underlines)

[580] In the application of this approach, the Court should be guided by the specific rules of treaty interpretation as developed by the Supreme Court and which are succinctly summarized in the same case by Justice McLachlin, as well as in the *Moses* case[250]*:*

> [107] Since we have determined that the Agreement is a treaty for the purposes of s. 35(3) of the Constitution Act, 1982, it follows that special principles of interpretation will apply to it. This Court has stated many times that Aboriginal treaties are to be interpreted broadly, flexibly and generously (*R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at

[249] *R.* v. *Marshall,* [1999] 3 S.C.R. 456, para. 82-83.
[250] *Quebec (Attorney General)* v. *Moses,* 2010 SCC 53.

paras. 76-78; *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393, at para. 24; *Sioui*, at p. 1043; *Simon*, at p. 404, see also Sullivan, at p. 513). In *Marshall (1999)*, McLachlin J. (as she then was), dissenting but not on this point, provided what is now the most frequently cited summary of the relevant interpretive principles, as they have been developed by this Court (at para. 78):

> *This Court has set out the principles governing treaty interpretation on many occasions. They include the following.*
>
> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: R. v. Sundown, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393, at para. 24; R. v. Badger, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 78; R. v. Sioui, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1043; Simon v. The Queen, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui *Generis Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.*
>
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: Simon, supra, at p. 402; Sioui, supra, at p. 1035; Badger, supra, at para. 52.
>
> *3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: Sioui, supra, at pp. 1068-69.*
>
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: Badger, supra, at para. 41.
>
> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: Badger, supra, at paras. 52-54; R. v. Horseman, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901, at p. 907.
>
> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: Badger, supra, at paras. 53 et seq.; Nowegijick v. The Queen, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 36.

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> 7. A technical or contractual interpretation of treaty wording should be avoided: Badger, supra; Horseman, supra; Nowegijick, supra.
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> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: Badger, supra, at para. 76; Sioui, supra, at p. 1069; Horseman, supra, at p. 908.
>
> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: Sundown, supra, at para. 32; Simon, supra, at p. 402.
>
> [108] The rationale behind this interpretive approach is that the negotiation of historical treaties was marked by "significant differences" in the signatories' languages, concepts, cultures and world views. This meant that the Crown and the Aboriginal signatories had fundamentally different understandings of the exact nature of their agreements (L. I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997), 46 *U.N.B.L.J.* 11, at p. 20). Because of these contextual factors, Aboriginal treaties are to be interpreted in light of the contexts in which they were signed, and that interpretation must be both liberal and dynamic so as to avoid the freezing of rights, while any ambiguity is to be resolved in favour of the Aboriginal signatories.

[581] Those principles must be completed with the following two:

- Interpretation of treaty that has an impact upon treaty rights must be approached in a manner that maintains the integrity of the Crown[251].
- Any limitation that restricts the rights of an Indigenous party under treaties must be narrowly construed[252].

C.2 The honour of the Crown

[582] The honour of the Crown is a foundational principle of Aboriginal law[253]. It has been described as "an important anchor" in this area of law and has the status of a

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[251] *R. v. Badger*, [1996] 1 SCR 771, para. 41.
[252] *Ibidem*.
[253] *Mikisew Cree Frist Nation* v. *Canada (Governor General in Council)*, 2018 SCC 40, para. 21.

constitutional principle[254]. The Supreme Court reminds us that it is not only a "mere incantation, but rather a core precept that finds its application in concrete practices"[255].

[583] It arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people"[256]. Recognition of this principle in an Aboriginal law context can be found as far back as in the *Royal Proclamation* of 1763, "in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples"[257].

[584] Essentially, it "recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples"[258]. The purpose of this fundamental principle is to facilitate the reconciliation of the pre-existence of Indigenous societies with the sovereignty of the Crown[259]. In *Desautel*, Justice Rowe writes for the majority that the honour of the Crown "looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship""[260].

[585] This principle has several implications, notably the well-known duty to consult established in *Haida*[261]. In the following paragraphs, the emphasis will be put on its role in the interpretation of treaties.

[586] As mentioned, it is clear since *Badger* that the honour of the Crown is an important principle of treaty interpretation:

> At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. […] Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned[262].

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[254] *Idem*, para. 42.
[255] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, para. 16.
[256] *Mikisew Cree Frist Nation* v. *Canada (Governor General in Council)*, 2018 SCC 40, para. 21; *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66; *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, para. 66.
[257] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42.
[258] *Mikisew Cree Frist Nation* v. *Canada (Governor General in Council)*, 2018 SCC 40, para. 21.
[259] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, para. 17; *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66; 2018 SCC 40, para. 22.
[260] *R.* v. *Desautel*, 2021 SCC 17, para. 30.
[261] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73.
[262] *R.* v. *Badger*, [1996] 1 S.C.R. 771, para. 41.

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[587] Another fundamental principle of interpretation, which is enunciated in *R.* v. *Sparrow* is*:*

> (…) The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [263]

[588] The Supreme Court expounded on the duties imposed by the honour of the Crown in *Manitoba Metis Federation inc.*[264]*.* There, the Supreme Court clarified that the honour of the Crown is not a cause of action itself, but "speaks to *how* obligations that attract it must be fulfilled" (emphasis in the original)[265]. In that case, the Supreme Court stated that "when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it"[266].

[589] This purposive approach is critical to the interpretation of consistent treaty obligations. In *Manitoba Metis Federation*, the Supreme Court recalls that, in *Marshall*, the majority rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown". Indeed, in *Marshall*, the majority stated that the trade arrangement of the Mi'kmaq must be interpreted "in a manner which gives meaning and substance to the promises made by the Crown". Otherwise, the majority added, the Mi'kmaq would be left with an "empty shell of a treaty promise"[267].

[590] More generally, "the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation"[268]. Recently, in *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, the Supreme Court reiterates that the honour of the Crown requires a generous and purposive interpretation of s. 35(1) in furtherance of the objective of reconciliation[269].

C.3 Reconciliation in treaty interpretation

[591] The Applicants do not argue that the above principles of interpretation are no longer valid. However, they plead that the Canadian legal landscape relating to

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[263] *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075, p. 1108*.*
[264] *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14.
[265] *Idem*, para. 73.
[266] *Idem*, para. 75; *R.* v. *Desautel*, 2021 SCC 17, para. 30.
[267] *R.* v. *Marshall*, [1999] 3 S.C.R. 456, para. 52; *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 76.
[268] *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 77
[269] *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 24.

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aboriginal law has changed, especially since the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act*[270] (hereafter the *UNDRIP Act*).

[592] The Supreme Court stated in *Beckman* v. *Little Salmon/Carmacks First Nation*[271], and reiterated in *Daniels*[272], that reconciliation in a mutually-respectful long-term relationship is the grand purpose of s. 35(1). This was also echoed by the Quebec Court of Appeal in *Ressources Strateco inc.* c. *Procureure générale du Québec*[273].

[593] We hasten to add that the same Court has held that the *UNDRIP Act* values, principles and rights are now a source of interpretation in Canadian law[274].

[594] These values and principles are well reflected in the first and fourth paragraphs of the preamble of the *UNDRIP Act*, which read as follows:

> Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith.
>
> […]
>
> Whereas, in its document entitled *Calls to Action*, the Truth and Reconciliation Commission of Canada calls upon federal, provincial, territorial and municipal governments to fully adopt and implement the Declaration as the framework for reconciliation, and the Government of Canada is committed to responding to those Calls to Action.

[595] Accordingly, with reconciliation being the ultimate purpose of s. 35(1) and of the *UNDRIP Act*, the interpretation of a treaty must be aligned with that goal.

[596] In 2018, the Government of Canada published the *Principles respecting the Government of Canada's relationship with Indigenous peoples*[275]. It enunciates ten principles that will guide the government's actions toward reconciliation through the implementation of the *UNDRIP*.

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[270] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.
[271] *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53.
[272] *Daniels* v. *Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.
[273] *Ressources Strateco inc. c Procureure générale du Québec*, 2020 QCCA 18, para. 8.
[274] See *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061), para. 507 à 510.
[275] DEPARTMENT OF JUSTICE CANADA, *Principles respecting the Government of Canada's relationship with Indigenous peoples*, Ottawa, Department of Justice, 2018, online: < Principles respecting the Government of Canada's relationship with Indigenous peoples (justice.gc.ca)>.

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[597] The first paragraph of the introduction of the *Principles* states the following:

> The Government of Canada is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.

[598] Still in the introduction, one can read:

> These Principles are a starting point to support efforts to end the denial of Indigenous rights that led to disempowerment and assimilationist policies and practices. They seek to turn the page in an often-troubled relationship by advancing fundamental change whereby Indigenous peoples increasingly live in strong and healthy communities with thriving cultures.

[599] The introduction is concluded in the following way:

> These Principles are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with Indigenous peoples. The work of shifting to, and implementing, recognition-based relationships is a process that will take dynamic and innovative action by the federal government and Indigenous peoples. These Principles are a step to building meaning into a renewed relationship.

[600] Principles 1, 2, 5 and 9 are worth mentioning, as well as some comments accompanying them:

> **PRINCIPLE 1: The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.**
>
> The Government of Canada's recognition of the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada is grounded in the promise of s. 35 of the *Constitution Act, 1982,* in addition to reflecting articles 3 and 4 of the UN Declaration. The promise mandates the reconciliation of the prior existence of Indigenous peoples and the assertion of Crown sovereignty, as well as the fulfilment of historic treaty relationships.
>
> Canada's constitutional and legal order recognizes the reality that Indigenous peoples' ancestors owned and governed the lands which now constitute Canada prior to the Crown's assertion of sovereignty. All of Canada's relationships with Indigenous peoples are based on recognition of this fact and supported by the recognition of Indigenous title and rights, as

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well as the negotiation and implementation of pre-Confederation, historic, and modern treaties.

PRINCIPLE 2. The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982.*

Reconciliation frames the Crown's actions in relation to Aboriginal and treaty rights and informs the Crown's broader relationship with Indigenous peoples. The Government of Canada's approach to reconciliation is guided by the UN Declaration, the TRCs Calls to Action, constitutional values, and collaboration with Indigenous peoples as well as provincial and territorial governments.

PRINCIPLE 5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

This principle honours historic treaties as frameworks for living together, including the modern expression of these relationships. In accordance with the Royal Proclamation of 1763, many Indigenous nations and the Crown historically relied on treaties for mutual recognition and respect to frame their relationships. Across much of Canada, the treaty relationship between the Indigenous nations and the Crown is a foundation for ongoing cooperations and partnership with Indigenous peoples.

The Government of Canada recognizes the role that treaty-making has played in building Canada and the contemporary importance of treaties, both historic and those negotiated after 1973, as foundations for ongoing efforts at reconciliation.

PRINCIPLE 9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

Treaties, agreements, and other constructive arrangements should be capable of evolution over time. Moreover, they should provide predictability for the future as to how provisions may be changed or implemented and in what circumstances. Canada is open to flexibility, innovation, and diversity in the nature, form, and content of agreements and arrangements.

[601] Thus, the Principles represent undertakings of the Government of Canada. As such, they should always govern its actions, including in a court of justice.

[602] Reconciliation is a relatively new concept, and the Supreme Court has yet to provide a specific and detailed definition of what it entails or how it can be achieved. Other courts, however, have already started paving the way.

[603] In *Coldwater First Nation* v. *Canada (Attorney General)*, the Federal Court of Appeal elaborated on the legal concept of reconciliation by suggesting that it ought both to look back and look forward, and focus on relationships:

> [47] The other controlling concept is reconciliation. The best description of reconciliation to date appears in the following passage from *Beckman* (para. 10):
>
> > The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.
>
> [48] Reconciliation must nonetheless begin by looking back and developing a deep understanding of the centuries of neglect and disrespect toward Indigenous peoples, well-summarized in a number of reports and studies.
>
> [49] Reconciliation also looks forward. It is meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality but also to promote a constructive relationship, to create a new attitude where Indigenous peoples and all others work together to advance our joint welfare with mutual respect and understanding, always recognizing that while majorities will sometimes prevail and sometimes not, concerns must always be taken on board, considered and rejected only after informed reflection and for good reason. This is a recognition that in the end, we all must live together and get along in a free and democratic society of mutual respect.
>
> [50] Reconciliation in this sense is about relationship (Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will

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> Kymlicka & Bashir Bashir, eds, The Politics of Reconciliation in Multicultural Societies (New York: Oxford University Press, 2008) 165, p. 168):
>
> > Reconciliation as relationship […] is always […] reciprocal, and […] invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts [and includes] facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved. [It] is about peace between communities divided by conflict, but it is also about establishing a sense of self-worth or internal peace within those communities[276].

[604] Soon after, the Alberta Court of Appeal referring to *Coldwater First Nation* in its decision in *AltaLink Management Ltd v. Alberta (Utilities Commission)* talked about reconciliation as a work in progress of rebuilding this relationship:

> [113] Reconciliation refers to the "work in progress" of rebuilding the relationship between Indigenous peoples and the Crown following historical and continuing injustices by the Crown against Indigenous peoples: Beckman, para 52; Truth and Reconciliation Commission of Canada, What We Have Learned: Principles of Truth and Reconciliation (2015). Reconciliation is concerned with establishing respectful and healthy long-term relationships among Aboriginal and non-Aboriginal peoples moving forward: Beckman, para 10; Truth and Reconciliation Commission of Canada, Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada, vol 6 (Montreal: McGill-Queen's University Press, 2015), 3; see also Coldwater First Nation v Canada (Attorney General), 2020 FCA 34, paras 49–50, 444 DLR (4th) 298.[277]

[605] The analysis of the issues raised in the Notice should be consistent with these principles.

D. THE COVENANT CHAIN

D.1 The Evidence

[606] Let us start by clarifying that the existence of the Covenant Chain is not contested in the Canadian jurisprudence.

[607] It has been referred to by other courts, including the Ontario Superior Court in *Restoule v. Canada (Attorney General)*[278]*, a*lthough in that case the legal nature of the Covenant Chain was not discussed. Its role was limited to being recognized as an element of the historical context in which the written Robinson treaties invoked were

[276] *Coldwater First Nation* v. *Canada (Attorney General),* 2020 FCA 34 (leave to appeal denied, SCC, 02-07-2020, n°39111), para. 47-50.
[277] *Alta Link Management Ltd* v. *Alberta (Utilities Commission),* 2021 ABCA 342, para. 113.
[278] *Restoule* v. *Canada (Attorney General),* 2018 ONSC 7701, para. 65-71.

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concluded. Since the issue there was the interpretation of one clause of those treaties, the *Restoule* case is not determinative on the issue before this Court.

[608] Although the Attorneys General do not contest the existence of a relationship referred to as the Covenant Chain, they are strongly opposed to the argument that the Covenant Chain is a treaty.

[609] Consequently, it is necessary to focus first on the evidence as to whether it was the intention of the parties when concluding the treaties to create mutually binding obligations and, if so, whether this was done with a certain measure of solemnity.

D.1.1 Two different approaches on history

[610] One considerable difficulty in the present case is its historical dimension. On numerous occasions, the parties, through the testimonies of their respective experts, invited the Court to give opposite interpretations to events that happened more than three hundreds year ago. This was most notably the case regarding the evidence on the Treaties and the Covenant Chain.

[611] The Court has found the following development of Prof. Parmenter at the beginning of his report very useful to face this challenge:

> Analysis of historical treaties between Indigenous nations and European colonizers necessarily involves consideration of power relations. It is vital that we engage in that analysis with appreciation that power relations between Indigenous nations and the English Crown have been more complex, negotiable, and variable over time than many "broad-brush histories" of colonial North America indicate. Histories tracing the development of nation-states like Canada and the United States naturally emphasize the factors that enabled the settler population to subordinate Indigenous nations to colonial rule. Without denying the ultimate subjugation and marginalization of Indigenous nations in Canada, consideration of events from historical actors' time- and culture-specific viewpoints can help us to "complicate the usual outcome-oriented perspective on power relations" that has long pervaded much of the historical treaty studies literature. There is a critical distinction, in other words, between a reconstructive versus a retrospective approach in understanding historical treaties. A retrospective assessment (i.e., one that proceeds from known outcomes of the treaty parties' relative future powers) offers no explanation or understanding of the parties' words and actions. Instead, a reconstructive approach acknowledges that it is "necessary to examine what the parties knew, did not know, valued, and expected at the time they spoke and acted.[279]

[279] Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 6-7. Exhibit WM-30.

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[the Court's emphasis]

[612] For the Court, the major differences in the interpretation of the evidence presented by the experts come to that divergence regarding the approach adopted and the consequences it has on the understanding of the power relations between the Europeans and the Indigenous Nations through the period covered by the treaties.

[613] The Court considers that in a judicial perspective, the reconstructive approach is more relevant to determine the common intent of the parties at the time. It also allows an interpretation that is more consistent with the honour of the Crown, as in an Aboriginal law case, a strict retrospective approach would mean to analyse every event through the lens of colonisation and assimilation. Therefore, in the analysis of the evidence, the Court has been careful to discern when an interpretation of events is tainted by a too strict retrospective approach which does not give enough room to the understanding of both parties during the period relevant to the case.

D.1.2 Uncontested historical facts about the Covenant Chain

[614] Although there were no formal admissions made, several crucial factual elements about the Covenant Chain remain undisputed, and it will be useful to identify those elements to avoid unnecessary discussion of marginally relevant topics, as interesting as it may be.

[615] The Courts finds that the following elements are undisputed and supported by the evidence presented:

- The origin of the Covenant Chain can be traced back to the beginning of the relationship between the Haudenosaunee and the British in the 17th century.

- Throughout the core historical period discussed in this judgment, the nations involved in the Covenant Chain were independent, sovereign, and equal politically and militarily.

- Both parties were skilled in the art of diplomacy, engaging in negotiations with other nations on matters such as military alliances, neutrality, peace and trade.

- The metaphor of the Covenant Chain illustrates the relationship between the Haudenosaunee and the British, and it is represented by a vessel (British) and a mountain (Haudenosaunee) linked by a durable silver chain that

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symbolizes a lasting bond, requiring regular care and polishing to prevent tarnishing and potential breakage[280].

- This metaphor represents an alliance between the nations.

- The Covenant Chain originates with the Haudenosaunee and is deeply rooted in their law and diplomatic traditions, characterized by the practice of conducting councils.

- Councils hold a central place in the political structure of the Haudenosaunee, utilized both within the Iroquois Confederacy and across various Haudenosaunee nations. This structure is deeply rooted in the Great Law of Peace and had been in existence long before the arrival of the first Europeans in North America.

- The Covenant Chain councils took place in Albany, NY and could be initiated by either one of the parties by sending a wampum belt as an invitation for the gathering.

- At council, wampum belts were exchanged, some of which served as a symbolic representation of the treaty concluded.

- The British followed that diplomatic structure in their relationship with the Haudenosaunee nations, including the Mohawks of Kahnawà:ke.

- The relationship between the Haudenosaunee and the British evolved through the Covenant Chain councils.

- The Covenant Chain diplomacy was conducted through councils that played a central role in maintaining the relationship. Regularly polishing the silver chain symbolized that any conflict or issue affecting the relationship should not be left unattended. Instead, the parties should address conflicts through discussions to find a mutually satisfying solution.

- The council's procedure involved a Condolence ceremony at the opening, which could sometimes last a few days. This was followed by speeches to introduce a proposition and an exchange of gifts to support it. Then there was a suspension for reflection on the answer, after which speeches were given to present the answer to the proposition, accompanied by an exchange of gifts. The proposition procedure was repeated until an agreement was reached.

[280] This is the Court’s version of the metaphor for the purpose of this judgment only. It can be express in many different ways and it is not the intention of the Court to cast in stone a definite version of the metaphor.

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- Depending on the subject of discussion, a council may or may not lead to a treaty. In the present case, all the Treaties except the first one of 1664 are oral treaties.

- At councils, the Covenant Chain was frequently renewed, as were the treaties concluded before.

- The relationship between the Haudenosaunee and the British was governed by the Covenant Chain diplomacy well into the 19th century.

- The Covenant Chain eventually became part of the British diplomacy with other Indigenous nations, such as the Anishinaabe[281].

[616] These facts form a broad historical background.

[617] Of course, the experts brought more facts to this background. While they agree on the events themselves, they hold differing opinions about the historical inferences and implications that can be drawn from them.

D.1.3 Historical documentary evidence relating to the Covenant Chain

[618] Even though the Covenant Chain itself has never been formalized in writing, it is mentioned numerous times in the historical documentation.

[619] Some preliminary comments are necessary before analyzing that documentation.

[620] First, the analysis of the relevant documents is the first step of treaty interpretation[282]. Second, all such documents require interpretation, keeping in mind that their meaning depends on the historical context at the time they were drafted, an element that becomes relevant at the second step of treaty interpretation.

[621] In reviewing these records, it important to remember that they were drafted exclusively by the British and that they only partially reported what was said or done. Only the first Treaty, the one of 1664, which does not mention the Covenant Chain, was drafted in a traditional European form of a written treaty and signed by the parties. Afterwards, no other document appears in such a formal format. Thus, the various council reports do not represent official written versions of the negotiations and were not signed after revision by the parties. Consequently, they are not the words of the

[281] See *Restoule* v. *Canada,* 2018 ONSC 7701; *Restoule* v. *Canada (Attorney General),* 2021 ONCA 779.
[282] *R. v. Marshall,* [1999] 3 S.C.R. 456, para. 82-83.

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Treaties and the first step of treaty analysis, as provided in *Marshall*, must be adjusted to the situation.

[622] The Mohawk were speaking in their mother tongue. As a result, the written records that do exist do not reflect what they said but, rather, what the translator understood and translated. Consequently, one must be careful about the meaning to be given to those translated words. The testimony of Dr Adams about what "brother" and "father" mean in the Mohawk language should be kept in mind[283]. They do not convey the same relationship as in English.

[623] The historical documentation produced covers decades of relationship and recorded exchanges, all of which took place centuries ago. Since then, language, writing style, spelling and grammar have evolved. The records are reproduced as they appeared in the historical documentation[284].

[624] With the exception of some correspondence between British officials, those records report speeches made by the parties at council meetings and were part of propositions made to the other party, or of an answer to a proposition formulated previously.

[625] The Court reproduces in the judgment certain extracts from the documentation, but generally only the relevant portion of a proposition or an answer, preceded by some brief context. It should be remembered that sometimes the councils were held on several days. Although a brief context will precede the citation, it is not necessary to reproduce the entire contents of the documents, although that is provided in the appendix.

[626] Considering the long time period under analysis and the quantity of historical records put into evidence, it is impossible to refer to every document mentioning the Covenant Chain, especially since the Covenant Chain existed between the British and all the Haudenosaunee nations. A selection had to be made, and the Court chose to emphasize the evidence relating to the period over which the Treaties were concluded, between 1677 and September 1760.

[627] For the same reason, the Court limited the references to the documents listed in *The selected documents: treaties and tobacco trade* of the Applicants, which they considered to be the most relevant documents produced in evidence. This selection

[283] See Section II.D.2.5.1 and II.D.6.

[284] Abbreviations are widely used in those documents. Here is their signification to the best of the understanding of the Court: b^{r} = brethren (brother), Nat^{s} = Nations, oy^{r} = other, ree^{d} = received, s^{d} = said, y^{e} = the, y^{m} = them, y^{r} = your, y^{t} = that, , w^{ch} = which, wth = with, W^{y} = Warrighiyagey (Sir William Johnson).

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was completed with certain documents produced through the testimony of Prof. Beaulieu[285].

[628] The reader should note that all underlining in the extracts was done by the Court, and this will not be mentioned again.

[629] The Court also considered several written records referring to the treaty relationship and the Covenant Chain. There are three main sources for those. The earliest is the *Minutes of the Albany Commissioners for Indian Affairs*, which began in 1696. Unfortunately, the documents prior to 1724 were destroyed, but detailed minutes for the subsequent period do exist. For the period before 1724, the documentation was reconstructed some time after 1750 by Peter Wraxall in the form of a compilation entitled: *An Abridgement of the Indian Affairs.* This is the second main source the Court consulted. The third is the *Papers of Sir William Johnson*, British Superintendent of Indian Affairs from 1756 to 1774.

[630] As for Peter Wraxall, he was a friend of Sir William Johnson. He was quite critical of the work of the Commissioners, who were often accused of bias. Regarding his compilation relating to the destroyed documents, it is in the form of an abridgment and, thus, is incomplete.

D.1.3.1 Treaty of 1677

[631] The parties agree that the first written references to the Covenant Chain are found in the council record of the 1677 Treaty, which refers to the making of a Covenant and an inviolable Covenant Chain. Those minutes mention that they were recorded, or at least revised, by the Secretary of the Albany Commissioners, Robert Livingston.

[632] The very first mention was made on July 21, 1677 by the Onnondagoes in their answer to the proposal made by Collnell Henry Coursy, as he was authorized by Charles Lord Barron of Baltimore[286]:

> 1. They say, wee are sent for by a Belt of zeawant to Speak w^{h} his honnor y^{e} Govern^{r} Generall, here, and Afterwars a Belt was Sent to us by Colln^{ll} : Coursay (…) Bot wee desire now y^{t} all w^{ch} is past may be buried in oblivion and doe make now ane absolut Covenant of peace w^{ch} we shall bind wth a chain for the Sealing of y^{e} Same doe give an hand of Therten deep.

[633] The Onneyads followed with their answer:

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[285] Those documents can be found in The Attorney General of Canada-70 D, E and F, *Selected sources from Dr Beaulieu's Report in Reply to Dr Parmenter, tab 1 to 136.*

[286] *The Selected Documents: Treaties and Tobacco Trade*, Tab. 2, *The Livingston Records*, 1666-1723, Lawrence H. Leder ed. (The Pennsylvania Historical Association), 1956, pp. 43 to 46. Exhibit Key-1, Appendix 2.

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> We are now Com together to mak the Covenant and doe agane absolutely approve of y^t^ w^ch^ y^e^ Onndagoes hath done (…) and doe give two Beaver.

[634] On August 6, 1677, in Albany, the Maquesse (Mohawk) answered the proposition made to them two days earlier by the same British representative:

> Thankes, Especially y^t^ his honnor hath bein pleased to Grant you y^e^ Priviledge for to Speak w^t h^ us heir Seeing that the Gov^r^ : Gen^ll^ : & wee are one, and one hart and one head, for the Covenant that is betwixt y^e^ Govr : Gen^ll^: and us is Inviolable yea so strong yt if y^e^ very Thunder should break upon y^e^ Covenant Chayn it wold not break it in Sunder (…) doe give thar upon ane drest Elk Skin and one Beaver.

D.1.3.2 Council of July 1701

[635] On July 14, 1701, a council was held with "the Hon^ble^ John Nafan, Esq. and Lieut. Governor and Commander in chief of the province of New York and territories depending thereon in American and vice Admiral of the same and the Sachims of the Five Nations called the Maquase, Oneydes, Onnondages, Cayouges and Sinnekes[287]". The purpose of this council was to introduce to the Sachims of the Five Nations the new Governor and Commander-in-Chief, the Hon. John Nafan. He was replacing the late Earle of Bellemont.

[636] After the speech of the Hon. John Nafan, the representative of the Five Nations spoke[288]:

> Brother Corlaer[289]. Wee doubt not but you will be carefull to keep and maintain the covenant chaine firme as the late Gov^r^ has done, who is now in heaven, and our earnest desire and prayer is that you may continue long with us in the station His Maj^ty^ has been pleased to place you in and that wee may frequently see one another in this Citty the General place of Treaty of all the five nations.
>
> (…)
>
> You know Brother, that as often as the covenant chain has been renew'd itt has always been agreed that neither party was to listen to any story's of falsehoods.

[287] Those nations are known today as the Mohawk, the Oneida, the Onondaga, the Cayuga and the Seneca.

[288] The Selected Documents: Treaties and Tobacco Trade, Tab. 3, *Documents Relative to the Colonial History of the State of New York*, Vol. IV, pp. 698-699, O'Callaghan ed. (1854). Appendix 3.

[289] Coarler was the name given by the Indigenous representatives to the Governor.

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D.1.3.3 Council of July 15 and 16, 1702

[637] At the council held on July 15, 1702, with the Five Nations and the Mohawks of Kahnawà:ke, Lord Cornbury, Captain and General and Governor in Chief of the Province of New York, said the following[290]:

> I am appointed by Her Majᵉs Royall Commission to succeed to the late E of Bellemont deceased in the command of this Government, & doe therefor assure you in yᵉ name of that great princesse Anne Queen of England &c my mistresse that you shall have all yᵉ Protection favour & Countenance imaginable as long as you continue in due obedience @ [sic] subjection to the Crown of England as your Ancestors have done before you, and I have sent for you in the beginning of my Governmᵗ to renew the Covenant Chain between us according to yᵉ ancient Custome where is included all Her Majesties subjects in this main of America, viz Virginy, Maryland, New England and all yᵉ rest of yᵉ English Provinces and Colonies in this Northern Continent and hope it will be more lasting and bright now on yʳ part, then ever it was formerly, and that you will answer that good Character I have heard of you in England.

[638] Later, directing his speech to "the Canada Praying Indians" (the Mohwak of Kahnawà:ke), he talked of a possible war between France and England and referred again to the protection of the Covenant Chain:

> Now to show yᵉ brethren that I concele nothing from you of any News that comes from Europe, I doe now acquaint you that we have a Rumor that there will be a warr between England and France, and I am informed yᵉ French of Canada design to keep back their Indians from committing any Acts of Hostility, and some of yᵉ Canada praying Indians that are now here a trading, seem to be very fond of a Peaceable hunting and are desirous that I may be instrumental and contribute towards their future Peace and Tranquility; I need not tell you what yᵉ French are, I understand that you have had the Tryall of them often to your Cost, if they be reall in this it is because their Interest leads them to be, I doe not design to trust them neither would I have yᵉ Brethren doe it but be upon their Guard, nevertheless if yᵉ warr breaks out I would no have yᵉ Brethren be yᵉ first aggressors nor commit any Acts of hostility upon the French or their Indians without directions from me, but if yᵉ French begin first upon us or any of yᵉ Brethren in League with us, we most joyn unanimously and make warr upon them with all Vigor, & not make a lingering war as yᵉ former was I know they will be threatening of you and forcing Priests upon you in your Country but I must tell you not to fear the one nor suffer the other as you tender yᵉ Preservation of yᵉ Covenant Chain

[290] The Selected Documents: Treaties and Tobacco Trade, Tab,4, *Documents Relative to the Colonial History of the State of New York*, Vol. IV, pp. 982-985, O'Callaghan ed. (1854), WC-30, Vol. 1, tab. 6, Appendix 4.

[639] Lord Cornbury finished his speech in the following manner:

> As to the question you ask whether I think you Governour is Reall in his Proposalls to you of neutrality you will be the best judges of that, if ye Warr breaks out, only I must be plain with you and Reall too, yt if you suffer yr selves to be deluded by ye French or any oyr to make Warr upon any that we are in alliance with, you must expect to loose not only the benefitte of ye peaceable Hunting which you so much value, but we will all joyn to destroy those that shall first take up the hatchett to kill any of ye Brethren that are link'd in our Covenant Chain was given to the said 3 Indians 3 Faddom Strouds 3 Bags of Powder.3Lacd Hatts 15 Barrs Lead 6 Faddom of Tobacco[291].

[640] On July 16th, the three Mohawks of Kahnawà:ke present there answered that they will report that speech to their Sachims and that the British can expect a response in the spring.

D.1.3.4 Renewal of the Covenant Chain: Council of March 13, 1725

[641] In 1725, the British were planning to build a fort at Oswego that would change the trade flow from North-South to East-West[292]. That displeased the French, who threatened to destroy the fort. The Mohawks of Kahnawà:ke went to Albany to inform the British of the consequences of such a project[293].

[642] At a meeting between the Commissioners of Indians Affairs and the five Sachims of Kahnawà:ke, Ondatsagto, their spokesperson said[294]:

> Brethren
>
> We are now mett together and desired that some of the Maquas Sachims might be present. [and-crossed out] at this meeting and are glad to see [some -crossed out] at this meeting and are glad to see [some-crossed out] a few of y.m here, we hope you do not Expect yt we Shall Speak in fine polishd words. Since we are but youngsters. our ancestors understood affairs better than we, for we Shall Speak in plain terms and tell you our minds freely. in what we are going to Say – which we ought to have done

[291] Strouds were wool blankets manufactured in England and of better quality than the one manufactured in France and very much appreciated by the Indigenous people.

[292] Oswego is situated in what is now Up State New York, on the bank of Lake Ontario, West of Albany.

[293] See Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 80 (WM-30); Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, p. 184-186. Exhibit AGC-70.

[294] The Selected Documents: Treaties and Tobacco Trade, Tab -9, [transcription of the] *Minutes of the Albany Commissioners of Indian Affairs, Att a meeting of the Com.rs of ye Ind.n Affairs in Albany, March 13-16, 1724/5*.

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> Some time Since, So hope youl Excuse us, it seems that our frindship and amity Declines [and-crossed out] as we were no Brethren, therefore we do now come to renew it, at this place wh. Is the seat fixd to treat about public, Matters & do now kindle the fire up. Gave a belt of wampum
>
> (…)
>
> Brethren
>
> Last year the Gov.t mett ye Sachims of ye Six Nations[295] here and did Renew ye Covenant Chain with ym. And Spoake in a peaceable manner which was very welldone you desired us to that we Should use our utmost Endeav.rs to appease ye Eastren Indians to be at peace with N England at our Return home we did what lay in our power till we were prevented by [ym-crossed out] ye the news we heard yt ye English had cut aff a Castle of those Indians.
>
> (…) gave a belt
>
> Brethren
>
> our ancestors livd all in in one Country and were one people but it seems Every one is gone where he pleasd and tis fallen our lott to be Setld in Canada. You sent us lately a belt of wampum that we Should Keep ye Covenant Chain [illeg-crossed out] inviolable w.h we promise on our Side to do and do Expect youl pform it on your Side according to your promises

[643] In their response, the Commissioners replied:

> (…) You do well to renew the friendship that has always been between us & your Nations at this place appointed to treat about publick Affairs, and that you kindle up the fire here after your manner, which we do in like manner in Your Castles and do expect you will keep firm to your former promises & engagements as we assure you will do your gave a Belt —-
>
> Brethren The Union & friendship that has been between our and your Ancestors, and now is between us, which we expect you'll keep Inviolable (…)
>
> Give a belt

[295] The Tuscarora joined the Iroquois Confederacy in 1726, the Five Nations were then referred to as the Six Nations.

> (…) We do renew the ancient Covent. And friendship that has always been between us & your Nations, and desire D Canehogo to continue to be an Obedient Child to Inform us of whatever designs there may be in Canada against this Governmt for which he shall be well rewarded
>
> Gave a Belt

D.1.3.5 Council of September 26 to 29, 1725

[644] On September 28, two Sachims of Kahnawà:ke presented condolences to the British for the murder of a British soldier by their people. They offered "an Indian woman to give to you in lieu of the man you lost". The woman was probably a captive from another community[296]. The Commissioners accepted the woman, but warned the Mohawk that, in the future, the perpetrator of such a crime would have to be handed over to them[297].

[645] Here are some of the exchanges that took place[298]:

> The Sachims of Cachnawage Rondax and Skawinnadie Ind.ns came this day before this Board and laid down seven hands of Wampum to wype off the Tears (after their manner) of those who are in mourning for the man who some of their vilest people have killed this Summer at Saraghtoge and are come to heal that breach
>
> Brethren We shall begin with telling you that our Ancestors have very prudently foreseen in their first entring of peace & the Covenant of friendship together, that when any accident or mischief should happen [on-crossed out] either on the one side or other, should be no breach of the Covenant and friendship but that it should be reconcil'd and made up by the aggressors in the best manner it can be done
>
> Brethren Our people have Committed a barbarous murder in killing the Man at Saraghtoge, We do acquaint you it has been done without our Order or knowledge but as they belong to our tribes we are answerable for that mischief and breach and desire you'll forgive it and pass that fault Over, and desire that you'll put the vail from you faces & be Joyfull and Sitt in the Light, that we may see one another with Joy and Gladness, We have brought an Ind.n woman to give you in lieu of the man you lost, tho it be not our maxim to do so yet we do it to satisfie you for the breach that is committed

[296] See Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 81. Exhibit WM-30C, Tab.3.

[297] See Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, p. 186. Exhibit AGC-70.

[298] The Selected Documents: Treaties and Tobacco Trade, Tab. 10, pp. 177-181, *Minutes of the Albany Commissioners of Indians Affairs,* Att a meeting of the Com.rs of Ind.ᴺ Affairs in Albany the 29th of Sept.ʳ1725, Appendix 6.

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[646] On September 29th, the Commissioners answered:

> It is true as you say that our Ancestors in their first making the Covenant and friendship have prudently foreseen that no mean accident or mischief that should be Committed or happen either on the one side or other should make a breach of that covenant, but that must be understood as such Acts as are done on Surprise or in heat of blood, but this base Action has been done deliberately and with a Design as we suppose to break the Amaty and food Understanding thas [sic] has has been long since between Us and to Stop up the Road that has been made open and Clean for you to come hither gave a blkt But such base Murders as this should be punished on the Comitters of them, w.ch we should have required had you no come to mediate and reconcile that Affair, and since you do come and acknowledge that this murder has been Committed by some of you vilest people & wt out your Consent, We shall at your Instance, Desire our Gov.r to forgive you that Injury on Condition that you promise to become Security to Deliver up to To Justice such of you people as shall for the future offend in the like nature, and we do now accept the Squa instead of the Man as a Token of your Repentance and sorrow for what is past give a Belt

[647] The Sachims answered that they "heard with attention but that they are not impowered to promise to become security to deliver up to Justice those of their people who transgress for the future, but that article in particular they shall communicate to their Sachims when they get home and bring an answer as soon as possible".

D.1.3.6 Treaty of 1735

[648] There is no dispute that this council led to the conclusion of a treaty.

[649] At this council, held between July 30 and August 2, 1735, neutrality and trade were discussed, as well as the Covenant Chain.

[650] Concentrating on the Covenant Chain, on August 1st, the speaker Sconondo of Kahnawà:ke said[299]:

> Brethren
>
> It is by the goodness of God y.t we are now assembld together it is very well known to Everyone y.t out Brethren Corlaer & y.e Six nations[300] are firmly united together, wherefore we know Speake out of one mouth ye Gov.r of Canada & s.d three nations to their Brethren Corlaer & y.e Six nations that

[299] The Selected Documents: Treaties and Tobacco Trade , Tab 12, Minutes *of the Albany Commissioners of Indian Affairs,* At a meeting of y.e Commissioners y.e 30 July 173[5] & Peter Wraxall, *An Abridgment of the Indian Affairs (*Cambridge: Harvard University Press, 1915), August, 1735, pp. 192-195, Exhibit WC-30C, Appendix 7.

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> what you do Promise that you will faithfully perform it; not to Speake only with y.e mouth but from y.e bottom you y.r hearts, gave a belt of wampum
>
> Brethren
>
> We Speake in behalf of those above mentioned; that while there is a war with y.e Indians to y.e Southward and Some of our young warriours who go out to war ag.st s.d Indians as well as those of y.e Six nations and if peradventure any of y.r y.t that may not be a breach of y.e treaty & Covenant we now make but y.t such breach made be make up with y.e Sachims of the Respective places. gave a belt of wampum

[651] The next day, the Commissioners answered:

> you told us yesterday that you Spoake & treated in behalf of y.e Gov.r of Canada, the Indians of Cachnawage Kieghsowanne & Canosodage that you was delegated by y.m to Renew with us y.e former treaties made between our ancestors in behalf of our Gov.r which we do Ractify & Confirm with you & all y.e Indians Living in Canada which treaty we take to be y.t you and all Indians Resideing in Canada Should live with all y.e Subjects of y. Great King of Great Brittain in a perfect frindship and neutrality in case there should happen to be a war between y.e king of Great Brittain & y.e king of France, and in Case you do keep Strickly to that agreement & treaty; we should then forever live in good unity to gether and have free Recourse to & from your habitations at all times as well an acct of trade as otherwise and be treated & Received by us as friends & fellow Subjects to y.e best kings and y.t you on y.r Side & in behalf of s:d Nations whom you Represent Shall not molest nor anoy any of y.e English Subjects give a belt
>
> (…)
>
> We are convince'd y.t it hath pleased god to in due you with knowledge & wisdom the one more y.n the oy.r the fault you find in us when you Rec.d y.e belt we sent that it was in our own name, and not in y.e name of us & y.e Six nations: we had such a good oppertinity by the Pson who we trusted with y.t message that we could have no time to acquaint our Brethren y.e Six nations with it we are So well assurd of the gen.l Inclination & disposition of y.m y.t we dare take on our selves, what we conclude with you that they will in y.e most publick manner confirm & Radify at our desire; we shall take an oppertunity at y.e first meeting of y.e Sachims to acquaint them with the Renewing of y.e Covenant Chain & y.e former treaties with you which have Subsisted between us and as we find your gen.l good disposition and inclination as also those Indians whom you Represent to Conclude a Lasting peace & friendship with us, as well as you find we have to do the Like with you from y.e bottom of our hearts. give a belt

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> Brethren
>
> We have considered what you have said in behalf of those by whom you are delegated in Relation to the war you and y.e Six nations have with the Indians living to the southward we do promise in behalf of our Brethren y.e Six nations in Psence of y.e few Sachims of the maquase & Sachim of Cayouge, that it for the future any of you or they may Peradventure kill one another thro mistake that that shall be no breach of y.e treaty & Covenant now made but that such unhappy accidents shall be amicably Reconcilld & made up by them.
>
> we are as well as you Convincd y.t what is Evil has generall y.e Strongest Impression on y.e minds of men, but we do assure you that no Evil Can harbour in our hearts ag.t you but they are pure and Clean which you may be perswaded will always be so as long as you keep this treaty & convenant on y.r parts inviolable and the Riad shall y.n be always kept clean & open to this place and be joyfully Recd with great friendship without dissimulation as in a fair Sun Shiny day, gave a belt

D.1.3.7 Treaty of 1742

[652] Between September 27 and 29, 1742, twelve Sachims from Kahnawà:ke, Kanesatake and also the Orondax (Algonquin) met with the Commissioners in Albany.

[653] Since they touch on several relevant aspects of the Covenant Chain, the minutes of the treaty council must be reproduced at length. It was also the occasion to renew the Treaty of 1735. The Commissioners spoke first. The minutes of September 28th report the following speech[301]:

> Then the Com.rs Spoak to them As follows
>
> Brethren
>
> We Are glad to see you Here at this place of treating where the fire Always Burns and which has of old been Looked upon As such
>
> Gave A Belt of Wampum
>
> We Are glad to see you Here with Chearfull Countenances to renew the Covenant so Long since made between our forefathers and so frequently renewed between us and you and particularly Seven years ago, we shall

[301] The Selected Documents Treaties and Tobacco Trade, Tab - 17 [transcription of the] *Minutes of the Albany Commissioners of Indian Affairs* (MACIA-LAC) RG10 vol. 1820, 236-236a, Exhibit WM-30C, Appendix 8.

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> now repeat the Substance of that Covenant which is as follows That you and All the Indians liveing in Canada shall Live with the Subjects of the King of Great Brittain not only in this Province but All other his majesties Subjects in A perfect frindship and neutrality, in Case there should Happen to be A War Between the King of Great Brittain and the french King, And That we shall for Ever live in Unity and peace together and have free recourse to and from Each Others habitations, Att All times as well on Account of Trade as on Other business and receive one the other At All times as Brethren and not molest Each Other in the Way to And from Each other But that the same remain Always free and Clear without Any Manner of Interruption from Each Other. The reason That We desired you to Come here is this, That you As Well As we might be Mindfull of this Covenant and That we by Seeing One Another and Smoakeing a Pipe together, might have the Stronger Impression on Our Minds of what has formerly been Transacted Between us and That the said Covenant may be kept Inviolable for Ever not only Between us but our Children after us, As A token That it shall be so on our side We give this belt and Expect the Same Engagements from you At that time

[654] On September 29, 1742, the Sachims answered:

> Brother Corlear and Queder
>
> It has been agreed between our forefathers That if Any mischance should Happen between Any of our people that It Should be Amicably Settled. An Indian of the five Nations has Lost his life Amongst Us, which we have made up with them and wiped their Tears from their Eyes, which was also part of our business here.
>
> You told us yesterday that this is the place of Treatys where the fire does and Always Shall burn as a token that we take it for such we give this Belt.
>
> Brethren
>
> You told us Also that our forefathers had made an Inviolable Covenant together and that you had thought fit to renew that Covenant for which we thank you And Are rejoyced At the wisdom you have expressed in your speech to us, you gave us a Belt whereby we Are Linked together in such a manner That we Can never be Separated, but Always remain joined firm to Each Other And We the Caghnawges, Schawenedes and Orondax in the name of All the Indians belonging To Canada, in the Presence of the five nations Give this Belt as A token That we Will for Ever observe this Treaty and the Covenant inviolable, what we now say proceeds from the bottom of our hears and not from the Lips only

It is now seven years since we mett together, we now wipe the Tears from the Eyes of All of us, which may Be Occasioned by the deaths of All that have died since our Last meeting

Give A Belt

We have yet one thing to Say That you should take Care of the fall at Osweego, There Are Already a great Many People killed there by means of the Rum and by other means, wherefore we desire you Will take Care That no Such things May happen for the future.

The Commissioners Answered

Brethren

We are glad to hear you speak such good words we Expect and doubt not but you will Perform your Engagements on your Parts, as we Shall do on Our parts. We also wipe of the Tears from the Eyes of Any Us That May be Occasioned by any thing that May Have happened since our Last meeting

Give a Belt

As to what you Say of Osweego, we will take Care That Our Traders do no Harm there and Will recommend the same to the Six Nations

Give A Belt

The names of the Sachims belonging to Canada present at this Treaty are

Caghnawages	Schawenedes	The names of our Indians present
D'garihoge	Degarighhonte	
Schonondo	Tarrotsarie	Old Seth
Cajengode	Oghfidadege	Hendrick
Sagoshies	Scoolkakese	Brandt
Tajasigha	Thahothatirliore	Nickus
Onighsighton		

Orondax

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Oghkannicks

D.1.3.8 Renewal of the Covenant Chain: Council of April 24-26, 1748

[655] In his speech of April 25, 1748 to the Five Nations, Sir William Johnson expressed his knowledge and understanding of the Covenant Chain[302]:

> Brethren of the five Nations I will begin upon a thing of a long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, 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, at which you were much surprised but finding what it contained pleased you so much, being Things for your Purpose, as our People convinced you of by shewing you the use of them, that you all Resolved to take the greatest care of that Vessel that nothing should hurt her Whereupon it was agree to tye her fast with a great Rope to one of the largest Nut Trees on the Bank of the River But on further Consideration in a fuller meeting it was thought safest Fearing the Wind should blow down that Tree to make a long Robe and tye her fast at Onondage which was accordingly done and the Rope put under your feet That if anything hurt or touched said Vessel by the shaking of the Rope you might know it, and then agreed to rise all as one and see what the Matter was and whoever hurt the Vessel was to suffer. After this was agreed on and done you made an offer to the Governour he was so pleased at that he told you he would find a strong Silver Chain which should never break or slip or Rust to bind you and him forever in Brothership together and that our Warriours and Ours should be as one Heart, one Head, one Blood &ca. and that what happened to the one happened to the other After this firm agreement was made our Forefathers finding it was good and foreseeing the many Advantages both sides would reap of it, Ordered that if ever that Silver Chain should turn the least brightened up again, and not let it slip or break on any account for then you and we were booth dead. Brethren there are the words of our Wise Forefathers which some among you know very well to be so. Now Brethren understanding or hearing that the French our and your Common Enemy were endeavouring to blindfold you and get you to slip your hands out of that Chain, which as our Forefathers said would certainly be our destruction, I now out of a tender regard for your Safety and Welfare as well as Ours, conjure you not to listen any more to the deceitful French who aim at nothing more than to destroy you all if in their power; but

[302] Selected sources from Dr Beaulieu's Report in Reply to Dr Parmenter, Vol. 2, tab. 58, *The papers of Sir William Johnson, A Conference at Onondage, April 24th, 1748,* PSWJ, 1: 157, 158, 162. Exhibit The Attorney General of Canada-70E. Cited in Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, fn 394, p. 164 but on another subject Exhibit AGC-70. Appendix 9.

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> stick fast to the Old Agreement which you will find the best. A large Belt of Wampum.

[656] The next day, the Five Nations answered:

> Brother We are very thankful to you for reminding us of the old Agreement made by our Forefathers and are overjoyed to hear that you have found it out, and hope you will take care not to let it be lost again, for we are sensible that keeping up to them Rules laid down to us thereby is the only way to enable us & You to withstand our Enemies and preserve our Lives wherefore you may depend upon it That all the arts or Cunning Ways of the French which its true they use a great deal of shall never get us to drop our Friendship to you Brethren. A large Belt.

D.1.3.9 Renewal of the Covenant Chain: Council of October 30 and 31, 1753

[657] The record of the Board of Commissioners dated October 30, 1753 reports what the Mohawk said in the following way[303]:

> and further said they Came to Renew the old Covenant Chain and that they would for Ever Keep it Bright & Clean Bright & free from Roast & thereupon gave 3 Bever Skins

[658] The next day, the Commissioners replied:

> Bretheren We are glad you are Come to Renew the Old Covenant Chain, and we do hereby Assure you, that of our Sides We will keep the same Bright, and the Road Between us and You Clear from all filth and Dirth, and the fire allways Burning for you and all yours to Come & Smoke your pipes when you please, and you may Depend that our friendship will be towards you a Long Duration, Whereon gaves one piece of Strouds.

D.1.3.10 Treaty of 1754

[659] On August 12, 1754, Mohawks of Kahnawà:ke were in Albany for the renewal of the Treaty of 1753. On that date, the Commissioners of Indian affairs said[304]:

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[303] The Selected Documents: Treaties and Tobacco Trade, Tab 18, *Minutes of the Albany Commissioners of Indian Affairs,* At a Meeting of the Commissioners of Indian Affairs at the House of Robert Leterage, October 30-31, 1753. Exhibit WM-30B, Exhibit Key1. Appendix 10.

[304] The Selected Documents: Treaties and Tobacco Trade, Tab. 19, *Minutes of the Albany Commissioners of Indian Affairs,* At a Meeting of the Commissioners of Indian Affairs at the House of Robert Leterage, August 13-14, 1754. Exhibit WM-30C, Tab.15. Appendix 11.

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> Brethren we Desired You Last fall (vide Minutes of October 31.1753) as You then Wass But few In Number that two Seachems our of Each of your Cassels, to wit, of the Cagnawages, Cannssedage, Rondaks and Annogungues, to Come down this spring to Confirm the Old Covenant, And are You here Accordingly
>
> To Which the Seachems and Warriers Replied
>
> It is true You Did So, But We that are now here Speak In the Name of All the Said Nations, and We Command and Are Master of All the Rest.

[660] On August 14, 1754, the Commissioners said:

> Bretheren, We now Again, Renew the Old Covenant Chain with You and all your Allies, Which has Been Made By Our forefathers, and Desire You, and All Your Allies, to keep the Same Bright, Clear and free from Rust; as Long as the Sun and Moon Indures, and that No Dark Clouds May Come In the Way, So that You and We May Walk and Go Without fear of Terror; and Live Always In Frindship, with Each Other, and if In Case an Open War Should Break Out, Between the King of Great Briten and the French King, We Desire You to Stand Neuter and Commit No hostilities On any of his Majesties Subjects. And We Do Now Again (as Wee Also Did Last fall) Assure You; that We of Our Side, Will Keep the Said Covenant Chain Bright, Clear & free from Rust and filt, and the Road Between us and You Clear from All filt and Dirt, and the fire Burning.
>
> […]
>
> Gave a Large Belt of Wampum.

[661] The response of the Kahnawà:ke warriors and chiefs was as follows:

> Brethren We Rejoyce with You to Behold it hath Pleased God that this Day We have a Conferrence together; We Don't Doubt, But You Likewise have had Sorrows together; We herewith Wipe Away the Tears out of Your Eyes; and Open Your hearts, that You May hear and Understand
>
> then Give few Strings of Wampon
>
> Bretheren, We thankfully Receive Your Belt of Covenant and to Confirm the Same, We, for Selves, and In Behalf of the Canussadages, Rondax and Annagungas, Give You this
>
> then Give a Belt of Wampen

(…)

> Notwithstanding all that, We Shall Keep our Selves firmly to the Covenant Chain, and Shall Always Do, as We have Done Now, and We have Done Now: and Moreover Shall Give you Intilligence, if Any Ill Design is Intended Against You.
>
> Brethren You Also Say that No Cloud, Shall Come In the Sky But What You Will Separate and Clear, as Much as Lays In Your Power. And that You Will Keep the Road Open, and Clear from all filt and Dirt. and if a War Should Break Out Between the King of Great Britan and the french King. You Desire us to Keep our Selves Neuter.
>
> We cannot Give a Proper Answer to that, Since We have heard that Your Governor has Given the hatched to the Mohawk Indians, Which We Shall Go and Enquire into: and Answer You that Paragraph, When We Return.

[662] On August 24, 1754, the Cagnewage sachims and warriors, in the presence or the Mohawk sachims and warriors, said:

> Bretheren We Rejoyce to Meet you at this our Return; You Know We Tould You, that We Would Give a Proper Answer to the Last Paragraph When We Should Return from the Mohase. [sic] We Accordingly Now tell You, that We Intirely Stand to and Agree to the said Article; and All and Every article or Clause in Your Proposition Concerning the Renewing of the Covenant Chain. Which We have also Renewed In the Mohacks; With our Brethren the Mohacks; Who are Now Present. And As We Live But a Little Distance from Each Other; Our Communication from time to time With Each Other Will Confirm the Same. and We Promiss and Assure You that if a fals Report Should Come Among us, We Shall Not Stop thereby, But Will Come here and Inquire, Where it Might Proceed from. it is Not Worth While to Repeat All Our transactions of What Past Between us, We Again Say that We Entirely ~~Agree~~ Stand to and Agree to Every Article Past Between Us. and as God is Master of Our Lives, Being Not Certain how Long We Shall Live, Howevir We Promiss to Be firm In the Covenant Chain, and Keep the Same as Long as We Live
>
> thereupon Gave a Large Belt of Wampon

D.1.3.11 Treaty of Kahnawà:ke: September 15 and 16, 1760

[663] The Treaty of Kahnawà:ke followed the unwritten treaty of August 30, 1760 in Oswegatchie and the capitulation of Montreal on September 8, 1760.

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[664] There is no written trace of Sir William Johnson's speech of September 15th, but his notes of the September 16th reply by the Mohawks of Kahnawà:ke shed light on what was said the day before[305]:

> 3. Br. Wy[306]
>
> We heard and took to heart the good Words you spoke to us yesterday; We thank you most heartily for [them] renewing and strengthing the old Covenant Chain [of] which before this War subsisted between us, and we in ye. Name of every Nation here prest. assure you [*to]* that we will hold fast [*of]* the Same, for ever hereafter.
>
> 4. Br. Wy
>
> We are greatly obliged to you for opening the Road from this to [*Albany*] you Country we on our parts assure you to keep it clear of any Obstacle & use it in a friendly Manner –

D.1.4 The Covenant Chain belts

[665] A word about the Covenant Chain belts.

[666] As seen above, wampum belts were important in Haudenosaunee/British diplomacy. They were exchanged as part of a proposition to the other party at councils, including those where the Covenant Chain was renewed. They were used to amplify the seriousness of the proposal and to confirm the solemnity of the promise made.

[667] It is open to debate whether some of these belts might have been a physical representation of the Covenant Chain. What happened to those belts over the years is also the subject of some speculation. Professors Walters and Beaulieu have differing opinions on the meaning of some of the belts exchanged, particularly the one exchanged in Niagara in 1764[307], and both expounded in some detail on this subject before the Court.

[668] In his testimony Chief Nelson identified one of these belts[308].

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[305] The Selected documents treaties, tobacco and trade, Tab. 20, Treaty of Kahnawà;ke as reported in *The Papers of Sir William Johnson*, Vol. XIII, Albany, The University of the State of New York, 1962. Exhibit-WM -3D. Appendix 12.

[306] Wr is the abbreviation for Warrighiyagey, the name given by the Haudenosaunee to Sir William Johnson. The words in brackets are crossed out in the manuscript.

[307] See Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 65, 67, 74 fn 36, 89, 91. Exhibit WM-34; Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 20 and ss. Exhibit AGC-71.

[308] See Chief Curtis Nelson testimony at Section II-E.9.

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[669] This passage of Sir William Johnson's speech in Niagara on July 31, 1764 is an example of how a belt represents an undeniable link to the Covenant Chain:

> Brothers of the Western Nations, Sachims Chiefs, & Warriors—
>
> You have now been here for several days, during which time we have frequently met to Renew, and strengthen our Engagements, & you have made so many Promises of Friendship, and Attachment to the English that there now only remains for us to exchange the great Belt of the *Covenant Chain* that we may not forget our mutual Engagements.—
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire you will take fast Hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipaweighs at St. Mary's whilst the other end remains at my House.—and moreover I desire that you will never listen to any News which comes to any other Quarter. If you do, it may shake the Belt.—but keep your Eyes upon me, & I shall be always ready to hear your Complaints, procure you Justice, or rectify any mistaken Prejudices. If you will strictly Observe this, you will enjoy the favor of the English, a plentiful Trade, and you will become a happy People … I Exhort you then to preserve my Words in your Hearts,—to look upon this Belt as the Chain which binds you to the English, and never to let it slip out of your Hands.— Gave the great Covenant Chain, 23 Rows broad, & the Year 1764 worked upon it, worth above—£30.51[309]

[670] As previously stated, the Court will not venture into historical disputes unless necessary. Exchanges of belts, as well as the belts themselves, might have multiple meanings and it is not necessary for our purposes to delve into that question in any detail. Nevertheless, the Court does not hesitate in concluding that certain belts represented a physical confirmation of the existence of the Covenant Chain and confirmed its importance and its special status in the Haudenosaunee/British relationship.

D.1.5 Evidence of Dr. Adams and Chief Nelson

[671] Dr. Adams, and to a lesser extent Chief Nelson, testified about the Covenant Chain.

[672] To avoid unduly repetition, their testimonies will not be reproduced here, but they can be read at Section II.D.6 and 7 for Dr. Adams and Section II.E.8 to 11 for Chief Nelson.

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[309] Cited in Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* p. 22-23. Exhibit WM-34.

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D.1.6 The expertise of Prof. Jon Parmenter

[673] Prof. Jon Parmenter is an Associate Professor Department of History at Cornell University. He holds a Ph.D. in history from the University of Michigan. He was declared an expert in history, with particular expertise in the history of relations between Iroquoian peoples and colonial powers in the Northeast Region of North America.

[674] The main subject of his expert report, titled *Trade Rights in Mohawk Treaties with the English Crown, 1664-1760*[310], was the treaty relationship between the Mohawk and the British.

[675] His analysis on the treaty relationship between the Haudenosaunee and the British brought him to the following opinion:

> In conclusion, it is evident that the record of treaty relations between the Crown and the Mohawks of Kahnawa:ke from 1664 to 1760 provided consistent recognition of the Mohawks' unhindered right to travel and conduct trade freely across inter-colonial boundaries. By 1760 they had enjoyed six decades of direct negotiations with Crown representatives on this subject that witnesses explicit acknowledgment of their sovereign standing and capacity, as Crown allies, to engage freely in long-distance travel and trade. The relationship survived difficult episodes caused by intercolonial wars but emerged from the decisive Seven Years War fully intact and sanctioned once more by Crown representatives[311].

[676] Although his report focused on the trade rights of the Mohawks of Kahnawà:ke and not on the Covenant Chain, his report and testimony touched on that subject.

[677] The Haudenosaunee/British relationship started in 1664. Before that date, the Dutch were present in the Hudson River Valley, which spreads between current Manhattan, NYC up to Albany. Within weeks of the British fleet's arrival, the British Crown entered into a treaty with the Five Nations, thus initiating the relationship.

[678] The Dutch did not rely on written treaties to the extent that the English did, but traces of their agreements with the Haudenosaunee do exist, and it appears that the first Haudenosaunee-British treaty of 1664 is similar to agreements concluded between the Haudenosaunee and the Dutch.

[679] That first treaty was concluded predominantly for security reasons. The British wanted to maintain peaceful relations with the Haudenosaunee. They felt that this would be accomplished by developing a relationship similar to the one the

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[310] In Summary, CV, Expert Report, Transcribed Sources & Select Documents Cited by Dr. Jon Parmenter in his Expert Report. Exhibit WM-30C, Vol. 1, Tab.3.

[311] Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 104. Exhibit WM-30-C.

Haudenosaunee entertained with the Dutch, which ensured peace and the facilitation of trade, as well as mutual defence and protection.

[680] At that time, the British were very much a minority in their new colony. After the British takeover, many Dutch remained there and, given their expertise in dealing with the Five Nations and other Indigenous people, they were able to maintain their relationship with the Haudenosaunee well into the 18th century. They resided largely in Albany. As astute businessmen and experts in local practice, they were relied on by the British to assist in interfacing with the Iroquois.

[681] According to Prof. Parmenter, few amongst the Dutch and British were fluent in Iroquois languages, although some could understand a little. Those who had knowledge were generally not high-level officials. Those relied on interpreters, some of whom were bi-ethnic and some were of Mohawk/Indigenous ancestry. The British took some time to get to a level of understanding but, by 1700, the two groups were able to understand each other fairly well. At times, the Mohawk and the British would come together with their own interpreters. The British tended to hire the same people that the Dutch had, while the Mohawk seem to have been more conversant in English than their counterparts. Interpreting was mostly done from the native language to written Dutch to English, or sometimes to written English directly.

[682] Albany is located near the confluence of the Mohawk and Hudson Rivers, where a major North/South route (the Hudson River) meets a major East/West route (the Mohawk River). It was an important cross-over for traveling inland from the Atlantic Coast, and its geography facilitated trade between the Dutch and Haudenosaunee and other Indigenous peoples.

[683] According to Prof. Parmenter, at that time the number of Europeans living in Albany was no more than a couple thousand, while the population of Indigenous people living in the Mohawk River Valley was a few less. This said, when adding the population of all of the Haudenosaunee Five Nations together, they would have outnumbered the Europeans[312].

[684] In the late 17th century, there was a movement of the Mohawk communities toward the north. By 1700, roughly two thirds of the Mohawk population lived in the Saint Lawrence River Valley[313], with about 1,200 living there and some 600 in the Mohawk River Valley.

[685] This migration north began in 1667 in reaction to a French assault. Prof. Parmenter and Prof. Beaulieu have differing opinions as to why the Mohawk moved to

[312] Prof. Beaulieu agrees that at least in the 17th century, the Iroquois were for many years more numerous than the French, the Dutch or even the British. Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, p. 47. Exhibit AGC-70.

[313] Transcriptions, 2021-09-17, p. 130.

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the Saint Lawrence River Valley, but this question is not relevant to the present judgment. Suffice it to say that, by 1700, the Mohawk were well established in Kahnawà:ke, a fact that is not contested by the parties.

[686] After the move, relations between the Mohawks of Kahnawà:ke and the British in Albany continued both through trade and the treaty relationship. In the British historical documents, the Mohawks of Kahnawà:ke are referred to as *Canada Praying Indians*[314], *Canada Maquase Praying Indians*[315], *Chiefs Sashems of Cacknawaga Castles in Canada*[316], *Sachims of Cachnawage in Canada*[317]*, Seachems and Several Warriers of Cagnawage Cassel*[318]*.*

[687] For Prof. Parmenter, no single document illustrates the relationship between the Mohawk and the British between 1664 to 1760. His approach is to examine different documents over the period to help explain the evolution of the relationship and how the Mohawks of Kahnawà:ke were integrated into the Covenant Chain beginning in 1700[319].

[688] For Prof. Parmenter, in the 17th and 18th centuries the Covenant Chain alliance acted as a meta-treaty, one that he describes as "mediatory", that contained an overarching pattern of relations and the baseline terms of agreement between the Haudenosaunee and the British. In that regard, he sees the Covenant Chain as helping to understand how trade rights operated in that period.

[689] For his opinion, he relies on several of the treaties already mentioned, and his analysis of them is presented below.

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[314] The Selected Documents: Treaties and Tobacco Trade, Tab 3, Treaty of July 1700, *Documents Relative to the Colonial History of the State of New York,* Vol. IV, O'Callaghan ed. (1854) pp. 692-693. Exhibit WM-30C, Tab 5. Appendix 3.

[315] The Selected Documents: Treaties and Tobacco Trade, Tab. 4, Treaty of July 16, 1702. O'Callagan (1854) *Documents Relative to the Colonial History of the State of ew York,* Vol. 4, pp. 982-985. Exhibit WM-30C, Vol. 1, Tab.6. Appendix 4.

[316] The Selected Documents: Treaties and Tobacco Trade, Tab. 5, Council of June 6, 1705, Wraxall, *An Abridgement of the Indians Affairs*, Cambridge Harvard Press, 1915.

[317] The Selected Documents: Treaties and Tobacco Trade, Tab. 12, Treaty of July 31, 1735, *Minutes of the Albany Commissioners of Indian Affairs,* At a meeting of y.e Commissioners y.e 30 July 173[5]. Exhibit WM-30C,Vol. 1, Tab. 10. Appendix 7.

[318] The Selected Documents: Treaties and Tobacco Trade, Tab. 19, WM-30C, Vol. 1, Tab. 15, Treaty of August 1754, *Minutes of the Albany Commissioners of Indian Affairs,* At a meeting of y.e Commissioners of Indians Affairs at the House of Robert Laterage, August 13-14, 1754. Appendix 11.

[319] The documents selected by Prof. Parmenter for his analysis and used during his testimony were produced under WM-30-C.

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D.1.6.1 Treaty of June 28 to July 3rd, 1700

[690] By 1700, the Mohawks in the St. Lawrence Valley already had a relationship with the French, and many of them had converted to Catholicism.

[691] Although there is no mention of the Covenant Chain *per se* in the written record of the Commissioners of Indians Affairs[320], Prof. Parmenter is of the opinion that the language used there reflects the characteristics of the Covenant Chain alliance, which was specific to the British Crown and the Iroquois Five Nations. It talks of a trade relationship, peace, discussion of mutual security arrangements, and it opens the door to a long-term relationship that can be renewed or modified. The words used became more complex over time, but the key features remained: trade, peace and mutual security.

[692] The written record demonstrates that the Mohawks of Kahnawà:ke and Kanasetage are addressed as the "Praying Indians". This is evidence of the Mohawks of Kahnawà:ke returning to Albany and engaging with the British colonial officials in a diplomatic relationship[321].

[693] Prof. Parmenter is of the opinion that a treaty was concluded at that council in the summer of 1700. The written record contains themes that indicate that it is a treaty. The key features of a treaty at these councils are for one side to make a proposal and for the other side to answer it. He said that treaties can be distinguished from an invitation or a conversation about airing of grievances and day-to-day interactions. When mundane or routine aspects of the relationship are discussed during a conversation or a meeting, then it is not a treaty[322].

[694] This council demonstrates that the Mohawks of Kahnawà:ke reached out to re-establish ties with the British Crown to formally establish a basis for legal trade. It manifests, as Prof. Parmenter puts it, a "rekindling / reviving / rebooting" of the old idea of an alliance based on peace, sustained by trade and incorporating aspects of mutual defence and protection[323].

[695] According to Prof. Parmenter, the treaty of July 1700[324] concluded in Albany is the first movement towards a documented treaty relationship between the Mohawks

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[320] The Selected Documents: Treaties and Tobacco Trade, Tab 3, Treaty of July 1700, *Documents Relative to the Colonial History of the State of New York,* Vol. IV, O'Callaghan ed. (1854) pp. 692-693. Exhibit WM-30C, Tab 5. Appendix 3.

[321] Transcriptions, 2021-09-20, pp. 17-21.

[322] *Idem*., pp. 22-24.

[323] Transcriptions, 2021-09-17, pp. 127-133.

[324] The Selected Documents: Treaties and Tobacco Trade, Tab. 3, Treaty of 1700. Exhibit WM 30-C, Tab.5. Appendix 3.

of Kahnawà:ke and the British Crown. It was a diplomatic, trade-oriented embassy that came from Kahnawà:ke to Albany seeking to formalize the trade relationship[325].

[696] He hesitated to say that a treaty was concluded at this occasion. He pointed out that this council followed a period of conflict (1689 to 1696) that blocked commercial exchanges between Montreal and Albany, and its purpose was only to reopen commerce with Albany, i.e., to reopen the road. For that reason, he opined that it is not a treaty[326].

D.1.6.2 Treaty of July 15 and 16, 1702

[697] On July 16, 1702, the Treaty of 1700 was renewed in Albany by Lord Cornbury, the Governor of New York, a process that Prof. Parmenter characterizes as a treaty.

[698] First, there was a treaty agreement made with the Five Nations. There followed a subsequent treaty with the "Canada Maquase Praying Indians", where the same terms and privileges of trade were extended to them.

[699] In the response of Lord Cornbury, there is mention of the obligation of mutual peace and security of nations included in the Covenant Chain alliance.

[700] For Prof. Parmenter, by this, the Mohawks of Kahnawà:ke were being included by the British in the alliance structure.

[701] In characterizing this as a treaty, Prof. Parmenter highlights the structure of the negotiations, which involves answers to proposals, and the fact that it is a reiteration of past agreements. Governor Cornbury granted to the Mohawks of Kahnawà:ke the same trading rights as before, but Prof. Parmenter notes that, from the British perspective, they were obtaining a security agreement by which the Mohawks undertook not to help the French in any military expeditions against any partners in the Covenant Chain alliance. In exchange for an assurance of peaceable hunting, the Mohawks of Kahnawà:ke promised political and military neutrality in the event a war were to break out between the British and French. A proposal was made, and an answer was given. There was an exchange of goods at the end. Thus, the terms are clearly of a treaty nature. The Mohawks of Kahnawà:ke are thereby incorporated into the Covenant Chain[327].

[702] In his testimony, Prof. Parmenter explained that the term "chain" is a metaphor for "joining hands" to make a "chain" connecting people. It is used to depict an alliance of mutually beneficial trade and mutual protection in war. It is an overarching term

[325] Transcriptions, 2021-09-17, pp. 135-137.
[326] Transcriptions, 2021-11-18, pp. 18-20; Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, p. 175. Exhibit AGC-70.
[327] Transcriptions, 2023-09-20, pp. 90-105.

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invoked to describe the relationship. “Keeping the chain bright”[328], renewing the chain and keeping the relationship on good terms are important components of this relationship.

[703] In looking at what the British are quoted to have said, as reported in the historical records, Prof. Parmenter notes that, at times, the British were asking for obedience to their command or to the King. He also notes, however, that “obedience” is not something to which the Haudenosaunee ever submitted[329].

D.1.6.3 Treaty of July 31st and August 1 and 2, 1735

[704] In August 1735, the Commissioners of Indians Affairs explicitly stated that their relationship with the community of Kahnawà:ke is understood in terms of the Covenant Chain.

[705] At that treaty council, held on July 31 and August 1st, 1735, the Mohawks of Kahnawà:ke asked that the alliance provide a “cover” for incidents that might happen, so they can continue as allies and resume their diplomatic relationship. The context was that the Six Nations were allies of the British, but the Mohawks of Kahnawà:ke were at war with the Six Nations. Given that alliance, the Mohawks of Kahnawà:ke were asking the Commissioners not to hold it against them if a British ally were to be killed in their separate war.

[706] Prof. Parmenter highlighted the answer of the commissioners[330]. The public recitation of the terms of an agreement is part of the treaty practice and is important where a literate culture is engaging with an oral culture. The commissioners reminded the Mohawks of Kahnawà:ke that neutrality is a condition of their agreement, i.e., that the Mohawks remain neutral in any issues between Britain and France. Then they renewed the relationship, provided that neutrality was respected. There is also mention of keeping the metaphorical road between Albany and Kahnawà:ke clean and clear, referring to trade, travel, and communication.

[707] Prof. Parmenter also highlights that the commissioners explicitly stated that their relationship with the community of Kahnawà:ke is understood in terms of the Covenant Chain. They state that they will notify the Six Nations, but finally accept to excuse accidental killings. This is significant because it indicates a large concession

[328] Prof. Parmenter is then referring to the document reproduced just before the one of July 16, 1702, in exhibit WM-30C, tab. 6, where the British representant is asking its counterpart to show their loyalty by “keeping a Covenant Chain firm and bright and inviolable”.

[329] Transcriptions, 2021-09-20, pp. 105-113.

[330] The Selected Documents: Treaties and Tobacco Trade, Tab. 12, *Minutes of the Albany Commissioners of Indian Affairs,* At a meeting of y.e 30 July 173[5] & Peter Wraxall, *An Abridgment of the Indian Affairs* (Cambridge: Harvard University Press, 1915), August 1st, 1735 pp.192-195. WM30-C, tab. 8, pp. 242-243-244. Appendix 7.

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on the part of the Albany commissioners. The mention that a string of wampum was given is, according to Prof. Parmenter, important and indicates a treaty relationship.

[708] Prof. Parmenter also referred to a list of names of people from the community of Kahnawà:ke who were present at that treaty council. The first name is "D'Cariehoga", which suggests that he was a turtle-clan title holder, a significant clan within the Mohawk nation. This indicates that, at that point in time, this turtle-clan title holder resided in Kahnawà:ke, and his presence was a confirmation of the legitimacy of the Kahnawà:ke community within Mohawk policy. According to Prof. Parmenter, this is a rare presence that indicates that the bonds were deep with the Mohawk Valley community. The presence of the turtle-clan title holder in Kahnawà:ke was a statement that Kahnawà:ke was a legitimate community within the Mohawk Nation as a whole.

[709] For Prof. Parmenter, this is an elaborate and detailed renewal of the relationship.[331]

D.1.6.4 Treaty of September 27 and 28, 1742

[710] On September 27th and 28th of 1742, the 1735 Treaty and the Covenant Chain were renewed between the Commissioners of Indians Affairs and the Mohawks of Kahnawà:ke[332].

[711] Prof. Parmenter testified that the record shows that the Mohawks of Kahnawà:ke were invited by the commissioners to come to Albany, where they renewed the 1735 Treaty and the Covenant Chain. He highlighted that the Mohawks of Kahnawà:ke not only renewed the treaty at that time, but that they also came to condole with someone from the Six Nations. Combining that with their trip to Albany shows that one purpose enforced the other. It also demonstrates that the Mohawks of Kahnawà:ke could extend the relationship they had in Albany to other members of the Five Nations. Prof. Parmenter indicates that this is another sign that the relationship with the British Crown also enabled the Mohawks of Kahnawà:ke to maintain closer ties to the people in the Mohawk Valley[333].

D.1.6.5 Treaty of October 30, 1753

[712] The participation of the Mohawks of Kahnawà:ke in the November 17, 1745 raid on Saratoga temporarily disrupted their longstanding diplomatic neutrality with the

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[331] Transcriptions, 2021-09-20, pp. 17-38

[332] The Selected Documents: Treaties and Tobacco Trade, Tab. 17, *Minutes of the Albany Commissioners of Indian Affairs,* At a meeting of y.e 30 July 173[5] & Peter Wraxall, *An Abridgment of the Indian Affairs* (Cambridge: Harvard University Press, 1915), August 1st, 1735 pp.192-195. WM30-C, tab. 8, pp. 242-243-244. Appendix 8.

[333] Transcriptions, 2021-09-21, pp. 56-60

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Iroquois Confederacy, the British and the French. This took place during the War of Austrian Succession, where the Mohawk sided with the French.

[713] Eight years later, on October 30, 1753[334], two sachems from Kahnawà:ke went to Albany and met with the Commissioners of Indian Affairs, stating, with a belt of wampum, that they had come "to renew the Old Covenant Chain and that they would for Ever keep it bright & Clear and free from Roast [i.e., rust]." They then gave "3 Bever Skins".

[714] The importance of that renewal for Prof. Parmenter is that it took place after a fairly extended period of war.

D.1.6.6 Treaty renewal of August 12 to 14, 1754

[715] On August 12, 1754, another delegation from Kahnawà:ke went to renew the treaty relationship. At the demand of the commissioners, they confirmed their desire to renew the Covenant Chain, declaring that they were also representing other Mohawk nations to the treaty council. At least one of those sachems had been present in 1753[335].

[716] On August 14, 1754, the commissioners answered by renewing the Covenant Chain.

[717] In the record of this council, Prof. Parmenter identified explicit language relating to the renewal of the Covenant Chain. There are also references to the longevity and the consistency of the relationship. The idea of safe, secure, and open travel between Kahnawà:ke and Albany and acknowledgment of the condition of neutrality, meaning that all is predicated on the Mohawk remaining neutral. Keeping the chain bright, clear, and free from rust and filth and the road clear from all filth and dirt are some of the elaborate rhetoric found therein and that is often associated with Haudenosaunee-British treaty diplomacy. The burning fire is also particular to treaty rhetoric, the commissioners meaning that they will always welcome the delegation from Kahnawà:ke and be ready to talk to them[336].

[718] In their response, the Mohawk used condolence rhetoric symbolically clearing and mending the primary channels of human communication, which is important in the Covenant Chain treaty protocol. Wampum was exchanged to mark the renewal. Prof. Parmenter affirmed that the use of metaphors and analogy in the terms is significantly

[334] The Selected Documents: Treaties and Tobacco Trade, Tab 18, *Minutes of the Albany Commissioners of Indian Affairs,* At a Meeting of the Commissioners of Indian Affairs at the House of Robert Leterage, October 30-31, 1753. Exhibit WM-30-B, Exhibit Key1. Appendix 10.

[335] The Selected Documents: Treaties and Tobacco Trade, Tab 19, *Minutes of the Albany Commissioners of Indian Affairs*, At a Meeting of the Commissioners of Indian Affairs at the House of Robert Laterage, August 13-14, 1754. Exhibit WM-30-C, Tab 13 to 15. Appendix 11.

[336] Transcriptions, 2021-09-21, pp. 66-68.

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more aligned with the way Indigenous people understood the relationship than with the British perception.

[719] For Prof. Parmenter, this invitation from the Commissioners of Indians Affairs to renew the Covenant Chain and the 1753 Treaty were important for the British because they were expecting a war to break out with the French (the Seven Years' War - 1756 to 1763). In such a context, the desire to renew publicly the Covenant Chain, the language used that specifically referred to the Covenant Chain and the linking of the benefit of the relationship for the Indigenous party to their neutrality, are all very important elements for the relationship.

[720] This was the last treaty recorded between the Mohawks of Kahnawà:ke and the British authorities prior to the fall of Montreal in 1760.

D.1.6.7 Oswegatchie Treaty – August 30, 1760

[721] Oswegatchie was a community of Haudenosaunee comprised mostly of Onondagas, with a few Mohawks. The village was in the St. Lawrence Valley at Ogdensburg, in what is now New York state.

[722] As for historical context, this council took place in the final days before the capitulation of Montreal on September 8, 1760. The British forces were moving toward final victory over the French.

[723] Sir William Johnson was en route toward Montreal through upper New York state. He stopped at two Haudenosaunee communities, first Oswegatchie and then Akwesasne where he negotiated agreements. For Prof. Parmenter, these became the preliminary treaties to the one concluded eventually in Kahnawà:ke after the conquest of Canada one week later. These treaties were based on the relationship originating in the 1700s and led to an advantageous transition for the Indigenous people from the French to the British regime.[337]

[724] Seeking a promise of non-intervention from the Mohawks of Kahnawà:ke and the other Indigenous nations of the St. Lawrence Valley [338], Sir William Johnson, the British Superintendent of Indians Affairs, sent them an invitation to meet in Oswegatchie.

[725] As previously stated, there are no contemporary records of the treaty in question, but there are numerous subsequent references to it.

[726] To obtain the neutrality of the Indigenous nations, the British offered them the same privileges they enjoyed under the French regime, and they guaranteed them

[337] Transcriptions, 2021-09-21, pp. 71-78.
[338] Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 94. Exhibit WM-30-C. Tab.3.

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advantageous protection of their territory. Those were very advantageous propositions.

[727] The subsequent documents recording the recollection of the terms of the Oswegatchie Treaty during the ensuing seven decades[339] have established that, in return for a promise of non-intervention, the treaty provided for an undertaking that there would be no reprisals for past actions on behalf of the French, for freedom to practise the Catholic religion, for the protection of all rights and privileges enjoyed during the French regime and for the guaranty of the integrity of Indigenous lands and property by the Crown[340].

[728] Shortly afterwards, while advancing towards Montreal, Sir William Johnson stopped at the Mohawk community of Akwesasne to confirm the terms of the Oswegatchie Treaty.

[729] That treaty secured the approach of the British military forces to Montreal and facilitated the formal surrender of the city on September 8, 1760. Article 40 of the formal French surrender guaranteed that the Indigenous allies of France (including the Mohawks of Kahnawà:ke) would be "maintained in the lands they inhabit", and that "they shall not be molested … for having carried arms and served in Most Christian Majesty" [Louis XV][341].

D.1.6.8 Kahnawà:ke Treaty – September 16, 1760

[730] One week after the surrender of Montreal, a two-day treaty conference was held at Kahnawà:ke. It was attended by the Mohawks of Kahnawà:ke, other Indigenous nations and Sir William Johnson.

[731] There is no record of Sir William Johnson's speech on the first day, but the record of the second day survived[342] and it contains the reply by the Indigenous people to that speech. According to the usual practice, it repeats some of the points made by Sir William Johnson the day before.

[732] At this treaty council, the usual diplomatic protocol of treaty conferences was respected, with proposals being made by Sir William Johnson, backed with belts of

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[339] To see the list and explanation of those seven historical documents, see Prof. Parmenter testimony, transcriptions, 2021-09-21, pp. 91-100, and Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, pp. 95-98. Exhibit WM-30-C, Tab.3.

[340] Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 95. Exhibit WM-30-C, Tab.3.

[341] *Idem,* pp. 98-99.

[342] The Selected Documents: Treaties and Tobacco Trade, Tab. 20. Select Documents Cited by Dr. Jon Parmenter in his Expert Report, Vol. 2, Tab.33. *The Papers of Sir William Johnson*, Vol. XIII, Albany, The University of the State of New York, 1962. Exhibit WM-30-D. Appendix 12.

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wampum, and the replies of the Indigenous parties the next day, also backed with belts and strings of wampum.

[733] The document by Sir William Johnston contains 16 paragraphs, the first fifteen being numbered.

[734] The first and second paragraphs indicate that Sir William Johnson had sent a previous message to Kahnawà:ke advising them to keep out of the way of the British forces marching toward Montreal. In the first paragraph, the Mohawk thank him for the message and confirm that they complied and that they are thankful that this permits them to meet in a friendly manner.

[735] The second paragraph reports that the Mohawks of Kahnawà:ke talked to people from the Five Nations who accompanied Johnson and helped the conclusion of the agreement at Oswegatchie and then Akwesasne, although this is not referred to directly:

> 2. Brn of ye. Nats
>
> I[t] [gives] gave us great Pleasure of your having resolved at Swegachy to accompany our Brother Warry. [343] as far as here. Our coming along was very necessary and of mutual Service We therefore most sincerely [*thank*] return you our hearty Thanks for it.
>
> a Belt.

[736] The third paragraph[344] is a renewal of the Covenant Chain. The Mohawks of Kahnawà:ke thanked Johnson for renewing the old Covenant Chain. They also thanked the other Indigenous Nations for accompanying Sir William Johnson and for their good service in helping to conclude the agreement. By using the words "… which before this War subsisted between us …" they referred to the earlier agreements that led to this one. It indicates that the Covenant Chain relationship between the British, the Five Nations and the Mohawks of Kahnawà:ke was important to enabling this final treaty.

[737] Prof. Parmenter's evidence demonstrates that, by the time the British arrived in Canada in 1760, much of the diplomatic groundwork between them and the Mohawks of Kahnawà:ke had already been done over the previous six decades.

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[343] Warry or Wy stand for Warraghiyahey, Sir William Johnson ceremonial name that the Mohawk gave him that can be translated to "he who does much business", Transcriptions, 2021-09-21, p. 104.
[344] Reproduced in Section III.D.1.3.11.

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D.1.7 The expertise of Prof. Mark D. Walters

[738] Prof. Walters is the main expert witness called by the Applicants on the issue of the nature and the role of the Covenant Chain. He is the Dean of Law and a Professor of Law at Queen's University in Kingston Ontario. He obtained a doctorate in law (D.Phil.) from Oxford University. His doctoral research was on the legal status of Aboriginal peoples, customary law, and governments in colonial Canada, 1760-1860.

[739] He was engaged by the Applicants to provide an opinion on historical issues relating to the Covenant Chain treaty relationship between the Crown and the Indigenous nations whose traditional territories encompass the Great Lakes region and the St. Lawrence River valley. The Applicants filed his report, entitled *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada* and he testified for three days[345].

D.1.7.1 The Attorneys General's objection to part of Prof. Walters' evidence

[740] The Attorneys General object to parts of his report (and the related parts of his testimony), arguing that some of his affirmations about the Covenant Chain are, in fact, legal opinions, thereby falling outside the scope of an expertise.

[741] The objection is raised against the following underlined affirmations found in his report:

- That the Covenant Chain treaty relationship was a distinctive legal and political relationship that was adopted by English/British colonial and imperial authorities on behalf of the Crown and Indigenous nations (…) (para. 10);
- That the Covenant Chain was a normative framework for Crown-Indigenous relations (para. 21);
- That the Two-Row Wampum provides the central metaphor in the Haudenosaunee oral tradition for describing the constitutional status of Indigenous peoples today (para. 65);
- That the Covenant Chain was a constitutional arrangement (para. 91);

[345] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* Exhibit WM-34. Transcriptions, 2021-09-27, 28, 29.

- That William Johnson's various assertions are roughly consistent with the interpretation of the legal status of Indigenous peoples under the Crown offered by the United States Chief Justice, John Marshall (para. 110);

- That it was generally assumed that the Covenant Chain relationship implied legal separateness (para.126).

[742] At the hearing, the objection was taken under reserve. For the following reasons, the objection is overruled.

[743] This case involves historical events spread over a long period of time, intertwined with the laws of two legal systems. Thereby, the fine line between opinion on the facts and opinion on the law is more blurred than usual.

[744] It is recognized that Indigenous law is part of the law of Canada[346]. Consequently, it should not be the subject of an expert's report, since analysis of the law is the domain of the judge.

[745] That being said, Indigenous rights cases present specific challenges.

[746] The Supreme Court of Canada in *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*[347] recognized those challenges in the following terms:

> [226] Section 35 of the Constitution Act, 1982 constitutionalizes the right of Indigenous peoples to claim Aboriginal rights and title in Canada. Aboriginal rights claims are complex, lengthy, and involve prodigious amounts of evidence: see, for example, Delgamuukw, at para. 89. Such evidence may include oral histories and other testimony based on the personal knowledge of witnesses. As aptly summarized by Satanove J. in Hereditary Chiefs Tony Hunt v. Attorney General of Canada, 2006 BCSC 1368, at para. 26 (CanLII):
>
> > [26] I think it must be *recognized that just as aboriginal rights are sui generis, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the*

[346] See *Mitchell* v. *Canada (M.R.N.)*, 2001 SCC 33, para. 10; *Alderville First Nation* v. *Canada*, 2014 FC 747.

[347] *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4.

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> *issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.*
>
> (The Court underlines)

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[747] It is in a similar context that the Supreme Court of the Yukon Territory allowed a legal historian to make several findings of fact and law in *Ross River Dena Council* v. *Canada (Attorney General)*[348]. In that decision, the court decided that the conclusions of the expert were intended to establish the historical, legal, and political context of the relations between the Indigenous peoples and the Imperial Crown at the time of the events[349]. Thus, it held that the conclusions of the expert served the purpose of helping the court to determine the intention of the Imperial Parliament when the provisions relevant to the dispute had been adopted:

> [63] *Dr. McHugh has expressed his opinion as a legal historian providing the context of the times. The purpose and intent of his opinions are not in the nature of a legal analysis of case law, nor are they in the form of traditional legal argument. He does not make any assertions or statements at all about what the state of the law is today in relation to the relevant provisions of the 1870 Order. His usage of the case law is not to engage in legal argument, but rather to describe the nature of Crown-Aboriginal relations around the time of that Order. His Report makes no attempt at all to delve into the precise words in the relevant provision, but confines his analysis to the general historic relationship between the Crown and Aboriginal people and how that is probative of the probable intention of the Imperial Parliament in drafting the 1870 Order.*
>
> (The Court underlines)

[748] This same reasoning was used in *Cowichan Tribes* v. *Canada (Attorney General)*[350]*,* where the Supreme Court of British Columbia admitted into evidence parts of an expert report that provided a summary of historical and geographical events, even though several passages were of legal significance[351]. Ultimately, the expert opinion was admitted because the court was of the opinion that it was necessary to be informed of the historical events that affected the process of creating reserves in British Columbia[352] .

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[348] *Ross River Dena Council* v. *Canada (Attorney General),* 2011 YKSC 87.
[349] *Idem*, para. 61.
[350] *Cowichan Tribes* v. *Canada (Attorney General),* 2020 BCSC 917.
[351] *Idem*, para. 82.
[352] *Idem*, para. 86.

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[749] Prof. Walters doctorate thesis at the University of Oxford in 1995 was about the legal status of Aboriginal peoples, customary laws, and government in colonial Canada between 1760 and 1860.

[750] In the present case he was declared an expert as a legal historian with an expertise in British imperial law and the legal history of Crown-Indigenous relations in pre-Confederation Canada[353].

[751] The role of an expert is to help the judge in an area outside of her expertise. Legal history is outside of the expertise of this Court. Legal implications at the time of events that occurred four centuries ago are part of legal history.

[752] Haudenosaunee law, which is not black letter law but is rooted in oral tradition, is another area where the Court may benefit from the help of an expert.

[753] In his report, at para. 4, Prof. Walters wrote:

> 4. In this report I will set forth my views about the Covenant Chain treaty relationship between the Crown and Indigenous nations in the Great Lakes region and St. Lawrence River valley in the late-eighteenth and early-nineteenth centuries. I will state my views about legal and political history only. I will not offer any opinions as to the legal implications of these conclusions in the modern-day context. I will refer to the eighteenth and nineteenth century sources of law, including treaties, statutes, proclamations, and judicial decisions – but only as a legal historian and not as a lawyer.

[754] At the voir-dire on its qualification, Prof. Walters testified to the following:

> I'm — and by the way, I know I'm not to testify on law as such in it's modern sense, and I've said that in my report, that I do not intend to say anything about Canadian law in its present context. So, when I say law in a broader sense, I mean how do communities that are really different culturally interact with each other in such a way as to create some kind of common, normative framework for their behaviour and actions? And they can do that through what I've called treaty relationships, and they did that through treaty relationships[354].

[755] This demonstrates that Prof. Walters, as a jurist, was aware of the limits of his expertise and intended to respect them. The Court found nothing in his report or testimony to conclude otherwise.

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[353] Transcriptions, 2021-09-27, p. 42.
[354] Transcriptions, 2021-09-27, pp. 26-27.

[756] It is for the Court to decide the probative value of this evidence, and it is the Court that will decide what is the legal status of the Covenant Chain at the time of council meetings and today.

[757] For these reasons, the objection is overruled.

D.1.7.2 Introduction

[758] Prof. Walters is of the opinion that the Covenant Chain treaty relationship cannot be fully understood unless Indigenous legal perspective is taken into consideration.

[759] For Prof. Walters, the Covenant Chain is an unwritten treaty, a distinctive legal and political relationship shaped by Indigenous legal traditions that provides a framework for governance for and between peoples with fundamentally different understandings of social, religious, political, economic, and legal ideas.

[760] Prof. Walters maintained that, in the historical record, the Covenant Chain was consistently described as a “treaty”, although it is not a treaty in the European sense. There is no written or signed document that sets out explicitly all of its terms but, although it is never fully described, it is referred to as a treaty by the British representatives in their written records that purport to summarize oral statements made by the parties at treaty council meeting[355].

[761] In addition, the Covenant Chain was expressed through metaphors and the ceremonies, distinctive modes of discourse whose meaning was more difficult for the British scribes to capture in written records.

[762] For the Haudenosaunee, the wampum belts exchanged at treaty council meetings are also a form of records of those meetings.

[763] For Prof. Walters, the Covenant Chain secured a trade and military alliance between the Crown and Indigenous nations that confirmed that the latter were to be self-governing in their own lands. In that sense, he said, the Covenant Chain was a normative framework for Crown-Indigenous relations that recognized jurisdictional autonomy or space for Indigenous nations[356].

[355] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 16-17. Exhibit WM-34.
[356] *Idem*, para. 20-21.

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D.1.7.3 Systems of Governance within and between Haudenosaunee nations

[764] In his report, before examining the Covenant Chain *per se*, Prof. Walters set the table by first explaining the systems of governance of the Haudenosaunee nations.

[765] This part of his report mirrors and completes the evidence of Dr. Adams and Chief Nelson by putting the accent on the governance aspect.

[766] Because the Haudenosaunee-British treaty relationship was conducted through councils, a Haudenosaunee diplomatic structure, it is important to take the time to understand the origin and mechanisms of this method, since it was through that perspective that the Haudenosaunee speakers were acting.

[767] Contrary to European states, where the political and legal powers are consolidated in centralized institutions capable of enforcing the sovereign's commands by force over relatively large populations and territories, in Indigenous societies, the power is diffused and held by local communities and exercised in non-hierarchical and non-coercive ways[357].

[768] For the Haudenosaunee, their ideas about normative ordering were inseparable from ideas about nature itself: earth, water, sky and the land. Their ideas about law and order are, therefore, grounded in their understanding of the place of people in relationship with land, water and nature in general.

[769] The foundation of Haudenosaunee legal traditions, rooted in the meta narratives, is found in The Creation Story. It is worth mentioning that, in the meta narratives, the animals are active participants in the creation of the world. They are people themselves, as animal-folk, holding councils to make decisions about how to respond to dangers coming their way. They co-exist with the spirit-being residing in the sky, also holding councils. When the humans entered the world, it was already populated by animals, spirit-beings that had already developed a form of normative environment.

[770] For Prof. Walters, the Haudenosaunee "legal order was a matter of seeking harmony between a complex series of shifting normative spheres or domains. Families, clans, villages, nations and confederacies of nations represented overlapping and interconnecting jurisdictional spheres within and between which normative meaning evolved through constant discourse and the performance of duties of care through gift exchanges that ensured spiritual kinship"[358].

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[357] *Idem,* para. 38.
[358] *Idem,* para. 36.

[771] Harmony also had to be maintained with the other entities they were sharing the world with, such as the animals, the spirit-being, nature, water and the land, each having its normative system.

[772] It is not surprising, then, that the Haudenosaunee did not see jurisdiction over the land in the same way the Europeans did, i.e., involving the assertion of a single dominant authority over the land. Rather, land claims were the object of constant negotiations of good relations with the world, that is, nature and the people around them[359].

[773] From that perspective emerged the idea that one normative system exists in a world of related normative systems and that all must respect each other. This is one of the metaphors of the Two Row Wampum, where the canoe and the vessel are jurisdictions within a world or related jurisdictions, respecting each other.

[774] That was the cultural and political context animating the Haudenosaunee at the councils with the British representatives.

D.1.7.4 The clan system

[775] Indigenous nations grew up among people who shared a common ancestry, identity, and linguistic dialect. Each nation is usually composed of two or three (sometimes more) fairly autonomous villages or bands.

[776] Members of a village are divided into clans. Since members of a clan can be found in other villages of the nation, the communities are thereby linked by a web of common clan identities.

[777] Clans are at the base of the political system upon which larger political units are built and, in the Haudenosaunee nations, they have three basic features[360].

[778] First, clan members can trace their ancestry through a maternal line to one of the original families of the nation.

[779] Second, members of a clan are, in a spiritual and legal way, siblings. That is why inter-clan marriages are prohibited, no matter how distant the blood relationship between two persons, and why spouses remain members of their own clan after marriage. Upon marriage, women will remain in the longhouse of their family, while men will move to their wife's longhouse, although they will spend much time either away hunting or with their own maternal longhouse families. This explains why children look up to their maternal uncles rather than their fathers for male role models.

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[359] *Idem,* pars. 38.
[360] *Idem,* para. 43.

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[780] Third, the clan system origin is found in the Creation Story. There, the Sky Women, who created the lands of North America on the back of a turtle, assign ceremonial roles to the people, dividing them into the Bear, the Turtle, and the Wolf clans[361].

[781] In the Haudenosaunee nations, people lived in longhouses. Their location depended on the cultivation of crops, generally by women, while men led more transient lives[362].

[782] Although clans originated in The Creation Story, their role in the political structure of the Haudenosaunee is set by The Great Law of Peace. There, female clan elders select the male chiefs of each clan longhouse and maintain influence over them once they are selected, since they are the only ones who can remove a chief from his position[363].

[783] As seen, The Great Law of Peace established the Iroquois Confederacy, with its fifty chiefs sitting as equals in council on each side of the fire. In council, decisions are made by consensus, described by Chief Nelson as "coming to one mind"[364].

[784] The consensus decision-making and problem-solving process is the same at all levels. It begins at the clan level in the village's longhouses and moves up to the Iroquois Confederacy level only after an entity has reached a consensus.

[785] Because all the chiefs are equal in status, this universal obligation to come to a consensus is foundational to the essence of Indigenous law and government. Council meetings were the only way to resolve issues between clans or nations[365].

[786] To reach consensus, it was first necessary to ensure that the "good mind" was achieved, but there is no quick and easy way to attain that. The negotiations at council were conducted through forms of oratory using metaphor and humour[366], and Chief Nelson reported that this is still the case in today's Iroquois Confederacy council meetings[367].

[787] The obligation to reach consensus means that relationships must also be maintained and nurtured outside council meetings. That was done through on-going debate, discussion, and discourse. Prof. Walters reports that Pierre-François-Xavier

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[361] *Idem,* para. 44.
[362] *Idem,* para. 45.
[363] *Idem, para*. 46.
[364] See Section II.E.5.
[365] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 49. Exhibit WM-34.
[366] *Idem,* para. 50.
[367] Transcriptions, 2021-10-21, pp. 35-36.

de Charlevoix, considered by some as the first historian of Nouvelle-France, observed in the 1720's that the Indigenous appeared to be "eternally negotiating"[368].

[788] One way to maintain relationships was through the Condolence Ceremonies. Prof. Walters discussed these at length, thereby confirming the testimony of Dr. Adams and Chief Nelson as to their importance and significance.

[789] Prof. Walters cited numerous historical documents reporting observations of this political structure by Europeans[369].

D.1.7.5 The Covenant Chain

D.1.7.5.1 The origin of the Covenant Chain

[790] For Prof. Walters, the Covenant Chain began with the Dutch and was continued by the British[370]. The metaphor of the Covenant Chain evolved at the rhythm of the strength of the relationship, from rope to silver chain, from being tied to a bush to being connected to a mountain in the heart of Onondaga. The parties needed to polish the silver chain regularly to keep it bright and free of rust, thereby confirming and renewing the relationship. This "polishing" was one of the functions of the councils.

[791] Prof. Walters cited many examples of renewal of the Covenant Chain at treaty councils held in 1689, 1694, 1701, 1722, 1737, 1744 and 1768[371].

[792] The council fire was initially maintained in Albany by the governor of the colony of New York. Representative of the Five Nations would travel there regularly to polish the Chain[372].

[793] In doing this, the governor was representing the interests of the local settlers, who were not always sensitive to the necessity of maintaining sound relationships with the Indigenous nations. That attitude put the Covenant Chain under strain, to the point that it was declared to be broken by Mohawk leaders in the mid-1750s. That is why, in 1755, the British Crown appointed William Johnson (later Sir William Johnson) as British Superintendent general of Indian Affairs[373]. In this role, he received his

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[368] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 50. Exhibit WM-34, citing Pierre-François-Xavier DE CHARLEVOIX, *Journal of a Voyage to North-America, Containing the Geographical Description and Natural History of that Country, particularly Canada, together with an Account of the Customs, Characters, Religion, Manners and Traditions of the Original Inhabitants* (London: Printed for R. and J. Dodsley, 1761) II, 27.

[369] *Idem,* para. 24-62.

[370] *Idem, para*. 63.

[371] *Idem, fn* 32.

[372] *Idem,* para. 68.

[373] *Idem,* para. 69.

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instructions directly from the Imperial government in London, sometimes through the Commander in Chief of British forces in America, and not by local colonial governments.

[794] As for the British Indian Department, it would survive the American war of independence and last in British North America/Canada throughout the first half of the nineteenth century. In Canada, Indian Department superintendents were directed by the Crown through colonial governors, and eventually through the Governor General. Control over Indian affairs finally devolved to the government of Canada in 1860[374].

[795] Sir William Johnson held its function until his death in 1774. The office was then passed to his son-in-law, Guy Johnson, and then to his son, John Johnson, who also held the position until his death in 1828[375].

[796] The situation is similar for Johnson's deputy superintendent, Daniel Claus. He was succeeded by his son, William Claus, who also served into the nineteenth century.

[797] In Prof. Walter's opinion, even though the British Indian Department was directed by the Imperial Crown, in reality, its officials were exercising an authority conferred by the acceptance by the Indigenous communities, an acceptance that came through the process of the Covenant Chain[376].

[798] For Prof. Walters, the role played by the Covenant Chain in the Haudenosaunee perspective was "to re-cast the very idea of the European sovereign. The juridical concept of the *Crown* was incorporated into the Indigenous legal tradition, and in the process the Crown was transformed from a sovereign to whom allegiance and obedience was due into a member of an Indigenous kinship alliance, a *father* or a *mother* with whom spiritual and material presents were to be exchanged"[377]. Prof. Walters underlined that the exchange of gifts was essential for maintaining the alliances[378] and that this occupied an important place in the Indigenous and European relationship.

D.1.7.5.2 The expansion of the Covenant Chain after the French defeat

The Oswegatchie Treaty, August 18 and 19, 1760

[374] *Idem,* para. 70.
[375] *Idem,* para. 72.
[376] *Idem,* para. 73.
[377] *Idem,* para. 75.
[378] *Idem,* para. 75, 97, 110, 149, 150, 160 to 163.

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[799] In August 1760, Sir William Johnson and a large contingent of Iroquois joined General Amherst's force as it progressed down the St. Lawrence River. They encountered some French resistance at Fort Lévis, which was situated on an island adjacent to the Iroquois mission village of *Oswegatchie*[379].

[800] On August 18th and 19th, while Amherst's soldiers laid siege to the fort, Johnson met with delegates from the various Indigenous nations of French Canada. The "Seven Nations of Canada", which included the Mohawks of Kahnawà:ke, were present and an agreement of peace was ratified[380]. According to Johnson, that agreement greatly increased "the number of his Majesty's Indians Allies", and this could not help but produce "most salutary consequences"[381].

[801] A few days later, on September 8, 1760, Montreal felt to the British forces and their allies.

The Kahnawà:ke Treaty, September 15 and 16, 1760

[802] As seen above, one week later, on September 15 and 16, 1760, a council was held at Kahnawà:ke between Sir William Johnson and the representatives of the Canadian nations. Present were the Mohawks of Kahnawà:ke, Kanesatake and Akwesasne, as well as representatives of the Iroquois Six Nations.

[803] The lead speaker for the Indigenous nations thanked Johnson for "opening the road" to them from his country and promised to keep it clear of obstacles and use it in a "friendly Manner"[382]. The speaker also recognized that all Six Nations had made peace with the British and that they "endeavor …to keep it inviolably", but that they also had special requests. One of those was that the sale of liquor be prohibited in their communities. Another was that the "Way our Affaires were managed while under the Care of the French" be continued: "access to "Smith &ca" at government expense, priest permitted to stay and supported, and that the fur trade be regulated so that we may not be imposed upon"[383].

[804] In subsequent years, the Kahnawà:ke Treaty was considered to be the source of normative structure for the evolving relationship between the Crown and the Indigenous villages of the Montreal area. The "Indians in Canada" were "received … into

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[379] *Idem,* para. 79.

[380] *Idem,* para. 79-81.

[381] Sir William Johnson to William Pitt (prime minister), 24 October 1760, JP III 269-275, at 273-274. Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 80. Exhibit WM-34.

[382] The Selected documents treaties, tobacco and trade, Tab.20, Treaty of Kahnawà:ke as reported in *The Papers of Sir William Johnson*, Vol. XIII, Albany, The University of the State of New York, 1962. Exhibit-WM -30D. Appendix 12.

[383] *Ibidem.* See also Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 84. Exhibit WM-34.

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our alliance", said Johnson in 1763. Membership within the Covenant Chain affected relations between these various "mission" villages. From this point on, both British and Indians referred to these communities as the "Seven Nations of Canada" or the "Seven Confederate Nations of Canada". As Sir William Johnson reminded the Seven Nations of Canada in September of 1763, upon "the Conquest of Canada, the Covenant Chain … was then brighten and renewed by us"[384].

[805] For Prof. Walters, since the Mohawks of Kahnawà:ke had in the past treated from time to time with the British authorities in Albany, for them it was just a matter of *re*-establishing the relationship[385].

The Treaty of Niagara, summer of 1764

[806] With the defeat of Montreal, the British began to extend the Covenant Chain into their relationship with other Indigenous nations of the St. Lawrence River valley and the Great Lakes region, such as the Anishinaabe nations.

[807] The treaty council of Niagara in the Summer of 1764 lasted several months. Representatives of the Seven Nations were there, including 124 representatives from Kahnawà:ke (referred to as the Caenawagués, Cagnawageys or Coghnawageys) and Kanesatake (referred to as the "Canyesadaguss), as well as those from the nations all around the Great Lakes. Thousands of Indigenous people spent the month of July in negotiations with the British authority, represented by Sir William Johnson[386].

[808] The purpose of the council was to establish, or re-establish, the Covenant Chain with nations that had been involved in Pontiac's uprising in 1763-64, being mainly Anishinaabee nations to the west, the so-called "Western nations"[387].

[809] For Prof. Walters, the role of the Mohawks of Kahnawà:ke and other members of the Seven Nations was one of "*leadership* from *within* the Covenant Chain"[388].

[810] On July 31, 1764, the last day of the council, Sir William Johnson said:

> Brothers of the Western Nations, Sachims Chiefs, & Warriors—
>
> You have now been here for several days, during which time we have frequently met to Renew, and strengthen our Engagements, & you have made so many Promises of Friendship, and Attachment to the English that

[384] *Idem,* para. 87.
[385] *Idem,* para. 78.
[386] *Idem,* para. 88.
[387] *Ibidem.*
[388] *Idem*, para. 90.

> there now only remains for us to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements. —
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire you will take fast Hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipaweighs at St. Mary's whilst the other end remains at my House.—and moreover I desire that you will never listen to any News which comes to any other Quarter. If you do, it may shake the Belt.—but keep your Eyes upon me, & I shall be always ready to hear your Complaints, procure you Justice, or rectify any mistaken Prejudices. If you will strictly Observe this, you will enjoy the favor of the English, a plentiful Trade, and you will become a happy People…
>
> I Exhort you then to preserve my Words in your Hearts, —to look upon this Belt as the Chain which binds you to the English, and never to let it slip out of your Hands. —
>
> Gave the great Covenant Chain, 23 Rows broad, & the Year 1764 worked upon it, worth above—£30.51[389]

[811] Wampum Belts were exchanged during the Niagara treaty Council, including the "Twenty-Four Nations Belt". Unfortunately, many of the belts are now lost, but we know about them through people that had seen them over the years and reported about this as late as 1850[390].

[812] Originally, the Covenant Chain started in Albany, with the Mohawk of the Mohawk River Valley, then it expanded to the St. Lawrence Valley and then to The Great Lake region. At the end of the American War of Independence in 1783, the Covenant Chain was reoriented as a result of the British Indian department headquarters being moved to Quebec City and loyalist members of the Six Nations Iroquois moving north of Lake Ontario[391].

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[389] *Idem,* para. 89, Selected Documents Cited by Mark Walters in his Expert Report, Vol. 2, Tab. 19, The papers of Sir William Johnson, Vol 11 "Conference with Indians", Niagara, July 9 -August 14, 1764, pp. 309-310. Exhibit WM-34D.

[390] See Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 94 ss. Exhibit WM-34.

[391] *Idem,* para. 102 -103.

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D.1.7.5.3 British understanding of the sovereignty of the Indigenous nations party to the Covenant Chain

[813] For Prof. Walters, the best evidence of the British perspective as to the meaning of the Covenant Chain is found in a series of letters written by Sir William Johnson in which he addressed the question of sovereignty:

[814] Writing to the Imperial Lords of Trade in September of 1763, he said[392]:

> I know, that many mistakes arise here from erroneous accounts formerly made of Indians; they have been represented as calling themselves subjects, altho, the very word would have startled them, had it been ever pronounced by any Interpreter; they desire to be considered as Allies and Friends.

[815] In response to a planned Act of Parliament that would have placed the Indian Department on a statutory foundation, he observed[393]:

> the Six Nations, Western Indians, ettc, having never been conquered, either by the English or French, nor subject to the Laws, consider themselves as a free people.
>
> (The Court's underlining)

[816] Again, in a message to the Lord of Trade after learning the terms of a Treaty made by Colonel Bradstreet with the Indigenous nations of the Detroit region in 1764, he said:

> I have just received from Genl. Gage a copy of a Treaty lately made at Detroit by Coll: Bradstreet with the Hurons and some Ottowaes, & Missisagaes; these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some other Mistake; for I am well convinced, they never mean or intend, anything like it, and that they cannot be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and

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[392] *Idem,* para. 104, citing Selected Documents Cited by Mark Walters in his Expert Report, Vol. 2, Tab. 16, Sir William Johnson to Lords of Trade, September 25, 1763, DRCHSNY, VII, 559 – 562 at 561, Exhibit WM-34-D.

[393] *Idem,* para. 104, citing Sir William Johnson, "Sentiments, Remarks, and additions humbly offered to the Lords Commissrs for Trade and Plantations, on their plan for the future management of Indian Affairs, 8 October 1764, DRCHSNY, VII, 661.

> the nature of subordination punishment ettc, defined, it might produce infinite harm, but could answer no purpose whatever…I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principle causes of all our troubles, and as I can see no motive for proposing to them terms, which if they attended to them, they most assuredly never meant to observe, and 'tis out of our power to enforce…[394]
>
> (The Court's underlining)

[817] According to Prof. Walter, Johnson believed that the confusion was over the meaning of the Crown-as-father metaphor. Writing to Thomas Cage (Commander in Chief of the British forces in America), he said:

> Altho the words of the late Treaty [Bradstreet's] may at first appear extraordinary, yet, I am not at a loss to Acct. for them, as I know it has been verry customary for many People to Insinuate that the Indians call themselves Subjects, altho I am thoroughly convinced they were never so called, nor would they approve of it…Indeed I have been Just looking into the Indian Records, were I find in the Minutes of 1751 that those who made ye Entry say, that Nine different Nations acknowledged themselves to be his Majestys Subjects, altho I sat at that Conference, made entrys of all the Transactions, in which there was not a Word mentioned, which could imply a Subjection, however, these matters (notwithstanding all I have from time to time said on that Subject) seem not to be well known at home, and therefore, it may prove of dangerous consequence to persuade them that the Indians have agreed to things which (had they even assented to) is so repugnant to their Principles that the attempting to enforce it, must lay the foundation of greater Calamities than has yet been experienced in this Country,—it is necessary to observe that no Nation of Indians have any word which can express, or convey the Idea of Subjection, they often say, we acknowledge the great King to be our Father, we hold him fast by the hand, and we shall do wt he desires' many such like words of course for which our People too readily adopt & insert a Word verry different in signification, and never intended by the Indians without explaining to them what is meant by Subjection.—Imagine to yourself Sir, how impossible it is to reduce a People to Subjection, who consider themselves independent thereof both by nature & Scituation, who can be governed by no Laws, and have no other Tyes amongst themselves but inclination, and suppose that it's explained to them that they shall be governed by the Laws Liable to the punishments for high Treason, Murder, Robbery and the pains and penaltys on Actions for property of Debt, then see how it will be relished, and whether they will agree

[394] *Idem,* para. 105, citing Selected Documents Cited by Mark Walters in his Expert Report, Vol. 2, Tab. 16, Sir William Johnson to the Lords of Trade, 30 October 1764, DRCHSNY, VII 670-4. Exhibit WM34-D.

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> to it, for without the Explanation, the Indians must be Strangers to the Word, & ignorant of the breach of it[395].
>
> (The Court's underlining)

[818] Sir Johnson wrote to other officials stating that it was absurd to use words like *subjection* and *Dominion* in written treaties, given that these terms were not used in the oral proceedings and that there are no words in the Indigenous languages that can capture the meaning of these concepts[396].

[819] It appears that Benjamin Franklin shared the same view considering his description of the status of the Iroquois Confederacy at this time:

> They stand in a close union with each other, which they had formed long before the English settled here. The Mohawks first united with another nation and others joined later. Now there are seven altogether so united. They have their regular stated meetings and their great council considers the general good. The members are distinguished only by their different languages. They are called subjects of the King, but they are not subject to British laws, and pay no taxes, but rather the colonists pay them a tribute under the name of presents.[397]
>
> (The Court's underlining)

D.1.7.5.4 The Covenant Chain after the 1760 Treaties: 1774-1840

[820] Although Prof. Walters included a mention in his report that the period that followed the *Royal Proclamation* demonstrates the sovereignty of the Haudenosaunee nations, that is not a question that the Court must decide in this case.

[821] Nonetheless, given the importance of post-treaty conduct to our analysis, the actions of the British authorities that he reported are relevant, as they reflect their understanding of the position of their treaty partners, as well as their own perspective.

[822] In 1763, the *Royal Proclamation* defined the boundaries of the British colony of Quebec, which at that time were confined to the settled banks of the St. Lawrence

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[395] *Idem,* para. 106, citing Selected Documents Cited by Mark Walters in his Expert Report, Vol. 2, Tab. 16. Exhibit WM34-D.

[396] *Idem,* para. 107, citing references to Sir William Johnson letters.

[397] *Idem,* para. 108, citing Benjamin Franklin, "Some observations on North America, and the Colonies of Great Britain' In *Volume 13: The Papers of Benjamin Franklin* (January 1 through December 31, 1766) edited by Leonard W. Labaree, New Haven, Yale University Press.

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River Valley. In 1774, the *Quebec Act, 1774*[398] extended the boundaries to include the vast region surrounding the Great Lakes. In 1791, the province of Quebec was divided by the *Constitutional Act 1791*[399] into Upper Canada and Lower Canada. In 1840, Upper and Lower Canada were unified again by the *Union Act*[400].

[823] None of those statutes addressed in any way the status of the Indigenous peoples, laws, or sovereignty, or the issue of the treaty relationship. In Indigenous lands and communities, Indigenous customary laws and systems of governance continued to govern[401].

[824] Nor did the Covenant Chain disappear from the Indigenous/British relationship. Council meetings continued to be held in the same manner, still governed by the Covenant Chain, and numerous references were made to it by both parties well into the nineteenth century[402].

[825] The Indian Department continued to manage relations with the Indigenous nations in Canada separately from local colonial legislative bodies. As such, it received instructions from the Commander in Chief of British forces in British North America or, later, from the Governor General[403].

[826] The 1783 instructions to John Johnson, then Superintendent General, confirmed the importance for the British authorities of continuity in their relationship with their treaty partners[404]:

> And as these People consider Themselves and in fact are free and independent unacquainted with Control and Subordination, their Passions and Conduct are alone to be governed by Persuasion and Address – Their disposition, Customs, and manners require the utmost Attention to external Appearances and, in Reality, an Observance of these Qualities, as well as to the great Abilities of Sir William Johnson, His Influence with all Indians was attributed. In these, all means relating to the management of Indians, I cannot recommend to you so great an Example as Sir William Johnson.
>
> (The Court's underlining)

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398 *Quebec Act, 1774,* 14 Geo.III, c. 83.
399 *Constitutional Act, 1791,* 31 Geo. III, c. 31.
400 *Union Act, 1840,* 3 & 4 Vic., c. 35, see Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 136. Exhibit WM-34.
401 Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 137-138. Exhibit WM-34.
402 *Idem,* para. 138-156.
403 *Idem,* para. 140.
404 *Idem*, para. 143, citing Instruction for Brigr. General sir J. Johnson, Superintendent General & Inspector general of the Indian Affairs in the Northern District of North America', 6 February 1783, National Archives (United Kingdom) CO 42/44:95:97.

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[827] These instructions were re-issued in 1787 by Lord Dorchester and referred to afterwards.

[828] In 1821, William Claus, then deputy superintendent, in a letter to the Secretary of Indian Affairs said[405]:

> To bring the Indians to a regular system is impossible" for "they are a free and independent people as our instructions tell us and such they will ever remain, nothing can alter them."
>
> (The Court's underlining)

[829] The Court considers that this post-treaty conduct establishes that the British authorities, despite their ultimate objective of colonisation, knew that the Indigenous nations considered themselves free and independent, and not subjects of the British Crown.

D.1.7.5.5 The erosion of the Covenant Chain

[830] The nineteenth century brought important demographic and political changes. The population of settlers increased, bringing friction and dispute over land and accusations of trespass. Indigenous territories were the object of treaties and Indigenous communities resided in what later would become known as "reserves".

[831] From 1830, the policy of the Indian Department was to "civilize" Indians by restricting them to reserves and exposing them to Christianisation. Later, the policy became one of assimilation[406].

[832] The area of concern for the Indian Department shifted from one of securing military allies to one of encouraging agriculture and dealing with disputes over land and trespassing[407].

[833] Nevertheless, the principles of the Covenant Chain were still followed, and for the Indigenous peoples, these had very particular substantive implications. Prof. Walters gave examples of these through events and discussions at a number of councils, such as the 1817 council between the Grand River Six Nations and the Indian Department officials, the council held at Drummond Island in 1818, two councils held in 1820 and others in 1824, 1826, and 1827. In all these councils, there was either a

[405] *Idem,* para. 146, citing W. Claus, Dpty. Supt. Gen. Ind. Dept., to Archivald K. Johnston, Sec of Ind. Affairs, 3 June 1821, National Archives of Canada, RG 10 Vol. 14:11654-56.
[406] *Idem*. para. 147.
[407] *Idem*, para. 148.

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Condolence ceremony performed, or the Covenant Chain was put into action[408] in one way or another.

[834] Prof. Walters concluded his report the following way:

> 157. With demographic and political change, attitudes about the status of Indigenous peoples in Canada also began to change at about this time. The officers within the British Indian Department still adhered to the basic assumptions of the Covenant Chain treaty relationship. But, as I have outlined above, this relationship was largely unwritten and implicit within treaty council discourse, oral tradition, and wampum belts. Local colonial officials, including Crown law officers and judges, who had little knowledge or experience in dealing with Indigenous peoples, began to question the very existence of a treaty relationship securing Indigenous autonomy. There was no question that, as one Attorney General for Upper Canada observed in relation to the Indians of the province in 1836, "[t]hey have within their own communities governed themselves by their own laws and customs" (I reproduce the full statement below). But just at the point when the need for a theory explaining how Indigenous laws and systems of governance recognized by the treaty relationship might co-exist with the European-based systems of law and government that had been introduced for settlers became essential, understandings of the Covenant Chain began to erode as waves of new settlers arrived and as a new generation of local colonial elites came to power.
>
> 158. Still, the basic outlines of the Covenant Chain relationship remained evident. Although it was the policy of the imperial Indian Department from about 1830 to "civilize" Indians—that is, assist them in becoming Christian, farming communities—it was also the policy of the Indian Department to pursue that end through the what became the "reserve" mechanism: social and political assimilation of Indians directly into the settler populations was to be delayed, and Indigenous communities were to be settled onto reserves separate from settlers and encouraged, through their own tribal governing structures, to adopt gradually European ways of life. The authority of chiefs and their councils within reserves was supported, through Indian Department officials were active in encouraging "civilizing" measures through indirect means.
>
> (…)
>
> 164. The Covenant Chain treaty relationship was essential to the founding of Canada. As a new phase in Canada's history began with the unification of Upper and Lower Canada in 1840, the Covenant Chain treaty relationship

[408] *Idem,* para. 149-156.

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> persisted—though the future challenges of keeping it bright were already becoming obvious.
>
> (Reference omitted)

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D.1.8 The expertise of Prof. Alain Beaulieu as a response to Prof. Walters

[835] The Attorneys' General response to Prof. Walters' expertise was presented by Prof. Alain Beaulieu.

[836] Prof. Beaulieu was declared an expert in history, with a specialization in the relationship between the Indigenous and the Europeans in the northeast North America from first contacts to the end of the 19th century[409].

[837] First, a few words about the qualifications of Prof. Beaulieu. An overview of his *curriculum vitae*[410] will be sufficient to demonstrate his qualifications as an historian.

[838] Since 1999, he has been a professor in the History Department at the Université du Québec à Montréal, being named an associate professor in 2003 and a full professor in 2013. Since June 2019, he is the Director of Graduate Studies there. From 2004 to 2014, he was the chairholder of the Canada Research Chair on the Aboriginal Land Question (Tier 2) at the Université du Québec à Montréal.

[839] He obtained his PHD in 1993. The title of his thesis was *Ne faire qu'un seul peuple? Iroquois et Français à l'"âge héroïque" de la Nouvelle-France, 1600-1660.*

[840] Over the last 30 years, his research activities have focused on five major areas: the publication of documents from New France; the history of Euro-Aboriginal relations (17th to 19th centuries); the history of the Wendat people in Quebec; Aboriginal land issues; and the problems around the judicialization of Aboriginal history.

[841] He is the author of numerous books and articles, both individually and collectively, and of numerous research reports. He was the beneficiary of many research grants and was honored twice with the Prize of the Quebec National Assembly, in 2009 and 2014. He has given over 75 conferences around the world and has also organized many conferences.

[842] He has been declared an expert in Aboriginal history in 14 cases.

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[409] Transcriptions, 2021-11-15, p. 133.
[410] See Prof. Beaulieu's Curriculum vitae, AGC-70-A.

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[843] Prof. Beaulieu's report is titled *A response to Mark D. Walters*[411] and is structured in the form of a critique of specific points raised by Prof. Walters. In the *voir-dire* on his qualification, he took care to mention that his approach is strictly that of an historian, and that he is not concerned about legal considerations[412].

[844] Prof. Beaulieu expanded on his written report during his testimony. To facilitate comprehension, the Court will follow the structure of the report and refer to his testimony when necessary.

[845] Prof. Beaulieu's opinion is that the Covenant Chain is not an unwritten treaty. For him, it is a metaphor designating bonds of friendship, occasionally incorporating an undertaking of neutrality, but that it became a real alliance after 1760[413].

[846] In his view, the Covenant Chain is a political alliance, which he described either as the Anglo-Indigenous alliance network[414] or the British alliance[415], but it is one that can be broken depending on the political context.

[847] His main objection to the conclusions of Prof. Walters is that the latter's methodology, from an historian's perspective, does not sufficiently take into account the historical context. He reproaches Prof. Walters for isolating specific passages of documents without considering their overall context, a method that is not accepted for historical research, he said. Finally, he considers that Prof. Walters' approach does not sufficiently consider the diversity of historical situations experienced by the Indigenous nations[416].

D.1.8.1 The Covenant Chain is not an unwritten treaty

[848] Prof. Beaulieu considers that the historiography of Haudenosaunee-British relations does not support the conclusion that the Covenant Chain is an unwritten treaty.

[849] He criticizes Prof. Walter for saying that "the Covenant Chain was consistently described as a treaty"[417] while using a single example. Moreover, in his opinion Prof. Walters' reference to the words of Lieutenant Governor James Hamilton of the Pennsylvania colony, found in the record of a diplomatic meeting with some "Western Nations" held in Lancaster, Pennsylvania in August 1762, is misleading. He points out

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411 Exhibit AGC-71.
412 Transcriptions, 2021-1-15, pp. 105-108.
413 Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 1. Exhibit AGC-71.
414 *Idem*, p. 4.
415 *Idem*, p. 5.
416 *Idem*, p. 2.
417 Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 16. Exhibit WM-34.

that the historical context demonstrates that Hamilton was not referring to the Covenant Chain when he used the word “treaty”.

[850] Prof. Beaulieu argued that context must be considered. To provide that, he referred to a longer version of Hamilton’s speech, which repeated a statement made by William Johnson a year earlier at Fort-Detroit. Using this larger historical context, he describes the reference to a “treaty” by Hamilton not as a qualification of the Covenant Chain but, rather, as a reference to the treaty concluded the previous year.

[851] That being said, the Court considers that, even if one can disagree on the interpretation of what Hamilton was referring to, the reference to the Covenant Chain at the Pennsylvania meeting is evidence of the existence of the Covenant Chain, of its renewal and of it use by Indigenous nations and the British authorities outside the treaty relationship between the Haudenosaunee and the British.

D.1.8.2 A thesis that raises many questions

[852] Prof. Beaulieu invites the Court to consider the following questions in the quest to decide if the Covenant Chain is indeed a treaty[418]:

- If it is a treaty, how can one identify the implied terms of such an agreement since there are no traces of the content of the Covenant Chain in any historical documentation or oral tradition?

- How is it that the British, who were anxious to keep a written record of their agreement with the Indigenous peoples, failed to take notes when negotiating what he called “the founding treaty”, the Covenant Chain?

- Why have the Six Nations never invoked the Covenant Chain to oppose actions taken against their autonomy if it is supposed to be a “normative framework for Crown-Indigenous relations that recognizes jurisdictional autonomy or space for Indigenous nations”?

- If the Covenant Chain is a “more general” treaty, does this mean that it includes all the specific treaties?

- What are the provisions of the Covenant Chain? Do they include undertakings about the land or about the opening of the road?

[853] Prof. Beaulieu concluded this series of question by emphasizing that Prof. Walters’ thesis represents an essentialization of the Covenant Chain, making it valid

[418] Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, pp. 5 to 8. Exhibit AGC-71.

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for all nations in the same way, but that does not take into account the diversity of historical situations involved in the British and Indigenous Nations relationship.

[854] For Prof. Beaulieu, the Covenant Chain is "a metaphor that points to an array of political and diplomatic links between Indigenous nations and the British colonies. This metaphor sometimes referred to an agreement resembling a non-aggression pact, or even to commitments to neutrality. (…) In other circumstances, as in the case of the Six Nations' ties to the British, the Covenant Chain officially took the form of an alliance, which involved a mutual commitment of military assistance"[419].

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D.1.8.3 Indigenous rituals in a colonial context

[855] In this section of his Response to Mark D.Walkers, Prof. Beaulieu is answering to the opinion of Prof. Walters that the Condolence ceremony is "the construction of a foundation of mutual respect that ensured that the relationship would be conducted according to a spirit of legality, or, we might even say, the rule of law, though of course this sense of legality, the *Kayanerenghkowa*[420], was very unlike European conceptions of law or legality"[421].

[856] To illustrate his point, Prof. Walters used a description of a Condolence ceremony by William Claus, deputy superintendent of the British Indian department, given in 1815[422].

[857] Prof. Beaulieu criticized this example as lacking context, which, he explained, must take into consideration circumstances relevant to the American War of 1812. Those include the decision of the King to end that war with a peace treaty, the manner in which the Crown conducted itself in relation to Indigenous people in 1783, the objectives of Indigenous nations on the issue of Indigenous lands in America, and the understanding of Tekarihoga, a Mohawk from Grand River, of the silence of William Claus at the negotiations for that treaty and his understanding of the Crown's negotiating position.

[858] Prof. Beaulieu then concluded that the 1815 treaty conference referred to by Prof. Walters is an "illuminating example of the British concept of sovereignty in North America: one that was not dependent of the condolence ceremony. This conference also sheds light on the status of the Indigenous nations in the Covenant Chain. This status was not one of equality"[423].

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[419] *Idem*, p. 8.

[420] The Great Law of Peace.

[421] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 57. Exhibit WM-34; Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 8. Exhibit AGC-71.

[422] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 60. Exhibit WM-34.

[423] Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, pp. 8-10. Exhibit AGC-71.

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D.1.8.4 1753: A chain that can be broken

[859] Prof. Walters and Prof. Beaulieu have two different interpretations of the meaning of the breaking of the Covenant Chain in 1753 by a Mohawk Chief.

[860] Prof. Walters mentioned it to explain how the Imperial government came to assume the direct control over Indians affairs in the colonies through Sir William Johnson as their Superintendent[424].

[861] In his report, Prof. Beaulieu stated his opinion that this demonstrates not only that the Covenant Chain can be broken, but that it is no more than a political alliance, highly responsive to the historical context, and that either party could abandon it if they considered that it became useless[425]. For him, this interpretation is confirmed by the very metaphor of the Covenant Chain, i.e., that if it is not regularly renewed and polished, it can break. He supports his point by citing the spokesman for the Six Nations, during the treaty negotiations at Fort Stanwix in 1768[426]:

> Then, Brother, you arose, renewed that chain which began to look dull, and have for man years take care of our affairs by the command of the Great King, & by your labors have polished that chain to that is has looked bright and is become known to all Nations, for all which we shall ever regard you and we are thankfull to you in that you have taken such care of these great affairs of which we are always mindful, and we do now on our parts renew and strengthen th Covenant Chain by which we will abide so lons as you shall preserve it strong & bright on your part. A Belt.

D.1.8.5 The "Canadianizing" of the Covenant Chain

[862] The criticism of Prof. Beaulieu to this part of Prof. Walters' Report echoed his previous one to the effect that Prof. Walters does not take the historical context sufficiently into account.

[863] Prof. Beaulieu disagreed his assertion that, at the Kahnawà:ke treaty conference of September 1760, Sir William Johnson renewed "the old Covenant Chain" between the Six Nations and the British.

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[424] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 70. Exhibit WM-34.

[425] Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 11. Exhibit AGC-71.

[426] *Idem,* pp. 11-12. Sources- 1768 *Proceedings at a Treaty held by Sir William Johnson Baronet with the Six Nations, Shawanese, Delawares, Senecas of Ohio and other dependant Tribes, at Fort Stanwix in the months of October November 1768, for the settlement of a Boundary Line between the Colonies and Indians, pursuant to his Majesty's orders, »* in E.B.O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York,* Albany, NY : Weed, Parsons, and Co., 1856-1887, Vol.8, 126.

[864] For him, Johnson was simply renewing a relationship that resulted from the neutrality treaties negotiated well before the British conquest of Canada between the eight nations of the St. Lawrence Valley and the British in the colony of New York. He was renewing a relationship that already existed and not integrating the Six Nations of the Iroquois League into a general treaty. The terminology may be the same, but it is not the same Covenant Chain[427].

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D.1.8.6 The Congress at Niagara (1764) and the Covenant Chain

[865] Prof. Beaulieu understood that, for Prof. Walters, there was only one treaty concluded at Niagara in 1764. He disagrees and refers the Court to one of his previous research projects on the subject, where he shows that two treaties were concluded there[428].

[866] Prof. Beaulieu also disagreed with the proposition that the Mohawks of Kahnawà:ke played a crucial leadership role at Niagara. In his view, they were not included in the negotiations with Johnson and were not included in the treaties, nor did they renew the Covenant Chain. They were there only to support the British in negotiations with the Chenusios: not trivial, but not crucial either. He also refuted the affirmation made by Prof. Walters that Thomas King, present in Niagara, was a Kahnawà:ke chief, saying that he was an Oneida chief instead[429].

D.1.8.7 Sovereignty of Indigenous people: Johnson's remarks on the status of Indigenous peoples

[867] Prof. Beaulieu responded to Prof. Walters' statement that the best evidence of the British perspective of the meaning of the Covenant Chain is found in a series of letters written by Sir William Johnson in which he addressed the question of sovereignty.

[868] For Prof. Beaulieu, Sir William Johnson's comments represent only one facet of the British perspective. For him, a more accurate understanding of British conceptions of Indigenous status requires a broader approach and an examination of policy in colonies other than New York.

[869] For Professor Beaulieu, the question surrounding the sovereignty of Indigenous nations is a contentious one among historians, causing divisions not only in their methods, but also in their final assessments. While some historians conclude that

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[427] *Idem*, p. 12; Transcriptions, 2021-11-22, pp. 146-149.
[428] *Ibidem*, fn 20.
[429] *Idem*, p. 13.

these nations were dominated, others argue that they functioned as allies, at least up until the end of the French rule or even into the early years of British governance[430].

[870] Following a thorough examination of the appropriate methodology for addressing this issue[431], he arrived at the following conclusion:

> Therefore, within a historical perspective, we should not have asked ourselves if Indigenous peoples were allies or subjects of the King. We should rather have examined the terms of their integration into a new legal and political order. This would have allowed us to direct our gaze toward the mechanisms that were implemented by the colonial powers to gradually subjugate Indigenous peoples, mechanisms that often had nothing to do with the strict application of French or British law. The administration of law is in fact only one of the many mechanisms used to institute a new sovereignty. To understand how a new legal order is built, we must take into account several other factors, for example the making of land concessions to Indigenous peoples within the seigniorial system, which in effect, inscribed their territorial rights in a system that was totally foreign to them; the implementation of commercial monopolies in the fur trade, which deprived Indigenous people of the freedom to choose for themselves with whom they should trade; the assignment to the governor of New France the role of armed mediator in disagreements between Indigenous nations, a political mechanism that, despite its reliance on the concept of alliance in fact instituted a first form of political domination; the implementation of protective measures such as the Royal Proclamation, which, under the guise of protecting Indigenous people from the illegal taking of their land also formally established Britain's sovereignty, since the Crown was depriving the Indigenous nations of their right to freely dispose of their own lands, which could thenceforth only be granted to the Crown; etc.
>
> In this sense, we should pay attention not only to the elements of European order that the colonizers successfully imposed, such as their laws, but also to those elements that the Indigenous nations had to forfeit. The colonial order was not built solely on the Europeans' successful introduction of new regulations but also on the failure of Indigenous people to enforce their own. The fundamental difference between the legal and historical approaches to the subjugation of Indigenous people is, therefore, on the one hand, a desire to categorize a historical situation, and on the other, the ambition of understanding a phenomenon in all of its complexity and, especially, within the context of its own evolution.[432]
>
> (References omitted)

[430] *Idem*, p. 27.
[431] *Idem*, p. 27-28.
[432] *Idem,* pp. 27-28.

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[871] Professor Beaulieu introduced a sophisticated and interesting debate among historians, but its depth goes beyond what the Court needs to decide if the Covenant Chain is a treaty. With humility, the Court acknowledges that it struggled to derive from Prof. Beaulieu's expertise a conclusion that would assist in evaluating Professor Walters' viewpoint on the matter. The law specifies that courts must consider the historical context of events, which may not align with a wider historical perspective. What the Court required was evidence presented in a manner that facilitated understanding, analysis, and judgment.

[872] The Court makes no reproach to Prof. Beaulieu, who is an outstanding historian and delivered an enlightening and engaging testimony. However, in a case like this, which spans multiple centuries and involves the histories of various nations, the Court felt overwhelmed by the extensive array of historical facts, details, and viewpoints that Professor Beaulieu provided. Assessing and analyzing such evidence would demand a level of expertise that the Court lacks.

[873] The Court has previously stated that a reconstructive historical approach is more pertinent for ascertaining the mutual intentions of the parties involved[433]. Employing this method and after evaluating the evidence from both experts, the Court is of the opinion that, in his letters, Sir William Johnson is not simply reporting a strictly personal opinion or interpretation of certain facts, engaging himself only. As the British Superintendent of Indian Affairs for all the northern colonies, he was a major actor in treaty councils over many decades and therefore was the direct contact of the Indigenous people with the Crown. He was a high-ranking representative of the British Crown, possessing a profound knowledge of several Haudenosaunee languages, traditions and customs gained both through his life-partner, Molly Brant, and his work for the Crown. For these reasons, the Court considered them relevant post-treaty evidence.

[874] This evidence demonstrates that the British authorities well knew that they were negotiating with free and independent nations and that those nations were able to propose and, in a way, even impose the structure of that relationship, i.e. the Covenant Chain.

D.1.8.8 A new relationship in a changing colonial context

[875] For Prof. Beaulieu, the fact that the traditions of the Covenant Chain persisted into the 19th century, as professed by Prof. Walters, is not enough to draw any conclusion about the persistence of the Covenant Chain itself.

[876] In addition to his criticism that most of the examples used by Prof. Walters come from Upper Canada, Prof. Beaulieu formulated two main critical remarks. The first related to the importance to historical analysis of the content of Indigenous-British

[433] See Section III.D.1.1.

negotiations or discussions, not just their form. The second centered on the need to consider the diversity of Indigenous situations in the British colonial world in the early 19th century, especially the differences on either side of the Ottawa River.

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[877] Taking the example of the 1818 meeting at Drummond Island used by Prof. Walters, Prof. Beaulieu referred to the speech made by an Onondaga chief who complained that, even though they had sided with the British in the American Revolutionary War, they lost their land across the border, i.e., in Canada. The Chief asked the British to correct that situation. The historical record demonstrates that, although the forms of the Covenant Chain were present, the result was not the one hoped for by the Onondaga. Superintendent William McKay answered them that he did not want to hear their complaints and that he would not come to the council the following year if they continued to voice them: "But every year you so lead me with reproaches, I can no longer bear the burthen; and if I have not some good news to tell you next Spring, I will not come here." [434]. This demonstrates a change in the dynamic between the British and the Indigenous nations.

[878] Prof. Beaulieu concluded as follows about the outcome of that meeting:

> The meeting, therefore, did follow some Covenant Chain rituals, but the outcome reflected the Indigenous people's position as nations who had to address their requests to the British, hoping they would listen and respond favorably. As with the example of the 1815 meeting at Burlington discussed in Section 2, continuity in the forms of Anglo-Aboriginal diplomacy does not conceal the transformation of the balance of power in the aftermath of the War of 1812-14.[435]

[879] Complementing his written *Response*, Prof. Beaulieu testified that the Haudenosaunee diplomatic rituals have no substantive content. If there are numerous mentions of it in the historic records, it is because they were part of the components of the Covenant Chain transposed at the council meetings. Their presence reflects the pragmatic approach of the Europeans, who used those rituals to obtain what they wanted from the Indigenous nations. Because the Europeans were the newcomers, they used the already-established practices of the Indigenous nations to progressively establish their sovereignty and their presence on the territory. Those rituals were maintained until the beginning of the 19th century, but diminished quite rapidly

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[434] Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 32-33. Exhibit AGC-71, citing « *The Ottawa, Chippawa, and Wenebago Indians, assembled at Drummond Island »*, 7 July 1818, in Province of Canada, Report on the affairs of the Indians in Canada, submitted to the Honorable the, Legislative Assembly, for their information, Appendix (T), in *Appendix to sixth volume of the Journals of the Legislative Assembly of the Province of Canada,* Session 1847, Montréal, « Great Britain » Stean Press -Rollo Campbell, Printer, 1847, Appendix no. 95 (n.p.)

[435] *Idem*, p. 33.

afterwards, to be replaced by British mechanisms when Indigenous nations wanted to discuss with the British authorities [436].

[880] To summarize, in his written *Response* and testimony, Prof. Beaulieu focuses his criticisms of Prof. Walters' Report on three points.

[881] First, Prof. Walters' thesis that a general Covenant Chain is a treaty or meta-treaty is not acceptable from an historical perspective.

[882] Second, the methodology of Prof. Walters to isolate parts of historical records from their context is not an accepted methodology of historical research.

[883] Finally, Prof. Walters' approach insufficiently takes account of the diversity of the historical situations experienced by the Indigenous nations, thereby portraying a homogenous picture of the Indigenous nations both in the Saint Lawrence River Valley and in Upper Canada, while, in fact, they experienced different realities[437].

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D.2 Analysis

[884] The task of the Court is to decide whether the Covenant Chain is a treaty protected by s. 35(1) of the *Constitution Act, 1982* or, as argued by the Attorneys General, it is no more than a metaphor for a military alliance that ceased to exist.

[885] Three interpretations of the Covenant Chain were presented to the Court.

[886] For the Applicants, the Covenant Chain is a meta-treaty under which all the treaties invoked in this case were made. It is both a military alliance and a "constitutional-like treaty instrument"[438] that provided a normative framework for relations between the Haudenosaunee and the Mohawks, on one side, and the Crown on the other.

[887] For the Attorneys General, the Covenant Chain is merely a metaphor for a relationship, representing a military alliance that is political in nature and that can be broken at the will of the parties. Treaties are self-standing, i.e., individuals instrument independent one from another, and they were not concluded within Haudenosaunee law.

[888] For the MNCC, the Covenant Chain is a family relationship where brothers are equals and that has bound the Haudenosaunee and the Crown since 1677. It is the framework for the thinking and conduct of every treaty council from 1677 to the 1830s. It requires constant collaboration and attention to each other's needs and concerns.

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[436] Transcriptions, 2021-11-23, pp. 72 to 74.

[437] Alain BEAULIEU, *A response to Mark D. Walters – Report on the Covenant Chain Treaty Relationship in Pre-Confederation Canada*, p. 31-33. Exhibit AGC-71.

[438] *Consolidated closing memorandum of fact and law of the Applicants*, para. 185.

The essence of the Covenant Chain is not consultation, but communication. It is a treaty relationship protected by s. 35(1) of the *Constitutional Act of 1982.*

[889] The Covenant Chain draws from Haudenosaunee law and culture. Because it is *sui generis*, unwritten and expressed through a metaphor its interpretation by the Court is essential in this case. That said, the interpretation to be given to it here must be confined to the specific scope of this judgment. It is not intended to be imposed on any Indigenous nations beyond the context of this legal proceeding.

[890] To decide if the Covenant Chain is a treaty protected by s. 35(1), the Court will examine the following issues:

- What are the obligations of the Covenant Chain?
- Did the parties intended to create mutually binding obligations?
- Was it concluded with a certain measure of solemnity?
- Is the Covenant Chain extinct?

[891] To these questions, the Court answers as follows: The Covenant Chain is an unextinct treaty that creates mutually binding obligations by way of military and friendship alliances and by a conflict-resolution procedure.

[892] The Covenant Chain presents a unique challenge for judicial interpretation.

[893] It is a metaphor shared by both the Haudenosaunee and the British. It is 350 years old and unwritten. It is, on the other hand, mentioned in numerous British historical written records spanning over a century. Moreover, it is deeply rooted in Haudenosaunee law and culture.

[894] This is unquestionably a situation where the term "*sui generis*" applies.

[895] There is no dispute that the essence of the Covenant Chain metaphor lies in its representation of the relationship between the Haudenosaunee and the British.

[896] That being said, in order to decide whether the Covenant Chain is a treaty, the law requires to examine if the parties intended to create mutually binding obligations with a certain level of solemnity. The determination of these obligations must be the first step of the analysis. It requires an examination and an understanding of the origin, the nature, and the dynamic of that relationship.

[897] Interpreting the Covenant Chain also presents a unique challenge due to its Haudenosaunee origin, as it involves the interaction between Indigenous law and Canadian Aboriginal law. Understanding a system developed and utilized within one legal system and applying it in another one poses significant difficulties. This challenge

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extends beyond legal aspects to encompass cultural considerations that depend on a high level of openness and flexibility in acknowledging and respecting both legal systems and cultures. It is essential to recognize that a perfect alignment may not be attainable, or even necessary.

[898] The judicial approach to an historical agreement involving multiple nations over an extended period must focus on the broader perspective and take account of the overall context of the involved nations. Dealing with historical evidence spanning such a duration can be overwhelming. It is thereby crucial to maintain a comprehensive view.

[899] Unfortunately, the approach taken by the Attorneys General inundated the Court with highly detailed historical evidence covering a plethora of events involving a large cast of actors. This evidence was based on a number of historical studies and analyses provided by experts from different backgrounds. This created a dense and sophisticated avalanche of information that was difficult to transform into a judicial format, let alone analyze within legal principles and assess for probative value.

[900] Expert evidence should be presented in a way that helps the Court understand the issues at hand and facilitates decision-making. Too much information can obfuscate the message, frustrate the Court's efforts to comprehend complicated issues and diminish its own probative value. That is what occurred here with respect to the Attorneys General's evidence.

D.2.1 The obligations contemplated by the Covenant Chain

[901] As previously said, because it is an unwritten metaphor, the first step of the analysis has to be the determination of what this metaphor represents. In other words, what are, if any, the obligations that the parties agreed upon within the Covenant Chain.

[902] There is no dispute that the Covenant Chain constitutes an alliance encompassing both military and friendship aspects as fundamental components.

[903] The historical records often referred to an alliance of peace and of friendship[439]. Though peace and friendship are not necessarily the same thing, they comprise the basic elements of the Covenant Chain and are expressed in different ways.

[439] Alliance of peace or neutrality appeared in the councils' discussions in 1677, 1702, March of 1725, September 1725, 1735, 1742, 1748, 1754, Oswegatchie August 1760, Kahnawà:ke September 1760. It was referred as an alliance of friendship in March and September 1725, 1742, 1748, 1753, 1754. All are reproduced in the Appendix.

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D.2.1.1 A Peace Alliance

[904] It is readily apparent that a peace alliance primarily pertained to military issues focused on ensuring the security and prosperity of both populations. Peace could be achieved either through military alliances or by a stance of neutrality, as it can be seen in the initial Treaty of 1664 between the Haudenosaunee and the British, that focused on matters of peace and trade.

[905] Throughout the period examined in this case, there were countless wars. These conflicts encompassed wars between Indigenous nations, wars between European nations that extended to America, and wars between Indigenous and European nations.

[906] All European nations recognized the importance and the advantages of securing alliances with Indigenous nations in North America. Over time, alliances were established with various Indigenous nations, with some enduring, while others failed to stand the test of time.

[907] The nature of the peace alliance between the British and the Haudenosaunee varied over different periods. At times, they acted as allies, while at others, they took a neutral stance. For instance, according to Sir William Johnson, during the final offensive to conquer Montreal, the Mohawk's decision to maintain neutrality played an important role in securing the British victory[440]. Also, different Haudenosaunee nations had different alliances with the British.

[908] In the end, engaging in combat alongside each other or adopting a neutral stance in a conflict involving one's ally are both mutual obligations aimed at preserving peace between the parties.

[909] There is no doubt that the Covenant Chain contained a peace alliance in the form of either a military alliance and/or a neutrality alliance.

D.2.1.2 A Friendship Alliance

[910] Peace and friendship are closely intertwined, akin to twins, though not identical ones. Friendship thrives when the parties are at peace.

[911] The evidence reveals that, while British written records refer to it as "friendship," the friendship alliance holds a deeper meaning for the Haudenosaunee, representing, in fact, a family alliance. The British were not merely seen as friends but were adopted and considered brothers. From the Haudenosaunee perspective, family relationships are meant to endure perpetually and are even stronger than mere friendship.

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[440] See Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para. 80. Exhibit WM-34.

[912] A friendship alliance, which creates a family tie, entails nurturing a relationship that benefits all parties across various spheres of activities. While a peace alliance primarily addresses the military aspects of a society, friendship or family pertain to its civil aspects. This peace and friendship alliance is a fundamental cornerstone of the Covenant Chain, as well as of the relationship between the Haudenosaunee and the British.

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D.2.1.3 The councils: a conflict-resolution process

[913] Within the context of the Covenant Chain, the pivotal element of the friendship alliance, or family, revolves around the utilization of councils as a conflict-resolution procedure.

[914] It is through its councils that the Covenant Chain was put into action.

[915] Originating in The Great Law of Peace, councils held a significance beyond mere gatherings. Within Haudenosaunee culture, ceremonies like Edges of the Woods or Condolence ceremonies were essential components of councils, each serving specific functions. Councils followed a structured format that was adhered to by all participants to effectively achieve their objectives.

[916] While councils adhered to the Haudenosaunee diplomatic protocol and the principles of The Great Law of Peace, they were conducted on British territory in Albany. The fact that councils took place in Albany means that both parties adjusted to each other's customs, thereby establishing a framework to govern their relationship.

[917] Councils were convened by sending wampum, and every matter falling under the purview of the two parties was open to be deliberated and resolved during these gatherings. The evidence demonstrated that issues relating to peace, military alliance, neutrality, trade practices, and criminal offenses were all discussed. The council proceedings were conducted orally, with each party making proposals and supporting them with gifts. Responses were provided, generally later, excuses were made and accepted, and agreements were reached orally. There were no official written records, written agreements, or written treaties during these meetings, yet this orality persisted for over a century.

[918] The enduring longevity and unwavering consistency of this framework underscore the fact that the Covenant Chain effectively governed and upheld the relationship between the British and the Haudenosaunee through the councils.

[919] In the metaphor of the Covenant Chain, the act of holding regular councils served as a means to polish and keep the chain clean and bright. The importance of

maintaining the brightness of the chain through regular meetings was duly acknowledged by all parties[441].

[920] This framework originated from the meta-narratives initially narrated centuries previously. For the Haudenosaunee, the foundation of a treaty relationship is rooted in the belief that the parties possess the knowledge and understanding required to foster a successful and effective relationship. Indeed, the Covenant Chain epitomizes this principle by employing council meetings as a means to resolve conflicts between the parties. The councils serve as a platform used by the parties for maintaining and strengthening their relationship, thereby upholding the spirit of the treaty.

[921] Chief Nelson highlighted that the Covenant Chain allows for multiple interpretations, but that, for him, it was created to begin a process of discussion with the Europeans upon their arrival. Fundamental to that process is the act of coming together and ensuring that the other side is accepted fully as a partner and a brother, so that they can always talk to one another[442].

[922] The precepts of The Great Law of Peace are well known to the Haudenosaunee. That they remain unwritten in black letter law does not hinder their application. It is worth repeating the words of Chief Nelson about The Great Law of Peace[443] :

> So, when the Peacemaker came to us, he brought us a Law of Peace and how we could — how we would be able to work together. Now, over the course of many years — it took a while to put this together, but what he did was he created a process where we would accept each other as brothers and sisters regardless of which nation we came from so that, as a family, you have to find ways to work out whatever the difficulties are in a good way. And so, the Great Law came to us for that purpose.
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> (…)
>
> So that's still there, and that's the same process that we still use.
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> (…)
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> Our ultimate goal of being together, and the ultimate goal of that law, is what we call skén:nen. For lack of a better word, it's — the short version is it means peace.

[441] See Prof. Beaulieu testimony, Transcriptions, 2021-11-22, pp. 137-140.
[442] Transcriptions, 2021-10-25, pp. 84-85.
[443] Transcriptions, 2021-10-21, pp. 96-99.

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(…)

> And when the European people arrived, we utilized that same process, and we brought them in and made them part of us, made them family, made them feel welcome. Some of our young folk these days say things like, "Well, maybe we should have got rid of them as soon as they got off the boat." But that's not how we were made, because by then, we already had this peace, this process for great peace. So that's how it was applied, and that's how we still apply it, even today.

[923] The Attorneys General put forth two principal arguments to contend that, should the Court determine the Covenant Chain to be a treaty, it did not incorporate a conflict-resolution process outside of the courts. First, were that the case, the written records would have reflected this understanding in some way since the British had the habit of writing down their agreements. Second, it is highly improbable that the British would have agreed to such a treaty right, as this would have been at odds with their imperial logic at the time[444].

[924] On the first argument, the Court disagrees that the written record does not demonstrate that the British understood that the Covenant Chain provided for a conflict-resolution procedure. There are multiple mentions in the historical records of conflicts that were brought to council by the British or the Mohawk and solved through this process[445]. Indeed, from the evidence provided, it can be reasonably inferred that the British were not only aware, but also agreed, that holding councils was the designated process for resolving conflicts and governing their relationship with the Haudenosaunee. The historical records demonstrate instances where conflicts were successfully addressed through these council meetings, reinforcing the understanding and acceptance of this conflict-resolution mechanism by the British.

[925] It is true that the British traditionally emphasized putting agreements into writing as a part of their diplomacy, however, the context here is one of oral transactions. It involves the Covenant Chain, an unwritten instrument utilized over decades during which the parties, except for 1664, never documented their agreements in writing. While the British maintained written records, the nature of the relationship itself was primarily oral. In this context, the absence of formal written documentation of the conflict-resolution process does not indicate that the British did not agree to it. Rather, it reflects the specific practice and tradition of this relationship.

[926] An *a contrario* argument would have had more chance of success if there were only one unwritten clause, i.e., the conflict-resolution procedure, amidst an otherwise fully written treaty. That, however, is not the case here. The entire relationship is predominantly unwritten. Given that, the fact that the conflict-resolution process lacks

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[444] Transcriptions, 2022-03-24, pp. 3-4.

[445] To take just one example: the council of September 1725 where an Indigenous woman was offered to the British to repair the murder of a British soldier by a Mohawk, see Appendix 6.

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written documentation should not be interpreted as a sign of non-agreement by the British but, rather, as a state of affairs that is consistent with the general rule of oral transactions within this unique relationship.

[927] In addition, during the same period the British were, in fact, entering into written treaties with other Indigenous nations[446]. This supports the inference that the absence of a written treaty around the Covenant Chain was a deliberate choice reflecting the specific nature and unique dynamics and practices of that relationship.

[928] In line with the above, the acknowledgment by the Attorneys General that several unwritten treaties were created through this relationship undermines their argument that the absence of written documentation negates the existence of a treaty. Treaties can be either written or oral, and the lack of a written form does not invalidate the recognition of an agreement as a treaty.

[929] The *Simon*[447] case is of some interest on this issue.

[930] In that case, James Matthew Simon, a Micmac, argued that he has a right to hunt under the Treaty of 1752 between the Micmac and the British. In its decision, the Supreme Court reproduced the 1752 Treaty, which was written in the European form of treaty writing and signed by both parties.

[931] Section 8 of the Treaty reads as follows:

> 8° That all Disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province shall be tried in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Privileges, as any others of His Majesty's Subjects.

[932] Although section 8 of the Treaty was not an issue in that case, the Supreme Court recognized that the Treaty contains a mechanism for dispute resolution[448].

[933] It demonstrates that the British used different forms of diplomacy with different Indigenous nations, reflecting what Prof. Beaulieu called the pragmatism of the British.

[934] It can also be inferred from it that the British knew that they could include a dispute-resolution procedure clause in a treaty with an Indigenous nation. The absence of a written treaty or agreement with the Haudenosaunee and the Mohawk containing a similar clause allows the conclusion that the British were content with the oral nature of the Covenant Chain and opted not to document it in writing.

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[446] See the written treaty concluded in 1752 between the British and the Micmacs in Nova Scotia in *R.* v. *Simon,* [1985] 2 S.C.R. 387, pp. 392-395.
[447] *Simon* v. *R.,* [1985] 2 S.C.R. 387.
[448] *Idem*, p. 401.

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[935] The Mohawks, as well, were familiar with written treaties that incorporated a conflict-resolution procedure clause. For instance, the 1701 Treaty known as La Grande Paix de Montréal, established between the French and 30 Indigenous nations, included a clause that designated the French as an armed mediator in matters concerning relations between the French Indigenous allies and the Five Nations of the Iroquois Confederacy[449].

[936] In the initial Treaty between the Haudenosaunee and the British in 1664, there were two written clauses specifically addressing the resolution of disputes, albeit limited to acts of violence. While, as already mentioned, the Court refrains from deliberating on whether these articles concerning criminal jurisdiction remain applicable to the parties in the present time, they are relevant here because they highlight the existence of such written clauses as early as 1664.

[937] In fact, the absence of any subsequent written treaties after 1664, suggests that the parties had adopted a different *modus operandi*. This can be attributed to their adoption of the Covenant Chain framework, which indicated their commitment to resolving any future conflicts through councils. The reliance on the Covenant Chain and the establishment of an unwritten, oral tradition for conflict resolution rendered the need for written treaties redundant, further reinforcing the significance and effectiveness of the council-based resolution process.

[938] The written records show that the parties relied on the council process for more than a century. By sending wampum belts as invitations to council meetings, they consistently utilized this mechanism to address conflictual issues. The longevity and consistency of the practice of holding councils to resolve disputes directly contradict the argument that the Covenant Chain lacked a conflict-resolution procedure. It is compelling evidence that the Covenant Chain did indeed include a conflict-resolution procedure through the vehicle of council meetings.

[939] Lastly, the evidence is silent as to any other process of conflict resolution that would have been agreed upon and used by the parties during such a long period. Sometimes, the absence of evidence by itself has probative value.

[940] The second argument of the Attorneys General is that it is highly improbable that the British would have agreed to such a treaty right, as this would have been at odds with their imperial logic of the time.

[941] This argument is grounded in the opinion of Prof. Beaulieu, which posits that the primary objective of the European nations in North America was to assert their

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[449] See Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 73. Exhibit WM-30. See also Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, pp. 156, 158. Exhibit AGC-70.

sovereignty over the territories and populations of the continent[450]. In the Attorney General of Québec final pleadings, it was presented as an argument against the right to residual sovereignty[451], an issue no longer before the Court. In oral arguments, it was extended to encompass the issue of a conflict-resolution procedure in the Covenant Chain. If the Court understands the argument properly, it means that one must analyze all the actions of the British through this colonial logic to arrive at a sound historical interpretation.

[942] This argument is rejected.

[943] While acknowledging that colonization was indeed a primary objective of colonial powers, the Court is not convinced that agreeing to a conflict-resolution procedure within the Covenant Chain contradicts British colonial logic. Creating a conflict-resolution process might well have served the interests of the British in effectively managing relations with Indigenous nations, maintaining peace and securing their territorial interests. In this perspective, a conflict-resolution mechanism would be a pragmatic approach in pursuit of colonial objectives, as it allowed for the resolution of disputes without resorting to armed conflicts that might disrupt the British colonial efforts. Therefore, the presence of a conflict-resolution process within the Covenant Chain does not necessarily undermine or contradict British colonial logic, rather, it appears to be a practical means of achieving colonial goals more effectively.

[944] Alliances were regularly discussed at councils, and the use of councils for diplomatic purposes is an integral part of the Haudenosaunee way of conducting affairs. The British not only accepted but also embraced this diplomatic structure, as it facilitated their interactions with the Indigenous nations. All diplomatic meetings, including those to discuss military issues, were conducted at councils. The historical record does not provide any evidence to suggest otherwise. This consistent practice further strengthens the case that the British recognized and respected the Haudenosaunee diplomatic process and engaged in it for resolving various issues, including military matters.

[945] Finally, the Attorneys General argued that s. 35(1) does not protect procedural rights. Consequently, the conflict-resolution procedure of the Covenant Chain cannot be protected.

[946] In the present context, the Court considers the distinction between procedural and substantive rights as irrelevant. When parties enter into a treaty, they have the freedom to agree on any matter they deem necessary. If the parties have reached an agreement on a procedural aspect of their relationship, it becomes an integral part of the treaty. Consequently, if the parties have agreed on a conflict-resolution procedure and it is not respected, such non-compliance would constitute a violation of the treaty.

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[450] Transcriptions, 2021-11-26, pp. 13-20.
[451] *Attorney General of Québec final Pleadings*, para. 403.

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In such a case, both procedural and substantive aspects are equally enforceable and integral components of a treaty.

[947] As a result, the Court concludes that the Covenant Chain is a peace and friendship alliance that includes a conflict-resolution procedure.

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D.2.2 The intention of the parties to create mutually binding obligations

[948] In Mohawk language, the Covenant Chain is *Tehontatenentshonteronhtáhkwa*. It means "they together have attached the ends of one another's arms at some point in the past and continue to do so"[452]. In English, Covenant Chain means a series of solemn agreements or mutual promises[453]. When taken together, it signifies a series of solemn agreements to remain together both in the past and in the future.

[949] The Court concludes that the historic record of council meetings and the conduct of the parties demonstrate that both parties intended to enter into both a peace and a friendship alliance and to have their relationship governed and regulated through councils.

D.2.2.1 The intention of the British

[950] The Crown argued that the only reason the British employed the rituals of the Covenant Chain was to obtain the collaboration of the Indigenous nations. They submit that the protocols and rituals were understood by the British as necessary diplomatic protocols, but not as importing substantive or procedural rights or obligations. They argued that the process must be distinguished from the intention to create binding obligations and that s. 35(1) protects only the latter.

[951] This argument is based on Prof. Beaulieu's opinion that the British pragmatically accepted those rituals, but only to pursue their colonialist agenda.

[952] As evidence of this pragmatic approach, he presented the answer of Superintendent William McKay at the Drummond Island meeting of 1818, when he told the Onondaga that he could not hear their complaints anymore and that he would not come to the council the following year if they continued to make them[454].

[953] McKay's conduct may well be characterized as a demonstration of pragmatism, but it also demonstrates that, once the British did not need their Indigenous allies anymore, they ceased to respect their previous agreements. From this standpoint, it

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[452] See Section II.D.2.10.1.
[453] *Ibidem.*
[454] See Section III.D.1.8.8.

confirms Prof. Walters' conclusion that the Covenant Chain began to erode as a new generation of local colonial elites came to power and as waves of new settlers arrived.

[954] That colonisation was the ultimate objective of the British is an inescapable historical fact. That being said, it is casting too wide a net to analyse every single act through that lens.

[955] The inference to be drawn from this argument is that the British had no real intention to create mutually binding obligations with the Haudenosaunee through the Covenant Chain. They just pretended to do so in the pursuit of their colonialist agenda, which was certainly not an agenda common to both parties. It means that they hid their real intentions.

[956] If this argument holds, it implies that the British were not honest when they stated that they were adopting and accepting the precepts of the Covenant Chain, that they never genuinely intended to enter into an alliance with the Haudenosaunee for perpetuity or to become brothers within the Haudenosaunee family. In that light, their adoption of the Covenant Chain was nothing more than a strategic approach to further their colonialist agenda without truly embracing the deeper principles and commitments inherent in the alliance. This interpretation raises doubts about the authenticity and sincerity of their words and actions.

[957] The evidence demonstrates that the British consistently employed the language and the protocols of the Covenant Chain. They sent wampum belts to convoke the Haudenosaunee to councils and gave them at the conclusion of treaties, they actively participated to the Condolence ceremonies, before any proposition they addressed the Haudenosaunee as "Brethren", they frequently spoke of renewing the Covenant Chain, they acknowledged the existence of the "ancient" Covenant Chain dating back to the time of their ancestors, and they emphasized the enduring friendship that has always existed between them and the Haudenosaunee nations.

[958] Moreover, they referred to "keeping the fire in Albany", drawing on the metaphor of the fire burning in the middle of the Longhouse , symbolizing the complementary relationships that applied to treaties. The council fire was a central aspect of the Haudenosaunee diplomacy governing councils. Through this reference, the British conveyed that the Haudenosaunee would always be welcome in Albany and that the covenant between them was lasting and significant.

[959] This language used by the British was the language of Haudenosaunee councils, and it had been for generations. As seen, repetition is at the heart of societies based on oral tradition. The repetition of that language held a particular significance and served as a guaranty of the honesty of those using it. Repetition facilitates access to publicly-held information; it preserves the consensus about the story being told, and it keeps fresh an awareness of agreements made and mutual responsibilities undertaken together. By repeating the language of the Covenant Chain, the British

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reaffirmed their commitment to the alliance and solidified their bond with the Haudenosaunee.

[960] Furthermore, the councils, which were an integral part of Haudenosaunee diplomatic protocol, took place on British territory in Albany. Of course, Albany was one of the most important trading centers at the time. That being said, there was more than a practical aspect to held councils there. One can also inferred that by hosting them, the British demonstrated their recognition of the significance of these meetings and their intention to be bound by the agreements coming out of them, that by willingly participating in these councils on their own territory, they indicated their understanding of the importance of the process and their commitment to honor the outcomes that emerged.

[961] The many years of engaging in a relationship based on the principles of the Covenant Chain convince the Court that the British were well aware of the significance and meaning behind its words and rituals for the Haudenosaunee. They deliberately used this language because they understood its importance to the Haudenosaunee, and they intended for the Haudenosaunee to take these words seriously and to act upon them. By using them, they sought to establish a genuine and lasting bond with the Indigenous nations, fostering trust and cooperation within the framework of the Covenant Chain alliance.

[962] On these words, the Haudenosaunee relied[455].

[963] The historical records and the historical context clearly indicate that the words and actions of the British conveyed their intention to establish mutually binding obligations with the Haudenosaunee. These obligations encompassed respecting the alliances forged and committing to resolve any issues arising in the relationship through council meetings. The British demonstrated a genuine willingness to honor the Covenant Chain alliance and to engage in a collaborative process with the Haudenosaunee, reinforcing their commitment to maintaining a strong and enduring partnership based on trust and mutual respect.

[964] The argument presented by the Attorneys General suggests that the British words and conduct were insincere, misleading and even dishonest for over a century. It evokes an enduring pattern of deception and insincerity in their dealings with Indigenous nations.

[965] Such a suggestion should be rejected, because this would contravene the legal principle of the honour of the Crown.

[966] The Crown is presumed to act, and to have acted, honorably in all its dealings with the Indigenous Nations, *urbi et orbi*, *heri et hodie*: here and everywhere, yesterday

[455] *White & Bob*, 1964 CanLII 452 (B.C.C.A) (affd. in the Supreme Court (1965), 1965 CanLII 643 (SCC), opcit fn 81.

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and today. The principle of the honour of the Crown applies to its dealings with Indigenous peoples and obliges the Crown to act with integrity, good faith, and fairness in its dealings with them. Dishonorable conduct and sharp dealing would go against this principle and would not align with the Crown's legal duty toward its Indigenous partners.

[967] This is the law.

[968] If the Crown, in that period of the relationship with the Haudenosaunee did not act honorably, if the "words of the white men" did not mean what they were supposed to mean, that would have legal consequences today. Dishonorable conduct in the past cannot be used to escape obligations in the present. One cannot legitimize the past in this manner. Applying the law to the proven facts means holding the Crown accountable for its actions, irrespective of the time period, and ensuring that legal obligations are met in the current context.

[969] This argument, being in contravention of the constitutional principle of the honour of the Crown, is hereby rejected[456].

[970] There is more. This argument questioning the honor and sincerity of the Crown's historical conduct goes against the goal of reconciliation, which is at the core of s. 35(1). Reconciliation aims to address past injustices, acknowledge historical wrongs, and work towards a more respectful and equitable relationship between the Crown and Indigenous people. Reconciliation requires the cessation of dishonorable conduct or distrust of the past. The honour of the Crown requires a generous and purposive interpretation in furtherance of the objective of reconciliation[457]. By embracing the principles of the honour of the Crown and recognizing the importance of honorable conduct in the present, the path towards reconciliation becomes more achievable. Rejecting arguments that hinder reconciliation efforts is essential to achieving that goal.

[971] During cross-examination, Dr. Adams was questioned as to whether she could find evidence in the primary sources indicating that the British were aware of the Haudenosaunee's interpretation of the Covenant Chain and the significance of their commitments. In response, she mentioned a letter written by William Johnson that she recalled as explicitly addressing this matter, and she expressed her intention to submit it as evidence to the Court[458].

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[456] See *R.* v. *Marshall*, [1999] 3 S.C.R. 456, para. 52; *Manitoba Metis Federation inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 76.

[457] See *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 24.

[458] Transcriptions, 2021-10-19, p. 44.

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[972] In the end, that letter could not be located, however, the suggestion behind the question that the British were unaware of the true meaning of the Covenant Chain due to a lack of explicit information remains unsupported by the evidence. On the contrary, the historical records and primary sources presented during the trial demonstrate that, throughout the century-long treaty relationship, both parties frequently made references to the Covenant Chain and the alliances it represented. Their conduct reflected a mutual understanding and adherence to the principles of the Covenant Chain.

[973] If the British were uncertain about the significance of the Covenant Chain, an alliance they praised and renewed numerous times, they had ample opportunity to seek clarification from their Indigenous counterparts. There is, however, no evidence indicating that they sought such an explanation.

[974] The Attorneys General also argued that the British could not have intended the Covenant Chain to be a treaty because its form is contrary to their culture of written treaties.

[975] As the Court has said, the absence of written treaties during that period indicates that the British accepted and embraced the Haudenosaunee diplomatic protocol, which included treaties that were not put into writing. This deviation from their customary practice could be seen as another example of their pragmatic approach in North America, but that does not support the assertion that they did not intend to enter into mutually binding obligations with the Haudenosaunee.

[976] Furthermore, it is not irrelevant to note that even the British Constitution, in part, remains unwritten, uncodified and, therefore, fundamentally flexible and open to change. As that shows, the existence of important unwritten instruments is not entirely alien to the British legal culture.

[977] Interestingly, this adaptability is also a defining characteristic of the Covenant Chain. Like the flexible nature of the British Constitution, the Covenant Chain demonstrated a capacity to adapt and evolve over time, making it a dynamic and enduring diplomatic framework.

D.2.2.2 The intention of the Haudenosaunee

[978] On the subject of the intention of the Haudenosaunee to agree to mutually binding obligations, only a few words are necessary regarding the previous developments.

[979] In the Mohawk language, the chain that is referred to in the word *Tehontatenentshonteronhtáhkwa* is not only a silver chain, but it is also a chain of hands, holding each other.

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[980] Chief Nelson testified that one of the goals of the Haudenosaunee chiefs is to carry the message that peace can expand to other nations through The Great Law of Peace. To make peace grow means to bring people in to sit with the Haudenosaunee, to be with them and to work with them and to be at peace with them so that everybody can function[459].

[981] Dr Adams also testified that one of the objectives of the process put in place by The Great Law of Peace is to resolve conflicts to everyone's satisfaction[460].

[982] Chief Nelson testified that, for the Haudenosaunee, concluding treaties with the Europeans was a way to keep their land, their own language, their own laws, their way of doing things. When the Europeans arrived on their land, they realised that they had to coexist, so they created treaties with them and adopted them as family[461].

[983] In the Haudenosaunee culture, a single person, a group, or a whole nation can be adopted. Dr. Adams explained that the adoption ceremonies include an agreement between people wishing to become family, an exchange of gifts, and a public acknowledgement of the new form the relationship is taking and the responsibilities each party assumes[462].

[984] For the Haudenosaunee, across-the-fire relationships are understood as everlasting and passed down from one generation to the next. It is fundamental to their identity[463].

[985] The evidence demonstrates that the Haudenosaunee adopted the British as a nation, and that the British actively and knowingly participated in these ceremonies. Such an adoption is not exceptional, since the Peacemaker in The Great Law of Peace proclaimed that the law is not exclusive to the Haudenosaunee but is open to anyone willing to embrace it[464]. The Covenant Chain, of Haudenosaunee origins, reflects this inclusive approach.

[986] The intention of the Haudenosaunee to engage in mutually binding obligations is conclusive.

D.2.3 Trade as an aspect of the Covenant Chain

[987] Once the Court has concluded that the Covenant Chain is a peace and friendship alliance with a conflict-resolution procedure, the issues submitted to the

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[459] See Section II.E.7.
[460] See Section II.D.5.3.1.
[461] See Section II.E.7.
[462] See Section II.D.2.5.2.
[463] See Section II.D.3.
[464] See Section II.D.5.3.1.

Court require to determine if conflicts about the regulation of tobacco trade should be submitted to council.

[988] For the Applicants, trade is a central component of the Covenant Chain relationship. Indeed, from a Haudenosaunee and Mohawk perspective, "peace and trade were indivisible"[465]. The Covenant Chain provides that the parties are in a relationship or alliance that is fundamentally about trade and peace[466]. Therefore, they plead that trade was at the core of the Covenant Chain[467]. The treaties concluded between 1664 and 1760 were intended to create a permanent relationship of which trade was a central component[468].

[989] Regarding the scope of the issue of trade, the Applicants argue that the notion of "free trade" in the alleged treaties "was understood by both the aboriginal parties and the Crown as confirming for the Mohawks unrestricted free trade in respect to all articles and goods"[469].

[990] Therefore, they argue that the Crown had a duty to discuss with the Mohawks of Kahnawà:ke when an issue relating to the free trade of tobacco was raised, a duty that it failed to respect.

[991] The first argument of the Attorneys General is that there could be no obligation to consult under the Covenant Chain without first establishing the existence of a treaty right or Aboriginal right to trade tobacco[470].

[992] Secondly, they argue that the Covenant Chain, being merely a metaphor for a political and military alliance between Indigenous peoples and the Crown, does not cover trade.

[993] Moreover, the Treaties do not refer to tobacco trade or even to trade on a commercial scale. They add that the parties could not have intended to cover the trade of tobacco in them, since at the time the Treaties were concluded, the Mohawk had no tradition of trading tobacco. They were trading only pelts. If certain treaties refer to trade, the historical context requires that this must be understood as being the trade of fur in exchange for the necessaries of life, and not for the accumulation of wealth.

[994] In addition, the expression "free trade" must be understood as meaning that "in times of peace or neutrality, trade was open to all and not limited to the holders of monopolies", but it was nevertheless regulated[471]. Both parties knew that all Europeans who traded

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[465] *Consolidated closing memorandum of fact and law of the Applicants*, para. 115.
[466] *Idem*, para. 116.
[467] *Idem*, para. 117-118.
[468] *Idem*, para. 119.
[469] *Idem*, para. 553.
[470] *Attorney General of Québec Final Pleadings*, para. 435-449.
[471] *Response Attorney General of Canada*, para. 74-75.

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goods were subject to European and colonial duties and taxes, and that travel and movements between French and British colonies were controlled at all times, and even more in times of war or conflicts[472]. In this context, "free trade" did not mean trade without tariffs or duties, or without colonial or imperial controls or rules"[473].

[995] The Attorneys General, therefore, do not consider that the Covenant Chain created an obligation to discuss with the Mohawks of Kahnawà:ke when an issue arose relating to tobacco trade, and, in particular, an issue relating to the imposition of excise duties.

[996] Regarding the first argument of the Attorneys General that the Applicants must first establish an Aboriginal or treaty right to trade tobacco, the Court must reject it in light of its previous conclusions on the Covenant Chain. The Court considers the Covenant Chain to be an independent source of obligations with no need for the party invoking it to first prove an Aboriginal or treaty right. It creates, by itself, a protected right to require that certain issues be discussed in councils. This decided, the question now becomes whether the regulation of the tobacco trade, and notably the imposition of excise duties on Indigenous participants in it, is covered by the Covenant Chain. The Court concludes that this is the case for the reasons set out below.

[997] The Covenant Chain is not a written treaty setting out all of its terms including a list of the subjects to be addressed in councils. However, it appears clearly from the evidence including the reading of the historical records relating to the Treaties that the requirement for council discussion is established, and this, with respect to at least two distinct topics: military alliances and trade. While the Court recognized that events of criminal behavior were also discussed and settled through councils, it was already said that the issue of criminal jurisdiction will not be addressed in this judgment[474].

[998] To come to that conclusion, the Court took particular note of the first treaty between the English and the Haudenosaunee concluded on the 24th and 25th of September 1664[475]. It is the Treaty that comes closest to a "traditional" treaty, and in it, the parties set the conditions of their new relationship.

[999] The first set of articles was agreed upon on the 24th of September 1664 and dealt with criminal jurisdiction. The parties agreed that each nation would be responsible for the actions of its people:

Articles between Col. Cartwright and the New York Indians.

[New England,I. 20T.]

[472] *Plan of arguments of the Attorney General of Canada*, para. 94, 110, 116.
[473] *Idem*, para. 109.
[474] See Section III.B.2.
[475] See Appendix 1.

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> Articles made and agreed upon the 24th day of September 1664 in Fort Albany between Ohgehando, Shanarage, Soachoenighta, Sachamackas of y^e^ Maques; Anaweed Conkeeherat Tewasserany, Aschanoondah, Sachamakas of the Synicks, on the one part; and Colonell George Cartwright, in the behalf of Colonell Nicolls Governour under his Royall Highnesse the Duke of Yorke of all his territoryes in America, on the other part, as followeth, viz^t^ —
>
> 1 Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had from the Dutch.
>
> 2. That if any English Dutch or Indian (under the proteccôn of the English) do any wrong injury or violence to any of y^e^ said Princes or their subjects in any sort whatever, if they complaine to the Governo^r^ at NewYorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishm^t^ and all due satisfaccôn shall be given ; and the like shall be done for all other English Plantations.
>
> 3. That if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to y^e^ Sachims and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaccôn shall be given to any of His Ma^ties^ subjects in any Colony or other English Plantacôn in America.
>
> 4. The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccôn of His Ma^tie^ are included in these Articles of Agreement and Peace;
>
> In confirmacôn whereof the partyes above mencôned have hereunto sett their hands the day and yeare above written
>
> (Signatures omitted)

[1000] The next day, the parties elaborated five additional articles that clearly address matters of trade and of a military alliance:

> 1 That the English do not assist the three Nations of the Ondiakes Pinnekooks and Pacamtekookes, who murdered one of the Princes of the Maques, when he brought ransomes & presents to them upon a treaty of peace.
>
> 2. That the English do make peace for the Indian Princes, with the Nations down the River.

> 3. That they may have free trade, as formerly.
>
> 4. That they may be lodged in houses, as formerly.
>
> 5. That if they be beaten by the three Nations above mentioned, they may receive accommodation from y^{e} English.

[1001] The subsequent treaties did not necessarily cover these three subjects each time and trade therefore was probably not an issue discussed at each council. Prof. Walters offers a sound explanation for that: the military aspect of the Covenant Chain was more important in the times of war, while trade took a more important role in periods of calm and peace[476].

[1002] Prof. Walters included trade as one of the most important aspects of the Covenant Chain in his description of the substance of the relationship:

> […] So I think I would go on to say, in terms of more substance about this relationship, what exactly is involved? In the documents we will find constant references to peace, friendship, I think — although the word might not be used — but respect would be an aspect of what friendship and peace mean. And then these ideas, concepts of peace and friendship were played out and had implications of a number of more specific kinds. I think the two most important ones were trade and commerce. That through establishing friendship and peace in the large sense, these were peoples who were going to trade with each other. And then there is the concept of mutual support. Mutual support can come in a variety of ways, sometimes material. And an important part of this relationship was the idea of gift giving and present giving, which eventually became very expensive for the British Crown because it was a form of material support, distinct from trade. And then military support, protection, I guess would be the most important word to use. And the sense that the Crown or the Crown's representatives would offer protection and expect back help too from the Indigenous side, in terms of defence or a kind of alliance militarily. So there's a military aspect as well. At time it may have been merely a matter of the Crown's representative asking for them to stay out of hostilities between France. Invariably, I talk about France and Britain in the era and — or area, and certainly once we get to the Seven years-war they are asking for much more than neutrality, they are asking for military alliance in the full sense. That too was the case during the American Revolutionary War and the War of 1812. So there is a military aspect to the Covenant Chain for sure […]477
>
> [the Court's emphasis]

[476] Transcriptions, 2021-09-29, pp. 51, 52.
[477] Transcriptions, 2021-09-17, p. 45, l. 16- p. 47, l. 2 (Walters).

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[1003] Similarly, for Prof. Parmenter, the three basic terms of the Covenant Chain relationship are that people are at peace with one another, people engage in trade with one another, and people look out for each other's mutual security. For him, if "the terms of the treaty relationship get a bit more complex, […] they hold firm on the three key objectives of peace, trade, and mutual security"[478].

[1004] Prof. Beaulieu for his part pointed out that trade usually ceases during wartime, as it is not customary to engage in trade with one's enemies[479].

[1005] For the Court, it is clear that trade was one of the main subjects raised in councils.

[1006] For instance, the councils of June 1700 between the Mohawks of Kahnawà:ke and the Albany Commissioners started with the former concerns about trade, notably regarding the prices that they considered too high[480]. Similar issues regarding prices were raised in councils held in May 1708[481].

[1007] The Treaty of Kahnawà:ke of 1760 is another interesting illustration. Articles 9 to 11 demonstrate that discussions on the regulation of the trade of a particular product, i.e. liquor, were held in councils. Article 13 also speaks of regulating trade "so that we may not be imposed upon by y^{e} People our new [Allies] B^{rs}". We will come back to these articles later.

[1008] An analysis of the historical records of the Treaties reveals that several aspects relating to trade were subjects to be addressed in councils in order to maintain the Covenant Chain relationship: the price, the free access to merchants, the choice of the trading partner, the behaviour of traders, the products that can be traded between the nations, etc.

[1009] For the parties, trade and peace were interlinked. Difficulties regarding trade could have an impact on their friendship and in turn, on peace. It is thus clear that trade was a sensitive subject that the parties wanted to resolve in councils. The following selected extracts demonstrate that the parties were aware of the importance of trade to maintaining a peaceful relationship:

- An Iroquois delegation told the New York Governor William Cosby that "for the Trade & Peace we take to be one thing"[482].

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[478] Transcriptions, 2021-09-20, p. 16-19 (Parmenter).
[479] Alain BEAULIEU, *Treaties and liberty of trade – The Mohawks of Kahnawake and their relations with the Europeans*, p. 271-273. Exhibit AGC-70.
[480] See Appendix 3.
[481] See The Selected Documents Treaties and Tobacco Trade, Tab. 6. Peter Wraxall, *An Abridgment of the Indian Affairs* (Cambridge: Harvard University Press, 1915) May 22, 1708 p. 53.
[482] Jon PARMENTER, Trade rights in Mohawk treaties with the English Crown, 1664-1760, p. 123. Exhibit WM-30.

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- The Onondaga chief Red Head at a 1756 conference said the following to Sir William Johnson:

> What you have said, in regard to the trade, we look upon as a convincing proof of your love and affection to us, and it gives us pleasure that it now becomes a matter of serious consideration with you; we are sensible of your ability to supply us with all the necessaries of life cheaper and better than the French can possibly do: indeed, brother, there is nothing you should more seriously attend to, as it would greatly tend to cement that friendship that subsists between us, and would be the most likely means of bringing in the most remote nations to an acquaintance and union with us[483].

- Prof. Parmenter in his report quotes an Iroquois speaker advising New York Governor Robert Burnet in 1724 that "Trade is the chiefest Motive to promote friendship"[484].

- Prof. Parmenter also quotes a Six Nations delegation from Onondaga who said to the Albany Commissioners on March 5, 1741 that "a good trade and a good peace go hand in hand"[485].

- During the 1742 renewal of the 1735 Treaty, the Commissioners repeated almost textually to the Six Nations and to the Sashims of Kahnawà:ge their message from 1735 about the "substance of that Covenant" that they shall "for Ever live in Unity and peace together and have free recourse to and from Each Others habitation, Att All times as well on Account of Trade as on Other business"[486].

[1010] Moreover, nothing in the historical records of the Treaties and the evidence leads to the conclusion that the parties intended to discuss solely issues relating to the fur trade. It would be contrary to the intention of the parties to limit the extent of the Covenant Chain to the exact same products that were exchanged in the 17th and 18th centuries. That is not the essence of the Covenant Chain. The intention of the parties was to create a lasting relationship of friendship and peace, which would flourish through the development of trade, and not just the fur trade, the whole aided by the application of the Covenant Chain and the discussion at councils. The councils aimed at resolving any difficulties that would come between the parties and endanger their relationship. Besides, Prof. Beaulieu himself recognizes that although furs might have

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483 See Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para 23. Exhibit WM-34.

484 Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 5. Exhibit WM-30.

485 Jon PARMENTER, *Trade rights in Mohawk treaties with the English Crown, 1664-1760*, p. 87. WM-30.

486 Appendix 8.

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been the main object of trade in Albany, there was no wish to restrict trade to furs. It is just that they were the most desirable at the time[487].

[1011] Furthermore, the trade of tobacco was not unknown to the parties. The evidence shows that tobacco was ubiquitous at the time, and that Indigenous nations had a great interest in tobacco - their own as well as that tobacco brought by the Europeans.

[1012] The Court was presented with evidence that tobacco was used extensively as a form of payment for services rendered by Indigenous peoples[488]. Several account books, as well as travel stories of Europeans, show that tobacco was a desired good for Indigenous traders[489]. The Wendell account books are useful to understand the products exchanged in Albany, as they keep track of the customers who brought furs and what they obtained in exchange, and this from the late 17th century to the early 18th century. They demonstrate that tobacco was one of the items that was sought after. Also, archaeological Iroquois sites reveal that tobacco boxes and smoking pipes manufactured by the Dutch were present as early as the 17th century[490].

[1013] Prof. Parsons testified on the Bruyas Dictionary, the first Mohawk language dictionary. He explained that the dictionaries created by the Jesuits were not complete but focused on the language they found important for their daily interactions with Indigenous peoples. It is relevant to note that several entries use examples with tobacco to illustrate the meaning of a word, showing that the Jesuits considered these phrases to be useful in everyday life[491]. For instance, the word *gagentennion* is translated as being dizzy, and the first example given is of being dizzy from tobacco. Several words related to tobacco are included, such as the word *Gan^{e}nata* which is a bag for tobacco, or *Gatsiaras*i which means to give tobacco.

[1014] Prof. Parmenter testified that upon their arrival, the Europeans were surprised at the extend to which the Indigenous people were smoking tobacco[492]. Prof. Von Gernet confirms that tobacco was commonly used by Indigenous men:

> By the time Europeans arrived in eastern North America nearly all Indigenous men were pipe smokers. The early documentary sources

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[487] Transcriptions, 2021-11-29, p. 129 (Beaulieu).

[488] Christopher M. PARSONS, *The cultivation and commerce of tobacco among Mohawk and Iroquoian peoples*, pp. 61-66. Exhibit WM-32.

[489] For instance, Kees-Jan WATERMAN (ed.), *To do justice to him and myself: Evert Wendell's Account Book of the Fur Trade with Indians in Albany, New York, 1695-1726,* Philadelphia, American Philosophical Society, 2008, pp. 132, 162, 183. Exhibit WM-73; Pierre MARGRY, *Découvertes et établissements des français dans l'ouest et dans le sud de l'Amérique Septentrionale (1614-1698)*, Paris, Maisonneuve et Cie, 1879, pp. 163-164; Transcriptions, 12-10-2021, p. 153 *ff.* (Parsons).

[490] Alexander von GERNET, *The Mohawks of Kahnawake and tobacco*, p. 164. Exhibit AGC-74.

[491] Transcriptions 2021-10-12, pp. 107-109, 169-170 (Parsons).

[492] Transcriptions 2021-09-22, p. 100.

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> provide overwhelming evidence of nicotine dependence or addiction. Time and time again the newcomers expressed astonishment at the incessant smoking. People belonging to both Algonquian and Iroquoian language families were seen with pipes in their mouths at all hours of the day and night. They went to sleep with pipes in their mouths, got up at night to smoke, and interrupted journeys to do the same. The Jesuit missionaries found their potential neophytes anxious to know if tobacco was available in the Christian heaven, claiming they could not dispense with it in the afterlife[493].

[1015] It is true that the evidence of the trade of tobacco by the Mohawks is scarce, but it is not inexistent. Prof. Parsons quotes Radisson who was taken prisoner in what is now upstate New York and was adopted by a Mohawk family. Radisson wrote that "meeting with an ould man [he] gave me a sacke of tobacco of 12 pounds weight bearing it upon my head as its their usual customs". For Prof. Parsons, this comment leads to two conclusions: "[t]his was a large enough sack that he was forced to carry it on his head, and his comment that this was their usual custom argues for the regular transport of quantities of tobacco in just this fashion"[494].

[1016] Another example discussed by the experts can be found in the Journal of van den Bogaert, who tells of his journey into Mohawk and Oneida country in 1634 and 1635 and where he mentions the case of three women who tried to sell dried and fresh salmon, as well as "much green tobacco". The experts agree that it is not clear whether the women sold their tobacco to the Europeans. Prof. Von Gernet admits that it could be possible, as one of van den Bogaert's companions had wrote a letter to the commissary to obtain Indian tobacco a few days earlier. As Prof. Parsons, he draws another teaching from the fact that the European travellers asked for tobacco to the commissary during their journey, i.e., that the Dutch saw tobacco as "a vital part of these relationships, that they needed tobacco to engage with Indigenous people"[495].

[1017] Prof. Von Gernet concludes the following:

> Hence, after the first decade of the seventeenth century and for several centuries thereafter, the history of the tobacco trade was almost exclusively one in which Europeans traded tobacco to Indigenous peoples and not the other way around.
>
> […]
>
> I am not aware of any evidence that, during the centuries after first contact, any Mohawk "traded" tobacco to anyone else, although I must confess that

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[493] Alexander von GERNET, *The Mohawks of Kahnawake and tobacco*, p. 105 (AGC-74).
[494] Christopher M. PARSONS, *The cultivation and commerce of tobacco among Mohawk and Iroquoian peoples*, p. 69. Exhibit WM-32.
[495] Transcriptions, 2021-10-12, p. 182.

> I have not had occasion to systematically review for this purpose the voluminous record after c. 1700[496].
>
> [italics in the original]

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[1018] For Prof. Parmenter, there is some evidence of back-and-forth trade of tobacco to Europeans, particularly in Canada. As well there is documentary evidence that Mohawk and other Haudenosaunee people traded tobacco amongst themselves. He also underlines the importance of tobacco in the ceremonial part of diplomacy between 1700 and 1760. Nevertheless, he recognizes that, regarding the tobacco trade, during the 18th century, "there is not a great deal of evidence that is happening"[497]. He testified that he would not be comfortable in saying, based on the evidence, that tobacco was a bulk good sold by the Mohawks of Kahnawà:ke to the English between 1700 and 1760, because there is not enough a paper trail in the record. He points out that it was predominantly a peltry trade, because that is where the money was[498].

[1019] Thus, the evidence of a tobacco trade by the Mohawks to the Europeans is weak. This, however, does not support the conclusion that the Attorneys General would attribute to it, i.e., that the absence of regular trading of tobacco by the Mohawk to the Europeans shows that the parties could not have intended that the Covenant Chain apply to that trade.

[1020] In the words of Prof. Parsons "tobacco is not something that was nice to have, but in the Iroquoian world was necessary to have"[499]. The evidence of a tobacco trade to the Mohawk is very strong, as well is that of tobacco production. While the Court acknowledges that the evidence of the Mohawks of Kahnawà:ke selling tobacco to Europeans is weak, it does not necessarily follow that the intention of the parties was to freeze their trading relationship in the 18th century, i.e., with each party limited to trading only what it was offering at that time.

[1021] Their intention was to maintain their friendship and peace, and this required protecting and maintaining a trade relationship that benefited both sides. The fact that the fur trade has become less profitable, while the tobacco trade has become more lucrative should not be determinative of the parties' rights.

[1022] A word on the debate over the meaning of "free trade" and of expressions such as the "open road", or the road "clear from filth and dirth". The parties, through their respective experts, offered different yet plausible interpretations of these expressions and, as a result, it is not possible to arrive at a clear-cut position on their meaning. This said, from a Covenant Chain perspective, that is not necessary. Both interpretations put trade at the core of the relationship, and the evidence does not permit to conclude

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[496] Alexander von GERNET, *The Mohawks of Kahnawake and tobacco*, pp. 170-171. Exhibit AGC-74.
[497] Transcriptions, 2021-09-22, p. 101.
[498] *Ibidem.*
[499] Transcriptions, 2021-10-12, p. 168.

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that the intention of the parties was to limit the meaning of “trade” and therefore, the scope of the Covenant Chain, to the specific topics raised in the Treaties. Thus, even if the Court were to retain the Attorneys General’s position that “free trade” did not mean a right to trade without excise duties, that would have no effect on the conclusion that the regulation of the tobacco trade is a subject to be raise at councils.

[1023] In a similar vein, the fact that the parties followed the process of the Covenant Chain to deal with the issue of the sale of alcohol to Indigenous people supports this view, as seen below.

[1024] In 1725, the British sought to establish a trading post along the Onnondage River. During the council held in September 1725, sachims from the Onnondage, the Cayouge, and the Tuscarora declared that, despite their previous consent, they had reservations regarding the project considering the likelihood of the sale of alcohol to their people:

> You desire our Consent to build a trading house on the Onondage River which we have Consented to We see now some inconveniency in it, that there might some mischief arise from it by the Quantity of Strong Liquor that is sold there because our people are unruly when they are drunk they might comit some mischief to our Brethren or they to [us-crossed out] them w.ch should grieve us very much, If you are inclin'd to keep this trading place an build such a house, while [for-crossed out]our you Ind.ns [go-crossed out] often to there w.t.an Intent to buy powder but find none & then buy Rum with those Skins they design'd to lay out in powder [wherewith-crossed out] but instead of that they get drunk & are troublesome to prevent any mischief we desire you will for the future bring there powder instead of Rum which we might fetch here Gave seven hands of Wamp.m.[500]

[1025] The next day, on September 27, 1725, then in the presence of sachims of Kahnawà:ge, the Commissioners answered:

> We are glad to see that you have such a Concern for the peace and good understanding that is between us and you & to prevent all mischiefs that might insue by occasion of your people in Drink at the new trading place on the Onnondage River, We shall desire our Gov.r to pvent traders to sell any Rum to any of ye five Nations but only to the far Ind.ns but they shall supply you there with powder and Lead if any of your people should have Occasion for it, if our Traders should have no Rum to sell to the far Ind.ns they can’t well get Sale of their Ind.n Goods
>
> We desire you to be kind to all traders that shall go to trade on the Onnondage River or lakes & to encourage and Invite all far Ind.ns to carry

[500] Appendix 6.

> on their trade w.t. our people, they being able to supply them much Cheaper then the French do[501].

[1026] In 1742, at the end of a council meeting that included a formal renewal of the Covenant Chain, the speaker for the Caghnawages, the Schawenedes and the Orondax said:

> We have yet one thing to Say That you should take Care of the fall At Osweego, There Are Already a great Many People killed there by means of the Rum and by other means, wherefor we desire you Will take Care That no Such things May happen for the future[502].

[1027] To which the Commissioners answered:

> As to what you Say of Oswego, we will take Care That Our Traders do no Harms there and Will recommend the same to the Six Nations[503]

[1028] Finally, at the Treaty of Kahnawà:ke of 1760, the Indigenous delegates raised again the issue of the trade of liquor by European merchants to Indigenous people. They explained to their European counterparts that liquor is "the only thing w$^{ch.}$ Can turn our heads and prove fatal to us". The delegates of the eight Nations asked the Europeans to forbid their people from selling or giving alcohol to Indigenous peoples. They also asked that strict orders be given to their Officers post to ensure that no liquor was provided to their people.

[1029] Thus when one party realized that a particular product had harmful consequences for its people it raised the issue in councils and asked the other party to regulate its side of the trade of that product. The other party listened and acknowledged this request. In the case of alcohol, an ordinance was enacted four years later, in 1764, prohibiting the sale of spirituous liquors in any Indian village[504].

[1030] The evidence confirms that where a party had concerns with the dangerous consequences of a product on its population, what today would be called a public health issue, the subject was addressed in council and a solution was found through those discussions.

[1031] For all these reasons, the Court concludes that the regulation of the tobacco trade is an issue that must be raised at council and discussed by the parties with the

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[501] *Idem.*
[502] Appendix 8.
[503] *Idem*.
[504] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para.116. Exhibit WM-34.

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objective of finding a satisfying solution for all, or, as it can be said, to have serious and open-minded discussions with the objective of coming to one mind.

D.2.4 The solemnity of the promises

[1032] The law does not require any specific formality for the conclusion of a treaty. It only demands a certain degree of solemnity, which is to be analysed in its historical context.

[1033] Covenant Chain councils were held with a high degree of solemnity. This was reflected in the ceremonies preceding the discussions, their structure, and the exchange of wampum to support propositions, which all contributed to the solemnity of the councils.

[1034] The evidence also reveals numerous instances of Covenant Chain renewals, with both parties expressing solemn promises and mutual commitments. Words spoken on these occasions, such as "the chain that will not break" or "lasting and bright" as well as the promises to maintain its brightness all exude a sense of solemnity that underscored the gravity and significance of these engagements. The recognition that the Covenant Chain has endured for generations and will persist into the future further emphasizes the solemn nature of these commitments.

[1035] In the historical records mentioned earlier, we find the following examples[505].

[1036] In 1677:

> Bot wee desire now y^{t} all w^{ch} is past may be buried in oblivion and doe make now ane absolut Covenant of peace w^{ch} we shall bind wth a chain for the Sealing of y^{e} Same doe give an hand of Therten deep.[506]

[1037] In July 1702:

> I have sent for you in the beginning of my Governm^{t} to renew the Covenant Chain between us according to y^{e} ancient Custome where is included all Her Majesties subjects in this main of America, viz Virginy, Maryland, New England and all y^{e} rest of y^{e} English Provinces and Colonies in this Northern Continent and hope it will be more lasting and bright now on y^{r} part, then ever it was formerly, and that you will answer that good Character I have heard of you in England.[507]

[1038] In March 1725, Ondatsagto, the speaker of the Sachims of Kahnawà:ke said:

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[505] All underlinings are from the Court.
[506] Appendix 2.
[507] Appendix 4.

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> our ancestors livd all in in one Country and were one people but it seems Every one is gone where he pleasd and tis fallen our lott to be Setld in Canada. You sent us lately a belt of wampum that we Should Keep ye Covenant Chain [illeg-crossed out] inviolable w.h we promise on our Side to do and do Expect youl pform it on your Side according to your promises[508]

[1039] In their response the Commissioners said:

> Brethren The Union & friendship that has been between our and your Ancestors, and now is between us, which we expect you'll keep Inviolable (…)

[1040] In August 1735, the Commissioners said:

> we are as well as you Convincd y.t what is Evil has generall y.e Strongest Impression on y.e minds of men, but we do assure you that no Evil Can harbour in our hearts ag.t you but they are pure and Clean which you may be perswaded will always be so as long as you keep this treaty & convenant on y.r parts inviolable and the Riad shall y.n be always kept clean & open to this place and be joyfully Recd with great friendship without dissimulation as in a fair Sun Shiny day, gave a belt

[1041] That council meeting concluded in somewhat more formal promise, almost in the form of a written treaty:

> [The Commissioners]
>
> Brethren
>
> We Shall at y.e Request of your warriors Send your Calamet pipe to onnondage, where all the differences between you and the Six nations are to be made up & Reconcilld,
>
> We desire that you may give up your names as well Sachims as warriours who are now present at this treaty for Confirmation of what you have Promisd on your Side, that it may be Seen by your posterity who has been present Consented & Concluded it they gave their names who are as follows
>
> D'Cariehoga orachjawachet
>
> agarieyachtha Sconondo
>
> T'seegochie soahsedageerat

[508] Appendix 5.

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Canadagaje Soneejasee

adonienarickho Karichariego

Tahassa Tojachjago

Sagorancax

Thorondieraghton

after Some Consultation one of the Sachims Stood up & Said

Brethren

We return you thanks for what you have Said in Repeating our Speech, and the Reply you have made which is to our generall Satisfaction and Solemnly promise to perform y^e^ Engagements wee now made[509]

[1042] In 1742, the Commissioners said:

We Are glad to see you Here with Chearfull Countenances to renew the Covenant so Long since made between our forefathers and so frequently renewed between us and you and particularly Seven years ago, we shall now repeat the Substance of that Covenant which is as follows That you and All the Indians liveing in Canada shall Live with the Subjects of the King of Great Brittain not only in this Province but All other his majesties Subjects in A perfect frindship and neutrality, in Case there should Happen to be A War Between the King of Great Brittain and the french King, And That we shall for Ever live in Unity and peace together and have free recourse to and from Each Others habitations, Att All times as well on Account of Trade as on Other business and receive one the other At All times as Brethren and not molest Each Other in the Way to And from Each other But that the same remain Always free and Clear without Any Manner of Interruption from Each Other. The reason That We desired you to Come here is this, That you As Well As we might be Mindfull of this Covenant and That we by Seeing One Another and Smoakeing a Pipe together, might have the Stronger Impression on Our Minds of what has formerly been Transacted Between us and That the said Covenant may be kept Inviolable for Ever not only Between us but our Children after us, As A token That it shall be so on our side We give this belt and Expect the Same Engagements from you At that time[510]

[1043] In 1748, Sir William Johnson said:

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[509] *Idem.*

[510] Appendix 8.

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> Brethren of the five Nations I will begin upon a thing of a long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, 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, at which you were much surprised but finding what it contained pleased you so much, being Things for your Purpose, as our People convinced you of by shewing you the use of them, that you all Resolved to take the greatest care of that Vessel that nothing should hurt her Whereupon it was agree to tye her fast with a great Rope to one of the largest Nut Trees on the Bank of the River But on further Consideration in a fuller meeting it was thought safest Fearing the Wind should blow down that Tree to make a long Robe and tye her fast at Onondage which was accordingly done and the Rope put under your feet That if anything hurt or touched said Vessel by the shaking of the Rope you might know it, and then agreed to rise all as one and see what the Matter was and whoever hurt the Vessel was to suffer. <u>After this was agreed on and done you made an offer to the Governour he was so pleased at that he told you he would find a strong Silver Chain which should never break or slip or Rust to bind you and him forever in Brothership together and that our Warriours and Ours should be as one Heart, one Head, one Blood &ca. and that what happened to the one happened to the other After this firm agreement was made our Forefathers finding it was good and foreseeing the many Advantages both sides would reap of it, Ordered that if ever that Silver Chain should turn the least brightened up again, and not let it slip or break on any account for then you and we were booth dead.</u> Brethren there are the words of our Wise Forefathers which some among you know very well to be so. Now Brethren understanding or hearing that the French our and your Common Enemy were endeavouring to blindfold you and get you to slip your hands out of that Chain, which as our Forefathers said would certainly be our destruction, I now out of a tender regard for your Safety and Welfare as well as Ours, conjure you not to listen any more to the deceitful French who aim at nothing more than to destroy you all if in their power; but stick fast to the Old Agreement which you will find the best. A large Belt of Wampum. [511]

[1044] The next day, the Five Nations answered:

> Brother <u>We are very thankful to you for reminding us of the old Agreement made by our Forefathers and are overjoyed to hear that you have found it out, and hope you will take care not to let it be lost again, for we are sensible that keeping up to them Rules laid down to us</u> thereby is the only way to enable us & You to withstand our Enemies and preserve our Lives wherefore you may depend upon it That all the arts or Cunning Ways of the French

[511] Appendix 9.

> which its true they use a great deal of shall never get us to drop our Friendship to you Brethren. A large Belt. [512]

[1045] On October 30th, 1753, the Mohawks of Kahnawà:ke said:

> and further said they Came to Renew the old Covenant Chain and that they would for Ever Keep it Bright & Clean Bright & free from Roast & thereupon gave 3 Bever Skins[513]

[1046] The next day, the Commissioners replied:

> Bretheren We are glad you are Come to Renew the Old Covenant Chain, and we do hereby Assure you, that of our Sides We will keep the same Bright, and the Road Between us and You Clear from all filth and Dirth, and the fire allways Burning for you and all yours to Come & Smoke your pipes when you please, and you may Depend that our friendship will be towards you a Long Duration, Whereon gaves one piece of Strouds.[514]

[1047] In 1754, the Commissioners said:

> Bretheren, We now Again, Renew the Old Covenant Chain with You and all your Allies, Which has Been Made By Our forefathers, and Desire You, and All Your Allies, to keep the Same Bright, Clear and free from Rust; as Long as the Sun and Moon Indures, and that No Dark Clouds May Come In the Way, So that You and We May Walk and Go Without fear of Terror; and Live Always In Frindship, with Each Other, and if In Case an Open War Should Break Out, Between the King of Great Briten and the French King, We Desire You to Stand Neuter and Commit No hostilities On any of his Majesties Subjects. And We Do Now Again (as Wee Also Did Last fall) Assure You; that We of Our Side, Will Keep the Said Covenant Chain Bright, Clear & free from Rust and filt, and the Road Between us and You Clear from filt and Dirt, and the fire Burning.[515]

[1048] In September 1760, the Mohawks of Kahnawà:ke said:

> We heard and took to heart the good Words you spoke to us yesterday; We thank you most heartily for [them] renewing and strengthing the old Covenant Chain [of] which before this War subsisted between us, and we in

[512] *Idem.*
[513] Appendix 10.
[514] *Idem.*
[515] Appendix 11.

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> y^e^. Name of every Nation here pres^t^. assure you [*to]* that we will hold fast [*of]* the Same, for ever hereafter. [516]

[1049] The nature of the Covenant Chain, the words used by both parties at its renewals, the extended period over which this was done, all combined to bestow a solemn character upon the Covenant Chain.

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D.2.5 Conclusion on the constitutional status of the Covenant Chain

[1050] Amidst the turbulence of that era, two civilizations encountered one another and, in response to the challenge that this represented, they devised a distinctive mechanism to favour and govern a mutually beneficial relationship, the Covenant Chain.

[1051] Through their entry into and subsequent renewals of the Covenant Chain, the parties intended to establish a lasting relationship characterized by both a military and friendship alliance. This alliance was to be guided by the principles of Haudenosaunee diplomatic protocol and included a conflict-resolution procedure.

[1052] The Court concludes that the Covenant Chain is a treaty between the Haudenosaunee and the British, as recognized by s. 35(1).

D.2.6 Extinction of the Covenant Chain, or breaking the chain

D.2.6.1 The law

[1053] In Canadian law, the burden to prove the extinction of a treaty lies with the party making the claim of extinction.

[1054] In *R. v. Simon*, Chief Justice Dickon reminded that "given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises." [517]

[1055] The extinguishment of a treaty requires the consent of both parties involved. In *R. v. Sioui,* the Supreme Court added that *"*The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned*."*[518]

[1056] In the same decision, the Supreme Court stipulated that non-user of a treaty cannot by itself extinguish its effects:

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[516] Appendix 12.
[517] *R. v. Simon,* [1985] 2 S.C.R. 387, pp. 405-406.
[518] *R.* v. *Sioui*, [1990] 1 S.C.R 1025, p. 1063.

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> Finally, the appellant argues that non-user of the treaty over a long period of time may extinguish its effect. He cites no authority for this. I do not think that this argument carries much weight: a solemn agreement cannot lose its validity merely because it has not been invoked to, which in any case is disputed by the respondents, who maintain that it was relied on in a seigneurial claim in 1824. Such a proposition would mean that a treaty could be extinguished merely because it had not been relied on in litigation, which is untenable.[519]

[1057] In *Simon*, the issue was the extinction of a written Treaty concluded in 1752. The Crown argued that the Treaty became null and was terminated and rendered unenforceable when hostilities arose between the Micmac and the British in 1753. Simon's position was that the alleged hostilities were sporadic and of minor consequences and thus did not invalidate or terminate the Treaty[520].

[1058] Facing a conflicting interpretation of historical facts, Chief Justice Dickson said:

> It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements of proving such a termination have not been met. Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question. The Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.[521]
>
> (Underlining from the Court)

[1059] Chief Justice Dickson then noted that nothing in the British conduct after the conclusion of the Treaty and the alleged hostilities indicated that the Crown considered the Treaty to be at an end.

[1060] In Haudenosaunee law, there is no principle that either applies to or leads to the extinction of a treaty.

[1061] For Dr. Adams, the objective of The Great Law of Peace is to foster the maintenance of sustainable, long-lasting relationships of peace, which, in the

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[519] *Idem*, p. 1066
[520] *R.* v. *Simon,* [1985] 2 S.C.R. 387, p. 401.
[521] *Idem*, p. 404.

Haudenosaunee culture, are meant to be permanent. Moreover, because they are established over generations, there is no easy way to dissolve a relationship[522].

[1062] According to The Great Law of Peace, the objective of resolving conflict involves repairing the chain through councils and never breaking it[523].

D.2.6.2 Analysis

[1063] The evidence shows that the Covenant Chain is an agreement designed to last for perpetuity.

[1064] The historical records contain numerous references where the parties expressed their intent to uphold, renew, or rejoin the Covenant Chain, with a desire for its longevity across generations to come. In line with that, the inclusion of a diplomatic forum for conflict resolution further supports the parties' intention to utilize it in a lasting relationship.

[1065] Prof. Beaulieu testified that treaties were concluded to last for eternity, and we note that none of the Treaties contains a clause limiting its application in time. In the same vein, peace was also promised for eternity[524].

[1066] According to the Haudenosaunee perspective, when the British became brothers and members of the family, it signified their commitment to a perpetual relationship. The process of admitting the British into the Haudenosaunee family was not immediate; it evolved over decades. In a family relationship, the bond does not break merely because of neglect or challenges. Nevertheless, relationships always face difficulties and tests and, when they do, council meetings are held to address the issues. This perspective is rooted in The Creation Story and has been passed down through the meta-narrative of the relationship between the two brothers.

[1067] The Attorneys General did not address the extinction of the Covenant Chain, because they maintain that it is not a treaty. They did, however, present an argument suggesting that certain treaties might have been extinguished as a result of acts of warfare. If that argument were to be applied to the Covenant Chain, the Court would conclude that, in its case, acts of warfare did not lead to its extinction.

[1068] The evidence shows that the Covenant Chain survived multiple episodes of warfare between 1677 and 1760, including three European wars[525] that greatly affected peace and neutrality between the Mohawks of Kahnawà:ke and the British. Those are complex historical episodes, but the broader perspective of the Covenant

[522] See Section II.D.2.8.3.
[523] *Ibidem.*
[524] Transcriptions, 2021-11-18, pp. 7-9.
[525] The Spanish Succession War of 1702-1713, The Austrian Succession War of 1744-1748, The Seven Years War of 1756-1763.

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Chain reveals that, in their wake, council meetings and Condolence Ceremonies were held in accordance with its protocol. Pursuant to discussions during these meetings, the parties consistently renewed the Covenant Chain, highlighting the essence of their enduring relationship.

[1069] During some of these periods of warfare, only certain members of the Indigenous nations were involved in hostilities. With respect to that, Dr. Adams discussed the tolerance for individual actions within Mohawk society. From the Haudenosaunee perspective, the fact that certain individuals took up arms in defiance of agreements did not automatically result in the extinction of the overall agreement[526].

[1070] Furthermore, the absence of words of coercion in the Mohawk language is a reflection of the broader Haudenosaunee legal tradition. Their law is not based on punitive consequences for unacceptable behavior but is rather oriented toward finding the best possible action[527]. This principle holds true for all their relationships, including the Covenant Chain.

[1071] Canadian law requires the consent of both parties for the extinction of a treaty. Not only is there no evidence that the Haudenosaunee consented to the extinguishment of the Covenant Chain, but the evidence points to the contrary. For example, Chief Nelson spoke of a recent discussion amongst chiefs of the Iroquois Confederacy about changing the silver chain to a gold one[528]. This shows that the Covenant Chain remains a valid Treaty for the Haudenosaunee to this day.

[1072] Chief Nelson goes even further, declaring that, even if the chain might need polishing, it will be passed to future generations so that they too will hold the Covenant Chain as a sacred connection between brothers[529].

[1073] The metaphor of the Covenant Chain also reflects this aspect. The strength of the silver chain symbolized its enduring nature, meant to last. From the Haudenosaunee perspective, the Covenant Chain cannot be broken.

[1074] The image of arms linked together, depicted on Sir William Johnson's seal, is intricately connected to the word *Tehontatenentshonteronhtáhkwa*, which signifies "they together have attached the ends of one another's arms at some point in the past and continue to do so". In the Haudenosaunee belief, linked arms symbolize an unbreakable bond and once joined, they are meant to remain inseparable[530].

[1075] Indeed, in the historical records, both parties make numerous references to "polishing the chain" to keep it bright and prevent it from breaking. This metaphor

[526] See Section II.D.2.4. and II.D.7.2.5.
[527] See Section II.D.5.1.
[528] Transcriptions, 2021-10-12, p. 139.
[529] *Ibidem.*
[530] See Section II.D.7.2.1.

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emphasizes the importance of maintaining the Covenant Chain and taking care of the relationship. If neglected, like any precious object, the chain can tarnish or break. The idea behind this symbolism is to highlight the need for ongoing effort and care to ensure the longevity and strength of the alliance.

[1076] To prevent the Covenant Chain from tarnishing, it requires regular polishing, a process performed through council meetings. Whenever an issue arises, council is convened to discuss and resolve it through dialogue and mutual understanding. This practice has been consistently followed since 1677, as evidenced in Chief Nelson's testimony and numerous historical council reports. It reflects the core essence of the Covenant Chain, where the parties engage in ongoing communication to maintain the strength and integrity of their relationship.

[1077] Breaking the Covenant Chain cannot result from mere negligence or dysfunction. To do that requires an explicit gesture from the parties expressing their intent to sever the relationship.

[1078] The evidence does refer to one notable event in 1753, when the Mohawk Chief Hendrix declared the chain to be broken. In Prof. Beaulieu's opinion[531], however, this was not a definitive break. It was, rather, a dramatic gesture to draw attention to the consequences of Britain's refusal to address longstanding issues, including land encroachment, that had led to years of frustration in their relationship. This singular reference remains the only recorded event of its kind.

[1079] Moreover, even if, hypothetically, the Covenant Chain had effectively been broken in 1753, historical records reveal that it was restored at a council meeting in 1754. This emphasizes the enduring nature of the relationship and the ability of the chain to be repaired through the diplomatic process of councils, even in the face of challenges.

[1080] The evidence shows that the Covenant Chain is a treaty that includes a conflict-resolution procedure known as councils, and that such councils were consistently held for well over a century. Nevertheless, as explained by Prof. Walters, the understanding and significance of the Covenant Chain gradually eroded over time due to various factors, such as the influx of new settlers and the rise of a new generation of local colonial elites[532].

[1081] Furthermore, it is possible that the erosion of the Covenant Chain was accelerated by the policies of civilization and assimilation adopted by the Crown. That said, it would be incorrect to conclude from this that the Covenant Chain had been

[531] Transcriptions, 2021-11-22, p. 89.
[532] Mark D. WALTERS, *Report on the Covenant Chain Treaty Relationship in pre-Confederation Canada,* para.157. Exhibit WM-34.

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extinguished, as such a conclusion would be inconsistent with the principle of the Honour of the Crown.

[1082] Throughout the 19th, 20th, and 21st centuries, the Covenant Chain may have been tarnished, but the evidence shows that the Haudenosaunee kept it alive by holding their side of the chain. While non-Indigenous views might perceive it as an element of the past, for the Haudenosaunee, the Covenant Chain has never been extinguished. It remains intact and ready to be polished and followed as a purposeful and enduring instrument designed to last for perpetuity, enshrining the enduring relationship between nations.

[1083] Chief Nelson clearly expressed that, for the Mohawk, the Covenant Chain is not broken, even though it is in serious need of polishing:

> We know that that Chain has not been polished for a while even now. And as I mentioned earlier, it created a process that the bushes between us have grown up and we don't see each other very much anymore. So, we need to repolish this again and make it strong again because now we share this land. And even though our land is unceded territory we still share that with you today. And we shared it back then as well. [533]

[1084] The Covenant Chain relationship and Treaty between the Crown and the Mohawks of Kahnawà:ke has not disappeared and is not broken, despite being tested over recent centuries. In the era of reconciliation, the Covenant Chain is uniquely well suited for this important task.

E. FINAL REMARKS ON THE TREATY ISSUE

[1085] The conclusions made about the Covenant Chain have altered the context surrounding the issue of a legal determination of a treaty right to trade tobacco guarantied by the Treaties.

[1086] It is now determined that the Covenant Chain is a non extinct Treaty, binding the parties, that includes a conflict resolution procedure. The Court has also determined that the contemporary issue about tobacco trade between the parties must be discussed at council.

[1087] These conclusions are sufficient to resolve the dispute between the parties about treaty rights, without delving into the question of a right to engage in tobacco trade guarantied by the Treaties.

[1088] Drawing on Chief Nelson's metaphor, there appears to be bushes that have grown between the parties and that obstacles have arisen that need to be addressed, keeping in mind the constitutional goal of reconciliation. The proof that trade was a

[533] Transcriptions, 2021-10-21, p. 137.

topic addressed during council meetings is sufficient to prompt the responsibility of the parties to address it in contemporary Covenant Chain council sessions. The Covenant Chain councils seem like a well-designed forum for accomplishing this aim. To honour the parties and the council process, they should be given sufficient latitude and flexibility to work through these issues.

[1089] At future councils, these Treaties will serve as milestones in a relationship that is destined to develop, as the parties persist in their earnest discussions with the aim of reaching a consensus and ultimately resolving the issue at hand.

[1090] Making early judicial determination on topics under discussion would not be conducive to achieving this objective.

[1091] Another reason to exercise judicial restraint is that the Aboriginal law of treaty right under s. 35(1) has not been developed with an historical context such as this one.

[1092] The parties agreed that dating back to 1677, the British and the Haudenosaunee had placed their relationship within the framework of the Covenant Chain. Furthermore, the available evidence shows that all the Treaties were discussed and formalized at Covenant Chain councils. They are thereby part of the Covenant Chain.

[1093] Extensive, in-depth historical evidence and expertise have been presented regarding the Treaties. Understandably, in the absence of a determination regarding the status of the Covenant Chain, the parties invested significant efforts in analysing the evidence of the Treaties according to the Aboriginal law jurisprudence.

[1094] The legal precedents were predominantly developed in situations where one written treaty was being scrutinized, where the scope of the issues was notably more limited, and where the historical context was tightly focused on the period surrounding the creation of that treaty. The unique circumstances of this case where only the Treaty of 1664 is written, and where the historical context is unusually wide and long, add a significant layer of complexity to their application in this instance.

[1095] The Covenant Chain is the framework of the treaty relationship between the parties. Through this framework they periodically entered into oral agreements that at the time, were not labelled as treaties, but that nonetheless governed their relationship. Those agreements were renewed and adjusted when need be. They provided for a dynamic relationship, highly adaptable to the best interest of all the parties depending on the circumstances.

[1096] Once the Treaties are understood as elements of the Covenant Chain, the context is quite different and unique. As part of the Covenant Chain, there is no necessity to examine them separately, seeking distinct interpretations that the parties might have held at the time, to compare them against a vast historical backdrop, or to examine the issue of a modern counterpart.

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[1097] It is worth repeating the admonishment of the Supreme Court that the criminal process is inadequate and inappropriate for dealing with Indigenous rights claims[534], that "the settlement of Indigenous claims has an inescapable political dimension that is best handled through direct negotiation"[535], and that "reconciliation is rarely if ever, to be achieved in courtrooms"[536].

[1098] Thereby, exercising judicial restraint will more effectively accomplish the constitutional objective of reconciliation.

[1099] For these reasons, the Court will not address the issue of a treaty right to trade tobacco under the individual Treaties.

F. CONCLUSION

[1100] The court concludes that the Covenant Chain is a unextinct treaty of peace and friendship that contains a conflict resolution procedure, guaranteed by sec. 35(1) of the *Constitution Act, 1982*.

IV. THE ABORIGINAL RIGHT

[1101] While the Applicants conceded that the issue of treaty rights is their strongest argument[537], at least under the current state of the law[538], they also allege an Aboriginal right of participation in the tobacco trade[539].

[1102] Primarily, the Applicants plead for a rethinking of the applicable test to determine whether an Aboriginal right is protected by s. 35(1). They consider that the conditions to depart from the current framework established by the Supreme Court in *Van der Peet* are met, and they elaborate on the pitfalls of the current test. They offer an alternative test that aims at protecting contemporary, rather than historic, practices.

[1103] The MNCC also severely criticizes the current *Van der Peet* test but is, nonetheless, uncomfortable with the test proposed by the Applicants[540].

[1104] In reply, the Attorney Generals argue that the conditions to reverse the legal framework established by the Supreme Court in *Van der Peet* are not met, and submit that the Applicants have not established the existence of an Aboriginal right that they characterize as a right to "transport tobacco from pre-contact Mohawk territory located in

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[534] *R.* v. *Marshall, R.* v. *Bernard* 2005 SCC 43, para. 143.
[535] *R.* v. *Desautel,* 2021 SCC 17, para. 87-89.
[536] *Clyde River (Hamlet)* v. *Petroleum Geo-Services Inc.,* 2017 SCC 40, para. 24.
[537] Opening statement, transcriptions 2021-09-13, p. 20.
[538] Final pleadings, transcriptions 2022-01-21, p. 38.
[539] *Consolidated closing memorandum of fact and law of the Applicants*, para. 326.
[540] Final pleadings, 2022-01-31, p. 12, l. 7-10.

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the Mohawk River Valley (in what is now New York State), to the north of Lake Champlain and the Adirondack mountains (in what is now Canada), for the purposes of commercial trade"[541].

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A. DETERMINATION OF THE APPLICABLE TEST

[1105] The Applicants argue for a change to the test. To obtain that goal, they must demonstrate that the existing precedent can be set aside. If the conditions to depart from a precedent of the Supreme Court are met, the Court will then consider if the test favoured by the Applicants is the one that the Court should apply.

A.1 Legal principles

[1106] Before deciding on the Applicants' claim, it is necessary to understand both the current framework established by the Supreme Court to analyse Aboriginal rights claims and the applicable law on vertical *stare decisis*.

A.1.1 The legal framework established by the Supreme Court to recognize Aboriginal rights

[1107] S. 35(1) reads as follows:

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

[1108] Aboriginal rights were not created by s. 35(1); they were already recognized under the common law[542]. This said, s. 35(1) gave them a constitutional status that prevents them from being extinguished or regulated by Parliament[543].

[1109] The Supreme Court explored the scope of s. 35(1) for the first time in *Sparrow*[544]. In that case, a member of the Musqueam Indian Band was charged with an offence to the *Fisheries Act*[545] because he fished with a net longer than what was authorized by the Band's Indian food fishing licence. In *Sparrow*, the Supreme Court established a general framework for analyzing s. 35(1) claims, which is summarized by the majority in *Van der Peet* in the following terms:

> First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must

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[541] *Attorney General of Québec Final Pleadings*, para. 87, 103; *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings*, para. 40.
[542] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 538, quoting *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313; *R.* v. *Desautel*, 2021 SCC 17, para. 34.
[543] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 538, 582; *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 11.
[544] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.
[545] *Fisheries Act*, R.S.C. 1970, c. F-14.

> determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified[546].

[1110] The following review of the current jurisprudence will focus on the first step, namely the existence of an Aboriginal right, as that is highly contested in the present case. The law on infringement and justification will be dealt with in the relevant sections of the judgment (Sections V.A and VI.A). Conversely, the Court will not elaborate on the extinguishment step, as that is not an issue here.

[1111] In *Sparrow* (1990), the Aboriginal right to fish for food was not seriously contested, so it was not necessary for the Supreme Court to explain precisely how Aboriginal rights were to be defined. Instead, the Court focused on establishing a general framework, and discussed especially the questions of extinguishment, *prima facie* infringement and justification.

[1112] Six years later, in *Van der Peet* (1996)[547], the Court addressed for the first time the issue of how the rights recognized and affirmed in s. 35(1) were to be defined. *Van der Peet* was heard contemporaneously with three other cases that refine certain aspects of that stage of the analysis: *R.* v. *Gladstone*[548], *R.* v. *N.T.C. Smokehouse Ltd*.[549] and *R.* v. *Nikal*[550].

[1113] In *Van der Peet*, the Appellant was accused under the *Fisheries Act* for having sold salmon fished under the authority of an Indian food fish licence. She based her defence on the existing right to sell fish as a member of the Sto:lo society. The only issues before the Supreme Court were whether the Appellant had proven that the Sto:lo had an Aboriginal right to fish and, if so, whether it included the right to sell, trade and barter fish for livelihood, support and sustenance purposes[551].

[1114] The Supreme Court starts its analysis in *Van der Peet* by stating that, in the liberal enlightenment view, rights are general and universal. They are held by all people in society because each person is entitled to dignity and respect. In contrast, Aboriginal rights are held only by Aboriginal members of society. They arise from the fact that Aboriginal peoples are Aboriginal[552].

[1115] In that light, the aim that the Supreme Court gives itself in elaborating a framework is to "define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by

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[546] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 526.
[547] *Idem*.
[548] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723.
[549] *R.* v. *N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672.
[550] *R.* v. *Nikal*, [1996] 1 S.C.R. 1013.
[551] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, p. 587.
[552] *Idem*, p. 534.

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aboriginal people because they are aboriginal"[553] (emphasis in the original). A central element of the philosophy of the *Van der Peet* test is, therefore, the Supreme Court's concern that there needs to be specificity when granting special constitutional protection to one part of Canadian society[554].

[1116] The purposive analysis of the Chief Justice is best summarized in this oft-quoted extract:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) because of one simple fact: when Europeans arrived in North America, aboriginal people were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown[555].
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> [emphasis in the original]

[1117] Thus, reconciliation between the pre-existence of distinctive Aboriginal societies occupying the land and Crown sovereignty is the crux of the *Van der Peet* framework. The content of Aboriginal rights is directed at fulfilling two purposes: (1) to recognize "the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies", and (2) to reconcile this prior occupation with the assertion of Crown sovereignty over Canadian territory[556].

[1118] The majority of the Supreme Court considers in *Van der Peet* that to fulfil these objectives, "the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies", being "the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans"[557]. In other words, "in order to be an

[553] *Idem,* p. 535.
[554] *Ibidem*.
[555] *Idem*, pp. 538-539.
[556] *Idem*, pp. 547-548.
[557] *Idem*, p. 548.

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aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right"[558].

[1119] Before going into more detail on the multiple layers of the test, it is important to note that the Supreme Court reminds us that Courts must take into account the perspective of Indigenous peoples themselves. But there is a *caveat*: if Courts must be sensitive to the Indigenous perspective, they must also "be aware that aboriginal rights exist within the general legal system of Canada". Recognition of Aboriginal rights must be done "in terms which are cognizable to the non-aboriginal legal system"[559].

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A.1.1.1 Overview of the *Van der Peet* test

[1120] The *Van der Peet* test can be summarized in the following three steps[560]:

a) Characterization

The Court must first characterize the right claimed in light of the pleadings and evidence[561].

b) Existence and integrality

The Court must then determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society[562].

c) Continuity

The Court must finally determine whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice[563].

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[558] *Idem, p.* 549.
[559] *Idem*, pp. 550-551.
[560] *R*. v. *Desautel*, 2021 SCC 17, para. 51.
[561] *Ibidem.* See also *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 53; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, para. 24; *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 14-19.
[562] *R*. v. *Desautel*, 2021 SCC 17, para. 51; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 46; *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 12; *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 40-45.
[563] *R*. v. *Desautel*, 2021 SCC 17, para. 51; *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*, 2011 CSC 56, para. 46.

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A.1.1.2 Characterization

[1121] As a first step, courts must identify the nature of the claim being made in a precise manner. This is essential because it has an impact on whether the evidence supports the claim[564]. The majority indicates that "[to] characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right"[565].

[1122] In *Mitchell*, Chief Justice McLachlin cautions that the right claimed must not be distorted to fit the desired result. She adds: "An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society"[566].

[1123] Regarding the first factor, namely, the nature of the actions of the applicant, the highest Court warns that the activities must be considered at a general rather than at a specific level. Also, it must be "[borne] in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly"[567].

[1124] In the *Gladstone* case, heard contemporaneously with *Van der Peet*, the Supreme Court underlines that, at this stage of the analysis, the Court is "determining what the appellants will have to demonstrate to be an aboriginal right in order for the activities they were engaged in to be encompassed by s. 35(1)"[568].

[1125] In both *Gladstone* and *N.T.C. Smokehouse*, the Supreme Court had to face a situation where the actions of the appellants and the regulations under which the appellants were charged did not perfectly align. The actions of the appellants were best characterized as a commercial exploitation, whereas the regulations prohibited all forms of sale or trade regardless of their extent or scale.

[1126] The Supreme Court adopted what could be called a pragmatic approach. It decided that it will first address whether the appellant could demonstrate an Aboriginal right to exchange the goods for money or other goods. Thereafter, if the first hurdle is crossed, it will turn to the question of whether the appellant demonstrated a right to sell to the commercial market[569].

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[564] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 551.
[565] *Idem*, p. 552.
[566] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 15.
[567] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 553.
[568] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 743, para. 23.
[569] *Idem*, para. 24; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, para. 20-21.

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[1127] Finally, on the issue of characterization, one of the questions raised in the Applicants' case is the relevance of geographical limitations in the characterization of the right. To that extent, it is important to note that the Supreme Court "has frequently considered the geographical reach of a claimed right in assessing its centrality to the aboriginal culture claiming it"[570].

[1128] In *Côté*, the Supreme Court stated that "[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land"[571]. On the other hand, Chief Justice McLachlin makes clear in *Mitchell* that the relevance of geographical considerations depends on each case[572]. In that regard, Justice Lamer in *Delgamuukw* talks about a "spectrum" with respect to the degree of connection of a right with the land[573]. Geographical considerations will be clearly relevant in cases where the activity is intrinsically linked to specific tracts of land, such as hunting and fishing cases.

[1129] In other situations, "more free-ranging rights, such as a general right to trade", would fall on the opposite end of the spectrum, since there is no inherent connection to a specific land area in such a case. Chief Justice McLachlin concludes in *Mitchell* that "trading rights will seldom attract geographical restrictions"[574]. In that specific case, however, the right to trade was only one aspect of the broader claim to a right to convey goods across an international boundary for the purposes of trade. The Court notes that all the factors of *Van der Peet* refer to geographical considerations: (1) the action giving rise to the case was the arrival of Chief Mitchell at the border where he claimed his right to cross the international boundary with goods for trade - "[a]bsent a border, this case would not be before the Court"; (2) the relevant regulation is the *Customs Act,* which is "fundamentally concerned with the geographical origins and destinations of goods"; and (3) the ancestral practice involved allegations of an historical trade route north across the St. Lawrence river[575].

A.1.1.3 Existence of an integral practice, custom or tradition

[1130] After characterization, the Court must examine if the evidence substantiates the existence of the ancestral practice, custom or tradition claimed. It is only after satisfying this second step that it will become necessary to determine whether it is an integral feature of the Aboriginal society in question with continuity to the present day[576].

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[570] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 55.
[571] *R*. v. *Côté*, [1996] 3 S.C.R. 139, para. 39
[572] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 56.
[573] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 138.
[574] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 56.
[575] *Idem*, para. 58.
[576] *Idem*, para. 41.

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[1131] The Chief Justice clarified in *Van der Peet* that "in order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question"[577]. This means that it must not only have been an aspect of the Aboriginal society or have taken place in it, but the practice, custom or tradition must also be "one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was" (emphasis in the original)[578]. This excludes aspects of the Aboriginal society that are true of every human society and that are only incidental or occasional to that society[579]. For the majority of the Supreme Court, "[it] is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1)"[580].

[1132] The majority in *Van der Peet* presents the question in another practical way, namely, that the Court must determine if, without this practice, custom or tradition, the culture in question would be fundamentally altered or become other than what it is. Expressed in an affirmative form, the Court must determine whether the practice, custom or tradition is a defining feature of the culture in question[581].

[1133] That said, Justice Bastarache wrote in *Sappier* that the notion that the culture would be "fundamentally altered" without the pre-contact practice should be used with caution, as it has created artificial barriers to the recognition and affirmation of Aboriginal rights. He also "discard[s] the notion that the pre-contact practice […] must go to the core of the society's identity", as was written in *Mitchell*, because this has "unintentionally resulted in a heightened threshold"[582].

[1134] In analyzing the Appellant's claim, Chief Justice Lamer specifies in *Van der Peet* that "a claim to aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question"[583]. The key element is that the practice, custom or tradition is integral to the culture of the Aboriginal group. Therefore, "[t]he significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right" (emphasis in the original)[584].

[1135] Regarding the period that should be considered for identifying whether a practice, custom or tradition is integral, the Supreme Court focuses on the period prior to contact between Aboriginal and European societies. It reasons that, it is the fact that the Aboriginal societies lived on the land prior to the European arrival that underlies

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[577] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 553.
[578] *Ibidem.*
[579] *Ibidem.*
[580] *Idem,* 553-554.
[581] *Idem*, 554.
[582] *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 40-41.
[583] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 564.
[584] *Ibidem*.

the protection afforded by s. 35(1), and not the fact that they existed prior to Crown sovereignty[585].

[1136] The Supreme Court recognizes that the claimant does not have to produce conclusive evidence from pre-contact evidence. It is enough to provide post-contact evidence directed at demonstrating aspects of the Aboriginal society that have their origins pre-contact[586]. In *Sappier*, Justice Bastarache reminds us that "[f]lexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular Aboriginal society. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available"[587].

[1137] It is interesting to note the opinion of the author Émond, who considers that the date of contact is not actually the real focus of the *Van der Peet* test:

> La coutume, pratique ou tradition reconnue comme un droit ancestral devait faire partie de la culture distinctive d'une communauté amérindienne au moment du premier contact avec les Européens, ont répété les tribunaux depuis l'affaire *R.* c. *Van der Peet*.
>
> Il faut cependant se rappeler que l'objectif de la doctrine des droits ancestraux est la protection des activités fondamentales des sociétés indigènes, tel qu'elles existaient déjà en Amérique du Nord avant l'arrivée des Européens. En réalité, ce n'est donc pas vraiment la date du premier contact entre les deux civilisations qu'il convient de déterminer le mieux possible, parfois avec une bonne marge d'erreur; on doit surtout se demander si une coutume, pratique ou tradition est d'origine exclusivement amérindienne ou si son apparition résulte de l'influence européenne. Une activité devenue fondamentale uniquement en raison de l'influence européenne ne se métamorphose jamais en un droit ancestral[588].
>
> [the Court's emphasis]

[1138] This interpretation appears coherent with the decision in *Delgamuukw,* in which the distinction regarding the relevant time period between a claim to Aboriginal title (sovereignty) and a claim to an Aboriginal right (contact) is explained. Chief Justice Lamer said that, for an Aboriginal right, the relevant time period is pre-contact because "[p]ractices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights"[589].

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[585] *Idem*, 554-555.
[586] *Idem*, 555; *R.* v. *Côté*, [1996] 3 S.C.R. 139, 177.
[587] *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 33.
[588] André ÉMOND, *Les droits des Premières Nations du Canada – Genèse et développement*, Montréal, Wilson & Lafleur, 2022, p. 96-97.
[589] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 144.

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A.1.1.4 Continuity

[1139] The last important aspect of *Van der Peet* that the Court must consider is the notion of continuity. To start with, it is seen by the Supreme Court as an answer to criticisms that the test, focused on the pre-contact period, "freezes" Aboriginal rights in the past:

> […] Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1)[590].

[1140] The Supreme Court believes that the evolution of a practice, custom or tradition will not prevent its protection as an Aboriginal right as long as a continuity is demonstrated[591]. In *Sappier*, the Supreme Court explains that "[a]lthough the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances" (emphasis in the original)[592].

[1141] However, in *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*[593], Justice Binnie warns that "allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right". In that case, the main issue was the question of continuity between an ancestral trade in eulachon grease and a "full-blown twenty-first century commercial fishery" of all species of fish[594]. A court should determine whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. To answer this question, a court should take "a generous though realistic approach to matching pre-contact practices to the claimed modern right"[595].

A.1.1.5 Burden of proof

[1142] The onus to demonstrate that the individual was acting pursuant to an Aboriginal right and that the impugned legislation is a *prima facie* infringement of that right lies on him or her. The burden on the Crown is to prove the extinguishment of the right and that the infringement is justified[596].

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[590] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 556.
[591] *Idem*, 557.
[592] *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 48.
[593] *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*, 2011 CSC 56.
[594] *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*, 2011 CSC 56, para. 8.
[595] *Idem*, para. 46.
[596] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1099, 1112, 1119; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 585, 586.

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A.1.2 Vertical *stare decisis*

[1143] The other important legal issue that the Court will have to explore with respect to modifying the *Van der Peet* test is the effect of vertical *stare decisis*. In that context, it is necessary to analyse the contours of the exceptions to vertical *stare decisis* before starting any discussion on the merits of the Applicants' claim.

[1144] The Court of Appeal recently summarized the law on vertical *stare decisis* in *R.* v. *Lapointe*[597]*,* as follows:

> The rule of *stare decisis* comes from English law; it aims to guarantee certainty in the law and in fact constitutes one of the foundational principle of the common law. It promotes predictability, enhances fairness and reduces arbitrariness. Similarly, it makes justice more efficient and economical and discourages the multiplication of judicial proceedings.
>
> […]
>
> The case law has identified several conditions for the application of vertical *stare decisis*. First, the decision establishing the precedent must come from a hierarchically higher court. Indeed, the logic inherent to vertical *stare decisis* is partially related to the right of appeal and relies on an essentially hierarchical conception of the judicial order. This hierarchical aspect means that a court is bound by the decisions of another higher court that is part of the same hierarchy. In this way, the Superior Court is bound by the decisions of the Court of Appeal and the Supreme Court of Canada, but not by those of another Canadian appellate court, although those decisions can be persuasive, without being binding.
>
> […]
>
> When the rule of vertical *stare decisis* applies and the lower court disagrees with the binding decision of the hierarchically higher court, it can certainly explain in its reasons what it considers problematic with the binding precedent, but it cannot refuse to apply it.
>
> It is true that in its judgments in *Bedford* and *Carter* the Supreme Court of Canada opened the door for lower courts to depart from a precedent in certain exceptional circumstances, that is (1) where a new legal issue is raised; or (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate". As the Supreme Court recently recalled in *R.* v. *Comeau*, the threshold is high and applies primarily

[597] *R.* v. *Lapointe*, 2021 QCCA 360 (leave to appeal denied, S.C.C., 24-03-2022, n°39655). All the quotes are from the unofficial English translation of the judgment of the Court made by SOQUIJ.

> when constitutional questions are at issue and the factual situation that gave rise to the precedent is radically different. Other than these rare cases, the lower court must follow the hierarchical precedent[598].
>
> [the Court's emphasis]

[1145] As mentioned in this extract, the Supreme Court has developed the current contours of vertical *stare decisis* in three cases in which a lower court departed from a Supreme Court precedent: *Bedford* (2013), *Carter* (2015) and *Comeau* (2018).

[1146] The Supreme Court first articulated the test for what could be described as a "modern approach" to vertical *stare decisis* in *Bedford*[599]. There, the judge of the Ontario Superior Court of Justice decided that the previous Supreme Court decision *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*[600] did not prevent her from reviewing the constitutionality of three provisions criminalizing various activities related to prostitution. She reasoned that the jurisprudence on s. 7 had evolved considerably since 1990. She noted, in particular, that the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the *Prostitution Reference*, that the evidentiary record before her was much richer, based on research not available in 1990, and, finally, that the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid[601].

[1147] The Supreme Court reminds that "a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. […] [This] threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role"[602].

[1148] In the *Bedford* case, the Supreme Court decided that the application judge was entitled to rule on the constitutionality of the provisions, as what was raised was a violation of the security of the person interest, whereas the previous decision was based on physical liberty interest alone. Thus, it was not the same interest at issue. In

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[598] *R.* v. *Lapointe*, 2021 QCCA 360 (leave to appeal denied, S.C.C., 24-03-2022, n°39655), para. 30-36.

[599] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72; Shannon HALE, "The Bedford trilogy and the shifting foundations of vertical stare decisis: emancipation from judicial restraint?", (2020) 29 *Dalhousie Journal of Legal Studies* 97, p. 99.

[600] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

[601] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72, para. 17.

[602] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72, para. 44.

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addition, "[t]he principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — [had], to a large extent, developed only in the last 20 years"[603].

[1149] Nevertheless, the Supreme Court also considered that on the question of whether the communication provision is a justified limit on freedom of expression, the issue was decided in *Prostitution Reference*. It stated that "the more current evidentiary record or the shift in attitudes and perspectives [did not] amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate"[604].

[1150] *Bedford* represents a significant change in the Supreme Court position on vertical *stare decisis*: "[u]ntil this point, vertical *stare decisis* in Canadian jurisprudence was near absolute"[605].

[1151] The Supreme Court reiterated this approach to vertical *stare decisis* in *Carter*, a case on the prohibition of physician-assisted death. In that case, "the trial judge concluded that the decision in *Rodriguez* did not prevent her from reviewing the constitutionality of the impugned provisions, because (1) the majority in *Rodriguez* did not address the right to life; (2) the principles of overbreadth and gross disproportionality had not been identified at the time of the decision in *Rodriguez* and thus were not addressed in that decision; (3) the majority only "assumed" a violation of s. 15; and (4) the decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, represented a "substantive change" to the s. 1 analysis (para. 994)". The trial judge "concluded that these changes in the law, combined with the changes in the social and factual landscape over the past 20 years, permitted her to reconsider the constitutionality on the prohibition on physician-assisted dying"[606]. The trial judge then held the prohibition to be unconstitutional.

[1152] The Court of Appeal allowed the appeal on the ground that the trial judge should have followed the Supreme Court's decision in *Rodriguez*[607].

[1153] On further appeal, the Supreme Court affirmed that vertical *stare decisis* should not be a "straitjacket that condemns the law to stasis". The Court made it clear that "[t]rial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate"[608]. These conditions were met in *Carter,* where the trial judge underlined "the changes in both the legal framework of s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide"[609]. The majority in *Rodriguez* did not have to apply the principle of overbreadth and did not

[603] *Idem*, para. 45.
[604] *Idem*, para. 46.
[605] Shannon HALE, "The Bedford trilogy and the shifting foundations of vertical stare decisis: emancipation from judicial restraint?", (2020) 29 *Dalhousie Journal of Legal Studies* 97, p. 107.
[606] *Carter* v. *Canada (Attorney General)*, 2015 SCC 5, para. 28.
[607] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
[608] *Carter* v. *Canada (Attorney General)*, 2015 SCC 5, para. 44.
[609] *Idem*, para. 44-45.

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consider whether the prohibition was grossly disproportionate[610]. In addition, the record in first instance "contained evidence that, if accepted, was capable of undermining" several conclusions of facts in *Rodriguez*[611].

[1154] In a third case, *R.* v. *Comeau*[612], the Supreme Court "signalled a more restrictive application of the doctrine [of *stare decisis*]"[613].

[1155] In that case, the Court emphasizes how narrow the path is for a lower court to disregard a previous decision of the highest Court. The Supreme Court starts by linking the concept of "shifting legislative and social facts" to the "living tree metaphor", which recognizes that interpretations of the Constitution may evolve over time[614]. It reiterates, however the strict test to put aside a precedent of a higher jurisdiction:

> To reiterate: departing from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must "fundamentally shif[t]" how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question[615].
>
> [the Court's emphasis]

[1156] Stated otherwise, it must not only be the answer to the question that must change, but also the debate itself and its parameters[616].

A.2 Analysis

[1157] The Court here will first address whether the exceptional circumstances to depart from *Van der Peet* have been demonstrate. Then, if the first hurdle is passed, the Court will turn to the analysis of the proposed new test.

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610 *Idem*, para. 46.
611 *Idem,* para.47.
612 *R.* v. *Comeau*, 2018 SCC 15.
613 Shannon HALE, "The Bedford trilogy and the shifting foundations of vertical stare decisis: emancipation from judicial restraint?", (2020) 29 *Dalhousie Journal of Legal Studies* 97, p. 112.
614 *R.* v. *Comeau*, 2018 SCC 15, para. 33.
615 *Idem*, para. 34.
616 *Idem,* para. 42.

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A.2.1 Stare decisis

A.2.1.1 Position of the parties

[1158] To begin with, it is important to underline that the Applicants do not ask the Court to discard the entire s. 35(1) framework. Their request is limited to the way the Court should direct itself to determine if they have proven the existence of the claimed right. Their core concern centers on the obligation for Indigenous claimants to prove that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society.

[1159] They emphasize that they are only asking the Court to adjust but one aspect of the *Van der Peet* test and, therefore, that they are not really asking to set aside a precedent of the highest Court.

[1160] Alternatively, if the Court considers that their new test is a departure from *Van der Peet*, they plead that the *United Nations Declaration on the Rights of Indigenous Peoples*[617] (hereafter the *UNDRIP*) and the *United Nations Declaration on the Rights of Indigenous Peoples Act*[618] (hereafter the *UNDRIP Act*) not only raise the new legal issue of the presumption of conformity of s. 35(1) with the *UNDRIP*, but also fundamentally shift the parameters of the debate[619]. Regarding that latter aspect, the Applicants assert that the adoption of the *UNDRIP* and the *UNDRIP Act* reflects the entry into a new "age of reconciliation"[620].

[1161] In *Charter* jurisprudence, there is a presumption of conformity that the *Charter*'s protection is at least as great as that afforded by international human rights documents that Canada has ratified[621]. The Applicants submit that this presumption should also apply to the interpretation of s. 35(1) and, therefore, that the Court should be guided by the presumption that s. 35(1) provides protection at least as great as that afforded by international instruments such as the *UNDRIP*[622]. Even though s. 35(1) is not part of the *Charter*, s. 35(1) jurisprudence has developed in parallel to that of the *Charter* and they argue that the principle should apply in a similar manner[623].

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[617] *United Nations Declaration on the Rights of Indigenous Peoples,* G.A. Res., U.N.G.A.O.R., 61st Sess., Suppl. No. 49, U.N. Doc. A/RES/61/295 (2007).
[618] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.
[619] Final pleadings, 2022-01-24, p. 59, l. 2-11.
[620] See Section III.A.2.1
[621] *Consolidated closing memorandum of fact and law of the Applicants*, para. 282, quoting *Re Public Service Employee Relations Act*, [1987] 1 R.C.S. 313, p. 349.
[622] *Consolidated closing memorandum of fact and law of the Applicants*, para. 283-286.
[623] *Consolidated closing memorandum of fact and law of the Applicants*, para. 287-288, quoting notably *Tsilhqot'in Nation* v. *British Columbia*, 2014 CSC 44, para. 142.

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[1162] Moreover, even though the Applicants recognize that, strictly speaking, the *UNDRIP* cannot be said to be a ratified treaty[624], they plead that this does not mean that the presumption of conformity does not apply. Indeed, the Applicants consider that the adoption by Parliament in June 2021 of the *UNDRIP Act* should be treated as a ratification of the *UNDRIP*. The Applicants explain that the *UNDRIP* followed a different path than a traditional international treaty. It went through a long negotiation process, and it was never going to lead to an international treaty. Therefore, there was no opportunity for Canada to ratify it. But still, "Canada has taken a decisive step to identify this nevertheless as […] a human rights instrument, that has that status"[625]. Therefore, they reason that the presumption should apply. The preamble of the *UNDRIP Act* is a clear enactment that the *UNDRIP* is a human rights instrument with application in Canada. As Canada was not able to ratify it, Parliament has found an alternative path to give it the same standing as a ratified treaty[626]. They add that the Supreme Court has already recognised that the *Universal Declaration of Human Rights*, which has a normative status in international law similar to the *UNDRIP*, can be relevant in interpreting the *Charter*[627].

[1163] The MNCC does not explicitly pronounce itself on the issue of *stare decisis*. Nevertheless, it is clear from their representations on the current test that they consider that *Van der Peet* should be discarded.

[1164] The Attorney General of Quebec retorts that the *UNDRIP* and the *UNDRIP Act* cannot modify s. 35(1) or the test to recognize s. 35(1) rights, because the *UNDRIP* has not been incorporated into Canadian law[628]. The *UNDRIP* is a resolution of the United Nations General Assembly. As such, it does not create binding obligations on states in international law. Since it is non-binding, the presumption of conformity does not apply[629]. Regarding the *UNDRIP Act*, it provides a framework for the implementation of the *UNDRIP*, but it does not incorporate it, or the rights comprised in it, into Canadian law[630]. And even if that were the intention, the federal legislator does not have the power to modify unilaterally the Canadian Constitution with a simple law[631].

[1165] In response to this last argument, the Applicants clarify that they are not asking for an amendment of s. 35(1) by a simple law. They point out that it is within the power of Parliament to adopt a statute that helps define how certain constitutional terms are

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[624] Final pleadings, 2022-01-24, p. 122, l. 9-21; p. 125, l.7-11.
[625] *Idem*, p. 126, l. 1-3.
[626] *Idem*, p. 126, l. 18-25.
[627] *Idem*, p. 127, l. 1-p. 128, l. 10, quoting *Quebec (Attorney General)* v. *9147-0732 Québec inc.*, 2020 CSC 32, para. 41.
[628] Final pleadings, 2022-02-02, p. 26, l. 5-11.
[629] *Idem*, p. 26, l. 16-20.
[630] *Idem*, p. 27, l. 2-9.
[631] *Idem*, p. 27, l. 10-15.

applied. They take the example of the term “citizen” in s. 3 and s. 6 of the *Charter*, which is defined by the *Citizenship Act*, a “simple” statute of Canada. In the same way, the *UNDRIP Act* assists courts, governments and federal agencies with the interpretation of s. 35(1)[632].

[1166] Regarding that argument, the Court notes that the Attorney General of Quebec’s representations were made prior to a similar argument being dismissed by the Court of Appeal in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis* (therafter « *Renvoi* »)[633].

[1167] Finally, the Attorney General of Canada maintains that the Court is bound to apply a precedent of the Supreme Court and that only the Supreme Court can modify the framework in the manner proposed by the Applicants[634].

A.2.1.2 Preliminary issue: Adjusting *Van der Peet* or departing from it?

[1168] The Court cannot accept the Applicants’ assertion that they are not really asking to depart from *Van der Peet*. The first step of their proposed test requires the Court to examine whether the activity is within the scope of an inherent right recognized in the *UNDRIP.* The *UNDRIP* was not adopted at the time of *Van der Peet*, so to incorporate into the test the substantive rights protected in it would be a completely new approach to s. 35(1) analysis.

[1169] Moreover, at the second step of their test, the Applicants are asking the Court to depart from the pre-contact and continuity aspects of the *Van der Peet* test. They essentially assert that the test protects pre-colonial culture, instead of practices that are important to Indigenous peoples today. This second step touches on the essence itself of the *Van der Peet* test.

[1170] In that light, the Applicants are not so much asking the Court to adjust the *Van der Peet* test as to make an abrupt departure from it.

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[632] Final pleadings, 2022-01-24, p. 131, l. 6- p. 133, l. 25.

[633] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061), para. 439-451.

[634] Final pleadings, 2022-02-07, p. 97, l. 21- p. 98, l. 4.

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A.2.1.3 A new legal issue is raised: the presumption of conformity with the *UNDRIP*

[1171] The Supreme Court reminded in *R.* v. *Hape* that "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law"[635]. This presumption also applies to the interpretation of the *Charter*[636], but in this context, the presumption of conformity turns into a presumption that the *Charter* provides a "protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified"[637].

[1172] However, the majority in *Quebec (Attorney General)* v. *9147-0732 Québec inc.*[638] warns that the role of international law is limited to supporting or confirming an interpretation of the *Charter* and cannot be relied on to define the scope of *Charter* rights. Also, the majority insists that the normative value and weight of a specific international source must be taken into account, and that the presumption of conformity applies to ratified, and therefore binding, international instruments. Non-binding sources, on the contrary, only have persuasive value in *Charter* interpretation and carry less weight in the interpretation process[639].

[1173] The Applicants plead that, according to the presumption of conformity, s. 35(1) should offer a protection at least as great as that afforded by the *UNDRIP*. This argument raises two questions: (1) Does the presumption of conformity apply to s. 35(1) and (2) How does the presumption of conformity apply to a declaration of the United Nations General Assembly, which is not a ratified international instrument?

[1174] The parties did not have the benefit of the judgment of the Court of Appeal in *Renvoi*[640] when they made most of their pleadings. In that decision, the Court of Appeal adopts the following position:

> [507] While the *UN Declaration* does not impose binding international law obligations on Canada, it is nevertheless a universal international human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law. The preamble and s. 4(a) of the *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* state this clearly with respect to federal matters:

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635 *R.* v. *Hape*, 2007 SCC 26, para. 53.

636 *Idem*, para. 55.

637 *R.* v. *McGregor*, 2023 SCC 4, para. 68 (joint concurring reasons of Karakatsanis and Martin JJ.), quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349; *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, 1056; *R.* v. *Hape*, 2007 SCC 26, para. 55).

638 *Quebec (Attorney General)* v. *9147-0732 Québec inc.*, 2020 SCC 32.

639 *Idem*, para. 28-32.

640 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061)

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Preamble	**Préambule**
[…]	Attendu :
Whereas the Declaration is affirmed as a source for the interpretation of Canadian law;	[…]
[…]	qu'il y a lieu de confirmer que la Déclaration est une source d'interprétation du droit canadien;
4. The purposes of this Act are to	[…]
(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and	4 La présente loi a pour objet :
(b) provide a framework for the Government of Canada's implementation of the Declaration.	a) de confirmer que la Déclaration constitue un instrument international universel en matière de droits de la personne qui trouve application en droit canadien;
	b) d'encadrer la mise en œuvre de la Déclaration par le gouvernement du Canada.

[508] In *R. v. Hape*, LeBel, J. addressed the presumption of conformity with international principles, reiterating the well-established rule of interpretation that legislation is presumed to conform to international law and to Canada's international obligations, unless the legislature's intention clearly compels otherwise. The presumption extends to the *Canadian Charter* where its wording is capable of supporting such a construction.

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> [509] There is no reason for not extending this presumption to s. 35 of the *Constitution Act, 1982*, given that it pertains primarily to the protection of the fundamental rights of Aboriginal peoples.
>
> [510] As Brown and Rowe, JJ. recently pointed out, however, these international norms—particularly when non-binding—usually play a limited role in constitutional interpretation, by supporting or confirming the result reached by a court through purposive interpretation, the reason for such limitation being the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty. Binding international instruments ratified by Canada necessarily carry more weight in the analysis than non-binding instruments.
>
> [511] How is this applicable to the matter at hand?
>
> [512] As noted above, the *UN Declaration*—which is non-binding internationally, but has been implemented as part of the federal normative order through the *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*—states that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs. It adds that Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. It specifies that Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of that community or nation. Moreover, it states that Indigenous peoples have the right to maintain and develop their political, economic and social systems and institutions.
>
> [513] Construing s. 35 of the *Constitution Act, 1982* as including, within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate child and family services seems entirely consistent with the principles set out in the *UN Declaration*. This bolsters and confirms the correctness of such an interpretation[641].
>
> [the Court's emphasis]

[1175] The Court concludes from this extract that the current state of the law in Quebec is that the presumption of conformity extends to s. 35(1) and applies to the *UNDRIP*. It is however not clear whether the Court of Appeal considers that the *UNDRIP* should have the weight of a binding or non-binding instrument. Although the Court underlines that it is non-binding, it also emphasizes in the same breath that it has been implemented in the normative federal order through the *UNDRIP Act*.

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[641] *Idem,* para. 512-513.

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[1176] There are several other recent cases in other provinces on the interpretative value of the *UNDRIP*. For instance, Feehan, J.A. of the Alberta Court of Appeal (concurring) considers in *AltaLink Management Ltd v Alberta (Utilities Commission*) that "[w]hile the Commission is not obligated to consider *UNDRIP*, it may serve as a useful tool to inform a fuller understanding of reconciliation" [642]. That position was cited with approbation in *Westley* v. *Alberta*, a decision of the Alberta Court of King's Bench, which states that the *UNDRIP* "can be used to inform the interpretation and application of Canadian law, including the Constitution"[643].

[1177] If there seems to be a consensus on the fact that the *UNDRIP* is not legally binding at the international level, there is limited judicial guidance on the effect of the *UNDRIP* at the domestic level.

[1178] To discard the presumption of conformity, the Attorney General of Quebec insisted on the fact that the *UNDRIP* was not a ratified treaty. The Court considers however that the weight of a resolution coming from the General Assembly, which is the highest deliberative body of the United Nations, should not be underestimated, and even less so given that the resolution has had nearly unanimous support[644]. Besides, even though the violation of the *UNDRIP* cannot attract the same international law remedies that a ratified treaty or convention would, when dealing with international human rights, the international community's expectations that states will comply with a Declaration can be as high as for a treaty or convention. The choice of a "non-binding" instrument over a binding one might very well be "to garner greater state buy-in"[645].

[1179] It is useful at this stage to recall some key elements of the *UNDRIP*'s historical background.

[1180] In 1982, following a study on the problem of discrimination against Indigenous populations[646], a Working Group on Indigenous Population, overseen by a subsidiary commission of the United Nations Commission on Human Rights, was established. Thereafter, the process of finalizing a draft declaration on the rights of Indigenous peoples and then having it submitted for approval to the U.N General Assembly was

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[642] *AltaLink Management Ltd v Alberta (Utilities Commission*), 2021 ABCA 342, para. 123.

[643] *Wesley* v. *Alberta*, 2022 ABKB 713, para. 144.

[644] See notably Brenda L. GUNN, « Legislation and beyond: Implementing and interpreting the UN Declaration on the Rights of Indigenous Peoples", (2021) 53 *U.B.C. L. Rev.* 1065, p. 1074.

[645] Naiomi METALLIC, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard ALPERT et al. in *Rewriting the Canadian Constitution*, 2022 (forthcoming). Available at SSRN: https://ssrn.com/abstract=4232531 or http://dx.doi.org/10.2139/ssrn.4232531

[646] Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José MARTÍNEZ COBO, *Study of the problem of discrimination against Indigenous populations*, UN Doc E/CN.4/Sub.2/1986/7, 1987, online: <Martínez Cobo Study | United Nations For Indigenous Peoples>

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slow due to several states' concerns over provisions on self-determination and control over natural resources. Without dwelling on this tortuous process, it was only on September 13, 2007, after twenty-five years of discussions and negotiations, that the *UNDRIP* was adopted by the General Assembly, albeit by a vast majority of 144 States.

[1181] An analysis of the voting results shows that, at first, the *UNDRIP* did not attract strong support from countries having Indigenous communities. The most notable opposition came from Canada, the United States, Australia and New Zealand, which were the only four countries to vote against adoption[647].

[1182] Three years later, in 2010, Canada decided to support the *UNDRIP*. The support was nonetheless qualified. The Statement of Support specifies that it is an "aspirational", "non-legally binding" document, that does not change Canadian laws[648].

[1183] In 2015, the Truth and Reconciliation Commission in Canada issued its "Calls to Action". Several of them made reference to the *UNDRIP*, notably under the Reconciliation heading:

> 43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation[649].

[1184] The same year, Prime Minister Justin Trudeau issued the following statement after his receipt of the *Final Report of the Truth and Reconciliation Commission*:

> And we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*[650].

[1185] The next year, in 2016, the government endorsed the *UNDRIP* without qualification. Carolyn Bennett, then Minister of Indigenous and Northern Affairs

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[647] United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples

[648] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: <Archived - Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (rcaanc-cirnac.gc.ca)>

[649] TRUTH AND RECONCILIATION COMMISSION OF CANADA, *Truth and reconciliation commission of Canada: Calls to Action*, 2015, Winnipeg, Truth and Reconciliation Commission of Canada, p. 4, online: <Calls_to_Action_English2.pdf (exactdn.com)>

[650] PRIME MINISTER JUSTIN TRUDEAU, Statement on release of the Final Report of the Truth and Reconciliation Commission, 15 December 2015, online: <Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission | Prime Minister of Canada (pm.gc.ca)>

(hereafter the Minister of Indigenous and Northern Affairs), affirmed that "[b]y adopting and implementing the *Declaration*, we are excited that we are breathing life into s. 35 and recognizing it **now** as a full box of rights for Indigenous peoples in Canada" (the Court's emphasis)[651].

[1186] A few years later, in 2019, a call for implementation of the *UNDRIP* was reiterated in the *Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls*[652].

[1187] It seems that these calls for action were heard and, after the introduction of several unsuccessful bills, Parliament finally adopted the *United Declaration on the Rights of Indigenous Peoples Act* on June 21, 2021.

[1188] The Court draws the following conclusions from the long process that led to the endorsement of the *UNDRIP* and the adoption of the *Act*.

[1189] First of all, it is very significant that the *UNDRIP* took that much time to be elaborated, adopted with qualifications, and finally endorsed without qualifications. Such caution proves that Canada was well aware of the potential legal consequences of such a step and it runs contrary to an interpretation that would strip this instrument of any legal consequences. If Canada had considered this instrument merely as a symbolic gesture, an "empty box", it would not have felt the need to vote initially against the nearly unanimous UN General Assembly declaration supporting it, with all the stigma attached to such a position at the international level.

[1190] Moreover, the decision by Prime Minister Trudeau to adopt the *UNDRIP* without qualifications shows a desire to go further in Canada's commitment. It clearly means that Canada intended to elevate it a step beyond an "aspirational", "non-legally binding" document that does not change Canadian laws.

[1191] The speech of the Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues cannot be interpreted in any other way. Her declaration that "[b]y adopting and implementing the *Declaration*, we are excited that we are breathing life into s. 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada" speaks volumes (the Court's emphasis).

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[651] MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CAROLYN BENNETT, *Speaking notes of the speech delivered at the United Nations Permanent Forum on Indigenous Issues*, 10 May 2016, online: <Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10. - Canada.ca>

[652] NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, *Reclaiming power and place: The final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1b, Vancouver, Privy Council Office, 2019, p. 177, online: <Final Report | MMIWG (mmiwg-ffada.ca)>

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[1192] The reference to a "full box of rights" might seem insignificant at first sight. It is not. The image of a box has been recurrent in debates regarding the meaning of s. 35(1), with governments traditionally claiming that the box is empty[653]. The fact that the Minister of Indigenous and Northern Affairs refers to this image and recognizes that now it will be a full box of rights, is striking. She is confirming not only that the box was not full prior to that, but also that, by the adoption of the *UNDRIP*, the box is now filled with rights. It is also important to note that the present tense is used, not the future.

[1193] Furthermore, the adoption of the *UNDRIP Act* is eloquent, considering that Canada had no obligation at the international level regarding a declaration adopted by the General Assembly. It proves a willingness to abide by the *UNDRIP*. The Court agrees with the Applicants' contention that, by adopting the *Act*, Canada took an alternative path in order to give domestic standing to the *UNDRIP*, given that classic ratification was not an available option.

[1194] The *UNDRIP Act*'s content also demonstrates that the *UNDRIP* is an interpretative tool of Canadian law having the weight of a binding international instrument, and this, for the following reasons.

[1195] First, its Preamble states that "the Declaration is affirmed as a source for the interpretation of Canadian law".

[1196] Second, s. 2(3) affirms that "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law" (the Court's emphasis). Ass. Professor Metallic reads this last passage "as the drafters seeking to clarify that the future efforts to incorporate the *Declaration* directly into Canadian law, contemplated in ss. 5-6 of the Act, ought not to delay or prevent the *UN Declaration* from continuing to be a source of interpretation in Canadian law"[654]. The Court shares this interpretation.

[1197] Third, s. 4(a) stipulates that one purpose of the *UNDRIP Act* is to "affirm the Declaration as a universal international rights instrument with application in Canadian law".

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[653] See notably James Youngblood HENDERSON, *First Nations jurisprudence and aboriginal rights – Defining the just society*, Saskatoon, Native Law Center, 2006, p. 45; John BORROWS and Leonard I. ROTMAN, "The sui generis nature of aboriginal rights: does it make a difference?", (1997) 36(1) *Alberta Law Review* 9, at fn 131; Ardith WALKEM, « Constructing the constitutional box: the Supreme Court's section 35(1) reasoning", in Ardith WALKEM and Halie BRUCE (editors), *Box of treasures or empty box? Twenty years of section 35*, Penticton, Theytus Books, 2003, p. 195, at p. 196.

[654] Naiomi METALLIC, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard ALPERT et al. in *Rewriting the Canadian Constitution*, 2022 (forthcoming). Available at SSRN: https://ssrn.com/abstract=4232531 or http://dx.doi.org/10.2139/ssrn.4232531.

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[1198] The *UNDRIP Act* contains but seven provisions. As seen from the historical background of the *UNDRIP*, when considering Indigenous peoples' rights, the stakes are high and each word is carefully chosen.

[1199] When the Attorney General of Quebec pleads that the *UNDRIP Act* is only a framework for the implementation of the *UNDRIP*, he fails to recognize that the legislator has written in black letter law that the purpose of the *UNDRIP Act* is two-fold, with its first purpose being the affirmation that the *UNDRIP* has application in Canadian law. The legislator is deemed not to speak in vain, and he has expressed his clear intention that the *UNDRIP* be given application in Canadian law. S. 5 of the *UNDRIP Act* goes so far as to require the Government of Canada to take all measures necessary to ensure that the laws of Canada are consistent with the *UNDRIP*.

[1200] The Court cannot help but make a parallel between the position of the Attorney General of Quebec in this case and the submission that was made before the Court of Appeal in *Sparrow*, where it was pleaded that s. 35(1) had no effect on Aboriginal or treaty rights and was merely a preamble to the parts of the *Constitution* dealing with Aboriginal rights[655]. The Court rejects any interpretation that would turn the *UNDRIP Act* and the *UNDRIP* into empty boxes, an argument that was once made regarding s. 35(1) itself.

[1201] The Court concludes that the *UNDRIP*, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1).

[1202] The rationale behind the limited role of non-binding international instruments relates to the necessity of preserving Canadian sovereignty, but, here, application of the presumption of conformity does not weaken Canadian sovereignty[656]. Canada has shown its willingness to abide by the *UNDRIP*, notably by its endorsement without qualification and the adoption of the *UNDRIP Act*.

[1203] Finally, it is important to underline that the Applicants are not challenging a statute on the basis that it is in violation of the *UNDRIP*. Although not apparent from the start, by the end of the hearing it was clear that the question regarding the impact of the *UNDRIP* pertains to *stare decisis,* and to whether this norm creates a new legal issue that was not before the Supreme Court when it created a jurisprudential framework for analyzing s. 35(1) claims. In any case, the fact that the *UNDRIP* is not legally binding at the international level is not determinative for deciding on *stare decisis*. When examining possible exceptions to vertical *stare decisis*, the Supreme

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[655] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1106-1107.

[656] Naiomi METALLIC, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard ALPERT et al. in *Rewriting the Canadian Constitution*, 2022 (forthcoming). Available at SSRN: https://ssrn.com/abstract=4232531 or http://dx.doi.org/10.2139/ssrn.4232531.

Court in *Carter* and *Bedford,* focuses on a “new legal issue”, not on the existence of a new legally-binding provision.

[1204] To conclude, as the presumption of conformity with the *UNDRIP* was not an issue raised before the Supreme Court in *Van der Peet*, the Court finds that the endorsement of the *UNDRIP* without qualification and the adoption of the *UNDRIP Act* bring a new legal issue into the debate that could have an impact on the s. 35(1) framework established by the jurisprudence.

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A.2.1.1 A fundamental shift of the parameters of the debate: from conciliation to reconciliation

[1205] The endorsement of the *UNDRIP* without qualification and the adoption of the *UNDRIP Act* are more than additional instruments in the Aboriginal law landscape. They are also expressions of more profound changes. The entire societal landscape in which *Van der Peet* was decided has changed[657].

The parameters of the debate in 1996

[1206] *Van der Peet* must be viewed in its context. In *Sparrow*, the Supreme Court reminded us that for a long time, Aboriginal rights were blatantly violated:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, 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; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder*, *supra*, *per* Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."
>
> For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of

[657] See notably John BORROWS, “Indigenous law and governance: challenging pre-contact and post-contact distinctions in Canadian constitutional law?”, dans *Les Conférences Chevrette-Marx*, Montréal, Éditions Thémis, 2017, p. 36.

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> Clement's The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see The Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government[658].
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> [emphasis in the original]

[1207] This was the context in which the infancy of the protection of Aboriginal rights under the Constitution took place. After hundreds of years of colonialism, nearly everything remained to be done, and s. 35(1), with its broad wording, was not giving much guidance to the Supreme Court, faced with the real challenge of transforming high hopes into enforceable rights. The task was enormous and hazardous.

[1208] In this context, the Supreme Court jurisprudence on Aboriginal law of the nineteen-nineties was perceived - mostly by non-Indigenous authors - as a major step in the recognition of Aboriginal rights. For instance, Prof. Hogg writes that "[r]ights that were undefined and barely recognized in 1973, and were in any case vulnerable to legislative and constitutional extinguishment, have in the short space of little more than 30 years become powerful, constitutionally-protected rights". He considers that *Van der Peet* allows one to tackle the indeterminacy of the rights by providing a definition that was judicially enforceable[659].

[1209] Nonetheless, some argued from the start that, if *Sparrow* was a step forward, *Van der Peet* and the cases heard concurrently represented a step back in the recognition of Aboriginal rights, notably because it was interpreted as freezing them in the past[660] and preventing recognition of Aboriginal rights with a commercial or

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[658] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, pp. 1103-1104.

[659] Peter W. HOGG, "The constitutional basis of Aboriginal rights", in Pierre NOREAU et Louise ROLLAND (ed.), *Mélanges Andrée Lajoie: le droit, une variable dépendante*, Montréal. Éditions Thémis, 2008, p. 177, at p. 195-196.

[660] See notably Jonathan RUDIN, « One step forward, two steps back – The political and institutional dynamics behind the Supreme Court of Canada's decisions in *R.* v. *Sparrow*, *R.* v. *Van der Peet* and *Delgamuuku* v. *British Columbia*", (1998) 13 *Journal of Law and Social Policy* 67.

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monetary dimension[661]. Several authors explain the backpedaling of the Supreme Court in *Van der Peet* by its desire to maintain its legitimacy. It is true that the authority of the Supreme Court depends in large part on the acceptability of its decisions by the public, and that, at that time, the public was largely not inclined to support an important redistribution of wealth and lands to Indigenous peoples. Stated otherwise, *Van der Peet* comes from the Supreme Court's recognition that tribunals cannot by themselves change social order[662].

[1210] For instance, the author Rudin affirms that the Supreme Court should not be blamed for a "lack of courage" in *Van der Peet* but, rather, that the blame would be better placed on governments "for their lack of leadership in advancing Aboriginal issues". He states further that "[i]n the face of political and public disinterest – not to mention potential overt hostility – it is unrealistic to expect the Court to move forward in an area as complex as Aboriginal rights"[663].

[1211] These words were written in 1998. Today, more than twenty-five years have passed since *Van der Peet*. Over that time, one could reasonably assert that Canadian society has considerably evolved, some would even say shaken, regarding its knowledge of Indigenous peoples' life in Canada. This new understanding of the challenges faced by Indigenous peoples should have an impact on any hostility towards Indigenous peoples' claims. Also, any blame on governmental lack of leadership regarding protection of Aboriginal rights should be reconsidered in light of major steps pursued in the political sphere, such as the vast increase in spending on settling claims, official apologies and the endorsement without qualification of the *UNDRIP*.

The parameters of the debate in 2023

[1212] Since *Van der Peet*, knowledge about Indigenous peoples' life in Canada has tremendously evolved. Numerous chapters of Canada's history have been revealed, notably through the Royal Commission on Aboriginal Peoples (hereafter RCAP)

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[661] See notably André GOLDENBERG, « "Salmon for Peanut Butter": Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights » (2004), 3 *Indigenous L.J.* 61, p. 92-94.

[662] Sebastien GRAMMOND, "La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 36, 48; Catherine BELL, "New directions in the law of Aboriginal rights", (1998) 77 *Can. B. Rev.* 36, 65-66; Jonathan RUDIN, « One step forward, two steps back – The political and institutional dynamics behind the Supreme Court of Canada's decisions in *R.* v. *Sparrow*, *R.* v. *Van der Peet* and *Delgamuuku* v. *British Columbia*", (1998) 13 *Journal of Law and Social Policy* 67, 80-87, 89; André GOLDENBERG, « "Salmon for Peanut Butter" : Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights » (2004), 3 *Indigenous L.J.* 61, p. 95.

[663] Jonathan RUDIN, « One step forward, two steps back – The political and institutional dynamics behind the Supreme Court of Canada's decisions in *R.* v. *Sparrow*, *R.* v. *Van der Peet* and *Delgamuuku* v. *British Columbia*", (1998) 13 *Journal of Law and Social Policy* 67, 89.

(1996)[664], the Truth and Reconciliation Commission (hereafter TRC) (2015)[665], and the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019)[666].

[1213] In addition to the insight brought by public inquiries, United Nations Special Rapporteurs on the Rights of Indigenous Peoples publicly reported in 2004 and 2014 on a serious crisis in the situation of Indigenous peoples in Canada. The gaps between the situations of Indigenous and non-Indigenous groups, notably in education, employment and basic social services, were alarming, according to their reports[667].

[1214] The raising of a collective awareness on the past and present situations of Indigenous peoples in Canada is palpable. Canadian society is starting to grasp the pressing need for a renewed relationship in which reconciliation is central.

[1215] In 2008, Prime Minister Harper offered full apology on behalf of Canadians for the Indian residential school system. In this apology, the government recognized that the absence of an apology had been an impediment to healing and reconciliation[668]. In 2018, the Government of Canada adopted ten Principles respecting the Government of Canada's relationship with Indigenous peoples[669]. The recognition of the right to self-government (principles 1, 4, 8), and the notions of reconciliation (principles 2, 5, 8, 9) and honour of the Crown (principles 3, 7) are omnipresent in these Principles and their supporting commentaries[670]. Efforts towards reconciliation at a national level are also illustrated in symbolic actions, such as the creation of a National Day for Truth and Reconciliation: September 30th.

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[664] CANADA, ROYAL COMMISSION ON ABORIGINAL PEOPLES, *Report of the Royal Commission on Aboriginal People*, vol. 1-5, Ottawa, Minister of Supply and Services Canada, 1996, online: <Report of the Royal Commission on Aboriginal Peoples - Library and Archives Canada (bac-lac.gc.ca)>.

[665] TRUTH AND RECONCILIATION COMMISSION OF CANADA, *The final report of the Truth and reconciliation commission of Canada*, vol. 1-6, 2015, Winnipeg, Truth and Reconciliation Commission of Canada, online: <Reports - NCTR>.

[666] NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, *Reclaiming power and place: The final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vancouver, Privy Council Office, 2019, online: <Final Report | MMIWG (mmiwg-ffada.ca) >.

[667] Rodolfo STAVENHAGEN, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, E/CN.4/2005/88/Add.3, United Nations, Commission on Human Rights, 2004; James ANAYA, *Report of the Special Rapporteur on the rights of indigenous peoples,* United Nations, Human Rights Council, A/HRC/27/52/Add. 2, 2014.

[668] Stephen HARPER, Statement of apology to former students of Indian Residential Schools, June 11, 2008, online: <Statement of apology to former students of Indian Residential Schools (rcaanc-cirnac.gc.ca)>.

[669] See Section III.C.1.2.

[670] DEPARTMENT OF JUSTICE CANADA, *Principles respecting the Government of Canada's relationship with Indigenous peoples*, Ottawa, Department of Justice, 2018, online: < Principles respecting the Government of Canada's relationship with Indigenous peoples (justice.gc.ca)>.

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[1216] The evolution of Canada's commitment to the *UNDRIP*, as described above, shows a transformation of Canada's attitude towards Indigenous peoples. For instance, the *UNDRIP Act* resolutely rejects the doctrines of discovery and *terra nullius* and all forms of colonialism[671].

[1217] Furthermore, s. 6(2) of the *UNDRIP Act* shows awareness of the challenges that Indigenous peoples face, and that must be dealt with through an action plan: injustices, racism, violence, etc. In this regard, the very first sentence of the *Act* refers to the *UNDRIP* as a framework for "reconciliation, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith".

[1218] In her speech delivered in 2016 at the United Nations Permanent Forum on Indigenous Issues in which she announced the endorsement without qualification of the *UNDRIP*, the Minister of Indigenous and Northern Affairs recognized the impact of knowledge on reconciliation:

> We believe the calls to action have also informed the path forward. What is needed is fundamental and foundational change. It's about righting historical wrongs. It's about shedding our colonial past. It's about writing the next chapter together as partners. I firmly believe that once you know the truth, you cannot unknow the truth. We now know the truth. We know the reality of our shared reality with Indigenous people in Canada. We now need all Canadians to embark on the journey of reconciliation[672].
>
> [the Court's emphasis]

[1219] Reconciliation has unquestionably become a central concept in any discussion regarding the relationship between Indigenous peoples and Canada. According to the

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[671] A definition of the doctrine of discovery can be found in the recent *Joint statement of the Dicasteries for culture and education and for promoting integral human development on the "doctrine of discovery"*, dated of March 30th, 2023: "The legal concept of "discovery" was debated by colonial powers from the sixteenth century onward and found particular expression in the nineteenth century jurisprudence of courts in several countries, according to which the discovery of lands by settlers granted an exclusive right to extinguish, either by purchase or conquest, the title to or possession of those lands by indigenous peoples. Certain scholars have argued that the basis of the aforementioned "doctrine" is to be found in several papal documents, such as the Bulls *Dum Diversas* (1452), *Romanus Pontifex* (1455) and *Inter Caetera* (1493)". In that same statement, the Vatican affirms that this doctrine is not part of the teaching of the Catholic Church and alleges that the papal documents in question were never considered expressions of the Catholic faith and were manipulated for political purposes by colonial powers. In the end, answering a request of numerous Indigenous leaders and activists, the Catholic Church repudiates the "doctrine of discovery".

[672] MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CAROLYN BENNETT, *Speaking notes of the speech delivered at the United Nations Permanent Forum on Indigenous Issues*, 10 May 2016, online: <Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10. - Canada.ca>.

TRC, reconciliation is "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. For that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour" (the Court's emphasis)[673].

[1220] Reconciliation is also a central concept in *Van der Peet,* although with a different understanding.

[1221] Indeed, the words reconciliation and reconciliate are polysemous in English. In fact, in the French version of *Van der Peet*, the Supreme Court uses the term "*conciliation*" rather than "*réconciliation*"[674].

[1222] In the 2005 decision *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*[675], the two different meanings of reconciliation appear very clearly from the French version of the first sentence:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.
>
> L'objectif fondamental du droit moderne relatif aux droits ancestraux et issus de traités est la réconciliation entre les peuples autochtones et non autochtones et la conciliation de leurs revendications, intérêts et ambitions respectifs.
>
> [the Court's emphasis]

[1223] When "reconciliation" was first introduced in *Sparrow* as a legal term in the context of interpreting s. 35(1), it referred to the need to reconcile the federal power over Indians (s. 91(24) of the *British North America Act*) with the federal duty under s. 35(1) of the *Constitution Act, 1982*. This reconciliation was best achieved, according to Chief Justice Dickson, through the requirement of a justification where the government infringes upon or denies Aboriginal rights[676].

[1224] In *Van der Peet*, Chief Justice Lamer affirms that "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of

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673 TRUTH AND RECONCILIATION COMMISSION OF CANADA, *The final report of the Truth and Reconciliation Commission of Canada*, vol. 6, 2015, Winnipeg, Truth and Reconciliation Commission of Canada, p. 3, online: <Volume_6_Reconciliation_English_Web.pdf (exactdn.com)>.

674 See notably Sebastien GRAMMOND, "La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 40; André GOLDENBERG, « "Salmon for Peanut Butter": Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights » (2004), 3 *Indigenous L.J.* 61, p. 82-87.

675 *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 1.

676 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1109.

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aboriginal societies with the sovereignty of the Crown."[677] He writes in *Gladstone* that, because Aboriginal societies "exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign", some limitations of their rights are justifiable in order to pursue objectives of compelling and substantial importance to the community as a whole. He continues:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[678]
>
> [emphasis in the original]

[1225] The notion of "reconciliation" as used by the Supreme Court in the early cases on s. 35(1) has often been criticized by Aboriginal law academics. Reconciliation in that context is perceived as a tool to restrict the scope of Aboriginal rights, and "shifts the balance of reconciliation in favour of the more universal obligations of the Crown rather than its specific duty toward Aboriginal people"[679]. For instance, Ardith Walkem, now a judge on the Supreme Court of British Columbia, considers that the mechanisms of reconciliation and justification were created, in part, "to protect third parties against the operation of Aboriginal Rights: A legal sword, rather than a shield"[680].

[1226] As a matter of fact, reconciliation as evoked in *Van der Peet* has little to do with reconciliation as understood nowadays, for instance, by the TRC, the *UNDRIP Act* or Canadian society in general. The TRC explains what it sees as a dichotomy between the two meanings of reconciliation as follows: on one side, reconciliation as a limitation on Aboriginal rights to "conciliate" the rights of peoples who had prior "occupation" of the territory with the sovereignty of the Crown, and, on the other side, reconciliation as a respectful relationship between sovereign peoples. In the view of the TRC, the latter notion of reconciliation demands a new reading of s. 35(1):

> The road to reconciliation also includes a large, liberal, and generous application of the concepts underlying Section 35(1) of Canada's Constitution, so that Aboriginal rights are implemented in a way that facilitates Aboriginal peoples' collective and individual aspirations. The

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677 *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 539, para 31.

678 *R*. v. *Gladstone*, [1996] 2 S.C.R. 723, para. 73.

679 Catherine BELL, "New directions in the law of Aboriginal rights", (1998) 77 *Can. B. Rev.* 36, 48. See also Kent McNEIL, "Reconciliation and the Supreme Court: the opposing view of Chief Justices Lamer and McLachlin", (2003) 2(1) *Indigenous Law Journal* 1, p. 5, 18.

680 Ardith WALKEM, « Constructing the constitutional box: the Supreme Court's section 35(1) reasoning", in Ardith WALKEM and Halie BRUCE (editors), *Box of treasures or empty box? Twenty years of section 35*, Penticton, Theytus Books, 2003, p. 195, at p. 204.

> reconciliation vision that lies behind Section 35 should not be seen as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown, but as a means to establish the kind of relationship that should have flourished since Confederation, as was envisioned in the Royal Proclamation of 1763 and the post-Confederation Treaties. That relationship did not flourish because of Canada's failure to live up to that vision and its promises. So long as the vision of reconciliation in Section 35(1) is not being implemented with sufficient strength and vigour, Canadian law will continue to be regarded as deeply adverse to realizing truth and reconciliation for many First Nations, Inuit, and Métis people […][681].
>
> [The Court's emphasis]

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[1227] In fact, the Supreme Court has already recognized the importance of reconciliation, in the sense of a relationship between peoples. For instance, in *Beckman* v. *Little Salmon/Carmacks First Nation* (2010), Justice Binnie writes for the majority:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards[682]**.**
>
> [the Court's emphasis]

[1228] In *Daniels* (2016), Justice Abella opens her reasons for a unanimous Court with the fact that this case represents another chapter in the pursuit of reconciliation and redress in the relationship between Canada and Indigenous peoples:

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[681] TRUTH AND RECONCILIATION COMMISSION OF CANADA, "*Honouring the Truth, Reconciling for the future – Summary of the final report of the truth and reconciliation commission of Canada*", 2015, Winnipeg, Truth and Reconciliation Commission of Canada, p. 203, online: < Executive_Summary_English_Web.pdf (exactdn.com)>.

[682] *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 10.

> As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the pursuit of reconciliation and redress in that relationship.[683]
>
> [the Court's emphasis]

[1229] Further in the judgment, Justice Abella makes very clear that reconciliation between peoples is Parliament's goal:

> The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal[684].
>
> [emphasis in the original]

[1230] In fact, as early as in *Van der Peet*, Justice McLachlin warned the majority of the fact that their vision on reconciliation might be incomplete:

> It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples[685].

[1231] As the first paragraph of *Daniels* shows, courts have a role to play in the furtherance of the objective of reconciliation. This role stems from the fact that, even though Aboriginal rights are protected by s. 35(1), it falls largely on the courts to define

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[683] *Daniels* v. *Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para. 1.
[684] *Idem*, para. 37.
[685] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 230.

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the scope of those rights. In this difficult exercise of interpreting s. 35(1), courts must be led by the objective of reconciliation[686].

[1232] The reports of the public inquiries have shed light on dark times in Canadian history. The state of knowledge has changed. Society has changed. As well, the executive and legislative branches have made significant steps towards reconciliation. It follows that there is both a need and room for a test more in line with the idea of reconciliation between Indigenous and non-Indigenous peoples. It is time, as the Applicants put it, to enter an "age of reconciliation".

[1233] The Court thus concludes that the parameters of the debate have fundamentally changed. The notion of reconciliation, as referring to a work-in-progress to arrive at a mutually-respectful long-term relationship between sovereign peoples, did not have the same importance at the time *Van der Peet* was delivered as it has nowadays. *Van der Peet* concentrates on the "conciliation" of Aboriginal claims with the interests of non-Indigenous society, a notion which often turned against recognition of meaningful Aboriginal claims in a contemporary context. The question before the Court when elaborating a s. 35(1) framework is no longer, or at least not only, how to "conciliate" Aboriginal rights claims with Crown's sovereignty, but also how to reconciliate sovereign peoples through the recognition of Indigenous peoples' rights.

A.2.1.2 Conclusion on *stare decisis*

[1234] For all the above reasons, the Court concludes that the parameters of the debates have fundamentally changed and that this case raises a new legal issue that was not addressed in *Van der Peet,* i.e., the presumption of conformity with the *UNDRIP*.

[1235] The Court adopts the following words of Prof. Borrows:

> […] *UNDRIP*'s embrace by the Canadian government fundamentally changes the character of the debate surrounding Indigenous law and governance. *Van der Peet* and *Pamajewon* should be overturned; *stare decisis* should not be a straitjacket that condemns the law to stasis, particularly when such stasis continues to tear the fabric of constitutional reconciliation as it relates to Indigenous peoples.[687]

[1236] Aboriginal rights are dependant on the judicial interpretation of s. 35(1). As the Supreme Court said in *Reference re Same-Sex Marriage*, a progressive interpretation

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686 *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 24.

687 John BORROWS, "Revitalizing Canada's Indigenous Constitution", in *UNDRIP Implementation: Braiding international, domestic and indigenous laws*, Centre for International Governance Innovation, p. 27.

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"ensures the continued relevance and, indeed, legitimacy of Canada's constituting document"[688]. There is a real risk that, by putting *stare decisis* above all other considerations, the Constitution will cease to represent the fundamental values of Canadian society[689].

[1237] Since the Court concludes that exceptional circumstances exist to depart from *Van der Peet*, the Court can now turn to the substance of the arguments raised by the Applicants and the MNCC regarding the current test, and to the test proposed by the former.

A.2.2 The new test

A.2.2.1 Position of the parties

[1238] Simply put, the Applicants submit that the current test presents important flaws that could jeopardize reconciliation, notably because it reflects prejudice, and that the framework to analyse s. 35(1) claims should be elaborated in a manner more consistent with the *UNDRIP*[690]. They offer an alternative test that would answer these concerns.

[1239] Divided into two questions, their test requires, first, to analyse whether the contentious activity is within the scope of an inherent right recognized in the *UNDRIP* and, second, to determine if it is an element of a collective practice integral to the Indigenous society concerned, having continuity with the practices, customs and practices of that community. Their test focuses on whether a practice is integral to an Indigenous culture today, and not during the pre-contact period.

[1240] The MNCC agrees with the Applicants' criticisms and goes even further by attacking the justification part of the s. 35(1) framework. For the MNCC, the *Van der Peet* test is racist by essence, arbitrary and cynical[691]. However, the MNCC is uncomfortable with the test put forth by the Applicants. They do not believe that, if a thousand people in Kahnawà:ke are doing something today, it automatically is an Aboriginal right[692]. They do not, however, suggest another test.

[1241] The Attorney General of Quebec replies that these criticisms of the test were well known by the Supreme Court and were replied to by it. They were addressed from the start, even by the dissenting judges in the *Van der Peet* case itself[693]. The Attorney General of Quebec also criticizes the proposed test notably because it should take into

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[688] *Reference re Same-Sex Marriage*, 2004 SCC 79, para. 23.
[689] *Quebec (Attorney General)* v. *9147-0732 Québec inc.*, 2020 SCC 32, para. 76.
[690] *Consolidated closing memorandum of fact and law of the Applicants*, para. 289.
[691] Final pleadings, 2022-01-31, p. 9, l. 21-25; p. 11, l. 25- p. 12, l. 3.
[692] *Idem*, p. 12, l. 7-10.
[693] Final pleadings, 2022-02-02, p. 33, l. 3-p. 34, l. 13.

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consideration that, since s. 35(1) grants special constitutional protection to one part of Canadian society, there should be some specificity to the test[694]. Also, it underlines that, since the purpose of s. 35(1) is reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown, the rights recognized under s. 35(1) must be "temporally rooted in the historical presence – the ancestry – of Aboriginal peoples in North America"[695]. That aspect is obliterated in the Applicants' test.

[1242] The Attorney General of Canada does not elaborate on the proposed test or on the Applicants' criticisms of the current test. It considers that "the problem is not the test, it's the evidence that supports the claim"[696]. The Attorney General of Canada underlines that the current test has ample flexibility, having undergone constant reviews by the Supreme Court. It allows, for instance, to rely on post-contact evidence[697].

[1243] The Court will first examine the criticisms raised by the Applicants and the MNCC before analyzing the proposed test in the light of the Attorney General of Canada's comments.

A.2.2.2 Criticisms of the current test

[1244] There are currently strong and steady criticisms of the *Van der Peet* framework. These criticisms underpin the Applicants' claim that the *Van der Peet* test cannot be read in conformity with the *UNDRIP* and that it runs against true reconciliation. The Applicants have listed several criticisms of the current *Van der Peet* test based on the work of several Aboriginal law specialists[698].

[1245] The Court is aware that it is not bound "to adopt the prevailing approach proffered in the scholarship or that academic criticism is [not] a sufficient reason not to apply the principles of *stare decisis*"[699]. However, the Court is of the view that the arguments offered by the Applicants, the MNCC and many specialists in Aboriginal law should be

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[694] *Idem,* p. 40, l. 7, -quoting *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 19-20.
[695] *Idem,* p. 42, l. 23- p. 45, l. 21, quoting *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 27, 30-32.
[696] *Idem*, p. 98, l. 5- p. 99, l. 4.
[697] *Idem*, p. 99, l. 5 – p. 101, l.16, taking as example *R.* v. *Desautel*, 2021 SCC 17.
[698] Brenda GUNN, "Beyond *Van der Peet* – Bringing together international, indigenous and constitutional law", in *UNDRIP Implementation: Braiding international, domestic and indigenous laws – Special report*, Waterloo, Center for International Governance Innovation, 2017, p. 34-35 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 9); John BORROWS, "(Ab)Originalism and Canada's constitution", (2012) 58 *Sup. Ct. L. Rev.* (2d) 351 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 10); Brian SLATTERY, "The generative structure of aboriginal rights" (2007) 38 S.C.L.R. (2d) 595 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 11); Russel Lawrence BARSH and James YOUNGLBOOD HENDERSON, "The Supreme Court's Van der Peet trilogy: naïve imperialism and ropes of sand", (1996-1997) 42 *McGill L.J.* 993 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 12).
[699] *R.* v. *McGregor*, 2023 SCC 4, para. 22

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considered seriously and kept in mind when examining a new framework for s. 35(1) claims.

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A.2.2.2.1 An element of practice, custom or tradition *integral to the distinctive culture* of the aboriginal group claiming the right

[1246] First, one of the most often-raised concerns about the *Van der Peet* test is that the notion of *integrality*, on which it is based, conveys the idea that culture is a conglomerate of independent practices, customs and traditions, from which some elements could be categorized as integral and other incidental.

[1247] The Applicants describe this as a "*lego theory of culture*". They contend that a theory of components that can be cleanly separated out cannot apply to any culture, because it is not possible to deconstruct something as complex as a culture. It is a completely artificial approach that Canadians could not apply to their own culture[700].

[1248] For several academics, this perception of culture based on the presumption that cultural elements can exist independently from each other is not only at odds with the current state of social sciences[701], but it is also incompatible with Indigenous cultures that "tend to regard all human activity (and indeed all of existence) as inextricably inter-dependent"[702].

[1249] Moreover, by requiring a non-Indigenous judge to catalog distinctive elements of an Indigenous culture and decide which ones are integral and which ones are not, *Van der Peet* can be perceived as reflecting prejudice on Indigenous societies. Indeed, some argue that it assumes implicitly that they are "simple", primitive and static societies that "could be described adequately in one book when European society has not even begun to exhaust its possibilities (and its ambiguities) in a hundred thousand books"[703]. The Applicants and the MNCC are not the only ones to argue that such an approach would never be applied to non-Indigenous culture[704].

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[700] Final pleadings, 2022-01-25, p. 14, l. 16- p. 15, l. 24.

[701] See notably Sébastien GRAMMOND, « La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 34; Catherine BELL, "New directions in the law of Aboriginal rights", (1998) 77 *Can. B. Rev.* 36, p. 47; James Youngblood HENDERSON, *First Nations jurisprudence and aboriginal rights – Defining the just society*, Saskatoon, Native Law Center, 2006, p. 208;

[702] Russel Lawrence BARSH and James Younglbood HENDERSON, "The Supreme Court's Van der Peet trilogy: naïve imperialism and ropes of sand", (1996-1997) 42 *McGill L.J.* 993 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, vol. 2, tab 12), p. 1000.

[703] James Youngblood HENDERSON, *First Nations jurisprudence and aboriginal rights – Defining the just society*, Saskatoon, Native Law Center, 2006, p. 209.

[704] See notably Russel Lawrence BARSH and James Younglbood HENDERSON, "The Supreme Court's Van der Peet trilogy: naïve imperialism and ropes of sand", (1996-1997) 42 *McGill L.J.* 993

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[1250] As well, the Applicants question how non-Indigenous judges can appreciate which practices or customs are worthy of protection[705]. For Henderson, "[t]he *Van der Peet* judgment entrenches European paternalism because the courts of the colonizer have assumed the authority to define the nature and meaning of Aboriginal cultures. The Supreme Court has declared to First Nations, in effect, 'We shall decide which of your values and practices can be reconciled with our culture, and with our vision of Canada'. It has done so evidently with the best intentions- but we all know the danger of best intentions"[706]. Therefore, some contend that the current framework maintains the colonial relationship[707].

[1251] The Applicants also claim that the centrality of a particular practice, custom or tradition within a culture cannot be objectified and, therefore, cannot be evaluated in an appropriate way to determine if it is a constitutional right[708]. As a consequence, this exercise leads to uncertainty, as underlined by Justice McLachlin in her dissent in *Van der Peet*. She argued that the test chosen by the majority allows "the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms"[709].

[1252] What is more, it is said that the exercise of determining what was and what was not a practice, custom or tradition integral to the distinctive culture of the Indigenous group in the pre-contact period puts judges in the shoes of historians or ethnohistorians[710]. Not only have they no training for this work, and therefore are not aware of all the pitfalls they have to avoid, but they could also lose sight of their actual role as a judge.

[1253] Prof. Slattery notably writes that "the test suggests that identifying Aboriginal rights is a largely descriptive matter – an exercise in historical ethnography. The judge plays the role of ethnohistorian, attempting to discern the distinctive features of Aboriginal societies in the distant reaches of Canadian history. He need not trouble himself with normative questions – such as whether these features merit recognition as constitutional rights and, if so, what basic

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(*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, vol. 2, tab 12), p. 1001.

[705] Final pleadings, 2022-01-25, p. 12, l. 16-p. 13, l. 25; Russel Lawrence BARSH and James Youngblood HENDERSON, "The Supreme Court's Van der Peet trilogy: naïve imperialism and ropes of sand", (1996-1997) 42 *McGill L.J.* 993 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 12).

[706] James Youngblood HENDERSON, *First Nations jurisprudence and aboriginal rights – Defining the just society*, Saskatoon, Native Law Center, 2006, p. 210.

[707] See notably Brenda GUNN, "Beyond *Van der Peet* – Bringing together international, indigenous and constitutional law", in *UNDRIP Implementation: Braiding international, domestic and indigenous laws – Special report*, Waterloo, Center for International Governance Innovation, 2017, p. 30 (*Additional authorities of the Applicants*, tab 91).

[708] Final pleadings, 2022-01-25, p. 14, l. 1-15.

[709] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 639.

[710] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 597 (*Additional authorities of the Applicants*, tab 93); Sébastien GRAMMOND, « La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 45.

purposes they serve"[711]. In a way, he considers that the current test diverts the court's function:

> One of the shortcomings of the *Van der Peet* test is that it does not provide a reliable basis for distinguishing between indigenous practices that are constitutionally significant and those that are not. In its ethnohistorical bias, the test obscures the fact that identifying Aboriginal rights cannot simply be a descriptive exercise, that it has deep normative dimensions. The court's role is not to reconstruct the internal dynamics of long-vanished Aboriginal lifestyles. Rather it is to determine what general constitutional norms underpin section 35, and the kind of modern rights these norms support[712].
>
> [the Court's emphasis]

[1254] Thus, for Prof. Slattery, the relevant question should not be "what is *distinctive* but what is *constitutionally significant*" (emphasis in the original)[713]. He submits that the character and scope of Aboriginal rights cannot be determined simply by historical and anthropological evidence. Characterization should be normative as well as factual.

[1255] In the same vein, the author Tokawa underlines that the test offered in *Van der Peet* somehow misses the point: "We are left with a test for identifying the existence of a right that neglects to consider the purpose of a right: protection from the threat of the state's exercise of power over the interest"[714]. Interestingly, he also deplores that *Van der Peet* fails to "acknowledge the very reason driving the need for reconciliation: the injustice wrought on Indigenous peoples by the assertion of Crown sovereignty, disrespect for their jurisdiction, and the very real, very material consequences that have brutalized and impoverished Indigenous peoples for generations"[715].

A.2.2.2.2 A *pre-contact* practice, tradition or custom

[1256] Another common criticism to the *Van der Peet* test is that it freezes Aboriginal rights in the past or, more exactly, a "Court-constructed past"[716]. Despite the Supreme Court's assertion to the contrary, for Prof. Borrows, it is impossible to "evade the fact

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[711] *Ibidem*.

[712] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 610 (*Additional authorities of the Applicants*, tab 93).

[713] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 611 (*Additional authorities of the Applicants*, tab 93).

[714] Kenji TOKAWA, « *Van der Peet* turns 20: revisiting the rights equation and building a new test for aboriginal rights", (2016) 49 *U.B.C.L. Rev.* 817, p. 831, 818.

[715] Kenji TOKAWA, « *Van der Peet* turns 20: revisiting the rights equation and building a new test for aboriginal rights", (2016) 49 *U.B.C.L. Rev.* 817, p. 833.

[716] John BORROWS, "Indigenous law and governance: challenging pre-contact and post-contact distinctions in Canadian constitutional law?", dans *Les Conférences Chevrette-Marx*, Montréal, Éditions Thémis, 2017, p. 19.

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that contemporary Aboriginal practices are frozen out of constitutional inclusion if they do not have pre-contact correlations"[717]. The author Henderson also condemns a test that "stuck [Indigenous cultures] in time in order to remain authentic". Even though Chief Justice Lamer has acknowledged that cultures evolve and that the test must be applied with flexibility, the fact remains that the paradigm of the test requires demonstration of pre-colonial traditions. Thus, while it is true that the Supreme Court allows a pre-colonial practice to evolve, in the end, Henderson believes that under the current jurisprudence "an Aboriginal culture cannot adopt new elements and remain genuine"[718].

[1257] The Applicants raise another danger of the reference to "pre-contact" society. It supposes that it is possible to describe a pre-contact society prior to modifications resulting from European influences, which assumes that the Indigenous cultures were relatively static prior to the contact. It also presumes that "soon after contact between Europeans and Indigenous peoples, the distinctive cultures of Indigenous peoples would be sufficiently similar to the pre-contact culture to adequately understand the way of life of the Indigenous peoples before the arrival of Europeans"[719].

[1258] The Applicants affirm that these assumptions cannot apply to the Indigenous societies of the Northeast because of how dynamic they were during the period from Jacques Cartier's visit to Hochelaga in 1535 to the first permanent French settlement in Montreal in 1642. European contact began to transform the native cultures long before any significant information was recorded about them[720]. The Applicants reject the idea that their culture was static prior to the interaction between Indigenous and European cultures and that it had been the same for hundreds of years. They argue that this approach fails to appreciate the dynamic character of Aboriginal cultures before and after contact[721], and that it is impossible in fact to identify the culture of the Mohawks prior to contact, as it had already begun to change far before contact[722].

[1259] For the Applicants, the "pre-contact" element of the test also brings evidentiary difficulties. This test is "particularly responsive to eye-witness reports of European observers soon after contact describing behaviour of Indigenous peoples comparable in scope and character to contemporary activities", such as fishing or hunting, for example[723]. It poses

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[717] John BORROWS, "(Ab)Originalism and Canada's constitution", (2012) 58 *Sup. Ct. L. Rev.* (2d) 351, p. 378 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 10).

[718] James Youngblood HENDERSON, *First Nations jurisprudence and aboriginal rights – Defining the just society*, Saskatoon, Native Law Center, 2006, p. 208-210.

[719] *Consolidated closing memorandum of fact and law of the Applicants*, para. 290-291.

[720] *Idem*, para. 292-293, quoting Exhibit AGC-74C, Bruce G. Trigger, "Archeology and the Ethnographic Present", (1981) 23:1 *Anthropologica* 3, 11.

[721] Final pleadings, 2022-01-25, p. 15, l. 25-p. 17, l. 16.

[722] *Idem*, p. 79, l. 15-24.

[723] *Consolidated closing memorandum of fact and law of the Applicants*, para. 289.

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additional evidentiary issues when the rights claim relates to the trade of an organic matter that does not leave traces[724].

[1260] The date chosen in *Van der Peet*, the "magic moment of European contact", to use the expression of Justice McLachlin in dissent[725], is also the subject of continuous and serious attacks. *Van der Peet*, in determining that the practice, custom or tradition must have existed at the date of first contact, which could sometimes be three centuries earlier, is seen as searching to protect "long-vanished" modes of life[726]. The choice of this date is also seen as an expression of colonialism, as the simple unsolicited contact with Europeans stopped entire Indigenous cultures from adopting new elements. In oral pleadings, counsel for the MNCC, after pointing out that the current test makes the rights of an entire people dependent on their first contact with Europeans, made the following remark:

> But nobody but Europeans has that kind of impact to be determinative of an entire people's rights. When this case began, I said you meet your first African, your first Asian, they have no impact on your rights, only Europeans have that magic. Of course, it's racist[727].

[1261] For some authors, the court rightly chose the date of asserted sovereignty in *Delgamuukw* to determine the existence of an Aboriginal title, but it did not offer convincing arguments as to why it adopted a different critical date for Aboriginal rights. For instance, one of the arguments in *Delgamuukw* to dismiss the date of contact is that it is difficult to determine the precise moment that a group had first contact with European culture. However, one might – convincingly – argue that it is very difficult to understand how that date could be more easily determined with respect to an Aboriginal right, as opposed to an Aboriginal title. In fact, *Delgamuukw* could be read as a convincing authority for rejecting the time of contact[728].

[1262] Justice L'Heureux-Dubé, in her dissent in *Van der Peet*, rejected any "frozen right" approach that requires a practice, tradition or custom to have existed prior to a specific date to be recognized as a right under s. 35(1). For her, a dynamic approach is necessary to recognize that "distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives

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[724] Final pleadings, 2022-01-25, p. 88, l. 4- p. 90, l. 25.
[725] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 634, para. 247.
[726] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 619 (*Additional authorities of the Applicants*, tab 93).
[727] Final pleadings, 2022-01-31, p. 9, l. 21-25.
[728] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 619-620 (*Additional authorities of the Applicants*, tab 93); Sébastien GRAMMOND, « La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 33.

as they have changed, modernized and flourished over time, along with the rest of Canadian society"[729].

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A.2.2.2.3 A more restrictive approach to Aboriginal rights than to other *Charter* rights

[1263] The Applicants contend that the restrictive approach of the Supreme Court regarding s. 35(1) is contradictory to the generous approach adopted with respect to other rights of the *Charter*, such as freedom of expression[730].

[1264] Several authors, indeed, have noted the radically different approach to Aboriginal rights as opposed to other rights. This is eloquently put forth by Prof. Borrows in his article "(Ab)Originalism and Canada's Constitution". He notably remarks that "[w]hile it is perfectly appropriate to draw upon history in considering Aboriginal and treaty rights, holding that rights are solely dependent on past recognition, crystallization or contemplation is a significant break with our country's dominant constitutional traditions"[731]. For Borrows, the application of originalism to Aboriginal rights creates a double standard in Canadian constitutional law. He calls for a change, so that Aboriginal rights also benefit from the living tree theory, as do any other rights, which would allow them to expand and mature[732].

A.2.2.2.4 A vision of Aboriginal rights that prevents from governing in modern days

[1265] The Applicants also criticize the *Van der Peet* test as focusing only on "culture", while omitting to protect economic and political practices of Indigenous societies. Briefly stated, the Applicants consider that to assume that Aboriginal rights as defined in s. 35(1) are cultural rights is inconsistent with the fundamental right of self-determination of Indigenous peoples[733]. They do recognize, however, that the Court of Appeal continues to rely on a cultural approach in *Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des*

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[729] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 179

[730] Final pleadings, 2022-01-25, p. 30, l. 10- p. 33, l. 21.

[731] John BORROWS, "(Ab)Originalism and Canada's constitution", (2012) 58 *Sup. Ct. L. Rev.* (2d) 351, p. 361 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 10).

[732] John BORROWS, "(Ab)Originalism and Canada's constitution", (2012) 58 *Sup. Ct. L. Rev.* (2d) 351, p. 362 (*Selected readings on the modern approach to indigenous and aboriginal law in Canada*, tab 10).

[733] *Consolidated closing memorandum of fact and law of the Applicants*, para. 294; Final pleadings, 2022-01-25, p. 18, l. 2-p. 28, l. 3 quoting Isabelle SCHULTE-TENCKHOFF, "Treaties, peoplehood, and self-determination: understanding the language of indigenous rights", in Elvira PULITANO (ed.), *Indigenous rights in the age of the UN Declaration*, New York, Cambridge University Press, 2012, p. 65 *ff*. (*Additional authorities of the Applicants*, vol. 2, tab 92).

Premières Nations, des Inuits et des Métis[734]*.* They counter by saying that this case was about family and social services, whereas the present case is concerned with economic rights[735].

[1266] More generally, there have been long and consistent criticisms that, when put into practice, the *Van der Peet* test allows for the protection only of certain rights which reflect a restrictive understanding of Indigenous culture. Thus, the MNCC emphasizes that the early decisions of the Supreme Court on s. 35(1) concerned subsistence hunting and fishing rights. They deplore that "Canadians are comfortable with the idea that it's the nature of Indians to hunt and fish", but that they become uncomfortable when commercial rights are at issue, as seen from the fact that the Supreme Court felt the need to issue two separate judgments in *Marshall* - an unprecedented situation[736].

[1267] The consequences of an approach based on past practices and activities are arguably very real, notably by restraining Aboriginal rights into a stereotypical idea of Indigeneity[737]. The author Grammond, then a professor and now a judge, describes the effects of the current orientation of the s. 35(1) framework:

> […] Exiger une preuve reliée à la culture autochtone du passé ou, plus précisément, à la vision que des magistrats non autochtones s'en font, condamne à l'échec toute revendication qui ne se conforme pas à l'image des sociétés précolombiennes de chasseurs-cueilleurs. C'est notamment le cas des revendications de droits commerciaux ou de celles reliées à l'autonomie gouvernementale, qu'il est difficile de faire correspondre à des pratiques précises du XVIIe siècle et qui se sont généralement soldées par des échecs. Cette situation prive les peuples autochtones d'un recours utile pour faire valoir leurs intérêts dans des domaines qui sont cruciaux pour leur bien-être et leur autonomie dans le contexte moderne. La détermination judiciaire des éléments centraux des cultures autochtones n'est pas de nature à vraiment protéger ou promouvoir celles-ci. La reconnaissance de droits de chasse et de pêche, même s'il s'agit d'un pas important, ne peut pas non plus compenser la dépossession historique des autochtones. Enfin, la difficulté pratique de faire la preuve de droits ancestraux devant un tribunal est illustré par le récent arrêt *Drew* v. *Newfoundland and Labrador (Minister of Government Services and Lands)* de la Cour d'appel de Terre-Neuve : le procès dans cette affaire avait duré près de 50 jours, impliqué une dizaine de témoins experts et nécessité le dépôt de plus de 100 000

[734] *Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,* 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061).

[735] Final pleadings, 2022-03-31, p. 157, l. 14- p. 158, l. 21.

[736] Final pleadings, 2022-01-31, p. 12, l. 14- p. 13, l. 2.

[737] See notably Brenda GUNN, "Beyond *Van der Peet* – Bringing together international, indigenous and constitutional law", in *UNDRIP Implementation: Braiding international, domestic and indigenous laws – Special report*, Waterloo, Center for International Governance Innovation, 2017, p. 30 (*Additional authorities of the Applicants*, tab 91).

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> pages de documents. Il aura fallu que dix ans s'écoulent après *Delgamuukw* pour qu'un seul jugement reconnaisse un titre ancestral, encore que de manière partielle seulement. Peu de groupes autochtones ont les moyens de mener à terme de telles batailles; ceux qui ne le peuvent pas risquent de voir leurs droits méconnus[738].
>
> [the Court's emphasis]

[1268] Grammond's observation on the drawbacks of a test looking backward is shared by Prof. Slaterry, who considers that "it tends to yield rights that have a limited ability to serve the modern needs of Aboriginal peoples and may also fit uneasily with third-party and broader societal interests"[739]. He deplores that "[t]he result is that Aboriginal rights are identified in an almost mechanical manner, without regard to the contemporary needs of Aboriginal peoples, the rights and interests of other affected groups, or the welfare of the body politic as a whole"[740].

[1269] It is also supported by Prof. Borrows, who believes that "[r]estricting Aboriginal rights to historical analogues prevents Aboriginal peoples from governing in a contemporary context, since many governance fields will not rest on practices that were central to them when Europeans arrived"[741]. He defends the right of Indigenous societies to change, grow and transform to adapt to new circumstances, as must any society. He argues that Indigenous societies "should be able to secure constitutional protection for their current governance preferences. They should enjoy recognition based on contemporary choices rather than from the purity or authenticity of their historic lineages"[742]. His reasoning comes back to the distinction between history and law that the Court raised earlier. For Prof. Borrows, it is fundamental not to equate law with history. He makes the following warning:

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[738] Sébastien GRAMMOND, « La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 35.

[739] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 597 (*Additional authorities of the Applicants*, tab 93).

[740] Brian SLATTERY, « The generative structure of Aboriginal rights », (2007) 38 *S.C.L.R.* (2d) 595, p. 598 (*Additional authorities of the Applicants*, tab 93).

[741] John BORROWS, "Revitalizing Canada's Indigenous Constitution", in *UNDRIP Implementation: Braiding international, domestic and indigenous laws*, Centre for International Governance Innovation, p. 22.

[742] John BORROWS, "Indigenous law and governance: challenging pre-contact and post-contact distinctions in Canadian constitutional law?", dans *Les Conférences Chevrette-Marx*, Montréal, Éditions Thémis, 2017, p. 13.

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> Law must continue to regard the "past" as a grab-bag of possibilities for present reasoning, rather than a constraint on present developments because they do not have analogues in a bygone era[743].

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A.2.2.2.5 The Supreme Court itself recognizes the limits of *Van der Peet*

[1270] The Supreme Court itself has recognized the limits of the *Van der Peet* test. As mentioned above in the summary on the applicable law, in *Sappier*, Justice Bastarache admitted that the notion that the culture would be "fundamentally altered" without the pre-contact practice has created artificial barriers to the recognition and affirmation of aboriginal rights and should be used with caution. He also "discard[ed] the notion that the pre-contact practice […] must go to the core of the society's identity" as was written in *Mitchell*, because it has "unintentionally resulted in a heightened threshold" (the court's emphasis)[744]. Justice Bastarache also recognized that the notion of "distinctive culture" has been the object of criticisms and "has proven to be a difficult concept to grasp for Canadian courts"[745]. He found the need to clarify:

> The focus of the Court should therefore be on the nature of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word 'distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples"[746].

[1271] For the author Grammond, the judgment in *Haïda*[747] is also implicitly an acknowledgement of failure. The obligation for the government to consult before complete evidence of an Aboriginal right is pursued, is a recognition that some Aboriginal rights legal actions are, in fact, illusive. *Haïda* is based on the assumption that legal actions based on ancestral rights will take so long as to risk depriving them of useful effect[748].

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[743] John BORROWS, "Indigenous law and governance: challenging pre-contact and post-contact distinctions in Canadian constitutional law?", dans *Les Conférences Chevrette-Marx*, Montréal, Éditions Thémis, 2017, p. 13.

[744] *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 40-41. See André ÉMOND, *Les droits des Premières Nations du Canada – Genèse et développement*, Montréal, Wilson & Lafleur, 2022, p. 92-93.

[745] *R.* v. *Sappier*; *R.* v. *Gray*, 2006 SCC 54, para. 42-44.

[746] *Idem*, para. 45.

[747] *Haïda Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73.

[748] Sébastien GRAMMOND, « La contribution du juge Lamer à l'évolution du droit des autochtones », (2009) 88 *Can. B. Rev.* 21, p. 39.

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A.2.2.2.6 The MNCC's argument on justification

[1272] A few words on the position of the MNCC that goes further than the Applicants. For their part, the Applicants elaborate only on the specific step of determining the existence of an Aboriginal right, while the MNCC also attacks the justification part of the *Sparrow* test.

[1273] Indeed, the MNCC is shocked by the notion that there could be justification for the violation of a practice that has been recognized as integral to a culture. According to the MNCC, *integral* means "so important that if it were taken away from you, you would not be the same people"[749]. To do that would amount to genocide, according to the definition of the United Nations Convention on Genocide.

[1274] The MNCC severely criticizes the Supreme Court in *Delgamuukw* for making a broad list of justifications to "[take] away the core of a people's existence"[750]. Even if in *Tsilhqot* the Supreme Court adds that to do so would have to be compatible with reconciliation, the MNCC wonders how it would be possible to take away a people's land or resources without consent, and still consider that it is compatible with reconciliation[751].

[1275] Regarding the criticisms to the justification part of the *Sparrow* test, this point was not raised by the Applicants, who limited their challenge to part of the *Van der Peet* test. In addition, the criticisms raised by the MNCC of the justification part of the test focus on the acceptance that there could be justification for violating a practice that has been determined integral to a culture. The MNCC, however, made no representations on the justification part of the test in the case where Aboriginal rights were to be defined differently. For these reasons, the Court will refrain from commenting on this part of the *Sparrow* test.

A.2.2.3 The new test proposed by the Applicants

[1276] The test formulated by the Applicants is composed of two questions:

a) Is the activity within the scope of an inherent right of the Mohawks of Kahnawà:ke recognized in the *UNDRIP*?

b) Is the activity an element of a collective practice integral to the Indigenous society of the Mohawks of Kahnawà:ke having continuity with the practices, customs, and traditions of the Mohawk Nation and the Haudenosaunee?[752]

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[749] Final pleadings, 2022-01-31, p. 10, l. 2-4.
[750] *Idem*, p. 10, l. 1-21.
[751] *Idem*, p. 10, l. 22- p. 11, l. 4.
[752] *Consolidated closing memorandum of fact and law of the Applicants*, para. 295.

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[1277] Regarding the first element, the Applicants refer to the notion of inherent rights, given that it is "one of the expressions that Indigenous peoples use to describe their own perspective on the rights which they enjoy because of their peoplehood". It conveys the principle that these rights are inherent to their status as a people, instead of being "granted" to Indigenous peoples by the state of Canada[753]. In this regard, the primary inherent right would be the right to self-determination[754].

[1278] In the perspective of protecting Indigenous peoples' inherent rights, they submit that the notion of inherent rights should be nourished by the provisions of the *UNDRIP*[755]. Therefore, the first part of their test is to determine whether the activity is thus within its scope[756].

[1279] They submit that the evidence with respect to the contemporary tobacco trade in Kahnawà:ke shows that it is within the scope of the right to self-determination and the right to freely determine and pursue economic development, as protected in the *UNDRIP*[757].

[1280] Regarding the second step, the Applicants plead that this is merely a simplification of the *Van der Peet* test. Instead of proving an "element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right", it would only require proving that the activity is an element of a collective practice integral to the Indigenous people today and apply it to the contemporary Indigenous people[758].

[1281] As stated above, the Applicants recognize that there would be evidentiary difficulties to meet the traditional *Van der Peet* test[759], but they argue that this should not be the case. They assert that Aboriginal rights should protect contemporary practices, i.e., those of people who are alive today and their rights[760]. In that regard, they emphasize the importance of the tobacco trade to the Mohawks of Kahnawà:ke today[761]. They consider that, in the spirit of reconciliation, "there is no point in looking and defining everything in terms of practices that were undertaken 400 years ago"[762].

[1282] Essentially, they plead that the "continuity test should not have the effect of annihilating or eliminating the significance of the practice to the contemporary community […];

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[753] *Idem*, para. 298; Final pleadings, 2022-01-25, p. 67, l. 18-25.
[754] *Consolidated closing memorandum of fact and law of the Applicants*, para. 299.
[755] *Idem,* para. 299.
[756] Final pleadings, 2022-01-25, p. 69, l. 2-8.
[757] Final pleadings, 2022-01-25, p. 69, l. 9-16.
[758] *Consolidated closing memorandum of fact and law of the Applicants*, para. 300; Final pleading, 2022-01-25, p. 72, l. 1-10.
[759] Final pleadings, 2022-01-25, p. 71, l. 12-14.
[760] *Idem*, p. 71, l. 15-23.
[761] *Idem*, p. 72, l. 1-3.
[762] *Idem*, p. 78, l. 5-12.

there should be some equilibrium and balance between the contemporary expression of the rights and the historic practices"[763]. They find support for this approach in *Van der Peet* itself:

> Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of Aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as Aboriginal rights[764].
>
> [The Applicants' underlining]

[1283] Thereby, they propose to start with the contemporary situation and go back to see if there is continuity. According to them, this methodology would remove some of the cultural biases of the *Van der Peet* test[765]. For the Applicants, if a strict correlation between a pre-contact practice and a contemporary practice of tobacco trade is required, then it fails to consider "the dynamic nature of an indigenous society and the fact that an indigenous society like the Mohawks of Kahnawà:ke has been in constant evolution for four centuries precisely because it has evolved in a colonial and colonialist environment"[766].

[1284] The Applicants plead that there is already an assumption of continuity within the very concept of Aboriginal people, because "what distinguishes an Aboriginal people from a non-Aboriginal people is precisely the continuity of that Aboriginal people which exists in the present and which can be shown to have existed all the way to a deep historical time which indicates that the Mohawks of Kahnawà:ke is clearly pre-contact"[767]. They argue that they should not have to prove continuity when that continuity is demonstrated through a contemporary existing Indigenous people[768]. The continuity of the Mohawks of Kahnawà:ke with their predecessors should be taken for granted[769].

[1285] Finally, for the Applicants, part of the goal of s. 35(1) is "to address and remedy the harms that have arisen from colonialism" and "to give indigenous peoples the tools

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[763] *Idem*, p. 79, l. 6-14.
[764] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 64.
[765] Final pleadings, 2022-01-25, p. 73, l. 7-18.
[766] *Idem*, p. 76, l. 8-19.
[767] *Idem*, p. 83, l. 17- p. 84, l. 8; *Consolidated closing memorandum of fact and law of the Applicants*, para. 301.
[768] Final pleadings, 2022-01-25, p. 87, l. 6-12.
[769] *Idem*, p. 86, l. 1- p. 87, l. 12.

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necessary to ensure their future development"[770], as opposed to the actual *Van der Peet* test that assumes that the culture that needs to be protected is pre-colonial[771].

[1286] While certain aspects of the test offered by the Applicants are convincing, such as a first step concentrated on the identification of a broader right and the dismissal of the notion of pre-contact practice, the Court cannot adopt it entirely.

[1287] The Court is not convinced by the reference to the *UNDRIP* as the direct source of Aboriginal rights. Indeed, the Applicants have not clearly pleaded nor shown that the rights contained in the *UNDRIP* are directly enforceable under Canadian law. Their efforts were focused on the demonstration that the presumption of conformity applied to the *UNDRIP* and, more generally, on its impact on the entry into a new age in the protection of Indigenous rights. But they did not demonstrate, or really argue, that the substantive norms of the *UNDRIP* were integrated into the domestic legal framework. In fact, the parliamentary debates tend to support the wisdom of this decision[772].

[1288] In the second step of their test, the Applicants also espouse the notion of integrality. The Court shares the concerns of numerous authors that the notion of integrality does not conform to the current state of social sciences, and that a court is ill-suited to determine from the outside, even more in the context of a criminal trial, what is and what is not integral to a culture.

[1289] The Court believes that, in the context of the *Van der Peet* test, the notion of integrality might have answered a perceived need to confine constitutional protection only to practices having some significance. This concern will be addressed by the Court at a later stage of this judgment, by the first step of the test it has elaborated.

[1290] The Court considers that the test offered by the Applicants can serve as a starting point for a new test that can ride on the wake of the dissenting opinions in *Van der Peet.* Given the fundamental shift in the parameters of the debate that the Court has previously recognized, the dissenting opinions of Justices L'Heureux-Dubé and McLachlin offer an interesting perspective on some of the underlying shortcomings of the *Van der Peet* approach when viewed today.

A.2.2.4 The new applicable test

[1291] Some preliminary observations that will have an impact on the analysis need to be recapped.

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[770] *Idem*, p. 80, l. 3-7.
[771] *Idem*, p. 79, l. 15-18.
[772] CANADA, *House of Common Debates*, 2nd session, 43rd Parliament, vol. 150, n° 60 (17 February 2021), p. 4188 (Hon. David Lametti); CANADA, *Senate Debates*, 2nd session, 43rd Parliament, vol. 152, n°42 (27 May 2021), p. 1547 (Hon. Patti LaBoucane-Benson).

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[1292] First, the notion of reconciliation must guide the Court. One of the consequences is that it requires, as the Preamble of the *UNDRIP Act* recalls, to reject all forms of colonialism, as well as any reasoning based directly or indirectly on the doctrine of *terra nullius* and discovery.

[1293] Second, the *Van der Peet* test, as nearly thirty years of jurisprudence shows, is best suited to the recognition of fishing, hunting or harvesting rights for personal uses. In that sense, it is a test adapted to the circumstances in which it was elaborated. However, the Court agrees with the MNCC that it is questionable whether the current test can be applied in the context of commercial rights with economic significance in modern times, even with some adaptations to it. The burden of proving that a contemporary trade practice at a commercial scale in a capitalistic world is the continuity of a pre-contact practice of an Indigenous society would be daunting even for the most zealous of applicants. The same goes for proving the right to contemporary commercial trade outside of traditional hunting or fishing activities.

[1294] The perception of the *Van der Peet* test reflected by most Indigenous academics is that it limits the recognition of Aboriginal rights to a stereotypical and outdated vision of their culture. This impression could impede Indigenous peoples' access to justice, while trust in the Canadian justice system is fundamental to reconciliation. The Court notes that, in the context of judicial review of administrative decisions, the Supreme Court took note of the difficulty of applying in practice a test that it had previously elaborated. In response to widespread criticism, it considered the effect of this test on access to justice and adopted a new approach. Thus, the Supreme Court's aim in *Vavilov* was to avoid long debates on a preliminary step, which overshadowed more important stages of the analysis, and ultimately, to improve access to justice [773].

[1295] Third, the Court must be aware of the unexpected consequences of limiting the recognition of rights to specific hunting or fishing practices. The current test inability to recognize modern rights with economic impacts could hinder the enforceability of other important – and maybe less contested – rights. A myriad of rights, many of which are protected by the *UNDRIP*, depends on the right to develop an autonomous economy, such as the right to revitalize cultural traditions and customs, the right to establish and control an education system, the right to establish Indigenous media, etc. Without independent financial leverage, most collective rights are just empty shells.

[1296] Based on all the preceding analysis, as well as that which will come in the following paragraphs, the Court concludes that the question it has to answer is whether the activity or practice under consideration is the exercise of a right protected by the traditional legal system of the Indigenous peoples claiming the right.

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[773] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.

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[1297] This question imposes the following three burdens on those wishing to exercise what, in the case of a lawsuit, can be categorized as a "litigious right". For that purpose, these burdens, or steps, constitute what the Court considers to be the new applicable test:

a) It will require first to identify the collective right that an Applicant invokes;

b) Then, an Applicant will have to prove that such a right is protected by his or her traditional legal system; and

c) Finally, an Applicant will have to show that the litigious practice or activity in question is an exercise of that right.

[1298] The Court will now explain in more detail where each of these steps comes from and how each should be applied.

First step: To identify the collective right invoked

[1299] Here the emphasis is on the fact that s. 35(1) aims at protecting rights, and not specific exercises of rights.

[1300] The reasoning of the Court is based on its reading of s. 35(1) in conjunction with s. 37, and the observations made in dissent by Justices McLachlin and L'Heureux-Dubé in *Van der Peet*.

[1301] It must be kept in mind that, even though s. 35(1) was the fruit of a long struggle of Indigenous peoples, the delineation of constitutionally protected Aboriginal rights was not supposed to end with the adoption of this section.

[1302] Initially, s. 37 of the *Constitution Act, 1982* provided that a constitutional conference was to be convened within one year after the *Constitution Act, 1982,* came into force. According to the text of this disposition, which was repealed on April 17, 1983 by application of s. 54, the conference "[…] included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada" (the Court's emphasis). The attendees at the constitutional conference were the Prime Minister of Canada, the first ministers of the provinces, as well as representatives of Indigenous peoples.

[1303] A new article, s. 37.1, was later added by the *Constitution Amendment Proclamation, 1983*. This disposition added two constitutional conferences to be convened within five years after April 17, 1982. The aim of these conferences was to address constitutional matters that directly affect the Aboriginal peoples of Canada. S. 37.1 was also repealed on April 18, 1987.

[1304] From these dispositions, the Court infers that the intrinsic logic of s. 35(1) was that Aboriginal rights were to be constitutionally identified and defined, much like the rights and freedoms protected in the *Charter*.

[1305] However, the Conferences failed to do so, and Aboriginal rights were never constitutionally defined, thus leaving this task to the judiciary[774]. This is not surprising given the deadlines of s. 37 and 37.1 in comparison with the twenty-five-year gestation period leading to the birth of the *UNDRIP.*

[1306] The test adopted by the Court thus tries to reconcile the judicial framework for applying s. 35(1) with the intent of the constituent power when adopting s. 37 and s. 37.1. The Court is of the view that the aim of the constitutional conferences would not have been to catalog a list of specific practices, customs or traditions but, rather, to identify collective rights which a party could then have claimed before a court.

[1307] An approach centered on collective rights is more aligned with the judiciary's fundamental role of interpreting and enforcing legal norms in light of factual circumstances. It is also in conformity with the approach adopted in the *UNDRIP*.

[1308] The content of the *UNDRIP* can be summarized as follows:

> The UN Declaration addresses the rights of Indigenous peoples in a comprehensive way. It has 24 clauses in its preamble and 46 articles, many with subsections. It touches on virtually every area that affects the rights of Indigenous peoples, both individual and collective. This ranges from articles on Indigenous peoples' rights to—and governments' obligations in relation to— land, resources, self-government, consultation, social and economic rights, education, employment, health, culture, spirituality, language, non-discrimination, and more. Article 43 states that the rights in the Declaration, "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"[775].

[1309] The *UNDRIP* recognizes inherent rights that Indigenous peoples have, as peoples. In the philosophy of the *UNDRIP*, Indigenous peoples do not have to prove their rights, right by right, group by group[776]. They are generic rights inherent to Indigenous peoples by the sole fact that they are Indigenous and that they are peoples.

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[774] James Youngblood HENDERSON et al., *Aboriginal tenure in the Constitution of Canada*, Toronto, Thomson Reuters, 2022, s. 5:2.

[775] Naiomi METALLIC, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard ALPERT et al. in *Rewriting the Canadian Constitution*, 2022 (forthcoming). Available at SSRN: https://ssrn.com/abstract=4232531 or http://dx.doi.org/10.2139/ssrn.4232531.

[776] Naiomi METALLIC, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard ALPERT et al. in *Rewriting the Canadian Constitution*, 2022 (forthcoming). Available at SSRN: https://ssrn.com/abstract=4232531 or http://dx.doi.org/10.2139/ssrn.4232531.

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[1310] The *UNDRIP* does not protect a catalog of practices, but, rather, rights which are recognized because of their normative significance. The logic is much closer to other human rights instruments, such as the *Charter* or the *Universal Declaration of Human Rights*.

[1311] In a very real way, it could be said that the *UNDRIP* has succeeded where the process laid down by the *Constitution Act, 1982* has failed.

[1312] The fundamental distinction between Aboriginal rights on one side and the exercise of Aboriginal rights on the other side was already underlined by Justice McLachlin. In her opinion:

> [238] [i]t is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.
>
> [239] If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right[777].

[1313] She stated, and the Court agrees, that, when this distinction is made, there is no longer a risk of freezing Aboriginal rights in the past. If rights are ancestral and have been passed down from generation to generation, their exercise may take modern forms[778]. Justice McLachlin also wrote that, for a right to be protected under s. 35(1), it must be of constitutional significance[779].

[1314] Justice L'Heureux-Dubé also calls in her dissent for an approach to rights more abstract than the one adopted by the majority. Instead of focusing on manifestations of culture and protecting a catalogue of practices, traditions and customs, she writes that the emphasis should be put on the significance of an activity to the culture and

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[777] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 238-239.
[778] *Idem*, para. 240.
[779] *Idem*, para. 242.

social organization of the group. She offers an approach more in line with *Charter* jurisprudence[780].

[1315] The majority in *Van der Peet* underlined the "aboriginal" aspect of the "aboriginal rights"[781]. The majority intended to define the scope of s. 35(1) "in a way which captures both the aboriginal and the rights in aboriginal rights" (emphasis in the original)[782].

[1316] However, after nearly thirty years, the evolution of the jurisprudence shows that the notion of rights might have disappeared behind the notion of "aboriginality". It is now necessary to put more emphasis on the notion of rights in order to rebalance the two notions and offer an adequate protection for Aboriginal rights. For s. 35(1) to serve its function, it is necessary to put at the forefront of the test the fact that the Constitution protects rights with normative value.

[1317] Having said that, the test must also capture the "aboriginal" aspect of the right, and that is what is done at the second step of the test.

Second step: To prove that the right is protected by the traditional legal system

[1318] The Court recognizes that in *Van der Peet,* the appellant pleaded that Aboriginal rights should be defined through the notion of pre-existing legal rights and that this argument was rejected[783]. But the Court has concluded that it is justified to depart from *Van der Peet*.

[1319] In the new parameters of the debate, reference to the Indigenous traditional legal system is a means of ensuring that the aboriginal aspect of "Aboriginal rights" is taken into account, while avoiding the stereotypes that accompany the notion of pre-contact practices.

[1320] The majority stated in *Van der Peet* that the reference to the pre-existing legal rights would take "s. 35(1) too far from that which the provision is intended to protect"[784]. However, as noted earlier, the purpose of s. 35(1) now encompasses the notion of reconciliation between sovereign nations, and the Court is convinced that the new test will better encapsulate what s. 35(1) aims to protect.

[1321] Indeed, by acknowledging and giving due recognition to the existence of the traditional Indigenous legal systems at the second step, the new test favour reconciliation. This is a clear departure from the doctrine of discovery and *terra nullius*.

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[780] *Idem*, para. 157-158.
[781] *Idem*, para. 16-17.
[782] *Idem*, para. 20.
[783] *Idem*, para. 16-17.
[784] *Idem*, para. 17.

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It fully recognizes that Indigenous peoples were not only occupying the land, but were and are nations with political, social, economical and also legal systems.

[1322] It is important to note that the Supreme Court has regularly recognized the continued existence of Indigenous legal systems. For instance, in *Delgamuukw*, Chief Justice Lamer wrote for the majority that one of the sources for aboriginal title is the relationship between common law and "pre-existing systems of aboriginal law"[785]. In *Van der Peet* itself, the majority quotes with approbation the reasons of Justice Brennan of the Australian High Court in the landmark case *Mabo,* according to which "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory" (the Court's emphasis)[786].

[1323] Putting the emphasis on Indigenous legal systems instead of on particular practices addresses several criticisms previously mentioned, such as the Eurocentrism of the previous test.

[1324] It is also in harmony with the *UNDRIP*, which calls for the due recognition of Indigenous legal systems, as can be seen, for instance, in articles 27 and 40[787]:

> Article 27
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
>
> Article 40
>
> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.
>
> (The Court's emphasis)

[785] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 114.
[786] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 40.
[787] See also art. 5, 11 and 26(3).

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[1325] For this stage of the test, Aboriginal rights must incorporate the notion of a certain continuity in time. Once the focus is on rights instead of on practices, the anchoring in time does not have the same negative impact. It will not prevent the evolution of the exercise of that right, nor will it favour a stereotyped vision of Indigenous rights.

[1326] If the Court is of the opinion that some continuity in time is essential to establishing constitutional rights, for the reasons previously exposed, the "magic moment" of European contact is no longer relevant. The reference to *traditional* legal systems will be sufficient to ensure continuity.

[1327] With respect to continuity, each claim should be dealt with on a case-by-case basis. As the past thirty years of jurisprudence have demonstrated, Aboriginal rights is not an area of law that can accommodate a "one-size-fits-all" test. Flexibility must be the guide for determining if a right has sufficient continuity within Indigenous legal systems.

[1328] The evidence of traditional Indigenous legal systems could be made in a number of ways. For instance, an expert in Haudenosaunee law could share his expertise with the Court, an elder could testify about relevant oral tradition or meta-narratives, or a chief could testify about his deep knowledge of his culture. Historical evidence would still be part of the proof. The *UNDRIP* would also be one of the sources to consider, given that it was elaborated with the participation of Indigenous peoples over a considerable period of time and, thus, reflects some consensus. All these elements would be part of the grab-bag available to the Court in determining if a right is part of the legal tradition of an Indigenous society for the purpose of s. 35(1). Some rights could even be generic[788], benefitting from a presumption that they are protected under traditional Indigenous legal systems because of their universal nature.

Third step: To show that the litigious practice or activity in question is an exercise of that right.

[1329] Aboriginal rights are collective rights, but they are often pleaded before the courts by individuals. This can sometimes lead to tension, as the interests of the individual and those of his or her community might not align. The community might not necessarily want to embrace or support the litigious activity in question, but at the same time still want to defend its collective right.

[788] See for instance the approach of the Court of Appeal regarding the right to self-government in relation to child and family services in *Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,* 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061).

[1330] In the present case, for instance, the MNCC expressed much reluctance to the Applicant's putting the question of the Aboriginal right to trade tobacco before this Court.

[1331] The third step of the test would allow the Court to distinguish between the existence of a collective right, which has already been decided at step two, and the alleged exercise of that right by an individual. This distinction will make the justification analysis more acceptable since it will focus on the exercise of a collective right by an individual and not on the existence of the collective right itself. The question will no longer be whether the violation of the free exercise of an activity that has been qualified as *integral* to the distinctive culture of the group can be justified, but instead whether the violation of the individual exercise of a collective right can be justified, without impeding the recognisance of the collective right itself.

A.2.2.4.1 Final remarks on the new test

[1332] The new test should be seen as a funnel. Step one should generally not pose difficulties, being essentially a formal step. Step two could be quite expeditive when the right in issue is an uncontested generic right. In such a situation, there would be a strong presumption that the right is protected by the traditional legal system in question. The last and third step, the exercise of the right by the individual, could be in some circumstances more challenging. A court could recognize the existence of a collective right but conclude that the actions of the individual claiming the right are not protected under it.

[1333] In the end, in the spirit of reconciliation, the task should be eased for establishing the existence of an Aboriginal right. In most cases, the debate should no longer focus on the existence of the collective Aboriginal right, but on whether the individual practices at hand are protected by the collective right, and how to conciliate, at the justification step, the individual exercise of the Aboriginal right with other collective interests. The new test should avoid long historical debates unsuited to the judicial context and concentrate the efforts on the essential legal questions, notably, on how to conciliate the existence of the interests of two sovereign nations in a reconciliation perspective.

[1334] Indeed, the individual exercise of an Aboriginal right will still be submitted to a justification test. That is why there is no need to add a layer of extreme specificity to the test; the justification stage is enough.

[1335] The Attorney General of Quebec expressed concerns that the test proposed by the Applicants did not offer enough specificity, as required by the majority in *Van der Peet*.

[1336] In *Van der Peet*, the court started its analysis by affirming that, in the liberal enlightenment view, "rights are held by all people in society because each person is entitled

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to dignity and respect"[789]. In contrast, Aboriginal rights are held only by Indigenous members of society. Based on that observation, the Supreme Court felt that it had to define Aboriginal rights in a manner that recognized that, although they were rights, they were granted to only one part of the overall society.

[1337] To accomplish this goal, the Supreme Court adopted a purposive approach to s. 35(1), concluding that Aboriginal rights were rights held by Indigenous peoples because they were already here when Europeans arrived, living in distinctive societies with their own practices, customs and traditions. The basis for Aboriginal rights was then the "reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". From this conclusion stemmed the *Van der Peet* test, which focuses on the identification of crucial elements of those pre-existing distinctive societies[790].

[1338] At this stage, it is useful to restate that the Court has held that the conditions to depart from *Van der Peet* have been met and, with respect to *stare decisis,* that the purpose of s. 35(1) has evolved. The protection of the rights of Indigenous peoples results not only from the fact that they were here first, but also from a deeper need for reconciliation between sovereign nations. The Supreme Court's reasoning on specificity should therefore be read in this new light.

[1339] With this in mind, the Court believes that the new test, taken in its entirety, is consistent with a purposive analysis of s. 35(1). It is coherent with the objectives of both conciliation and reconciliation by admitting that Indigenous peoples are nations with traditional legal systems that still exist to this day and that deserve recognition.

B. APPLICATION OF THE NEW TEST TO THE PRESENT CASE

[1340] Even though the test to be applied is now a different one, the Court is of the view that there is enough evidence on the record to decide the claim on this basis and in accordance with the test of a balance of probability.

[1341] The Court will now analyse the Applicants' claim using the three steps of the new test: (1) identification of the right invoked; (2) protection of that right by the traditional legal system of the Mohawks of Kahnawà:ke; (3) analysis of the litigious practice as an exercise of that right.

[1342] In order to be as concise as the case allows and avoid repetitions, the evidence will be treated directly in the analysis of the three steps. However, the Court must deal with the objection to the testimony of Dr. Alfred beforehand.

[1343] Although the Attorneys General did not oppose to the qualification of Dr. Gerald Taiaiake Alfred as a political scientist, they object to his qualification as an historian. They also did not contest the admissibility of his expert report but argued that little

[789] *Idem*, para. 18.
[790] *Idem*, para. 44.

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weight should be given to his reference to historical facts. The parties agreed that it was not necessary to decide on this issue before his testimony, leaving the arguments for the final pleading.

[1344] The qualification proposed by the Applicants is that Dr Alfred be declared an expert in political science with expertise in historical and contemporary Indigenous-state relations, and the historical and contemporary exercise by the Mohawks of Kahnawà:ke of self-determination or sovereignty[791]. The Attorneys General proposed that he be qualified as an expert in political science with a speciality in the field of national affirmation and Indigenous governance[792].

[1345] The Attorney General of Quebec does not contest the admissibility of his report but argue the Court should give very little weight to his reference to historical facts because he did not respect a rigorous historian process, especially in his use of sources.

[1346] The Court will now summarize Dr Alfred's most relevant qualifications and experience as revealed by his *curriculum vitae*[793].

[1347] Dr Alfred obtained his B.A. with Honours in History from Concordia University. The focus of that degree was on the history of colonialism since there was still no courses yet developed on Indigenous stories or history at the time. He then obtained his Ph.D. in the field of government from Cornell University in 1994. The title of his thesis was: *Kanawake Mohawk Politics and the Rise of Native Nationalism.* Previously, he had obtained his M.A. in the same field, at the same university.

[1348] From 1994 to 1996 he was assistant professor in political science at Concordia University. Once his studies completed, he became professor in Indigenous governance at the University of Victoria from 1996 to 2019. During those years, he founded the Indigenous Governance Program and was the Chair of its management committee from 2002 to 2011, then its Director from 2011 to 2015 and finally, from 2015 to 2017, its Graduate Advisor.

[1349] He is the author of many articles and books and has participated in numerous monographs and to chapters in books. He also gave hundreds on speeches, in Canada and abroad since 2002.

[1350] The major fields of scholarly and professional interests reflected in those publications and in the conferences, presentations, and media events he attended are Indigenous resurgence, political philosophy, environmental ethics, cultural resources, damages assessment, cultural restoration, decolonization, Indigenous-State relations.

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[791] Transcriptions, 2021-09-14, p. 171, l. 13.
[792] *Idem*, p. 222, l. 9.
[793] Curriculum vitae, Gerald Taiaiake Alfred. Exhibit WM-28-A.

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[1351] In parallel to his academic career, Dr. Alfred was active in different Mohawk communities, in Canada and the United States, working as a consultant on different issues of importance for various Indigenous communities.

[1352] At the outset of his report, he mentioned that he has been retained to present his professional opinion on issues of Indigenous nationhood and the question of sovereignty of the Mohawks of Kahnawà:ke. He added: "the opinion expressed in this report are mine alone and based on the knowledge I have been gifted with through teachings shared by elders and cultural knowledge holders and which I have accumulated through my studies, work as a scholar and life experience as a Mohawk of Kahnawà:ke"[794].

[1353] The significance of Dr. Alfred's testimony lies not in detailing events from hundreds of years ago, but rather in how those events have been understood and assimilated by the community to influence current happenings and how it contributed to the resurgence of Indigenous culture or societal changes. Even if the Court determines that certain historical facts are incorrect, it will not alter the community's present-day experiences or its current understanding of its history.

[1354] For the same reason, the Court considers that the nuances on his qualifications as an expert in this Notice proposed by the parties will not affect the content of his testimony and how it can be used by the Court.

[1355] Given that Dr. Alfred stated his focus is on Indigenous nationhood and Mohawk sovereignty in Kahnawà:ke, and considering his qualifications as evidenced by his curriculum vitae, the Court recognizes Dr. Gerald Taiaiake Alfred as an expert in the areas of Indigenous nationhood and Mohawk sovereignty in Kahnawà:ke.

B.1 First step: Identification of the right invoked

[1356] The first step of the new test is to identify the right that the Applicants invoke.

[1357] Under the *Van der Peet* framework, the Attorneys General have characterized the Aboriginal right as a "right to transport tobacco from pre-contact Mohawk territory located in the Mohawk River Valley (in what is now New York State), to the north of Lake Champlain and the Adirondack mountains (in what is now Canada), for the purposes of commercial trade"[795]. The Applicants have more broadly defined their claim as a right to participate in the tobacco trade of the Mohawks of Kahnawà:ke, the Mohawk Nation and the Iroquois Confederacy[796].

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[794] Gerald Taiaiake ALFRED, *Expert Report*, p. 1. Exhibit WM-28.

[795] *Attorney General of Québec Final Pleadings*, para. 87, 103; *Response of the Attorney General of Canada to the Amended Consolidated Constitutional Pleadings*, para. 40.

[796] Consolidated closing memorandum of fact and law of the Applicants, para. 326.

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[1358] These characterizations reflect the orientation of the *Van der Peet* test. The characterization of the right under the former test was defined by factors such as the nature of the action done pursuant to the claimed Aboriginal right, the nature of the legislation being impugned, and the practice, custom or tradition being relied upon to establish the right[797]. Because the *Van der Peet* test aimed at protecting specific practices, customs or traditions, the approach to characterization of the right was quite narrow. This led to complex debates.

[1359] The Applicants went so far as to say that characterization was one of the most difficult issues that the Court had to decide in the present case[798]. The difficulties here arise essentially from the fact that the Applicants were not found guilty of a regulatory offence under the *Excise Act,* but with the crime of fraud (s. 380 *Cr. c.*), conspiracy (s. 465 *Cr. c.*), and gangsterism (s. 467.11 and 467.12 *Cr. c.*). Therefore, there is no clear alignment between the impugned legislation, i.e., the *Excise Act*, and the activities being analysed. The nature of the crimes stretched the characterization step of the *Van der Peet* test to its limits.

[1360] The consequence of that situation was, amongst other things, to generate discussions on whether the crossing of an international border should be part of the characterization.

[1361] To summarize that debate, for the Applicants, importation is only an incidental part of the factual matrix of the case and is not an essential element of the offence charged. They were found guilty of fraud on the Government of Canada for failure to pay taxes, not for lying to customs officers[799]. The element of defrauding the Government of "any property" in this case refers to the remittance of excise duties pursuant to s. 42 of the *Excise Act*[800]. According to the Applicants, the substance in the present case can be qualified as partially-manufactured tobacco. Thus, pursuant to s. 42, excise duties were owed only once that tobacco had been incorporated into tobacco products and packaged. Therefore, the full offence occurred in Canada, as payment was not due until the tobacco products had been manufactured here, thus making the border issue irrelevant. The offence would have occurred whether or not a border was crossed at some point[801]. Consequently, the right they claim should not be characterized in relation to crossing the international border[802].

[1362] On the contrary, for the Attorneys General, the characterization must incorporate the notion of border. The Attorney General of Quebec argued that the

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[797] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 53.
[798] Final pleadings, 24-01-2022, p. 103, l. 22- p. 104, l. 4.
[799] *Consolidated closing memorandum of fact and law of the Applicants*, para. 309-313; Final pleadings, 2022-01-21, p. 18, l. 24- p. 21, l. 18; Final pleadings, 2022-01-25, p. 106, l. 14-p. 109, l. 3.
[800] *Consolidated closing memorandum of fact and law of the Applicants*, para. 314-316.
[801] Final pleadings, 2022-01-25, p. 128, l. 24-p. 133, l. 24.
[802] *Consolidated closing memorandum of fact and law of the Applicants*, para. 318.

notion of border is important as "Derek White was found guilty of fraud because he organized the importation of tobacco across the border without reporting to customs or holding the appropriate licenses and therefore causing the loss of excise duties". For the Attorney General of Quebec, "the impugned activity is the transportation of tobacco from the United States to Kahnawake and Six Nations of the Grand River Indian reserves in Canada"[803]. As in *Mitchell*, "[a]bsent a border, this case would not be before the Court"[804]. The Attorney General of Quebec considers that the Applicants' argument that duties are paid only after the tobacco is manufactured is not relevant. What is relevant is that s. 42 is concerned with partially-manufactured tobacco *imported* into Canada. This section has no purpose other than creating a rule for importation[805]. S. 42 operates in conjunction with the *Customs Act,* which creates an obligation to declare imported goods at the border. And when the good is tobacco, it triggers the application of s. 42 of the *Excise Act*[806]. For the Attorney General of Quebec, the *Excise Act* and the *Customs Act* are "inextricably related to one another": "[s]ection 42(2) is enforced through the obligation to declare at the border"[807]. Even though excise duties will be paid at the time of manufacturing, the *Excise Act, 2001* is triggered as of the crossing of the border[808]. For the purposes of characterization, the Applicants should be held to be in a position similar to that of the *Mitchell* case, since, in both cases, it was about crossing the border with goods for trade within their communities. The fact that Derek White did not declare the goods, contrary to *Mitchell*, should not have an impact[809].

[1363] The Attorney General of Canada adopts a similar approach. The Attorney General of Canada argues that s. 42 deals with importation and the activities of the Applicants relates to importation; they are not manufacturers but importers of partially-manufactured tobacco[810]. For the Attorney General of Canada, it is irrelevant that the duties might be paid later, when the tobacco is manufactured. What is important is that s. 42 is triggered at the border. The risk of economic prejudice materializes at the border, because it will be impossible to identify the volume imported, the person who will be manufacturing the products, etc. This frustrates the collection of excise duties because it is impossible to follow the trail of the imported tobacco and obstructs the strict accounting process that is normally followed[811]. Therefore, characterization should not center on participation in the tobacco trade but, rather, on the transportation and importation of tobacco into Canada[812].

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[803] *Attorney General of Québec Final Pleadings*, para. 94.
[804] Final pleadings, 2022-02-02, p. 68, l. 18- p. 69, l. 3.
[805] *Idem,* p. 77, l. 3-13.
[806] *Idem,* p. 77, l. 12- p. 78, l. 14.
[807] *Idem,* p. 78, l. 24- p. 79, l. 2.
[808] *Idem,* p. 79, l. 4-11.
[809] *Idem,* p. 83, l. 23- p. 84, l. 17.
[810] Final pleadings, 2022-02-07, p. 105, l. 12 – p. 110, l. 2.
[811] *Idem*, p. 110, l. 3 – p. 142, l. 6.
[812] *Idem*, p. 142, l. 14-19.

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[1364] As can be seen from this review of only one of the issues relating to characterization, a considerable amount of energy and thinking was put into the question of characterization. The Court cannot blame the parties for this. Under the *Van der Peet* test, the party who wins the "characterization battle" has a significant head start on the other party. Indeed, an overly narrow characterization of the right could lead a rightful claim to a dead end, and vice versa[813].

[1365] The new test offers a different approach, starting with the first step. Rights are seen in a perspective closer to the approach adopted for *Charter* rights. Hence, at that initial step, the Court seeks only to identify the fundamental norm that the Applicants invoke which could deserve protection from State intervention.

[1366] To make a parallel, a hypothetical claimant in a *Charter* case would not be invoking a constitutional right to wear the niqab but, rather, a right to freedom of conscience and religion. The debate focuses then on whether the specific practice invoked, wearing the niqab, is protected under a constitutional right, and, if so, if a violation is justified under s. 1 of the *Charter*.

[1367] With this in mind, the right to transport tobacco across a frontier or the right to participate in the tobacco trade are not, in themselves, constitutional rights deserving to be protected from State intervention. They have no intrinsic normative value. On the other hand, the right to transport tobacco across the border or to participate in the tobacco trade may be specific exercises of a broader constitutional right that now needs to be identified.

[1368] In the application of their proposed test, the Applicants invoked the right to self-determination and the right to freely determine and pursue economic development.

[1369] In the circumstances of the present case, the Court finds that the right to self-determination, without further qualification, is too broad.

[1370] That being said, the Court retains the Applicants' recourse to the right to freely determine and pursue economic development. That reflects the true foundation of the Applicants' position, as it emerges from a general perspective of their pleadings and the evidence they brought. They argue that their actions should not have been criminalized, since they were done in pursuance of the right of their nation to freely pursue economic development by their own chosen means. The essence of their case is that Canada illegally interferes with the right of the Mohawks of Kahnawà:ke to pursue economic development by the imposition of excise duties and the related criminal charges against them.

[1371] The question is then whether this right is protected by the Applicants' traditional legal systems.

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[813] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, para. 15.

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B.2 Second step: Protection by the traditional legal system of the Mohawks of Kahnawà:ke

[1372] The Court believes that the notion of generic rights adopted by the Court of Appeal in the *Renvoi* imposes itself in the present case.

[1373] Indeed, the right to freely pursue economic development is arguably what the Court of Appeal calls a "generic" right. In *Renvoi*, the Court of Appeal reproduces Prof. Slattery's explanation on generic rights:

> Generic rights are not only *uniform* in character, they are also *universal* in distribution. They make up a set of fundamental rights presumptively held by all Aboriginal groups in Canada. There is no need to prove in each case that a group has the right to conclude treaties with the Crown, to enjoy a customary legal system, to benefit from the honour of the Crown, to occupy its ancestral territory, to maintain the central attributes of its culture, or to govern itself under the Crown's protection. It is presumed that every Aboriginal group in Canada has these fundamental rights, in the absence of valid legislation or treaty stipulations to the contrary. This situation is hardly surprising, given the uniform application of the doctrine of Aboriginal rights throughout the various territories that make up Canada, regardless of their precise historical origins or previous positions as French or English colonies.
>
> The generic rights held by Aboriginal peoples resemble the set of constitutional rights vested in the provinces under the general provisions of the Constitution Act, 1867. Just as every province presumptively enjoys the same array of government powers, regardless of its size, population, wealth, resources, or historical circumstances, so also every Aboriginal group, large or small, presumptively enjoys the same range of generic Aboriginal rights. […][814]
>
> [Emphasis in the original; reference omitted]

[1374] By their nature, there is a strong presumption that generic rights are part of the traditional legal system of the Indigenous group of which the individuals claiming the rights are part. This presumption could be rebutted, for instance in case of extinguishment. However, similarly to what was decided in *Simon* v. *R.*, given the serious and far-reaching consequence of extinguishment, a strict proof of that would be necessary[815].

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[814] Brian SLATTERY, "A Taxonomy of Aboriginal Rights", in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 111, p. 123, quoted in *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (appeal as of right to SCC, 14-03-22, n°40061), para. 488.

[815] *Simon* v. *R.*, [1985] 2 S.C.R. 387, 405-406.

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[1375] The Court is convinced that the right to freely pursue economic development is one of the generic rights shared by all Indigenous peoples. It is intimately tied to the survival and dignity of any nations. Without it, Indigenous societies are not only deprived of the opportunity to flourish, but they could also be threatened with the inability to meet their basic needs. Moreover, as previously stated, a myriad of other rights essential to the continuity of Indigenous societies depends on the right to pursue economic development.

[1376] This interpretation is supported by the *UNDRIP,* which illustrates that there is a consensus amongst the states that have endorsed it that Indigenous peoples have the right to pursue economic development:

> Article 3
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> Article 20
>
> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. […]

[1377] The important connection made in these sections between the right to self-government and the right to pursue economic development was already made clear in the Report of the RCAP: "self-government without a significant economic base would be an exercise in illusion and futility"[816].

[1378] It is also interesting to note that, in its commentaries attached to the "Principles respecting the government of Canada's relationship with Indigenous peoples", the

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[816] CANADA, ROYAL COMMISSION ON ABORIGINAL PEOPLES, *Report of the Royal Commission on Aboriginal People*, vol. 2, "Restructuring the relationship", Ottawa, Minister of Supply and Services Canada, 1996, p. 750, online: <Report of the Royal Commission on Aboriginal Peoples - Library and Archives Canada (bac-lac.gc.ca)>.

Department of Justice recognizes Indigenous peoples' right to freely pursue their "economic, political, social, and cultural development" (commentaries under principle 5)[817].

[1379] In the same vein, the very first sentence of a recent Report of the Standing Committee on Indigenous and Northern Affairs entitled "Barriers to economic development in Indigenous communities" reads as follows: "By virtue of their right to self-determination, Indigenous peoples have the right to pursue their own socioeconomic development". The second sentence recognizes that "[y]et, across Canada, First Nations, Inuit and Métis communities continue to face significant barriers to their growth and prosperity"[818].

[1380] The Court comes to the conclusion that, in the absence of evidence to the contrary, the Mohawks of Kahnawà:ke benefit from this universal right in the same way as any other Indigenous people.

[1381] In addition, there is evidence on the record for the Court to conclude that the right to pursue economic development is protected under the traditional legal system of the Mohawks of Kahnawà:ke.

[1382] One of the pieces of evidence that the Court retains to establish that this right is indeed protected under the traditional legal system of the Mohawks of Kahnawà:ke can be found in the introduction to the tobacco policy of the Kahnawà:ke Tobacco Association (hereafter KTA), an association of Kahnawà:ke Mohawks involved in the tobacco trade. That passage refers to a law of nature as the legal basis for this right:

> 8. As sovereign Peoples, endowed by our creator with certain unalienable, fundamental and inherent rights – Life, Liberty, Self-Preservation and the Pursuit of Happiness. Self-Preservation being the first law of nature requires that our Peoples have our own economy and the right to develop and exploit that economy[819].

[1383] Chief Nelson testified to his belief that all nations, which implicitly includes his own, are entitled to economic trade and have the right to have an economic base[820]. He testified that, before the arrival of the European peoples, his people had full authority and responsibility for what they needed to do in order to take care of their members, including trade with other nations[821].

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[817] DEPARTMENT OF JUSTICE CANADA, *Principles respecting the Government of Canada's relationship with Indigenous peoples*, Ottawa, Department of Justice, 2018, online: < Principles respecting the Government of Canada's relationship with Indigenous peoples (justice.gc.ca).

[818] CANADA, House of Commons, Standing Committee on Indigenous and Northern Affairs, Barriers *to economic development in Indigenous communities*, 44th Parliament, 1st session (Chair: Marc Garneau), p. 9.

[819] Exhibit WM-010, *KTA Tobacco Policy*, p. 2.

[820] Transcriptions, 2021-10-25, p. 99, l. 11-13, p. 102, l. 21-22.

[821] *Idem*, p. 103, l. 3-20.

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[1384] Chief Nelson also said that "Trade is one facet of what we do and how we function", and he interlinks trade and peace[822]. The Court understands from his testimony that trade has always been important for the well-being of his community, not only as a way to get the products that they need and have an economic force, but also as a condition for peace between nations. Furthermore, he connected The Great Law of Peace to economic growth, stating that any trade disputes must be resolved according to its principles.

[1385] The Court also retains from Dr. Alfred's report and testimony a strong attachment amongst the Mohawks of Kahnawà:ke to their right to self-government and a deep conviction that the protection of their right to self-government is dependant on an autonomous economy. This desire to maintain an autonomous economy has manifested itself by a strong support to the tobacco trade since the 1980s. The Court understands from his testimony that the tobacco trade would generally be seen in the community as a mean to develop their capacities to provide for themselves, as well as a political statement of their sovereignty[823].

[1386] This strong conviction that the right to economic development is part of their inherent rights is also apparent from a 2011 letter of Grand Chief Delisle, which starts as follows: "We, the Mohawk Council of Kahnawá:ke stand in support, promote and defend the collective rights of the Kanien´kehá:ka to not only exist but to prosper as Peoples"[824].

[1387] The Court finds another illustration that the right to pursue freely economic development is protected by the traditional legal system of the Mohawks of Kahnawà:ke in the *Draft Kahnawà:ke Tobacco Law*:

> 1.6 Our right to self-determination also includes the right to achieve self-sufficiency through the responsible development and regulation of economic activities within the Mohawk Territory of Kahnawà:ke.
>
> […]
>
> 3.1 This Law is intended to assert the unalienable rights of the Kanien'kehá:ka of Kahnawà:ke to achieve peace, security, prosperity and self-sufficiency through sustainable economic activity and is urgently needed to counter an imminent threat by external governments to challenge these collective rights.
>
> 3.2. The purposes of this Law are:

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[822] *Idem*, p. 108, l. 21- p. 109, l. 3.

[823] See notably Gerald Taiaiake ALFRED, *Expert Report*, pp. 20, 26-27, 30-32. Exhibit WM-28; Transcriptions, 2021-09-06, p. 10-11.

[824] Exhibit WM-021, *Grand Chief Delisle re collective rights*.

> […]
>
> c) to ensure the Kahnawà:ke Tobacco Industry continues to provide a sustainable economic base and a source of revenue to Kahnawa'kehró:non[825].

[1388] The Court concludes that the right to pursue economic development is protected under the traditional legal system of the Mohawks of Kahnawà:ke. The Court should now turn to the last step of the new test and determine if the Applicants litigious actions are protected by the right to freely pursue economic development.

B.3 Third step: Analysis of the litigious practice as an exercise of the right to pursue freely economic development

[1389] The last step of the new test requires determining whether the litigious activity in question is protected under the right of the Mohawks of Kahnawà:ke to freely pursue economic development.

[1390] Under the former test, at the characterization step, the Applicants described the actions at issue as the acquisition and sale of bulk tobacco, the delivery of the tobacco to the Six Nations Territory in Ontario, and the action of facilitating those actions[826]. For the Applicants, these activities are basically tobacco-trading activities[827].

[1391] For the Attorney General of Quebec, "the impugned activity is the transportation of tobacco from the United States to Kahnawake and Six Nations of the Grand River Indian reserves in Canada"[828]. The Applicants were importing large quantities of tobacco from the United States to Canada clandestinely. The critical part of their operations was about crossing the border[829].

[1392] In the same vein, the Attorney General of Canada pleads that the charges brought against the Applicants aim at the importation into Canada, transportation and distribution of very large quantities of cigarette tobacco for commercial purposes[830].

[1393] The distinction made by the parties might have been critical under the former test, however, under the new test and in the present circumstances, the Court finds that the distinction makes no difference to its conclusion. If the Court holds that the

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[825] Exhibit WM-026, *Draft Kahnawà:ke Tobacco Law*, p. 1.
[826] *Consolidated closing memorandum of fact and law of the Applicants*, para. 308.
[827] Final pleadings, 2022-01-25, p. 103, l. 10-11.
[828] Attorney General of Québec Final Pleadings, para. 94.
[829] Final pleadings, 2022-02-02, p. 72, l. 24- p. 73, l. 13.
[830] *Plan of arguments of the Attorney General of Canada*, para. 31.

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Mohawks of Kahnawà:ke tobacco trade is protected under the right to freely pursue economic development, this will cover the phases of transportation and importation.

[1394] Essentially, the Applicants argue that a significant proportion of the population of Kahnawà:ke participates and benefits from the tobacco trade activities, and that the objective of this trade is to promote the economic self-sufficiency and political and economic self-determination of the Mohawks of Kahnawà:ke[831]. They also explain that during the 20th century, the Mohawks of Kahnawà:ke had to face significant political, economic and cultural disruption, such as the impact of the construction of the St. Lawrence Seaway and the quasi-death of the iron work industry. They had to embrace "various economic practices and trades to cope with the loss of traditional subsistence"[832].

[1395] This led first to an activity of retail sale of cigarettes on a substantial scale in the 1980s. The motor of the trade was to export cigarettes manufactured by Canadian companies to duty-free facilities in the United States, where they were not subject to excise duties, and then to bring them back across the border. This led to a large-scale police raid and the arrest of numerous individuals. Canada and Quebec then changed their tax laws to significantly lower the cost of cigarettes "off-reserve". This had a significant negative impact on Mohawk businesses[833]. Community members then turned, around the year 2000, to the production of tobacco products from bulk tobacco[834].

[1396] The Applicants insist on the collective character of the tobacco trade. A substantial portion of the adults Mohawks of Kahnawà:ke would currently be employed in the tobacco trade[835]. It gives an opportunity to the community to work on the territory of Kahnawà:ke, contrary, for example, to employment in high-steel ironwork in the United States[836].

[1397] There is conclusive evidence on the record that the tobacco trade has answered a problem regarding the employment opportunities of the Mohawks of Kahnawà:ke, and that it is currently a major source of employment.

[1398] Dr. Alfred testified that, before the development of tobacco trade, there was a high level of unemployment in Kahnawà:ke. Mohawks of Kahnawà:ke used to be high-steel ironworkers in the United States. This was a dangerous occupation, which led the men to leave the community from Sunday to Friday. It had an impact on family life,

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831 *Consolidated closing memorandum of fact and law of the Applicants*, para. 325.
832 *Idem*, para. 331.
833 *Idem,* para. 333, Final pleadings, 2022-01-26, p. 39, l. 7-p. 45, l. 5.
834 *Consolidated closing memorandum of fact and law of the Applicants*, para. 334.
835 *Consolidated closing memorandum of fact and law of the Applicants*, para. 336; Final pleadings, 2022-01-26, p. 113, l. 10-25.
836 Final pleadings, 2022-01-26, p. 121, l. 7- p. 124, l. 9.

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but also on the social dynamics in the community[837]. That is why, he believes, the tobacco trade attracted people. It allowed men to stay in their family and community[838]. Dr. Alfred also emphasizes that the Mohawks of Kahnawà:ke, as anglophones, had difficulties in the 1980s and early 1990s in finding employment opportunities, in addition to the effect of colonialism on their educational levels, and racism[839].

[1399] Peggy Mayo corroborates that, before the tobacco industry, the most prominent jobs were in the iron work. She adds that this trade died off in the seventies and eighties[840]. Peggy Mayo was born and raised in Kahnawà:ke. She was the Director of Justice in Kahnawà:ke from 1986 to 1992. She was elected to the Band Council in 1990 and re-elected until 2012. As the Director of Justice, she worked on developing projects of tobacco regulations, and then, as a council member, she was responsible for the tobacco portfolio. She participated in meetings with the Ministers of Justice and Revenue in Quebec City, on one side, and the Grand Chief and the traditional people of the Longhouse 207, on the other. From 2012 to 2021, she was hired by a tobacco company to record the history of the tobacco industry in Kahnawà:ke over the years. Asked to join the Kahnawà:ke Tobacco Association, she became coordinator and worked on a Kahnawà:ke tobacco law.

[1400] According to her testimony, there are between 500 to 1000 people who are employed in the tobacco trade in Kahnawà:ke[841]. Some are working in factories, others in retail stores, “mom and pop” shops, in the businesses of packaging, of cellophane, etc.[842]. She testified that the tobacco industry is a major employer in the community, and believes that, without it, the social assistance budget of the community would not be able to cover all the persons in need[843].

[1401] She explains that the people working in the tobacco industry make a good living and spend their money within the community, as there is a strong policy of “Shop in Kahnawà:ke”. The workers contribute to the different stores of the community[844].

[1402] Peggy Mayo also gave a picture of the impact of the tobacco industry on the lives of the community members in her testimony on the effect that a proposed, but rejected, anti-tobacco law would have had:

> […] Well, of course it would have shut down the industry. […] It would have put hundreds of people out of jobs. It would have stopped a lot of the resources that the tobacco industry gives, such as they fund the milk and

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[837] Transcriptions, 2021-09-16, p. 12.
[838] *Idem*, p. 13.
[839] Transcriptions, 2021-09-16, p. 13.
[840] Transcriptions, 2021-10-28, p. 144-145.
[841] Transcriptions, 2021-10-28, p. 143.
[842] *Idem*, p. 143-144.
[843] *Idem*, p. 144.
[844] *Idem*, p. 146.

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> cookie program at the schools in the morning. They fund the Skennen'kó:wa Room which is for children that come from very poor families that go to school, perhaps that have no breakfast and they have breakfast; that's what they fund. They have helped the hospital with medical equipment. They have helped the Kahnawake Sports Complex with their stuff. They have created the Kanien'kehá:ka fund which is a fund that they put money in from all of the tobacco people and the factories. And that fund itself has helped the elderly; it has helped the people in sports and it has helped the people that are travelling for sports such as lacrosse teams to Europe, et cetera, all of that. It has […] built homes for single parents. It has constructed about 35 homes within the community and they are not like little two by four; they're very beautiful not a mansion but a home, suitable for a woman and children. And they have contributed to a lot of the sporting programs. They have contributed to the education for someone who is going to be educated. Like, we have had a couple that went to Harvard University and to Yale University. But they needed money for living expenses and they have contributed to that. So they have done a lot in this community that I am aware of[845].

[1403] The Court takes into consideration the fact that Peggy Mayo – who was not cross-examined - worked for a tobacco company and is involved in the Kahnawà:ke Tobacco Association[846]. However, her testimony is supported by extracts of the minutes of the consultation in which the proposition for an anti-tobacco law was discussed:

> […] This is our way to make our community prosperous again. We take care of each other.
>
> No means no. This shouldn't be brought up again. This is the number one job in the community. This should never have been brought here.
>
> Yes and No is dividing people again.
>
> Education – This is our work our living.
>
> This is survival, we want to do better.
>
> Everyone is here for the industry.
>
> This is another way of trying to get rid of our rights. We have rights!
>
> Industry is a community staple[847].
>
> […]
>
> […] We can't agree with this as the Industry has provided a good economy for this community such as jobs, etc. It has brought many other things and

[845] *Idem*, p. 141-142.
[846] *Idem*, p. 37-41.
[847] Exhibit WM-022, *Anti-tobacco law consultation final minutes*, p. 2.

> helped a lot of people in this community. The local food bank benefits from this industry; as well, organizations such as the Kanienkehaka Funding Association help our community members by donating to sports events, they have even helped build homes for families and have provided monetary contributions to many other requests.
>
> […] This industry provides income in this community that no other industry can provide; this industry has to stay[848].
>
> […] The industry helps people put food on their table[849].

[1404] In the *KTA Tobacco Policy*, a clear connection is made between tobacco trade and the right to economic development. The tobacco industry is presented as the basis for the community economic development and for fighting poverty of its members:

> 11. Our objective is to develop an economic base, by means of promoting self-sufficiency through economic development in a fair and responsible trade and commerce environment.
>
> 12. We are exercising our right to grow, manufacture, trade, sell or barter, to purchase and transport any product that is available within the international world community, for the betterment of our peoples, to alleviate poverty and dependency, within our community and amongst our peoples.
>
> 13. Our trade and commerce in the tobacco industry in Kahnawake is a large economic force. We are exerting our right to self-regulate, as a legislative body of our industry, without interference from outside influence and will continue to grow for the benefit of our peoples[850].

[1405] There is, in fact, very little evidence presented by the parties to contradict the submission that the tobacco trade in Kahnawà:ke is part of a collective attempt to pursue economic development. The strong evidence of the impact of the trade on the employment in the community, and indirectly on all the community's economy, has not been refuted by the Attorneys General. From the evidence, the Court concludes that the tobacco trade improves the economic well-being and quality of life of the community as a whole. The evidence shows that the majority of the community sees the tobacco trade as the best way to economic self-determination, and that it is, indeed, a considerable source of income for a large number of members of the community.

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[848] *Idem*, p. 3.
[849] *Idem,* p. 5.
[850] Exhibit WM-010, *KTA Tobacco policy*, p. 2.

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[1406] The Applicants have been found guilty regarding acts of importation of bulk tobacco from the United States to the Six Nations reserves.

[1407] The Applicants have not called witnesses to testify on how their own activities fit into the larger Mohawk tobacco trade. This is not surprising as the previous test did not require such evidence. It is worth reminding that the Notice was raised in the context of criminal prosecutions. Any evidence by the Accused to demonstrate how their trade involved the community could lead to criminal prosecution of the people involved and even to self-incrimination.

[1408] Still, the Court believes that there is enough undisputed evidence on the records to link the Applicants' actions with the right to economic development of their community:

- The Applicants are Mohawks of Kahnawà:ke;
- The tobacco was delivered to unlicensed manufacture on the reserves of Kahnawà:ke and/or Six Nations;
- The substance imported is bulk tobacco. It was presented in evidence to the jury that 23 fully load 53-foot tractor/trailers crossed the boarder, each containing 13, 172 kilograms of tobacco[851]. Eleven of those shipments were made under the surveillance of the police authorities. The evidence has shown that in Kahnawà:ke in the early 1990s, the tobacco trade started with the exportation of manufactured cigarettes to duty free zones which were then smuggled back into Canada. But then, in the 2000s, there was a transition with the development of manufacturing facilities instead[852].
- Dr. Alfred testified on the network of trade among Haudenosaunee communities from both side of the frontier[853].

[1409] From this evidence, the Court considers that the Applicants have met their burden of proof. Despite any reluctance one might have towards the tobacco industry, the evidence demonstrates that the actions of the Applicants that have been criminalized were done pursuant to the right of their community to freely pursue economic development.

C. CONCLUSION

[1410] The Court thus concludes that the Applicants have demonstrated on a balance of probability that their participation in the Mohawks' of Kahnawà:ke tobacco trade industry is protected by their Aboriginal right to freely pursue economic development.

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[851] Jury trial, 2019-04-17, exhibit P-199.

[852] Transcriptions, 2021-12-01, p. 126-139 (Oliver); Transcriptions, 2021-10-28, p. 96-99 (Mayo); Transcriptions, 2021-0916, p. 14-15 (Alfred).

[853] Transcriptions, 2021-09-16, p. 15-16.

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V. THE INFRINGEMENT

[1411] Given that the Court has concluded that the Applicants have rights protected under s. 35(1) that are not extinguished, it must now address whether the impugned legislation infringes or interferes with these rights[854]. For that, we note that the principles formulated regarding the infringement of Aboriginal rights apply to treaty rights as well[855].

A. THE APPLICABLE LAW

[1412] From the start, the Supreme Court made it clear in *Sparrow* that there is no immunity from government regulation in a modern society[856]. A few years later, in *Nikal,* the Supreme Court rejected again the position that, once an Aboriginal right is established, "anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement"[857].

[1413] In *Sparrow*, the Supreme Court set guidelines to determine whether a *prima facie* infringement has been proven. It did so in the form of three questions:

(1) Is the limitation of the right unreasonable?

(2) Does the regulation impose undue hardship?

(3) Does the regulation deny to the holders of the right their preferred means of exercising that right?[858].

Regarding the second question, the Supreme Court indicates in *Nikal* that "undue hardship" is more than mere inconvenience[859].

[1414] Later, in *Gladstone*, Chief Justice Lamer notes that these three questions were determined to a certain extent by the factual context of the *Sparrow* case, which affects the application of the test.

[1415] First, in *Sparrow,* the appellant was challenging only a specific regulation, while, in *Gladstone*, the appellants were attacking the overall approach taken by the Crown to the management of the herring spawn on kelp fishery, i.e., the entire regulatory scheme. In such circumstances, the Supreme Court considers that the process established in *Sparrow* must be applied to the entire regulatory scheme to examine its cumulative effect on the appellant's rights[860].

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[854] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1111.
[855] *R.* c. *Badger*, [1996] 1 S.C.R. 771, para. 79; *R.* c. *Marshall*, [1993] 3 S.C.R. 456, para. 64.
[856] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1110.
[857] *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 91; *R.* v. *Morris*, 2006 SCC 59, para. 53.
[858] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1111-1112.
[859] *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 100.
[860] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 756-757, para. 39-42; 761, para. 52.

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[1416] Second, the Chief Justice recognizes that there is, at first glance, a contradiction in the test for infringement. Indeed, on the one hand, the test requires only to show a *prima facie* interference with the rights, suggesting that "any meaningful diminution of the appellant's rights will constitute an infringement for the purpose of this analysis". On the other hand, however, the questions listed in *Sparrow* incorporate ideas such as unreasonableness and "undue hardship", implying that "something more than meaningful diminution is required to demonstrate infringement".

[1417] The Chief Justice resolves the point by declaring that the questions in *Sparrow* are only factors to be considered in determining whether a *prima facie* infringement has taken place. A negative answer to these questions does not necessarily mean that no *prima facie* infringement has taken place[861]. Thus, they should not be seen as a test to be met but only as factors to be considered, depending on the circumstances of the case.

[1418] At the initial stage, the burden of proof is on the Applicants. However, if they prove that the *Excise Act, 2001* infringes their constitutional rights, the onus will shift to the Attorneys General to demonstrate that the infringement is justified.

B. *PRIMA FACIE* INFRINGEMENT OF THE ABORIGINAL RIGHT TO FREELY PURSUE ECONOMIC DEVELOPMENT

B.1 Position of the parties

B.1.1 The Applicants

[1419] First of all, the Applicants argue that, even though the relief is asked with respect only to s. 42, the Court should look at the *Excise Act, 2001* in its entirety to determine if there is an infringement of their rights. They see a distinction between the scope of the relief sought, which can be limited to striking down s. 42, and the scope of the argument with respect to s. 35(1)[862].

[1420] They plead that the *Excise Act, 2001* infringes the rights of the Mohawks of Kahnawà:ke to trade in tobacco "by imposing a rigid licensing scheme which constitutes a meaningful diminution of the Aboriginal and Treaty right of the Mohawks to collectively engage in the tobacco trade"[863]. They summarize the manner in which the *Excise Act, 2001* infringes on their Aboriginal right in the following terms:

> (1) it prohibits a significant range of commercial tobacco-related activities and establishes a limited range of activities that may be undertaken pursuant

[861] *Idem*, 757, para. 43.
[862] Final pleadings, 2022-03-31, p. 171, l. 9- p. 172, l. 17.
[863] *Consolidated closing memorandum of fact and law of the Applicants*, para. 462.

> to a permit; (2) it grants the Minister broad discretion with respect to the issuance of license and the specific terms of licenses without any guidance in respect to tobacco trading activities pursuant to Aboriginal or Treaty rights[864]; (3) it disrupts the collective exercise of activities related to the tobacco trade based on a division of roles within the community; (4) it disrupts the economic self-determination of the Mohawks of Kahnawake; (5) it provides no mechanism for the reconciliation of the regulation of the tobacco trade by the Mohawks of Kahnawake with the requirements of the Act and regulations made under the Act[865].

[1421] The Applicants note that the *Excise Act, 2001* provides for only two types of licences: a manufacturer licence and a tobacco dealer licence. In contrast, the *KTA Tobacco policy* and the draft *Kahnawà:ke Tobacco Law* contemplate several other roles, such as transporters, retailers, brokers, processors, etc.[866]. For the Applicants, the *Excise Act, 2001* does not allow the current division of labour in their community. It has no flexibility to adapt to the industry as it exists in Kahnawà:ke[867].

[1422] Another aspect to which the Applicants object is the broad discretion of the Minister to issue licences without any guidance regarding Aboriginal or treaty rights. They point out that the *Excise Act, 2001* applies to all species of tobacco, even to tobacco products specifically produced for Indigenous ceremonial use[868], with no provision on Indigenous tobacco trade. One provision, s. 211, does make reference to "Aboriginal government", but this relates to the communication of confidential information, and has no relevance to the application of the *Excise Act* to Indigenous people[869].

[1423] The Applicants find problematic that the Minister has discretion to refuse licenses in the public interest. They make a parallel with *Sparrow,* where the Supreme Court considers, at the justification stage, that "public interest" is so vague as to provide no meaningful guidance. In spite of this concern, the *Excise Act, 2001* provides no guidance for the exercise of the Minister's discretion[870] or for the enforcement of the *Excise Act, 2001* by Crown officials, notably, on how to interact with the Mohawk Council of Kahnawà:ke on the tobacco issue[871].

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[864] For example, s. 23(3): Final pleadings, 2022-01-28, p. 61, l. 5- p. 62, l. 10.
[865] *Consolidated closing memorandum of fact and law of the Applicants*, para. 470.
[866] *Idem,* para. 473; Final pleadings, 2022-01-28, p. 82, l. 9- p. 84, l. 20; Exhibit WM-10 KTA Tobacco Policy.
[867] Final pleadings, 2022-01-28, p. 82-84.
[868] *Consolidated closing memorandum of fact and law of the Applicants*, para. 464; Final pleadings, 2022-01-28, p. 43, l. 15- p. 50, l. 17, taking *Legal* v. *Canada*, 2012 TCC 167 as an illustration.
[869] *Consolidated closing memorandum of fact and law of the Applicants*, para. 469.
[870] Final pleadings, 2022-01-28, p. 76, l. 14- p. 79, l. 23.
[871] *Idem*, p. 37, l. 11-20.

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[1424] The Applicants give another example of the broad discretion of the Minister under the *Excise Act, 2001*, which can be found in s. 23(3)(c). According to this provision, the Minister may impose any condition that it considers appropriate with respect to the carrying on of activities under the licence or registration. Given that, the Applicants point out, for example, that nothing prevents the Minister from requiring that an applicant for a licence become a corporation. Such a condition would prevent the person from benefitting from an exemption under the *Indian Act*[872].

[1425] The Applicants also plead that the *Excise Act, 2001* disrupts the economic self-determination of the Mohawks of Kahnawà:ke and criminalizes the Kahnawà:ke tobacco trade[873].

[1426] In addition, they deplore the fact that it ignores the regulatory jurisdiction of the Mohawk governing bodies over the tobacco trade[874]. They protest that Canada assumes that the regulatory jurisdiction of the Mohawk governing bodies does not exist until it is placed on a statutory footing, as it transpires of the Canada-Kahnawake Relations Agreement[875]. They note that it is contrary to the public position of Canada and Quebec to acknowledge the right to self-determination and to self-government[876]. The Applicants affirm that the jurisdiction does exist. They plead that it is "desirable for Canada and Kahnawake to negotiate the terms on which this jurisdiction will be reconciled with federal jurisdiction"[877].

[1427] Regarding the Attorneys' General argument that licences can be obtained free of cost and that it is just "*paperasse*" (paperwork), the Applicants concede that the paperwork does not rise to the level of a *prima facie* infringement[878]. The infringement, however, comes from the fact that the tobacco trade is prohibited as a matter of principle and is only authorized through the obtention of a licence, as an exception to the prohibition[879].

[1428] Finally, the Applicants plead that the taxation aspect also infringes their rights, because establishing a price for tobacco goods is an element of their Aboriginal right[880].

[1429] The Attorneys General reply that the *Excise Act, 2001* is an indirect tax that is passed to the customers, as in the *Robertson* case[881]. There, the Federal Court of Appeal decided that the obligation to collect and remit the Goods and Services Tax

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[872] *Idem*, p. 61, l. 14 – p. 62, l. 10.
[873] *Consolidated closing memorandum of fact and law of the Applicants*, para. 474.
[874] *Idem*, para. 475.
[875] Framework Agreement Canada-Kahnawake. Exhibit WM-27.
[876] Final pleadings, 2022-01-28, p. 90, l. 20- p. 91, l. 12; p. 96, l. 4-23; p. 98, l. 15-19.
[877] *Consolidated closing memorandum of fact and law of the Applicants*, para. 475.
[878] Final pleadings, 2022-04-01, p. 28, l. 8-17.
[879] Final pleadings, 2022-03-31, p. 169, l. 20- p. 170, l. 10.
[880] Final pleadings, 2022-04-01, p. 28-31.
[881] *Robertson* v. *Canada*, 2017 FCA 168.

(GST) on sales to non-Indigenous customers does not infringe an Aboriginal right to trade fur.

[1430] The Applicants respond that that case dealt with the *Excise Tax Act* and not the *Excise Act, 2001*. In the former system, the vendor collects the tax from the ultimate consumer as a percentage of the price. In the *Excise Act, 2001* system, the rates are charged on a volume of tobacco to be paid before sale to the customer and are incorporated into the sale price. Thus, legally speaking, the duty is not imposed on the final consumer but on the manufacturer. In contrast, Robertson was not liable for the tax. His liability arose from his failure to collect and report the taxes he should have added to the price of furs sold to his clients, a small portion of whom were exempt. The Applicants underline the difference between the two situations: it was not Robertson that was being taxed, but, rather, his non-Indigenous clients. Therefore, the tax did not infringe so much his Aboriginal right. In their case, however, the Applicants are the ones being taxed, and they argue that to impose a direct tax on the exercise of their Aboriginal right in this manner is unreasonable[882].

B.1.2 The Attorneys General

[1431] The Attorneys General consider that the Applicants have not met the onus of proving the *prima facie* infringement of their rights and that "the applicable legislative framework does not prevent the Mohawks of Kahnawake from participating in the tobacco trade"[883]. They submit that the Applicants have "provided no evidence that the legislative framework provided in the *Customs Act* and the *Excise Act, 2001* would prevent them from participating in the tobacco trade in a meaningful way. More specifically, they provided no evidence of undue hardship or evidence that they would be unable to declare the imported goods at the border, obtain a tobacco licence or identify a tobacco licensee whom would pay excise duties on the imported tobacco"[884].

[1432] They point out that, in fact, the Applicants could have obtained a tobacco licence and complied with the excise and customs requirements to participate in the tobacco market[885]. The Attorney General of Canada underlines that there is no evidence that the Applicants tried to get a tobacco license but were unable to do so and were thus impeded from exercising their preferred means of doing business[886].

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[882] Final pleadings, 2022-03-31, p. 172, l. 18- p. 198, l. 6; Final pleadings, 2022-04-01, p. 18, l. 24-p. 28, l. 2.

[883] *Attorney General of Quebec final pleadings*, para. 193, 353-354; *Response Attorney General of Canada*, para. 125.

[884] *Plan of arguments of the Attorney General of Canada*, para. 225; Final pleadings, 2022-03-24, p. 44, l. 24- p. 62, l. 17, quoting *R.* v. *Lefthand*, 2007 ABCA 206 (leave to appeal refused, SCC, 21-02-2008, n°32250).

[885] *Final pleadings Attorney General of Quebec*, para. 195-203.

[886] Final pleadings, 2022-03-24, p. 77, l. 24- p. 79, l. 9.

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On the contrary, there are licensed tobacco manufactures operating on Indigenous reserves and some communities comply with customs and excise requirements[887].

[1433] The Attorney General of Canada adds that there is no evidence of the Applicants' own practices, of how the excise and customs framework is more than a mere inconvenience, and of their preferred means of doing business. The absence of evidence is fatal[888].

[1434] The Attorneys General also remind the Court that it is not any interference with the right that constitutes an infringement. For example, the obligation to hold a licence for exercising an Aboriginal right or to collect and remit the Goods and Services Tax (GST) have not been interpretated in the jurisprudence as necessarily constituting a *prima facie* infringement[889].

[1435] The Attorneys General claim that the excise and customs requirements do not impose undue hardship. The Attorney General of Canada specifies that, in the absence of the Applicants' testimony, the evidence shows, at most, that they were simply tobacco transporters, and not manufacturers. As transporters, they do not need to hold a tobacco license or to pay excise duties, etc. However, even if the Applicants were manufacturers, the Attorney General of Canada would still plead that the governmental measures at play do not meaningfully diminish or interfere with their alleged s. 35(1) right[890].

[1436] The Attorney General of Canada focuses on three measures: declaration at the border, tobacco license and payment of excise duties[891]. He goes through each requirement to prove that it does not impose undue hardship, all the more so if the Court agrees that the Applicants were only transporters[892]. For instance, regarding declaration at the border, as transporters, the Applicants simply have to "show up at the border with the licensed manufacturer's paperwork and then they deliver the goods to the manufacturer"[893]. And, even as manufacturers, the declaration at the border is a modest burden when placed upon a large-scale commercial operation[894].

[1437] Regarding the obtention of a license, the Attorney General of Canada disagrees with the Applicants' statement that the Minister has a broad discretion to issue licenses. He states that the discretionary power of the Minister is structured and that

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[887] *Plan of arguments of the Attorney General of Canada*, para. 226; Final pleadings, 24-03-2022, p. 72, l. 15- p. 77, l. 16.
[888] Final pleadings, 2022-03-24, p. 50, l. 8-17; p. 79, l. 13- p.87, l. 4, quoting *R.* v. *Dickson*, 2017 ABPC 315, para. 420, 426-435.
[889] *Final pleadings Attorney General of Quebec*, para. 190-192.
[890] Final pleadings, 2022-03-24, p. 91, l. 22-p. 94, l. 9.
[891] Final pleadings, 2022-03-24, p. 95, l. 1-5; p. 97, l. 2- p. 98, l. 2.
[892] *Idem*, p. 98, l. 22- p. 142, l. 11.
[893] *Idem*, p. 105, l. 24- p. 106, l. 4.
[894] *Idem*, p. 106, l. 23- p. 107, l. 6.

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there are regulatory criteria that apply to this power that can be found in the *Regulations Respecting Excise Licences and Registrations*[895]. Thus, it is not an unfettered discretion[896].

[1438] Turning to the excise duties, his main argument is that the Applicants, as transporters, are not responsible for the payment of the excise duties. Even if the Applicants were manufacturers, the Attorney General of Canada raises the fact that the excise duties are ultimately paid by the consumer, and the manufacturer is only an intermediary. Consequently, this obligation does not deprive the Applicants of substantially the whole value of their Aboriginal right to trade in tobacco and tobacco products; it is simply an administrative burden. The manufacturer does not have to pay to exercise a right[897]. In this regard, the Attorney General of Canada reiterates the relevance of *Robertson*, where the Federal Court of Appeal found that the Appellant was not personally paying any taxes but was, instead, acting as a Crown agent. His only duty was to remit to the Crown taxes collected from non-Indigenous customers. Stated otherwise, it is not because a manufacturer has to remit duties collected from others that he is paying taxes[898].

[1439] Regarding the argument of the Applicants that the *Excise Act, 2001* prohibits a significant range of commercial tobacco-related activities, the Attorney General of Canada disagrees and states that a person who has a license can participate in any and all activities related to the tobacco industry. He again underlines that the Applicants tendered no evidence as to which of their activities were not allowed[899].

[1440] As for the argument that the *Excise Act, 2001* disrupts a collective exercise of tobacco-related activities, the Attorney General of Canada affirms that it does allow the activities of growers, wholesalers, retailers, transporters, etc. In addition, there is no evidence that the Applicants participated in a collective practice of tobacco trade. On the contrary, the evidence at trial shows that the tobacco was brought in from the United States and that many participants in their operations were not Indigenous people[900]. The Attorney General of Canada reiterates that the infringement is argued by the Applicants from the community perspective, instead of being argued from the perspective of what the Applicants actually did, and that there is no link in evidence between the Applicants and the tobacco industry in the community[901].

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[895] *Regulations Respecting Excise Licences and Registrations,* SOR/2003-115*,* s. 2, 5**.**

[896] Final pleadings, 2022-03-24, p. 113, l. 13-p. 124, l. 8; *Plan of arguments of the Attorney General of Canada*, para. 234.

[897] *Plan of arguments of the Attorney General of Canada*, para. 230-238; Final pleadings, 2022-03-24, p. 124, l. 9- p. 126, l. 18; p. 129, l. 1- p. 141, l. 22 quoting *Robertson* v. *Canada*, 2017 FCA 168, para. 34-38; *Rice* v. *Quebec*, 2016 QCCA 666, para. 107-111; *R.* v. *Dickson*, 2017 ABPC 315, para. 433; Final pleadings, 2022-04-07, p. 120, l. 20- p. 124, l. 2.

[898] Final pleadings, 2022-04-07, p.125, l. 6- p.126, l. 9.

[899] Final pleadings, 2022-03-24, p. 144, l. 22- p. 145, l. 11.

[900] *Idem*, p. 145, l. 19-p. 146, l. 24.

[901] Final pleadings, 2022-04-07, p. 116, l. 4-10.

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[1441] The Attorney General of Canada insists that the argument of the Applicants on infringement ignores and deviates from the evidence presented during the criminal trial. The indictment targets a dishonest act at the border upon entry into Canada. Thus, the only connection between the actions of the Applicants, the *Excise Act, 2001* and the *Customs Act* is at the border. There is no evidence that the Applicants engaged with the *Excise Act, 2001* at any other moment. For instance, there is no evidence that they attempted to get a licence. Otherwise, they could have raised the argument of an undue burden. The only measure which affected the Applicants was that they had to declare the tobacco when entering Canada and identify a licensee to pay the duties later on. The sole question thus comes down to determining whether that constitutes an infringement[902].

B.2 Evidence

[1442] Although the evidence will be treated in more detail in the analysis section, an overview of the relevant witnesses will nonetheless be useful at this stage.

[1443] The Applicants essentially rely on the text of the *Excise Act, 2001* itself to demonstrate the *prima facie* infringement. Nevertheless, the testimony of Peggy Mayo is still relevant on several aspects.

[1444] Peggy Mayo[903] testified in particular on the discussions between the Council and the governments of Quebec and Canada about tobacco and the different agreements that were achieved. She described the exchanges between the Council and the Canada Customs and Revenue Agency (hereafter C.C.R.A) regarding their requirements for on-site verifications. She also shared her experience on how the tobacco trade and activities related to tobacco are perceived in the community, as well as on the relations between the community and governmental authorities.

[1445] The Attorneys General called witnesses to explain the process of declaration at the border and obtention of a licence, and to demonstrate the objectives of the legislative framework, namely public health, public security, reduction of organized crime and raising of revenue for the government.

[1446] Joe Oliver testified on his experience as a member of the RCMP from 1986 to 2020. During these years, he gained specific knowledge and experience in RCMP law enforcement policies and programs related to customs and excise, border integrity and law enforcement strategies, including in matters of organized crime and contraband (including contraband tobacco products). He participated in the negotiation of bilateral and multilateral initiatives on behalf of Canada, such as the World Health Organization Framework Convention on Tobacco Control.

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[902] *Idem*, p. 105, l. 6- p. 111, l. 8.
[903] See Section IV.B.3.

[1447] He testified on tobacco contraband and organized crime and, more specifically, on enforcement strategies to face these issues. He talked about different examples of collaboration between the RCMP and Indigenous police forces to ensure the enforcement of the tobacco strategy and to fight organized crime.

[1448] Denis Vinette works at the Canada Border Services Agency (hereafter: "CBSA"). He started his career as a customs inspector at the Port of Prescott, Ontario. Subsequently, he became a shift superintendent at the Port of Cornwall, Ontario. He then became Chief of Operations and, in 2010, became Regional Director General responsible for all of CBSA operations east of Toronto to the Quebec border, and for all of Northern Ontario and Nunavut. He then took more senior positions, notably, Director General of Border Operations or Associate Vice President of the Operations Branch.

[1449] He gave evidence on the role and mandate of the CBSA, the process followed by the CBSA when commercial goods are imported and the actions of CBSA regarding illicit tobacco.

[1450] Yannic Laroche works at the Canada Revenue Agency (hereafter CRA) since 2011. In 2014, she joined the Excise Duties and Taxes division and, a year later, became team manager. She was in charge of the team that enforces the *Excise Act* and the *Excise Act, 2001*. In March 2020, she took the position of manager of the section on excise duties.

[1451] During her testimony, she explained the role of the CRA, as well as the procedure and conditions to obtain and maintain a tobacco licence. She testified on the different requirements of the *Excise Act, 2001*. She notably explained the procedure of visits on premises.

[1452] The Attorneys General also introduced into evidence the transcripts of the testimony of Vicky Sabourin at the criminal trial, where she testified as an expert in customs and border procedure[904]. Hired by the CBSA in 2002, she has participated in training on counterfeit and fraud and on "eManifest", a new way to declare the transport information that must be given to Customs when a person arrives at the border with commercial goods. She has also managed - in partnership with Santé Canada, Health Canada, Agriculture Canada and Environment Canada - projects targeting merchandise that must be submitted to regulation and control in order to ensure that the declarations were meeting all the requirements.

[1453] Vicky Sabourin testified on the duties of a Canadian Border Services agent and of an agent working for the Commercial Section. She explained the procedure at the border, including the Pre-Arrival Review System for commercial transactions.

[904] Attorney General of Canada Compendium – Infringement and Justification, Tab 7.

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B.3 Relevant provisions of the *Excise Act, 2001*

[1454] According to the *Excise Act, 2001*, no person may manufacture a tobacco product except in accordance with a licence (s. 25). The same restriction applies to the activity of a tobacco dealer (s. 26). The *Excise Act, 2001* also prohibits other activities, such as the packaging or stamping of raw leaf tobacco or tobacco products without a licence (s. 27).

[1455] In accordance with s. 14(1)(d) and (e), the Minister may issue licences authorizing the manufacture of tobacco products and the carrying on of the activity of a tobacco dealer.

[1456] The Minister may refuse to issue a licence if she has reason to believe that access to the applicant's premises will be denied or impeded by any person, or that the refusal is otherwise in the public interest (s. 23(1)). The Minister may also amend, suspend or cancel any licence for the same reasons (s. 23(2.1)). There is no definition of public interest in the legislation.

[1457] The *Regulations Respecting Excise Licences and Registrations*[905] list the conditions to be eligible for a licence (s. 2). For instance, an individual must have sufficient financial resources to conduct his or her business in a responsible manner. S. 5 contains an obligation to provide a security deposit of not less than $5,000 and up to a maximum of $5 million. The *Regulations* also catalog specific grounds for the suspension or cancellation of a licence (s. 10-12).

[1458] The *Excise Act, 2001* also allows the Minister to impose conditions for issuing a licence or registration (s. 23(3)), including any conditions that he considers appropriate.

[1459] In addition, s. 42 imposes duties on tobacco products at a rate specified in Schedule 1.

B.4 Analysis

[1460] Before analyzing the evidence, some preliminary findings and observations are necessary.

[1461] First and foremost, the Court considers that, as in *Gladstone*, at that stage, the Applicants are not only attacking s. 42 of the *Excise Act, 2001* but also the overall tobacco trade regulation. In that context, the Court will examine the cumulative effect of the regulatory scheme put into place by the *Excise Act, 2001*.

[1462] Second, the Court will keep in mind the teachings of the Alberta Court of Appeal in *Lefthand*, where it was reminded that Aboriginal rights are collective in nature.

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[905] SOR/2003-115.

Therefore, "[i]n examining whether an infringement of a treaty right is minimal, the courts should have regard to the impact on the infringement on the rights of the Band as a whole, and not simply on the right of the individual who is charged with an offence" (the Court's emphasis)[906].

[1463] Third, as previously stated, the three questions listed in *Sparrow* are only factors to consider and are not the cumulative prongs of a mandatory test. Still, in the circumstances of the case, they are useful to structure the analysis.

[1464] Finally, it is important to underline that, at the infringement stage, the question before the Court is solely whether the impugned legislative scheme infringes the Aboriginal right. Considerations relevant at the justification stage – such as the existence of important legislative objectives – are not considered at this step[907].

Unreasonable limitation of the rights

[1465] The Court considers that the strongest argument of the Applicants is that the *Excise Act, 2001* violates their Aboriginal rights by giving broad discretion to the Minister to issue licences without providing any guidance regarding Aboriginal or treaty rights, thereby imposing an unreasonable limitation of the rights.

[1466] The Supreme Court has stated that the obtention of a licence can infringe an Aboriginal or treaty right when it is submitted to an entirely discretionary power[908].

[1467] In *Adams*, for instance, the regulatory scheme subjected the exercise of the Appellant's right to fish to a "pure act of Ministerial discretion and sets out no criteria regarding how that discretion is to be exercised"[909]. In that case, Chief Justice Lamer drew a distinction between the notion of discretionary power in a *Charter* context versus in a s. 35(1) context:

> [53] In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications*

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[906] *R.* v. *Lefthand*, 2007 ABCA 206, para. 125 (leave to appeal refused, SCC, 21-02-2008, n°32250).
[907] *R.* v. *Sampson*, (1995) 131 D.L.R. (4th) 192 (B.C.C.A.), p. 205-208; Sébastien GRAMMOND, *Terms of coexistence – Indigenous peoples and Canadian law*, Toronto, Thomson Reuters, 2013, p. 257-258.
[908] *R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 51-54; *R.* v. *Côté*, [1996] 3 S.C.R. 139, para. 76; *R.* v. *Marshall*, [1999] 3 S.C.R. 456, para. 64.
[909] *R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 52.

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> *Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R*. v. *Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter* v. *Canada*, [1992] 2 S.C.R. 679, at p. 720.
>
> [54] I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the Constitution Act, 1982. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test[910].
>
> [the Court's emphasis]

[1468] Prof. Garant describes a discretionary power in the following way:

> La meilleure définition que nous pouvons donner du pouvoir discrétionnaire serait la suivante : la faculté d'agir ou de ne pas agir, ou de prendre les mesures appropriées suivant les circonstances ou le contexte en en jugeant l'opportunité au regard de l'intérêt public[911].

[1469] In *Baker*, the Supreme Court defines the concept of discretion as referring to "decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries"[912].

[1470] The possibility for the Minister to refuse a licence on the basis of "public interest" is covered by these definitions of discretionary power. The question is whether in the present circumstances this discretionary power is so broad and unstructured as to infringe the rights recognized by the Court.

[1471] The criteria of "public interest" might not always be too vague to the point of being unconstitutional. In certain circumstances, the context might allow for the notion

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[910] *Idem*, para. 53-54.
[911] Patrice GARANT, *Droit administratif*, 6e éd., Cowansville, Yvon Blais, 2010, p. 184, quoted in *Shiller* c. *Bousquet*, 2017 QCCA 276, para. 34.
[912] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 52.

of “public interest” to be defined[913] thereby giving appropriate directives to the authorities for the exercise of their discretionary power. The difficulty arises when what is the “public interest” is “non susceptible d’un sens constant ou établi”[914]. The question the Court must answer then is “whether the provision permits the state to restrict constitutional rights in circumstances and ways that may not be justifiable”[915].

[1472] The *Excise Act, 2001* contains no exception or special guidelines or guidance for Aboriginal and treaty rights. On the contrary, the Applicants brought the Court’s attention to *Legal* v. *Canada*, which proves that the *Excise Act, 2001* applies even to ceremonial tobacco[916]. Yannic Laroche testified that any demand for a licence is analysed in the same way: no distinction is made between Indigenous and non-Indigenous applicants[917].

[1473] The Court sees no guideline in the *Excise Act, 2001* relating to the discretionary power of the Minister. According to s. 14, the Minister “may” issue a tobacco licence to manufacture tobacco products or to carry on the activity of a tobacco dealer. S. 23 shows the extent of the discretion of the Minister to issue, amend, suspend or cancel a licence, or to impose conditions:

> **23 (1)** The Minister may refuse to issue a licence or registration to a person if the Minister has reason to believe
>
> **(a)** that access to the person’s premises will be denied or impeded by any person; or
>
> **(b)** that the refusal is otherwise in the public interest.
>
> Amendment or renewal
>
> (2) Subject to the regulations, the Minister may amend, suspend, renew, cancel or reinstate any licence or registration.
>
> Cancellation, etc. — access to premises
>
> (2.1) The Minister may amend, suspend or cancel any licence or registration of a person if

[913] *Divito* c. *Canada (Ministre de la Justice),* J.E. 2004-2034 (C.A.) (leave to appeal refused, SCC, 05-05-2005, n° 30679), para. 39-43.
[914] *Idem,* para. 41.
[915] *R.* v. *Zundel*, [1992] 2 S.C.R. 731, 769-770.
[916] *Legal* v. *Canada (Attorney General)*, 2012 TCC 167.
[917] Transcriptions, 2021-12-02, p. 208, l. 19-24 (Laroche).

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> (a) access to the premises of the licensee or registrant is denied or impeded by any person;
>
> (a.1) in the case of a cannabis licence, a licence or permit issued to the person under subsection 62(1) of the Cannabis Act is amended, suspended or revoked; or
>
> (b) it is otherwise in the public interest.
>
> Conditions imposed by Minister
>
> (3) On issuing a licence or registration, or at any later time, the Minister
>
> (a) may, subject to the regulations, specify the activities that may be carried on under the licence or registration and the premises where those activities may be carried on;
>
> (b) shall, in the case of a spirits licence, a tobacco licence, a cannabis licence or a vaping product licence, require security in a form satisfactory to the Minister and in an amount determined in accordance with the regulations; and
>
> (c) may impose any other conditions that the Minister considers appropriate with respect to the carrying on of activities under the licence or registration.
>
> [the Court's emphasis]

[1474] The Attorneys General plead that the *Regulations* structure the Minister's discretionary power. But, although the *Regulations* do list precise grounds for the suspension (s. 10-11) or cancellation of a licence (s. 12), they provide no such list for the initial refusal to issue a licence. S. 2 only enumerates conditions to be eligible for a licence and not for its refusal, which apparently can result where the Minister has reason to believe that the refusal is in the public interest, even though the applicant fulfills all the conditions of s. 2. The Court notes that the Minister's appreciation of the public interest is nowhere defined.

[1475] Consequently, and contrary to the impression left by the Attorneys' General representations, the issuance of a licence is not a right that an applicant automatically enjoys when certain conditions are fulfilled. It is more in the nature of a privilege[918],

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[918] *Legal* v. *Canada (Attorney General)*, 2010 FC 554, para. 23; *9101-9380 Québec inc. (Les tabacs Galaxy)* v. *Canada (Customs and Revenue Agency)*, 2005 FC 309, para. 27. Yannic Laroche also qualified the obtention of a licence as a privilege: Transcriptions 2021-12-02, p. 209, l. 2-3 (Laroche).

granted at the discretion of the Minister. There is a risk of infringement when a constitutional right is turned into a privilege, and despite this risk, the *Excise Act, 2001* contains no guidance on how this discretionary power should be exercised.

[1476] In the current scheme, the Mohawks of Kahnawà:ke can only exercise their rights at the discretion of the Minister, who may refuse to deliver a licence on the nebulous ground of public interest. In a s. 35(1) context, this is unacceptable. It cannot be assumed that discretion will be exercised in a manner that will accommodate the Applicants' constitutional rights.

[1477] In addition, the discretionary power of the Minister also allows him to "impose any other conditions" that he considers appropriate when issuing a licence.

[1478] The imposition of conditions might be completely reasonable in the context of tobacco industry, and, indeed, might well be necessary to address public health and public security concerns. The difficulty arises from the fact that, in a s. 35(1) context, Parliament cannot give an unfettered power, without any guidance, where it is obvious that the legislation will apply to Indigenous applicants. As the Applicants mentioned, the Minister could, for example, impose the form of a corporation whereas the members of the community might prefer to exercise their right as individuals.

[1479] The fact that some licences were delivered from time to time is not evidence that there is no infringement. Of course, if no licence had ever been delivered, the infringement would be "all the more pronounced"[919]. But the fact that licences have been issued in the past or in other communities does not counter the Applicants' argument. In addition, the evidence on that point is too incomplete for the Court to draw any conclusions. There is no evidence on exactly how many licences have been delivered on the territory of Kahnawà:ke, how many were asked and refused, how many were cancelled and, if so, why they were cancelled.

[1480] One might say that the infringements in *Adams* or *Côté* were "more obvious", since there was absolutely no guidance as to the discretionary power of the Minister in those cases, not even a reference to the public interest. However, the Court considers that a reference to the vague principle of "public interest" when s. 35(1) rights are at stake is just as much an infringement since that notion provides no real guidance to the decision-maker. Moreover, one could assume that in *Adams* or *Côté* it was implicitly expected from the authorities to use their discretionary power in the public interest. In any event, the Supreme Court decided that it was not enough when dealing with Aboriginal rights: more explicit guidelines were necessary.

[1481] The Court concludes that the unfettered discretionary power to issue – or refuse - a licence and to impose conditions is an unreasonable limit to previously-recognized

[919] *R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 55.

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s. 35(1) rights, and that this can lead to the denial of the exercise of the Applicants' rights.

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Undue hardship

[1482] The Court is of the view that the Applicants have fulfilled their burden of proof and, consequently, that it could conclude its analysis at this point, but there is more.

[1483] Although the Supreme Court made it clear in *Nikal* that the sole requirement of obtaining a licence is not, in itself, an infringement, the Court is of the view that this could constitute undue hardship and, thereby, an infringement, where a licence could only be obtained with great difficulty[920]. That was not the case in *Nikal*, where the licence could be obtained easily and for free and was "nothing more than a form of identification"[921].

[1484] The Applicants conceded that the "paperasse" (paperwork) would not amount to a *prima facie* infringement. Nevertheless, this aspect is relevant to the cumulative effect of the *Excise Act, 2001* requirements and must be considered in order to have a full picture of the regulatory scheme and the mechanism for obtaining a licence.

[1485] The obtention – and keeping – of a licence under the *Excise Act, 2001* is far from a simple formality, as is the case in certain fishing cases. One cannot ignore, for instance, the substantial deposit that can be required of applicants for a licence, and the regular visits to maintain the licence. As the testimony of Yannic Laroche shows, the licence process under the *Excise Act, 2001* goes far beyond a formality for simple identification purpose:

> […] La façon qu'on va l'obtenir cette licence-là, la personne ou l'individu, la société de personne, la compagnie va nous faire une demande à son bureau régional, en remplissant un formulaire qui est le L-63. Il va aussi nous fournir un plan d'affaires, c'est-à-dire qu'on doit vraiment voir dans son plan qu'est-ce qu'il veut faire avec la licence de tabac, c'est quoi ses intentions et comment il croit financer son entreprise.
>
> De plus, il va devoir nous fournir une caution, une sécurité. Cette caution-là est au minimal (sic) 5 000$ et au maximum 5 millions. Et ce qu'elle vient faire la caution, elle vient protéger si on veut, les recettes au niveau des droits d'accise au niveau de la production. Donc on va analyser un peu le plan d'affaires et selon les projections, on va établir une sécurité.
>
> Lorsqu'on a reçu cette demande, la demande va être analysée par un agent et certaines conditions doivent être respectées pour qu'on puisse émettre

[920] *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 91-102.
[921] *Idem*, para. 101.

> cette licence. Donc dans ces conditions nous avons, par exemple le licencié ou le demandeur ne doit pas avoir fait faillite ou être en situation de faillite. Doit ne pas avoir agi dans le but de frauder Sa Majesté dans les cinq dernières années. Ne doit pas avoir remis de…de s'omettre de… de conformer à toute loi fédérale en lien avec la taxation sur les produits du tabac. On va s'assurer aussi qu'il a les dispositions financières nécessaires pour opérer son entreprise de manière responsable. On va aussi regarder si la caution est adéquate évidemment. Et lorsqu'on a fait un peu tout le tour du dossier, on va émettre […] notre opinion, on va suggérer si on émet ou non la licence. Par la suite, […] la demande est envoyée à l'administration centrale, qui elle aussi va analyser la demande et nous donner ses recommandations[922].

[1486] As well, the testimony of Denis Vinette shows that the procedures to be followed are quite complex. He testified that importers will generally have to hire a customs broker to prepare the documentation required for clearance at the border[923].

[1487] After hearing testimony such as that of Denis Vinette, the Court concludes that it would be a mischaracterization to say, as the Attorneys General present it, that the Applicants "just" had to apply for a licence, much in the same way one applies for a fishing or hunting licence. Whether or not the procedural aspects of the regulatory scheme are enough to conclude to a *prima facie* infringement, it clearly distorts the truth to say that the holders of the rights would "just" have to fill out an application to exercise their rights.

[1488] Maintaining the licence also requires fulfilling many obligations[924], among them what Yannic Laroche terms "examens réglementaires". There can be up to eight visits on site each year, lasting up to fifteen hours each. These "examens réglementaires" will be accompanied by longer and more complex annual verifications. Yannic Laroche testified that government officials will have a "présence quand même assez accrue chez les licenciés sur une base régulière"[925].

[1489] This amounts to unrestrictive open access to the territory of the Mohawks of Kahnawà:ke. In that sense, even if the existence of a control mechanism might not be unreasonable in and of itself, the absence of any mechanism for the reconciliation of the rights of the Mohawks of Kahnawà:ke on their territory with the requirements of the regulatory scheme makes it unreasonable. This open access requirement must be viewed in the context of the difficult relationship between the Mohawks of Kahnawà:ke and provincial and federal authorities, which, unfortunately, is not one based on trust. Peggy Mayo testified about a raid in 1988, where business where searched and people

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[922] Transcriptions, 2021-12-02, p. 206, l. 13-207, l. 24 (Laroche).
[923] *Idem*, p. 152-153 (Vinette). See also the testimony of Vicky Sabourin, Attorney General of Canada Compendium – Infringement and Justification, Tab 7.
[924] Transcriptions, 2021-12-02, p. 209-210 (Laroche).
[925] *Idem*, p. 214 (Laroche).

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were arrested and taken to jail, despite the previous commitment that this would not happen[926].

[1490] The absence of a mechanism in the legislation for reasonable verifications can, in practice, lead to the automatic refusal of a licence or the cancellation of one when the premise is on a reserve, since the condition of having unimpeded access to the premises might be deemed to be at risk (s. 23(1)(a) and (2.1)(a)). In a letter addressed to the Mohawk Council of Kahnawà:ke at the request of the Minister of National Revenue, it was made clear that, in the event that the CRA is unable to visit and inspect the premises of a licensee, this could have negative consequences on the operations of that licensee[927].

[1491] Access of governmental authorities on Indigenous nations territories is a sensitive issue[928]. Under the *Excise Act, 2001* it is the absence of any specific plan to integrate the control mechanisms on an Indigenous nation territory that is problematic, not the existence of the control mechanisms themselves. This absence of mechanisms forces the holders of the Aboriginal right to choose between the exercise of their right and allowing unfettered access on their territory.

Preferred means of exercising their rights

[1492] The Court is less convinced by the Applicants' argument that they are deprived of their preferred means of exercising their right because the *Excise Act, 2001* prohibits a significant range of activities. The Court does not see how it prohibits the activity of transporters, for instance, where the manufacturers and the tobacco dealers in the chain of work have their licence.

[1493] However, it is true that, indirectly, the *Excise Act, 2001* and the *Regulations* restrain the development of small businesses and favor big companies with requirements such as the obligation to provide a security deposit of not less than $5,000. This could deprive some holders of the right of their preferred means of exercising it, as such obligations could be disproportionate in certain circumstances, for instance, in the case of an individual who wants to operate a very small business. *Legal* v. *Canada*[929] is a concrete example of how the provisions of the *Excise Act, 2001* can be disproportionate in an Indigenous context. This case shows the significantly higher financial impact that duties on tobacco can have in an Indigenous

[926] Transcriptions, 2021-10-28, p. 29-30, 52-55 (Mayo). See also Transcription 2021-10-28, p. 36 (Mayo).
[927] Exhibit WM-013, lf Ed Gauthier CRA to Grand Chief Delisle re meeting to discuss inspections w McLester.
[928] Transcriptions, 2021-10-28, p. 103-104 (Mayo).
[929] *Legal* v. *Canada (Attorney General)*, 2012 TCC 167.

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context where, for example, one sees the sale of very small packages of tobacco for ceremonial use.

[1494] Finally, regarding the payment of a tax as an infringement of s. 35(1) rights, the Court agrees with the distinction made by the Applicants regarding the decision in *Robertson*[930]. There, the tax was on the client, who was not the holder of an Aboriginal right, and Robertson was merely an intermediary between the taxpayer and the tax-beneficiary. As such, he could not claim that his right was infringed. In contrast, under the *Excise Act, 2001* the holders of the right themselves must pay the tax in order to exercise their right.

[1495] Moreover, the tax is a revenue-generating tax for the government and not a fee to facilitate the exercise of the right, as it was in *Côté*[931], where the fee was used to upkeep the facilities and the roads used to exercise the Aboriginal right to fish. It is also important to note that it is not a symbolic fee, and that considerable amounts of money are at stake. Thus, the payment of the excise tax in order for the holder of an Aboriginal right to be allowed to exercise his or her own constitutional right is more than mere inconvenience. As for the fact that the tax could be justified by health considerations, this should be considered at the justification stage.

[1496] For all these reasons, the Court concludes that the Applicants have met their burden of proving *prima facie* infringement. Taken as a whole, the regulatory scheme places unreasonable limits on the exercise of their Aboriginal right, imposes undue hardship on them as holders of the right, and could deny them their preferred means of exercising that right. *Legal* v. *Canada* is a clear illustration in support of this conclusion[932].

C. *PRIMA FACIE* INFRINGEMENT OF THE COVENANT CHAIN

C.1 Position of the parties

[1497] The Applicants argue that the Crown infringed its obligations flowing from the Covenant Chain because it failed to discuss with the Mohawks of Kahnawà:ke at the time the *Excise Act, 2001* was adopted.

[1498] They note that, during his introduction speech before the House of Commons, the Minister of National Revenue mentioned several times that the industries were consulted and their interests were accommodated, while "nowhere does he even

[930] *Robertson* v. *Canada*, 2017 FCA 168.
[931] *R.* v. *Côté*, [1996] 3 S.C.R. 139.
[932] *Legal* v. *Canada (Attorney General)*, 2012 TCC 167.

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implicitly mention Indigenous peoples", despite tobacco being an important source of livelihood for them, especially for the Mohawk people[933].

[1499] They claim that the Crown failed to consult the Mohawk people on that subject, even though the Mohawk Council of Kahnawà:ke attempted to discuss a regulated tobacco trading framework and was expecting a tobacco negotiations table to achieve co-regulation of their rightful tobacco trade[934].

[1500] The Attorneys General's main position on this point is that the Crown had no obligation to discuss, be it under the Covenant Chain or under a traditional treaty or Aboriginal right. They nonetheless advance that there is evidence of consultation and discussion with the Mohawks of Kahnawà:ke. They assert that Canada consulted several national Indigenous organizations before the adoption of its current tobacco strategy, including, for example, with the First Nations of Quebec and Labrador Health and Social Services Commission, of which the Mohawks of Kahnawà:ke are members. Moreover, they point out that the government works in collaboration with Indigenous communities to reduce tobacco consumption and to combat organized crime. For instance, there was collaboration with Kahnawà:ke to organize joint inspections under the excise and customs framework. The Attorneys General also plead that negotiations between Canada and Kahnawà:ke have taken place, as evidenced by the *Agreement on an Agenda and Process for the Negotiation of a New Relationship between the Mohawks of Kahnawake and Canada*[935].

[1501] To summarize, for the Attorneys General, "Canada is always trying to involve the community in its different initiatives, whether it be the health policy, by having the community itself being involved in the development of the program, whether it's the enforcement aspect of it all, where we're having the local Indigenous police forces leading some initiatives or being involved"[936].

C.2 Evidence

[1502] As for the previous section, the evidence will be examined in the following section on analysis. In addition to the witnesses presented previously, the Attorneys General also called Suzy McDonald to testify.

[1503] Suzy McDonald started her career as an intern with the World Health Organization working for the Tobacco-Free Initiative. She currently works for the Tobacco Control Program at Health Canada. In 2014, she became the Associate Director General of the program. Since 2017, she is Director General. She also worked in grants and contributions.

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933 *Applicant's opening*, para. 17.
934 *Idem*, para. 19-20, 22.
935 Exhibit WM-27 Framework Agreement Canada-Kahnawake.
936 Final pleadings, 2022-10-28, p. 26.

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[1504] As Director General, she is responsible for overseeing all components of the Federal Tobacco Control Strategy, and for the legislation. Between 2014 and 2017, she worked on the renewal of the tobacco strategy.

[1505] While testifying on tobacco strategy, she explained to the Court how Indigenous communities are implicated in the development of strategies, notably through consultations.

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C.3 Analysis

[1506] The *Excise Act, 2001* has been presented as "the result of a co-operative effort between the Department of Finance and Revenue Canada, with input from industry associations and provincial liquor jurisdictions"[937]. It aimed to modernize the excise framework to accommodate the needs of the government, but also of the alcohol and tobacco industries[938]. During its drafting, there were meetings between the Department of Finance, Revenue Canada and industry associations[939].

[1507] Conversely, there is no evidence of discussion with the Mohawks of Kahnawà:ke on the subject. There is no reference to any consultations with the Mohawks of Kahnawà:ke in the debates before the House of Commons and the Senate, and it appears that no representatives of the community were heard before the Standing Committee on Finance and the Standing Senate Committee on Banking, Commerce and the Economy.

[1508] The position of the Attorneys General is that various official authorities engaged in discussions with the Mohawks of Kahnawà:ke about tobacco. The Attorneys General brought evidence:

- of collaboration, or of invitation to collaborate, between the RCMP and the Mohawks of Kahnawà:ke to ensure the enforcement of the Canada tobacco strategy and to reduce organized crime, notably through the testimony of Joe Oliver[940];
- of collaboration between the CCRA and the Mohawks of Kahnawà:ke for the development of joint regulatory inspections[941]. The CCRA and the

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[937] Exhibit AGC-1, Excise Act Review (…) – February 1997 (Volume 1), p. 7.

[938] *Ibidem.*

[939] Exhibit AGC-1,Excise Act Review (…) – February 1997 (Volume 1), p. 59; Exhibit AGC-5 HOC – volume 137 -number 162 – 1st session – 37th Parliament – March 22, 2002 – HAN162-E (volume 2), p. 26.

[940] For instance, Transcriptions, 2021-12-01, pp. 196-202 (Oliver); Transcriptions, 2021-12-02, pp. 3-22; 76- 83(Oliver); Exhibit AGC-82, Consultation letters prior to contraband tobacco enforcement strategy, in a bundle, 2007.

[941] Exhibit WM-17, lf Phil McLester to Alwyn Morris re possible regulatory activities; WM-18 lf Alwyn Morris to Phil McLester re inspections; AGC-44 RCMP Contraband Tobacco Enforcement Strategy – First Progress Report, 2008-2009 (Volume 9), p. 17.

Mohawks of Kahnawà:ke came to an agreement that a Council Chief would accompany an inspector, and that the inspectors would train members of the community to inspect tobacco factories[942];

- of participation of Indigenous communities in the elaboration of strategies to reduce the use of tobacco[943].

[1509] These examples, however, do not show any discussion regarding the elaboration and application of the tobacco regulatory scheme to the Mohawks of Kahnawà:ke, which is the key subject that needed to be discussed. They take for granted that the *Excise Act, 2001* applies as is to the Mohawks of Kahnawà:ke. Evidence of discussion on how to enforce the *Excise Act, 2001* or to reduce tobacco use in Indigenous communities is not relevant for the subject matter.

[1510] It has been well established before the Court that the Mohawks of Kahnawà:ke do not perceive the tobacco trade as a criminal or illegal activity[944]. Peggy Mayo, for instance, testified about how she was taught that tobacco was their God-given right, and spoke of the experience of her family-in-law and her own family in growing, bartering and trading tobacco[945]. Another illustration of this attitude comes from Joe Oliver' testimony. He stated that, in the context of trying to obtain the community's support to fight contraband, he was told that the Mohawk Council of Kahnawà:ke would not support the RCMP's fight against tobacco, but that they would be "on board" regarding drugs and organized crime[946].

[1511] It was also shown that this position was well known to the government at the time of the drafting of the *Excise Act, 2001*. The claims of the Mohawks of Kahnawà:ke regarding the tobacco trade were of public knowledge, and the different levels of governments knew there was a live issue regarding that subject.

[1512] The evidence at trial has shown that the tobacco industry started in the mid-1980s in Kahnawà:ke[947]. It attracted publicity from the start, as there were complaints, particularly from convenience store owners: *dépanneurs*[948]. Peggy Mayo testified about attending meetings in Quebec City as early as 1987 between the Minister of Revenue and the "Indian services like Indian Affairs" on one side, and the Grand Chief

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[942] Transcriptions, 2021-10-28, p. 104 (Mayo).
[943] For instance, Exhibit AGC-33, Consultation on the future of tobacco control in Canada, p. 18; Transcriptions, 1-12-2021, pp. 31-33 (McDonald); Exhibit AGC-80 First Nation and Inuit Community of Practice – Respecting Tobacco: a discussion paper to inform the future federal tobacco control in Canada; Transcriptions, 2021-12-01, pp. 31-39 (McDonald).
[944] Exhibit WM-21 Grand Chief Delisle re collective rights; Transcription 16-09-2021, pp. 24-28 (Alfred); Transcriptions 28-10-21, pp. 72-73; 116 (Mayo).
[945] Transcriptions, 2021-10-28, p. 27, pp. 42-49 (Mayo).
[946] Transcriptions, 2021-12-02, p. 81 (Oliver).
[947] Transcriptions, 2021-10-28, p. 26 (Mayo).
[948] *Idem*, p. 27 (Mayo).

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Joe Norton and traditional people from the 207 Longhouse on the other side[949]. Following these meetings, an agreement was reached and there were discussions about a one-source supply system. However, these negotiations stopped in 1988 after the community was raided by the Sûreté du Québec, even though the Council had previously been assured that no raids would take place[950].

[1513] Documents submitted by the Applicants, such as the *Framework Agreement between Québec and the Mohawks of Kahnawake – Agreement on fiscal matters related to tobacco, petroleum and alcohol products*[951], show that it was publicly known that the taxation of tobacco and the regulatory framework for the supply and sale of tobacco were sensitive subjects in 1999 for the Mohawks of Kahnawà:ke. This agreement was part of ten sectoral agreements between Quebec and the Mohawks of Kahnawà:ke. It aimed at finding a "statement of understanding and mutual respect between all parties" on the issue of tobacco, petroleum and alcohol[952]. Peggy Mayo testified that this agreement was the result of several meetings between Quebec, on one side, and a team, including "legal people", on the Mohawk's side[953]. This shows that it was publicly known that the Council was willing to discuss issues regarding tobacco and that it was, indeed, a live issue contemporaneously to the elaboration of the *Excise Act, 2001*.

[1514] Similarly, the *Agreement on an Agenda and Process for the Negotiation of a New Relationship between the Mohawks of Kahnawake and Canada*[954] is also evidence that it was well-known since the 1990s that trade and commerce were subject matters on which the Mohawks had expectations of negotiations as the basis of a new relationship.

[1515] The three factors in *Sparrow* – namely, (1) Is the limitation unreasonable? (2) Does the regulation impose undue hardship? And (3) Does the regulation deny to the holders of the right their preferred means of exercising that right? - cannot easily be adapted to the context where the right in question is a right to meet and discuss a contested issue. The analysis is more straightforward: where the evidence shows that there was no attempt to discuss a live issue covered by the Covenant Chain and that the Crown has regulated on that issue, there is an infringement of that right in the absence of any reasonable explanations or circumstances.

[1516] In the current circumstances, the Court finds no reasonable explanation in the evidence for the failure to reach out to the Mohawks of Kahnawà:ke to discuss the *Excise Act, 2001*. It is relevant to note that the Department of Finance and Revenue

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[949] *Idem*, pp. 28 -29 (Mayo).
[950] Transcriptions, 2021-10-28, pp. 29-30, 52-55 (Mayo).
[951] Exhibit WM-4.
[952] Transcriptions, 2021-10-28, p. 81 (Mayo).
[953] *Idem*, pp. 81-83 (Mayo).
[954] Exhibit WM-27.

Canada took time to meet and discuss with the other players in the tobacco industry to make sure that the new framework would answer their needs. At the time, it was public knowledge that the Mohawks of Kahnawà:ke were an important player in the industry but, in spite of that, they were not approached.

[1517] It is true that, at the end of the *Excise Act Review*[955], the government invited interested persons to send their comments on the proposal. However, given that the Mohawks of Kahnawà:ke have a constitutional right to discuss disagreements about tobacco trade, a general invitation to submit written submissions does not meet the Crown's obligations.

[1518] The fact that previous discussions failed is also no justification for not trying again. As long as the Covenant Chain is not extinguished, the parties have the obligation to discuss live issues. The fact that, for instance, the *Framework Agreement between Québec and the Mohawks of Kahnawake – Agreement on fiscal matters related to tobacco, petroleum and alcohol products*[956] fell apart does not mean that the Crown was freed of its obligation to meet with the Mohawks of Kahnawà:ke when it contemplated modernizing the *Excise Act*.

[1519] The Court concludes that the Crown has infringed its obligation under the Covenant Chain. The regulation of the tobacco trade was a well-known subject of disagreement between the Mohawks of Kahnawà:ke and the Crown, yet there was no attempt by the Crown to discuss the matter prior to the adoption of the *Excise Act, 2001*, even though other interested parties, including representatives of the tobacco industry, were consulted.

[1520] Where discussion or collaboration did take place between the Crown and the Mohawks of Kahnawà:ke, they dealt essentially with matters relating to criminal law enforcement. The evidence demonstrates that the Crown did not discuss tobacco-related issues with the Mohawks to any relevant degree, much less with an open mind, and even less with the intention of coming to one mind in accordance with the Covenant Chain's precepts.

[1521] Finally, the Court notes that, had the Crown met its obligations under the Covenant Chain, some of the infringements of the Aboriginal right examined in the previous section might have been avoided. For instance, after exchanges, the parties managed to come to an agreement on how to conduct regulatory inspections in a way that respects the Mohawks of Kahnawà:ke's territory. Such a procedure could have been incorporated into the regulatory scheme, instead of being an informal agreement subject to the parties' good will.

[955] Exhibit AGC-1, p. 56.
[956] Exhibit WM-4.

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D. CONCLUSION

[1522] The Court concludes that the Applicants have proven that their Aboriginal right to freely pursue economic development has been infringed *prima facie*. They have also demonstrated a *prima facie* infringement of their constitutional right to discuss live issues under the Covenant Chain. The Court will now turn to the question of justification.

VI. THE JUSTIFICATION

A. THE APPLICABLE LAW

[1523] In *Sparrow*, the appellant submitted to the Supreme Court that "s. 35(1) rights are more securely protected than the rights guaranteed by the Charter" as they are not subject to s. 1, which states that the rights and freedoms of the *Charter* can be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[957]. The Supreme Court rejected this proposition, which would entail that "any law or regulations affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982"[958].

[1524] The Supreme Court has repeatedly reiterated that rights – including Aboriginal rights – do not exist in a vacuum: the rights of an individual or group are limited by the rights of another. Aboriginal peoples are part of a broader community whose interests may, when certain conditions are met, justify the infringement of an Aboriginal or treaty right. The Supreme Court sees the justification stage as a necessary part of reconciliation ("conciliation" in French) between Aboriginal interests and those of the broader community[959]. Therefore, a piece of legislation or regulation can affect the exercise of an Aboriginal or treaty right and still be valid if certain conditions are met[960]. The burden of proof is on the Crown to demonstrate that the infringement is justified.

[1525] The test for justifying an infringement was introduced in *Sparrow* as a two-step test.

[1526] At the first step, a court must determine whether there is a valid legislative objective. The Supreme Court does not give an exhaustive list of these objectives. It gives as example the aim of conserving and managing a natural resource or preventing the exercise of s. 35(1) rights that would cause harm to the general populace or to Indigenous peoples themselves. In *Delgamuukw*, a broader list of examples was given: "the development of agriculture, forestry, mining, and hydroelectric power, the general

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957 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1109.
958 *Idem*, 1109.
959 *R.* v. *Desautel*, 2021 SCC 17, para. 79*; R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 92; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, para. 73; *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 118.
960 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1109.

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economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims"[961]. The Supreme Court notes, however, in *Sparrow* that a general "public interest" justification would be too vague[962].

[1527] If a valid legislative objective is found, the court proceeds to the next step and considers whether the litigious actions are consistent with the fiduciary duty of the government toward Indigenous peoples. The legislation must be analyzed in light of the honour of the Crown: "[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified"[963].

[1528] At this stage, the court should consider further questions, such as whether there has been as little infringement as possible in order to effect the desired result, or whether the Indigenous group in question has been consulted with respect to the measures being implemented[964].

[1529] It is also well established that the "concept of reasonableness forms an integral part of the *Sparrow* test for justification"[965]. The Supreme Court clarifies in *Nikal* that "[t]he mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement"[966]. The concept of reasonableness is also at play regarding information and consultation: "[so] long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement"[967].

[1530] The Supreme Court case law after *Sparrow* underlines, however, that the framework it established depended to a considerable extent on the legal and factual context of that case. Therefore, when "the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances […]"[968]. This will particularly be the case when the right at issue has no internal limitation. Then, the doctrine of priority underpinning *Sparrow* – the concept that Aboriginal rights holders should have priority in the fishery– will need to be adapted[969].

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[961] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 165.
[962] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1113.
[963] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1114.
[964] *Idem*, 1119.
[965] *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 110.
[966] *Idem*, para. 110.
[967] *Idem*. 110.
[968] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, para. 56.
[969] *Idem*, para. 56-64.

[1531] More recently, in *Tsilhqot'in*, an Aboriginal title case, the test for justification of infringement was formulated as a three-step test, with the requirement to consult and accommodate put at the first rank of the analysis:

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*[970].

[1532] In *Tsilhqot'in*, the Supreme Court also develops on the importance of proportionality in the justification analysis, getting closer to an analysis under s. 1 of the *Charter*:

> […] [T]he Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39)[971].

A.1 Preliminary issues of law

A.1.1 The applicable test

[1533] The Applicants plead that the justification framework in three steps developed in the *Tsilhqot'in* case should apply, and that the test for justification now incorporates elements like the *Oakes* test, namely, the rational connection, the minimal impairment and the proportionality of the impact[972].

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[970] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 77.
[971] *Idem*, para. 87.
[972] Final pleadings, 2022-04-01, p. 93, l. 21- p. 96, l. 13; *Consolidated Closing Memorandum of Fact and Law of the Applicants*, para. 496-498.

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[1534] The Attorneys General reply that the test for justification remains the *Sparrow* two-step test[973]. The justification standard established in *Tsilhqot'in* should be limited to Aboriginal title cases, whereas the *Sparrow* framework provides the general justification test that applies to all other situations[974].

[1535] To decide on that question, the Applicants invited the Court to read an article of Prof. Hogg and author Daniel Styler in which they recognize that "[t]he issue is one on which reasonable people can differ", but "lean to the view that the *Tsilhqot'in* framework was intended to apply to infringements of non-title rights as well as title rights"[975].

[1536] In the *Renvoi*, the Court of Appeal seems to adopt the *Tsilhqot'in* formulation outside of an Aboriginal title context:

> [497] Where there is a real conflict between Aboriginal and federal or provincial legislation, one must conclude that there is an infringement of the Aboriginal right. Since the Aboriginal right is recognized and affirmed by s. 35, the Aboriginal legislation must prevail. Concluding otherwise would render s. 35 meaningless. Thus, in principle, Aboriginal legislation prevails over incompatible federal or provincial legislation, unless the government concerned can establish that the infringement is justified.
>
> [498] In such a case, *the government must demonstrate that it discharged its procedural duty to consult, that the infringement is justified by a compelling and substantial public purpose, and that the infringement is consistent with the Crown's fiduciary obligation to the Aboriginal peoples concerned*.
>
> […]
>
> [500] If the incompatibility between the Aboriginal legislation and that of the federal or provincial government concerned cannot be resolved by accommodation following good faith consultation, then the Aboriginal legislation must prevail, unless the government concerned, acting within its sphere of jurisdiction, can demonstrate that its own legislation, while incompatible with that of the Indigenous governing body, pursues a compelling and substantial public objective and respects the honour of the Crown, such that it must override the Aboriginal legislation in whole or in part[976].

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[973] Final pleadings, 2022-03-25, p. 125, l. 24- p. 136, l. 7.
[974] *Idem*, p. 150, l. 24- p. 151, l. 10.
[975] Peter W. HOGG and Daniel STYLER, "Statutory limitation of aboriginal or treaty rights: what counts as justification?", (2015) 1 *L.L.J.* 3-15, p. 12.
[976] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (appeal as of right to SCC, 14-03-

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[underlining in original, italics added]

[1537] The Court will accordingly follow the *Tsilhqot'in* framework and determine first whether the government has discharged its duty to consult in good faith. In the end, the test remains essentially the same. But the *Tsilhqot'in* test, by addressing first the duty to consult before the question of the valid legislative objective, puts more emphasis on that obligation, in contrast to the framework in *Sparrow*, where consultation only appears as a factor to establish whether the infringement is consistent with the Crown's fiduciary duties. The *Tsilhqot'in* test seems more coherent with the evolution of the duty to consult since *Haïda*.

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A.1.2 The determination of the objective of a law in a s. 35(1) context

[1538] To determine the aim of the *Excise Act, 2001*, the Applicants use what they call "the standard approaches of constitutional analysis", which is used for federalism and *Charter* cases. These approaches require to determine the "constitutional characterization", the "pith and substance" or "matter" of the legislation[977]. Their argument is that the "pith and substance" of the *Excise Act, 2001* is the generation and protection of Crown revenues, which is not a valid and compelling objective.

[1539] The Attorney General of Canada warns the Court that the Applicants refer to principles of statutory interpretation or to principles developed in federalism cases where the Court had to decide the "pith and substance" of statutes to determine if they fell under the provincial or federal heads of power. These are different legal tests and legal inquiries that serve different purposes and that should not apply in the context of justification. The first stage of the justification analysis as defined in *Sparrow* is a much broader and more flexible inquiry[978].

[1540] In reply, the Applicants admit that these approaches should only be seen as helpful tools in the characterization exercise[979]. Nonetheless, they underline that it would be surprising that the same act be given two different characterizations, one under a federalism analysis and the other under a s. 35(1) analysis and, according to the Applicants, it would be very clear that the *Excise Act, 2001* is a taxing statute under a federalism analysis[980].

22, n°40061), para. 497-500. Even though it is a Court of Appeal decision rendered two months before the end of argumentation, the parties did not present additional arguments to adjust their position accordingly.

977 *Consolidated closing memorandum of fact and law of the Applicants*, para. 505.

978 Final pleadings, 2022-03-25, p. 17, l. 7-p. 19, l. 7; p. 27, l. 14 - p. 28, l. 5, responding to *Consolidated Closing Memorandum of Fact and Law of the Applicants*, para. 505-511.

979 Final pleadings, 2022-04-01, p. 132, l. 7- p. 135, l. 23.

980 Final pleadings, 2022-04-04, p. 19, l. 20- p. 20, l. 24; *Consolidated closing memorandum of fact and law of the Applicants*, para. 508-509, quoting *Flaro* v. *Canada*, 2018 FC 229, para. 40-41; *Rex* v. *Pee-Kay Smallwares Limited*., [1947] OR 1019 (Ont. C.A.).

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[1541] The parties raise again an interesting and difficult question of law that has not yet been addressed by the Supreme Court, and they present no authorities that deal directly with this issue. The Court is not convinced that a parallel can be made between federalism and s. 35(1) cases. The analysis under s. 35(1) is driven by the notion of reconciliation. With this consideration in mind, the Court does not consider that, in a s. 35(1) context, it has to determine the predominant objective of the legislation. It is enough that one of the objectives is compelling and substantial. In the perspective of reconciliation, a statute that would have amongst its objectives to reduce the leading cause of premature death in Canada should be recognized as a justifiable limit. This interpretation is directed at the reconciliation ("conciliation" in French) of Aboriginal rights with the interests of the broader community. It also aims reconciliation ("réconciliation" in French): the relationship between Indigenous peoples and non-Indigenous peoples would be at risk if Aboriginal rights could prevent the adoption of an efficient tool to reduce the use of a deadly product, notably by youth.

A.1.3 The priority doctrine

[1542] The Applicants read the jurisprudence of the Supreme Court as attributing an impact in the justification analysis to the lack of priority given to Aboriginal and treaty rights. In that regard, they submit that the Crown not only gave no priority to the Kahnawà:ke holders of Aboriginal and treaty rights in respect of the application of the *Excise Act, 2001*, but also gave no consideration to their rights and treated them in the same manner as non-Indigenous persons[981]. By denying the Mohawks of Kahnawà:ke a priority in respect of the tobacco trade commensurate with the extent of the treaty rights and treaty relationship of the Crown with the Mohawks, they submit that Canada has breached the honour of the Crown[982].

[1543] The Attorney General of Canada replies that the doctrine of priority only applies in cases where resources are limited and the government needs to allocate quotas, for instance, fishing quotas. Tobacco is not a limited resource and there is no production limits or quotas[983].

[1544] This argument is not of capital importance in the parties' representations, and the Court will summarily dismiss it. The Court agrees with the Attorneys General that the notion of priority only makes sense in a context of limited resources and that Aboriginal or treaty rights should not be seen as a "right to a competitive advantage". This said, the substance of the argument is relevant and has been addressed under the infringement section. In essence, the argument of the Applicants is that the *Excise Act, 2001* ignores the existence of an Aboriginal right by making no distinction between Indigenous and non-Indigenous applicants. That is a valid point, as stated earlier.

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[981] *Consolidated closing memorandum of fact and law of the Applicants*, para. 563.
[982] *Idem*, para. 565.
[983] Final pleadings, 2022-03-28, p. 71, l. 16- p. 74, l. 1.

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B. POSITION OF THE PARTIES

B.1 Overview

[1545] The position of the Attorney General of Canada is summarized in the following terms in their plan of arguments:

> The Attorney General of Canada submits that the alleged *prima facie* infringement is justified. Canada's tobacco control strategy which seeks to reduce tobacco consumption on health grounds using various tools, including the *Excise Act*, *2001* which regulates tobacco, advances polycentric objectives that are valid, compelling, and substantial. This strategy is consistent with the principle of the Honour of the Crown. Canada has consulted and collaborated with Indigenous peoples in its development, and its measures are aligned with international standards. Border control, licensing requirements and excise duties are proportional with Canada's objectives and do not constitute an excessive burden given the seriousness of the social interests involved[984].

[1546] The Attorney General of Quebec essentially refers the Court to the Attorney General of Canada's written submission regarding the justification issue[985]. He only adds that, when dealing with treaty rights instead of Aboriginal rights, there should be a more sensitive approach to the rights of non-Indigenous people because they were also living on the territory when the alleged treaties were concluded[986]. Thus, one must take into account the impact of a competitive advantage to the Mohawks on non-Indigenous Canadians (and the Indigenous peoples not party to the alleged treaties) working in the tobacco industry in Canada, and possibly on other sectors of industry[987]. A competitive advantage to a particular group of Canadian society would not promote reconciliation[988].

[1547] The Applicants argue that the *Excise Act, 2001*, and particularly s. 42, does not have a valid legislative objective. In addition, the legislative and regulatory impact of the *Excise Act, 2001* and its implementation by the Crown are inconsistent with the Crown's fiduciary relationship, the honour of the Crown, and the treaty obligations of the Crown under the Covenant Chain. Moreover, the Crown failed to discharge its duty to consult and accommodate the Mohawks of Kahnawà:ke[989].

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[984] *Plan of arguments of the Attorney General of Canada*, para. 247.
[985] Attorney General of Quebec final pleadings, para. 207, 356.
[986] *Idem*, para. 357.
[987] *Idem,* para. 358.
[988] *Idem*, para. 359.
[989] *Consolidated Closing Memorandum of Fact and Law of the Applicants*, para. 485-488.

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[1548] The MNCC's position on justification has been touched upon previously[990]. The MNCC's argumentation is mainly a criticism of the possibility of a justification to the infringement of an Aboriginal or treaty right. For instance, the MNCC does not understand what is meant in *Sparrow* when the Supreme Court states that the Crown can unilaterally violate treaty rights within the context of the treaty. For the MNCC, "[if] the essence of the Covenant Chain relationship is that, as brothers, our arms are joined so tightly that nothing can break us apart, the context of the treaty relationship does not permit unilateral violation"[991].

B.2 The procedural duty to consult and accommodate

B.2.1 The Attorney General of Canada

[1549] The Attorney General of Canada argues that the circumstances to trigger the duty to consult, as recognized in *Haïda*[992], are not met. The duty to consult is a procedural right to be consulted and to have a dialogue before the government adopts the intended measure. Excise duties regulations have existed for hundreds of years. Thus, it is not a new regulatory initiative, and there was no change that would have triggered a duty to consult[993].

[1550] The Attorney General of Canada also considers that, regarding the argument of the Applicants that the Crown did not act honourably when enforcement measures were taken under the *Excise Act, 2001,* the application of laws does not trigger a duty to consult[994].

[1551] He adds that, in any event, whether or not there was consultation regarding regulation of the tobacco market, the issues of taxation and inspections under *the Excise and Customs Act* are outside the scope of the present case, given that proper notice was not given to the Attorneys General about these questions.

[1552] In the alternative, the Attorney General of Canada pleads that the evidence shows that there were consultations, joint inspections, etc.[995], and that Canada has involved various Indigenous organizations in the elaboration of its tobacco strategy. The consultations included the First Nations of Quebec and Labrador Health and Social Services Commission, of which the Mohawks of Kahnawà:ke are members[996]. Moreover, the Attorney General of Canada underlines its collaboration with Indigenous

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990 See IV.2.2.2.6
991 *MNCC submissions*, para. 15; Final pleadings, 7-04-2022, p. 49, l. 12 -p. 51, l. 6.
992 *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73.
993 Final pleadings, 2022-03-25, p. 136, l. 20- p. 140, l. 8; *Plan of arguments of the Attorney General of Canada*, para. 263-264.
994 Final pleadings, 2022-04-07, p. 144, l. 13-p. 148, l. 6.
995 Final pleadings, 2022-03-28, p. 5, l. 24- p. 26, l. 5.
996 *Plan of arguments of the Attorney General of Canada*, para. 258.

police forces to fight organized crime and improve security at the border between Canada and the United States, including in the community of Kahnawà:ke[997]. One of the examples referred to by the Attorney General of Canada is the implication of Indigenous communities and local police services in Canada's 2008 Contraband Tobacco Enforcement Strategy. This strategy included a program to maintain a dialogue with Indigenous leaders, local police, including the police forces of Kahnawà:ke, and the Assembly of First Nations[998].

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B.2.2 The Applicants

[1553] The Applicants argue that the Crown failed to discharge its constitutional and procedural duty to consult and accommodate the Mohawks of Kahnawà:ke in respect of their tobacco trade[999]. They plead that the Attorneys General have led no meaningful evidence to demonstrate that the Crown has discharged its constitutional obligation to consult and accommodate the rights of the Mohawks of Kahnawà:ke in respect of free trade and self-regulation of the tobacco trade on their territory, particularly in Kahnawà:ke[1000].

[1554] On the contrary, the evidence shows that "since the transformation of the tobacco trade in the Mohawk community of Kahnawake into a tobacco-manufacturing industry, the Kahnawake Mohawks have been ignored and rebuffed in their attempts to have their rights of self-government and self-regulation of the trade recognized by or negotiated with the federal government"[1001].

[1555] For the Applicants, the teachings of *Haïda* on the duty to consult Indigenous peoples apply in the present case. There is a Crown conduct, i.e., the imposition of excise duties and the Crown's activities in the enforcement of the *Excise Act, 2001* with respect to the Mohawks of Kahnawà:ke (inspections, investigations, seizures, etc.). There is also evidence of knowledge of the asserted s. 35(1) rights. And finally, there is potential that the contemplated conduct adversely affects the asserted s. 35(1) rights. Indeed, there is an economic effect to the imposition of an excise duty that could have serious detrimental effect on the Kahnawà:ke tobacco trade. There is also a human cost in terms of prosecutions, sentences, and social consequences for the Mohawks of Kahnawà:ke, and this in the context of elevated levels of imprisonment of Indigenous people[1002].

[1556] The Applicants recognize that this is not a case where there is a bright line regarding the moment when the duty to consult arose. They consider that it started

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997 *Idem,* para. 259-261.
998 *Idem,* para. 259-262; Final pleadings, 2022-03-25, p. 178, l. 11- p. 206, l. 13.
999 *Consolidated closing memorandum of fact and law of the Applicants*, para. 487, 534.
1000 *Idem*, para. 569.
1001 *Idem*, para. 570.
1002 Final pleadings, 2022-04-04, p. 83, l. 81, l. 14- p. 97, l. 6.

during the first decade of 2000, when there was an increasing regulation by the Crown of the activity on the territory of the Mohawks of Kahnawà:ke and an insistent demand on their part for consultation. The Applicants ask the Court to consider that consultation is not only triggered by Crown conduct, but also by the circumstances in which the Crown is performing its activities[1003].

[1557] Regarding the representations by the Attorney General of Canada that there had been consultation preceding the adoption of the current Canada tobacco legal framework, the Applicants raise several points.

[1558] First and foremost, any consultation efforts by the Crown are based on "the widely-held institutional assumption that the participants in the tobacco trade of Kahnawake were engaged in criminal activities or were otherwise controlled by "organized crime""[1004].

[1559] Second, consultation with Indigenous entities other than the Mohawks of Kahnawà:ke is not a form of consultation with the Mohawks of Kahnawà:ke. The Attorneys General have not proven the representative character of the organisations with which they consulted.

[1560] Third, the Applicants warn that certain examples cited by the Attorney General of Canada to show consultations are not, in fact, illustrations of consultation. For instance, the testimony of Mr. Oliver to the effect that the Indigenous police are taking the lead on certain investigations cannot be taken as an element of justification. It is simply the work of the local police carrying out policing matters in the community. The Attorney General of Canada attempts to raise an ordinary collaboration to a justification of an infringement[1005]. Similarly, evidence of consultations about various social programs aimed at the reduction of tobacco consumption in Indigenous communities is irrelevant to the issue of justification. Such discussions do not represent consultation over the tobacco trade and they did not take place with the relevant parties[1006].

[1561] The Applicants also argue that the strategy adopted by the Crown is inefficient and that the refusal to consult and accommodate has not led to the expected result. The results of the current policy do not justify the infringement. The current enforcement strategy to criminalize the trade is a misuse of criminal law enforcement and a poor strategy for Canadians overall[1007].

[1003] *Idem*, p. 105, l. 21- p. 108, l. 2.
[1004] *Consolidated closing memorandum of fact and law of the Applicants*, para. 572.
[1005] Final pleadings, 2022-04-04, p. 71, l. 4- p. 74, l. 7.
[1006] *Idem*, p. 54, l. 12- p. 56, l. 11.
[1007] *Idem*, p. 45, l. 13- p. 50, l. 1.

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B.3 Valid compelling and substantial objectives

B.3.1 The Attorney General of Canada

[1562] The Attorney General of Canada considers that any infringement of the Applicants' rights is justified by the existence of valid, compelling, and substantial objectives. The legislative framework aims at protecting public health, public security (fighting organized crime), national security (border control and fighting trafficking and smuggling) and reducing organized crime. There is also an objective of raising revenue to finance programs and services for Canadians, including Canada's Tobacco Strategy. They underline that these objectives also protect members of Indigenous communities.

[1563] Regarding the protection of public health, the Attorney General of Canada argues that the tobacco control strategy developed through the Customs and Excise framework is efficient and has contributed to the reduction of tobacco use. Excise duties have an impact on the price of tobacco products, and it has been shown that high prices dissuade youth from starting to smoke and can influence adults' consumption, as well[1008]. The evidence shows that Canada's Tobacco Strategy has worked, with smoking rates going from more than 50% in the 1960's to less than 15% nowadays[1009].

[1564] The objective of raising revenue is also compelling and substantial, as it is linked to the health objective. Indeed, excise duties finance policies and programs like the Tobacco Control Strategy, which benefit all Canadian, including Indigenous peoples[1010].

B.3.2 The Applicants

[1565] The Applicants plead that the *Excise Act, 2001*, and particularly its s. 42, does not have a compelling and substantial objective[1011].

[1566] They submit that "the fundamental purpose and the pith and substance of the *Excise Act, 2001*, and particularly s. 42 is the generation and protection of Crown revenues and maintenance of a taxable market for tobacco products which, far from being prohibited, continue to be a significant source of revenues for the Crown"[1012]. For the Applicants, the *Excise Act, 2001* is a revenue or taxation statute, with its primary aim being to raise

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[1008] *Response Attorney General of Canada*, para. 133-134, *Plan of arguments of the Attorney General of Canada*, para. 248-252; Final pleadings, 25-03-2022, p. 27, l. 3-p. 46, l. 10, referring notably to *R.* v. *Dickson*, 2017 ABPC 315 (tab 132), para. 461-462; p. 117, l. 12- p. 120, l. 6.

[1009] Final pleadings, 2022-03-25, p. 92, l. 4-p. 96, l. 2.

[1010] Final pleadings, 2022-04-07, p. 135, l. 8- p. 137, l. 9.

[1011] *Consolidated closing memorandum of fact and law of the Applicants*, para. 485, 501.

[1012] *Idem*, para. 502.

government revenues and protecting those revenues[1013]. Health considerations are only incidental[1014].

[1567] Indeed, the *Excise Act, 2001* has a number of features common to a taxing statute. It has charted provisions and the provisions necessary to ensure that the debt and the debtor are clearly defined; the taxes are collected by the Crown; it has strong enforcement provisions[1015].

[1568] The Applicants plead that generating revenue is not a valid objective[1016]. First, the objective cannot be a vague and general purpose. The excise duties go to the Consolidated Revenue Fund. For the Applicants, a statute that collects money that goes into that fund cannot be specific enough to justify an infringement of an Aboriginal or treaty right. The revenues in that fund are used for general purposes[1017]. They consider that "[r]evenue-generation as such does not "further the goal of reconciliation", either from the aboriginal perspective or from the perspective of the broader public"[1018].

[1569] Even should the "pith and substance" analysis be discarded by the Court, they submit that the predominant objective of the *Excise Act, 2001* is beyond doubt the protection of revenues for the Crown[1019]. For instance, the Applicants quote an extract of a governmental report issued to prepare the adoption of the legislation that demonstrates that "the primary consideration for such legislative reforms was the control and protection of Crown revenues"[1020]:

> Control and protection of revenue is the most important consideration shaping the proposal for a revised excise framework for tobacco products. The large scale contraband trade during the early 1990s plainly illustrated the vulnerability of tobacco tax revenues[1021].

[1570] One of the stated aims of the *Excise Act, 2001* was to modernize the excise framework to establish a more efficient system of remittances and returns of excise duties on several products, including tobacco. The framework was simplified by the combination of the customs duty and the excise tax into a single excise duty, and the

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[1013] Applicant's opening, para. 18; *Consolidated closing memorandum of fact and law of the Applicants*, para. 503, 506-510, 515-516; Final pleadings, 2022-04-01, p. 101, l. 1-7.
[1014] Opening statement, 2021-09-13, p. 51; *Consolidated closing memorandum of fact and law of the Applicants*, para. 516.
[1015] Final pleadings, 2022-04-01, p. 156, l. 14- p. 160, al. 21.
[1016] Final pleadings, 2022-04-04, p. 26, l. 18-
[1017] Final pleadings, 2022-04-01, p. 179, l. 9- p. 183, l. 10.
[1018] *Consolidated closing memorandum of fact and law of the Applicants*, para. 510.
[1019] *Idem*, para. 512.
[1020] *Idem,* para. 515, quoting Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 35.
[1021] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 35.

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harmonization of the system of remittances and returns with other taxes and commercial accounting periods[1022].

[1571] In this regard, the Applicants warn that, to determine the objective of the legislation, a distinction should be made between the objective of the executive and the objective of the Parliament. There should not be a reference to the intention of "Canada" in general, and evidence of the objective of the executive should not automatically be seen as evidence of the objective of the legislator[1023].

[1572] The Applicants conclude that, whatever the methodology chosen, it remains that the objective of the *Excise Act, 2001* is to raise money, without any consideration to Aboriginal or treaty rights[1024].

[1573] In parallel, the Applicants argue that public health is not the objective of the *Excise Act, 2001*. The Applicants raise the following:

> (1) the purpose of the *EA, 2001* is to protect Crown revenues, including by maintaining a taxable tobacco market (rather than prohibit its uses, as the Crown does with other harmful substances, such as certain narcotics);
>
> (2) the legislative objective of *EA, 2001* cannot be derived from the use of the Act by government;
>
> (3) the legislative history and extrinsic evidence in respect to any health objectives of the Crown in regard to the *EA, 2001* is ambiguous and contradictory, and does not support the public health argument;
>
> (4) the international obligations of Canada pursuant to the *WHO Framework Convention on Tobacco Control* require that it co-develop and implement tobacco measures with indigenous peoples, an obligation it has breached in respect to the Mohawks of Kahnawake;
>
> (5) health issues dealt with by the Crown are the object of statutes other than the *EA, 2001*[1025].

[1574] The Applicants underline that tobacco products are not prohibited in Canada. The Applicants remind us that "[w]ithin the statutory scheme allowing the manufacture, sale and consumption of tobacco product, the goal of tobacco reduction does not exist"[1026].

[1022] *Consolidated closing memorandum of fact and law of the Applicants*, para. 518.
[1023] Final pleadings, 2022-04-01, p. 106, l. 11- p. 111, l. 23.
[1024] *Consolidated closing memorandum of fact and law of the Applicants*, para. 519.
[1025] *Idem*, para. 522.
[1026] *Idem*, para. 523.

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[1575] They add that evidence on tobacco-reduction programs is not relevant. First, it is largely concerned with federal health programs, rather than with the nature of the *Excise Act, 2001.* Second, this evidence is about the rate of the duty, rather than the purpose of the act itself[1027]. The Applicants also underline the ambiguity of extrinsic evidence and the profound disagreement even amongst lawmakers as to the fundamental purpose of excise duties, including tobacco duties. They consider that the most probative evidence does not confirm an underlying anti-tobacco purpose[1028].

[1576] They point out that the Department of Finance in the *Excise Act Review* shows some concerns that large tobacco producers should be treated with fairness. For the Applicants, this is an acknowledgment that the government intends to maintain a strong manufacturing sector. Also, it shows that the government is willing to find an equilibrium between the harm reduction and revenue generation goals that is acceptable to other participants in the industry. The Applicants wonder why a similar approach could not be adopted with respect to the Kahnawà:ke tobacco trade[1029]. The Applicants ask why the Indigenous people bear the brunt of the health justification while the big producers do not. They allege that this proves that the real concern is revenue protection and not health protection[1030].

[1577] The Attorney General of Canada relies on the *WHO Framework Convention on Tobacco Control* and the *Protocol to Eliminate Illicit Trade in Tobacco Products.* On this, the Applicants emphasize that the first of these instruments provides that states must "promote the participation of indigenous individuals and communities in the development, implementation, and evaluation of tobacco control programmes that are socially and culturally appropriate to their needs and perspectives"[1031]. Canada has failed to respect this international obligation.

[1578] The Applicants also contest other arguments made by the Attorneys General, such as that their action would be justified to counter sale of contraband cigarettes in plastic bags to children. The Attorneys General assume that the Kahnawà:ke tobacco trade is in contravention of a range of laws that are not at issue[1032]. For instance, there is no evidence or argument that the *Tobacco and Vaping Products Act*, the *Canada Consumer Product Safety* or the *Cigarette Ignition Propensity (Consumer Products) Regulations Act* have been violated. Nevertheless, the justification presented by the Attorneys General goes into these areas and assumes that the Kahnawà:ke tobacco trade contravenes these regulations, which, in any event, are not at issue in the

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[1027] *Idem*, para. 526.
[1028] *Idem,* para. 527-528.
[1029] Final pleadings, 2022-04-04, p. 7, l. 16- p. 16, l. 9, referring to Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*; p. 22, l. 4-p. 23, l. 11.
[1030] Final pleadings, 2022-04-04, p. 25, l. 17- p. 26. 8.
[1031] *Consolidated closing memorandum of fact and law of the Applicants*, para. 529.
[1032] Final pleadings, 2022-03-31, p. 39, l. 17-p. 43, l. 10.

present case. The Applicants warn that the Court should deal only with the particular infringement issues of this case, and the justification for that infringement. Whatever justifications that might exist relating to other laws are not relevant here[1033].

[1579] The Applicants present several arguments based on the fact that no evidence was made regarding the destination and use of the tobacco. For them, there should be no assumption that the bulk tobacco will be manufactured into cigarettes that will end up as contraband in a domestic retail context. In their view, it is not appropriate in the context of an *Excise Act, 2001* case dealing with partially-manufactured tobacco to make assumptions of illegal distribution at retail[1034]. The Applicants ask the Court to limit its analysis to the segment of the supply chain that is relevant in the present case and to refrain from considering the part of the supply chain that follows, which involves finished tobacco products[1035]. They add that the Attorneys General base their justification arguments on the presumption that the tobacco is destined for the Canadian market, but there is no evidence as to its final destination. In the absence of that, there is no reason why the Court should not consider that the tobacco could be destined for the first-nations' reserve market, in which case it would be exempt from taxes pursuant to s. 87 of the *Indian Act*[1036], or that it could target the export market outside of Canada, in which case the justification evidence is not very strong as to why Canada should protect people in a foreign country[1037].

[1580] The Applicants also submit that the Attorney General of Canada's position denies "the right of Kahnawake Mohawks to self-monitor this trade and its effects amongst the members of the community". The Applicants reproach the Attorney General of Canada for his "paternalistic overtones"[1038].

[1581] The Applicants also affirm that they do not deny the harms of tobacco[1039], and they do not express opposition to the overall goal of reducing tobacco consumption[1040]. They do oppose, however, what they call "reductionism", namely, reducing the objectives of Parliament only to a health objective[1041]. They recognize that the *Act* could have more than one objective, but "as long as there is a substantial revenue objective that is being pursued through the *Excise Act 2001* […] then at least to that extent there is no valid and pressing objective that justifies the limitation of an economic right"[1042]. They underline that the tobacco industry is very robust and generates substantial revenues that result in tax revenues for the Crown. This weakens the Attorneys' General efforts

[1033] *Idem*, p. 48, l. 11- p. 56, l. 10.
[1034] *Idem*, 31-03-2022, p. 57, l. 9- p. 58, l. 17.
[1035] Final pleadings, 2022-04-01, p. 15, l. 17- p. 16, l. 17.
[1036] Final pleadings, 2022-03-31, p. 75, l. 4-21.
[1037] *Idem*, p. 74, l. 7- p. 76, l. 23.
[1038] *Consolidated closing memorandum of fact and law of the Applicants*, para. 531.
[1039] Final pleadings, 2022-04-01, p. 119, l. 4- p. 120, l. 7.
[1040] *Idem*, p. 121, l. 17-21.
[1041] *Idem*, p. 122, l. 3-19.
[1042] *Idem*, p. 123, l. 23- p. 125, l. 23.

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to put aside the financial issue to focus solely on harm reduction objectives[1043]. They plead that if the Crown is "willing to draw that much revenue" from the tobacco industry and tolerate that degree of harm, then the Mohawks of Kahnawà:ke should participate in that same market, at least to the same extent[1044].

B.3.3 The MNCC

[1582] The MNCC criticizes the position of the Supreme Court regarding the definition of a "compelling public objective". After a broad definition in *Delgamuukw* v. *British Columbia*[1045], the Supreme Court stated that the public goal asserted by the government must also further the goal of reconciliation. The MNCC wonders how a unilateral breach of treaty rights can further reconciliation[1046]. Reconciliation in that context is a specific concept that flows out of *Van der Peet* about how to reconcile the Crown's unilaterally asserting sovereignty with the fact that there were already peoples with pre-existing sovereignties who were not conquered. In that sense, reconciliation is about "how do two sovereignties live in one place at one time?". This requires giving weight and respect to the Indigenous legal system, which continues to exist[1047]. In the present case, it means that the Court should give more weight to the Indigenous legal system, since all the treaty councils were conducted according to Haudenosaunee law[1048].

[1583] The MNCC also emphasizes that the Attorneys General have made no proof of a compelling objective justifying the government to ignore Indigenous justice systems and to fail to consult with traditional governments[1049].

B.4 Consistency with the fiduciary duties and honour of the Crown

B.4.1 The Attorney General of Canada

[1584] The Attorney General of Canada insists that the government's actions and legislation are consistent with the principle of the honour of the Crown[1050]. To summarize, he pleads that the evidence "[…] shows that in implementing its tobacco strategy, including the excise and customs framework, Canada has approached tobacco issues in Indigenous communities in a sensitive way, while respecting the cultural aspects of tobacco, whether it be by distinguishing commercial tobacco from ceremonial tobacco in its

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[1043] *Idem*, p. 126, l. 9-19.
[1044] *Idem*, p. 125, l. 24-p. 126, l. 8.
[1045] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.
[1046] *MNCC submissions*, para. 17; Final pleadings, 7-04-2022, p. 51, l. 7- p. 53, l. 10.
[1047] Final pleadings, 2022-04-07, p. 54, l. 9-p. 55, l. 8.
[1048] *Idem*, p. 55, l. 9-24.
[1049] *Idem*, p. 64, l. 12-17.
[1050] Final pleadings, 2022-03-25, p. 121, l. 12-, referring notably to *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 (tab 46), para. 109.

policies, or by adopting socially and culturally adapted tobacco control programs, or also by collaborating with local Indigenous authorities to implement enforcement initiatives and strategies"[1051].

[1585] For the Attorney General of Canada, Canada has respected its obligations by providing specific programming and funding to reduce tobacco use in Indigenous communities[1052]. Moreover, Canada's legislative framework regarding tobacco "aligns with international standards set out in the World Health Organization's Framework Convention on Tobacco Control, notably regarding core demand reduction provisions, such as price and tax measures to reduce the demand for tobacco, core supply reduction such as the control of contraband tobacco and the need to include Indigenous peoples in the development, implementation and evaluation of tobacco control programs that are socially and culturally appropriate to their needs and perspectives"[1053].

[1586] The Attorney General of Canada considers that the Canadian legislative framework is proportional, reasonable, and does not constitute an excessive burden, given the seriousness of the social interests involved[1054]. He notably underlines the efficiency of the increase of the price of tobacco through excise duties as a tool to reduce consumption of tobacco[1055].

[1587] Regarding the reasonableness of the means employed by the government, he deplores the fact that the Applicants presented no evidence of their activities, as this is critical for the determination of whether the means are reasonable[1056].

[1588] He also underlines that, despite the Applicants' assertion, there is no evidence that Kahnawà:ke's socio-economic development was diminished by the regulation of the tobacco trade. Any licensed tobacco manufacturer in Kahnawà:ke may participate in the industry[1057].

B.4.2 The Applicants

[1589] The Applicants underline the importance of the honour of the Crown and of the fiduciary relationship that exists, which were established in Supreme Court decisions dealing with treaty and Aboriginal rights. They emphasize the role of these principles in the test for justification and their critical importance in the pursuit of reconciliation[1058].

[1051] Final pleadings, 2022-03-25, p. 156, l. 11-25.
[1052] Plan of arguments of the Attorney General of Canada, para. 256-257.
[1053] *Idem*, para. 266, Final pleadings, 2022-03-28, p. 27, l. 6- p. 56, l. 20.
[1054] *Plan of arguments of the Attorney General of Canada*, para. 270.
[1055] *Idem*, para. 273.
[1056] Final pleadings, 2022-03-28, p. 58, l. 8- p. 59, l. 10.
[1057] *Idem*, p. 74, l. 20- p. 76, l. 13.
[1058] *Consolidated closing memorandum of fact and law of the Applicants*, para. 535-551.

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For the Applicants, "[c]learly, the Crown has not respected nor even taken into account the fiduciary relationship in respect to the *EA, 2001*, and the implementation thereof"[1059].

[1590] With regards to arguments of the Crown on the *WHO framework,* the Applicants plead that it is wrong for the Crown to argue that meeting international law obligations could somehow satisfy the requirement that it acted honourably towards Indigenous people[1060].

[1591] Also, the legislative objective of raising and protecting revenues is not rationally connected to the purported objective of harm prevention. The Applicants consider that far less drastic means of achieving the claimed objectives are conceivable.

[1592] Finally, they submit that "the adverse effects on the Kahnawake Mohawk rights-holders are disproportionate to any benefit of the governmental objectives"[1061]. Indeed, the effect of the impugned legislation is that it denies the Mohawks of Kahnawà:ke a right to economic development, and thus "Canada has […] prevented them from overcoming the socioeconomic and health disparities between aboriginal and non-aboriginal peoples"[1062]. They plead that the Crown had to consider the possible benefits to the Mohawk community in improving their economic opportunities when the government regulated tobacco products, but instead such economic opportunities have diminished[1063].

C. THE EVIDENCE

[1593] As in the previous section on infringement, the evidence will be treated directly in the analysis section, to avoid repetition. As well, the Court notes that most of the evidence on justification is the same as that on infringement.

[1594] The Attorneys' General evidence on the impact of excise duties in reducing tobacco use is comprised in large part of the testimony of Suzy McDonald[1064], the report of Emmanuel Guindon entitled "*The impact of tax and price strategies on the consumption of tobacco products and population health*"[1065], and other governmental documents setting out the government's tobacco strategy[1066].

[1059] *Idem,* para. 551.
[1060] Final pleadings, 2022-04-04, p. 110, l. 2- p. 118, l. 7.
[1061] *Consolidated closing memorandum of fact and law of the Applicants*, para. 558.
[1062] *Idem*, para. 559.
[1063] *Idem*, para. 559.
[1064] See Section V.C.2.
[1065] Emmanuel GUINDON, *The impact of tax and price strategies on the consumption of tobacco products and population health.* Exhibit AGC-11.
[1066] See for instance Exhibit AGC-31, *Federal Tobacco Control Strategy 2001-2011, June 2021 (Volume 6)*, p. 34.

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[1595] The testimony of Suzy McDonald also serves to demonstrate the government's consultation with Indigenous peoples to elaborate Canada's tobacco strategy.

[1596] The Attorneys General also used the testimony of Joe Oliver to show the government's collaboration with Indigenous peoples to ensure the enforcement of the regulations.

[1597] As for the Applicants, they essentially used the witnesses and the documentation submitted by the Attorneys General to demonstrate that the objective of the *Excise Act, 2001* is to raise revenue and not to protect public health[1067]. They also called Peggy Mayo and Dr. Alfred to reply to the Attorneys General evidence on justification.

[1598] Peggy Mayo[1068] testified that the health and safety of the workers in the tobacco industry is a concern of the Mohawks of Kahnawà:ke. Her testimony also supports the Applicants' assertion that, since the beginning of the tobacco-manufacturing industry in Kahnawà:ke, the Mohawks have attempted to negotiate with the government to have their rights recognized, but that these attempts were ignored or rebuffed.

[1599] Dr. Alfred[1069] gave evidence on the impact of the tobacco trade on the Mohawk community's right to economic development and, more generally, on its right to self-government. According to his testimony, the tobacco trade is seen as an act of Mohawk sovereignty.

D. ANALYSIS

[1600] The Court has presented the full range of the parties' arguments, which are not all of equal value. After careful considerations of all of them, the Court will restrict its written analysis only to the most relevant ones for the purpose of answering the questions before it.

[1601] At this stage, it is important to distinguish between the justification for the infringement of the Covenant Chain, and that for the infringement of the Aboriginal right to pursue economic development.

[1067] For instance, Exhibit AGC-1, *Excise Act Review: A Proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products, February 1997*; Transcriptions, 2021-12-02, p. 195 (Laroche).

[1068] See Section V.B.2.

[1069] See Section IV.B.

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D.1 Justification of the infringement of the Aboriginal right to freely pursue economic development

D.1.1 The procedural duty to consult and accommodate

[1602] This question was previously addressed in the infringement section of the Covenant Chain, and the Court concluded that the Crown has not sufficiently discussed with the Mohawks of Kahnawà:ke regarding the regulation of the tobacco trade.

[1603] As mentioned there, the Court reiterates that the evidence demonstrates that the Crown did collaborate, or at least tried to collaborate, with the Mohawks of Kahnawà:ke to enforce the *Excise Act, 2001* and fight organized crime[1070]. The evidence also shows important efforts to implicate Indigenous peoples in the elaboration of strategies to reduce tobacco use in their communities[1071]. The Court recognizes the dedication of the witnesses who testified for the Attorneys General in their efforts to collaborate with Indigenous communities, at their level and in their functions.

[1604] That said, these efforts are not enough for the Crown to discharge its procedural duty to consult the Mohawks of Kahnawà:ke on the adoption of the *Excise Act, 2001,* itself, and to find accommodation regarding the taxation scheme. As stated by the Applicants, it is not just any consultation about tobacco with just any Indigenous community that can fulfil the Crown obligation in this regard.

[1605] In fact, there is no evidence that the interests of the Mohawks of Kahnawà:ke have been taken seriously in the elaboration of the *Excise Act, 2001*. The government insisted that the challenge it faced was "to reform the legislative and administrative framework in a manner that recognizes and accommodates the needs of all parties" (the Court's emphasis)[1072], and it did indeed take into consideration the interests of the non-Indigenous industries involved. Unfortunately, it did not include the Mohawks of Kahnawà:ke as one of the parties to consult and accommodate. While it was well known that the Mohawks of Kahnawà:ke were important actors in that field, the government chose to largely ignore them.

[1070] For instance, Transcriptions, 2021-12-01, p. 196-202 (Oliver); Transcriptions, 2021-12-02, p. 3-22; 76- 83(Oliver); Exhibit AGC-82 *Consultation letters prior to contraband tobacco enforcement strategy, in a bundle*, *2007*.

[1071] For instance, Exhibit AGC-33, *Consultation on the future of tobacco control in Canada*, p. 18; Transcriptions, 2021-12-01, p. 31-33 (McDonald); Exhibit AGC-80 *First Nation and Inuit Community of Practice – Respecting Tobacco: a discussion paper to inform the future federal tobacco control in Canada*; Transcriptions, 2021-12-01, p. 31-39 (McDonald).

[1072] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 15.

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[1606] And yet, one of the aims of the framework is to counteract contraband tobacco:

> Thus, there is a strong desire on the part of government and industry to establish a new legislative structure and modern administrative approach that responds to the concerns and issues identified by the affected parties. The proposal for a revised excise framework will generate stable and secure revenues for the Crown and address recent contraband pressures, without imposing unrealistic administrative burdens on industry, or onerous controls on the manufacture of goods that fall under the legislation's jurisdiction[1073].
>
> […]
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> The challenge that faces government is to reform the legislative and administrative framework in a manner that recognizes and accommodates the needs of all parties. To assist in the development and assessment of possible taxation models, the following factors were identified as fundamental evaluation criteria:
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> • Control and protection of revenue – point of imposition for excise charges must provide a reliable and stable source of revenue and help to combat the contraband trade in alcohol and tobacco products[1074]; […]

[1607] In these circumstances, in light of the Crown's position that the well-known activities of the Mohawks of Kahnawà:ke represent contraband, the lack of consultation is even more troubling. There is a manifest contradiction between the government's concerns over contraband[1075] and the absence of the Mohawks of Kahnawà:ke in the discussion. It is obvious that, in the 2000s, the government knew that the activities of the Mohawks of Kahnawà:ke would be targeted by the new excise framework. The duty to consult was therefore very strong.

[1608] It is also troubling to read about the government's concerns to accommodate the needs of the non-Indigenous tobacco industry, while observing the absence of any interest to offer the same level of protection to the Kahnawà:ke tobacco industry. The *Excise Act, 2001* originates from the concerns of the industries of the private sector that they could not achieve competitive commercial structures with the former legislation[1076]. It is puzzling to understand why the same willingness to answer the needs of the private sector did not apply to the Kahnawà:ke tobacco industry,

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[1073] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 10.

[1074] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 15.

[1075] See for instance, Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 10, 13, 15, 19, 33-34.

[1076] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 9.

especially as it did not only impact on private interests, but also affected a collective right to economic development.

[1609] The evidence submitted by the Applicants also shows that the Mohawk Council of Kahnawà:ke has, since then, constantly repeated its desire to discuss the issue of tobacco regulation.

[1610] For instance, it addressed a letter to the Customs and Revenue agency of the Minister of National Revenue and the Minister of Finance dated October 23, 2003, in which it explicitly asked for a specific table "to resolve the preconceptions your government may have regarding the local tobacco industry and to address other concerns your Ministry may have regarding the control of this product". The Council expressed its hope to find solutions through existing agreements or through other innovative means, including new intergovernmental agreements or joint protocols for the control of tobacco[1077].

[1611] Peggy Mayo testified about that letter. She said that it was coming from the fact that there were meetings taking place regarding tobacco and that the Council was not aware of them. According to her testimony, they were only brought to the Council's attention after the fact[1078].

[1612] One might observe that this letter served the same function as the sending of wampum to convene councils in times past. Unfortunately, the response to that letter demonstrates that there was no path to open discussions on the subject with the Minister of National Revenue:

> […] The proposals in your letter concerning the regulation and taxation of tobacco products by the Mohawks Council of Kahnawake would fall outside of the existing legal authorities. Policy matters such as tax jurisdiction are the responsibility of the Department of Finance, and I understand that a copy of your letter was also forwarded to that Department. It is also the responsibility of the Department of Finance to deal with any proposals that you may have, such as the legislative Act controlling tobacco products, currently being drafted by the Mohawks Council of Kahnawake[1079].

[1613] The Assistant Deputy Minister of Tax Policy also stated clearly in response that "Canada was not prepared to participate in discussions about new jurisdictional arrangements for tobacco"[1080]. Consequently, the invitation of Grand Chief Norton to participate in discussions was declined[1081].

[1077] Exhibit WM-6, *20031023 If Grand Chief Joe Norton to MNR and MOF.*
[1078] Transcriptions, 2021-10-28, p. 101.
[1079] Exhibit WM-7, *20031208 If Bill McCloskey CRA to Grand Chief Joe Norton re administration of Excise Act.*
[1080] Exhibit WM-14, *20060215 If Ian Bennett to Grand Chief Delisle re possible direct tax*, p. 1.
[1081] Exhibit WM-14, *20060215 If Ian Bennett to Grand Chief Delisle re possible direct tax,* p. 2.

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[1614] Peggy Mayo testified that the reaction of the Council was to get upset and angry, because they considered that they have always dealt in good faith, and they wanted to come to an agreement[1082].

[1615] A few years later, following parliamentary hearings on May 5th and 7th 2008 regarding the RCMP Tobacco Strategy, the Mohawk Council of Kahnawà:ke took the initiative to request a formal meeting to discuss the tobacco industry and manufacturing. The Council sought a "genuine commitment to 'open, on-going dialogues with Aboriginal leaders'"[1083]. Grand Chief Delisle complained to the Standing Committee on Public Safety and National Security that the document entitled "*2008 Contraband Tobacco Enforcement Strategy*" had been released without any consultation with Kahnawà:ke and that the Council had not been officially informed of the hearings regarding that document[1084].

[1616] The Attorneys General produced the letter of Joe Oliver to the Council of Chiefs dated July 27, 2007, in which he personally invited them to discuss several subject areas, including the role of tobacco within the community and the benefits provided to the community by tobacco. He informed them that the RCMP Customs and Excise Branch was developing an RCMP Contraband Tobacco Enforcement Strategy[1085].

[1617] Even though Joe Oliver, in good faith, formally invited the Council to discuss the Contraband Tobacco Enforcement Strategy, this initiative was not enough to fulfil the Crown's duty to consult. It was very clear from the invitation that the conversation would only be from an enforcement perspective and be oriented towards the fight against organized crime. Yet the Crown knew full well that the desire of the Mohawks of Kahnawà:ke had always been to discuss the fact that tobacco manufacturing and trade in Kahnawà:ke were apprehended as criminal activities. There could be no useful discussion under such circumstance since the Crown was coming to the table with no intention of dealing with the true bone of contention.

[1618] The Attorneys General have provided no evidence of serious attempts to consult on the tobacco regulations themselves, and even less to discuss with an open mind how the Mohawks' interests could be accommodated. In the *Tsilhqot'in* case, the judge of the British Columbia Supreme Court wrote that "[…] the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights"[1086]. That conclusion was confirmed by the Supreme Court, who considered that

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[1082] Transcriptions, 2021-10-28, p. 103.
[1083] Exhibit WM-19, *20080529 If Grand Chief Delisle to federal ministers*.
[1084] Exhibit WM-40, *Extracts from Hansard Standing Committee on Public Safety and National Security 20080604*, p. 1, 2.
[1085] Exhibit AGC-82 *Consultation letters prior to contraband tobacco enforcement strategy, in a bundle*, *2007*.
[1086] *Xeni Gwet'in First Nations* v. *British Columbia*, 2007 BCSC 1700, para. 1294.

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no *meaningful* consultation took place[1087]. The same applies here. There could not be adequate consultation, as any discussion was based on the premise that the Mohawks of Kahnawà:ke had no right regarding tobacco and that their current activities were criminal.

[1619] The lack of consultation with the Aboriginal right holders is exacerbated by the fact that the government took the time to consult with industry associations and representatives to accommodate their needs. For instance, it is explicitly stated in the *Excise Act Review – A proposal for a revised framework for the taxation of alcohol and tobacco products*, that "[s]hortly after the release of this paper, officials of the Department of Finance and Revenue Canada will meet with industry associations and representatives to answer their questions concerning the revised excise framework"[1088]. It also appears clearly from the debates before the House of Commons:

> Building on this discussion paper proposal, the government followed up in 1999 with the release of draft legislation and regulations. Public consultations, an important element in any federal policy initiative of this kind, formed an integral part of the review. With the discussion paper and the draft legislation regulations as a basis, extensive consultations were conducted with affected industry groups and businesses, provincial governments, liquor boards, various federal departments, the Royal Canadian Mounted Police and other enforcement agencies. Refinements were made to the original review proposals with the result that Bill C-47 has been given broad support among the spirits, wine and tobacco sectors, the provincial liquor boards and the law enforcement agencies[1089].
>
> [the Court's emphasis]

[1620] The Applicants provided examples of what could have been discussed. For instance, they raise the issue that, as a fiscal statute, the *Excise Act, 2001,* should fall within s. 87 of the *Indian Act*. It could therefore be possible to accommodate the tobacco trade in Kahnawà:ke by recognizing an exemption from the tax under that provision. This would not be unprecedented, as there is a provision of the *Income Tax Act* that incorporates s. 87 into that statute. For the Applicants, this option represents a valid avenue for consultation[1090].

[1621] Finally, the Court must address the Attorneys General's argument that consultation on the regulation of the tobacco market is outside the scope of the present case, given that the Applicants failed to provide proper notice of this question to them. First, it was very clear to all parties that the absence of consultation was a key

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[1087] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 96.

[1088] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 59.

[1089] Exhibit AGC-5, *HOC – volume 137 – number 162 – 1st session – 37th Parliament – March 22, 2002 – HAN162-E (Volume 2)*, p. 10042.

[1090] Final pleadings, 2022-04-01, p. 167, l. 12-p. 176, l. 25.

argument of the Applicants, as stated in their opening submissions. Second, the Attorneys General have pleaded that the *Sparrow* test applies to the justification analysis. In that case, the Supreme Court expressly stated that one of the questions to be addressed is whether the Indigenous group was consulted. In light of that, how could the Attorneys General not have been aware that evidence of consultations would inevitably have to be made at the justification stage? Moreover, the Attorneys General, themselves, presented evidence of consultation. In the context of this case, it is difficult to believe that they would have presented only part of the evidence, especially after the testimony of Peggy Mayo.

[1622] The Court concludes that the Crown did not discharge its duties to consult - and even less to accommodate. Consequently, the infringement is not justified.

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D.1.2 A compelling and substantial objective

[1623] It is not contentious that the reduction of tobacco use is a valid compelling and substantial objective. The consequences of tobacco use on health are well-known, as well as its impact on the public health care budget. Some relevant facts, for which no contradictory evidence was presented, support this finding:

- Tobacco use is the leading cause of premature death in Canada[1091].
- Every year, 37,000 Canadians die from a tobacco-related illness, one person every 14 minutes[1092].
- Smoking costs the Canadian society around $17 billion a year in health care and indirect economic costs[1093].

[1624] The question that the Court must now answer is whether the reduction of tobacco use is indeed the objective of the *Excise Act, 2001*. The jurisprudence of the Supreme Court does not provide parameters on how to define the objective of a law in a s. 35(1) context. Usually, the determination of the objective is not problematic, and the real debate is over whether that objective is a compelling and substantial one. In the present case, however, the identification of the objective of the law is not an easy task.

[1091] Exhibit AGC-32, *Seizing the opportunity – The Future of Tobacco Control in Canada 2017 (Volume 6)*, p. 5; Exhibit AGC-41, *Equality Growth A Strong Middle Class – Budget 2018*, p. 3.

[1092] Exhibit AGC-32, *Seizing the opportunity – The Future of Tobacco Control in Canada 2017 (Volume 6),* p. 5; Exhibit AGC-41, *Equality Growth A Strong Middle Class – Budget 2018,* p. 4.

[1093] Exhibit AGC-32, *Seizing the opportunity – The Future of Tobacco Control in Canada 2017 (Volume 6),* p. 5; Exhibit AGC-35, *Canada's tobacco strategy, 2018 (volume 7)*, p. 1; Exhibit AGC-29, *New Directions for Tobacco Control in Canada, 1999 (Volume 5)*, p. 6.

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[1625] Historically, excise duties were a major source of revenue for the Crown, representing as much as 25% of federal revenues at the beginning of the 20th century[1094]. Today, they still make an important contribution to the Consolidated Revenue Fund, representing around 3.2 billion dollars a year[1095].

[1626] However, the evidence in this case shows that excise duties are not only a source of revenue (which, in the end, represents not even one-fifth of the economic costs of tobacco), but are also an efficient tool to reduce tobacco consumption[1096]. The report of Ass. Prof. Emmanuel Guindon entitled "*The impact of tax and price strategies on the consumption of tobacco products and population health*", which is based on numerous studies, is clear on that subject[1097]. Ass. Prof. Guindon starts his report with the following preliminary remarks:

> There is overwhelming evidence that taxes that increase tobacco prices are associated with lower prevalence of tobacco use, reduced consumption among tobacco users, fewer relapses among former users, more cessation attempts and successful cessation, lower tobacco use initiation and ultimately, improvements in population health. There is also substantial evidence that young people and those from more socioeconomically disadvantaged groups tend to be more sensitive to price changes and that higher tobacco taxes are associated with higher tax revenues.

[1627] He notably quotes the *Framework Convention on Tobacco Control* of the World Health Organization which states that "price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons"[1098].

[1628] Denis Choinière also testified that, when the taxes were reduced in 1994, there was an increase in tobacco use amongst young men[1099].

[1629] The Court concludes that, although s. 42 and the *Excise Act, 2001* have the objective of raising revenues, they are also important tools in the government's tobacco strategy.

[1094] Exhibit AGC-1, *Excise Act Review: A proposal for a Revised Framework for the Taxation of Alcohol and Tobacco Products*, p. 7; Exhibit AGC-5, *HOC – volume 137 – number 162 – 1st session – 37th Parliament – March 22, 2002 – HAN162-E (Volume 2)*, p. 10041

[1095] Transcriptions, 2021-12-02, p. 195 (Laroche).

[1096] See notably Exhibit AGC-31, *Federal Tobacco Control Strategy 2001-2011, June 2021 (Volume 6)*, p. 34, 39; Exhibit AGC-36, *A Recovery Plan for Jobs, Growth and Resilience – Canada Budget 2021 (Volume 7),* p. 4.

[1097] Emmanuel GUINDON, *The impact of tax and price strategies on the consumption of tobacco products and population health.* Exhibit AGC-11.

[1098] *WHO Framework Convention on Tobacco Control*, 2003, art. 6, online: < WHO Framework Convention on Tobacco Control>

[1099] Transcriptions, 2021-11-30, p. 86 (Choinière).

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[1630] Today, it would not be accurate to characterize s. 42 solely as a revenue-generating tool. While it is clear that revenue protection is an important aspect of the legislation, it is equally evident that there are valid public health concerns behind excise duties.

[1631] The two dimensions of the *Excise Act, 2001* appear in the debate before the House of Commons. At the outset, the *Excise Act, 2001* is presented from the angle of the modernisation of an outdated excise framework:

> Prompted by the need to update the Excise Act, the Department of Finance and the Canada Customs and Revenue Agency jointly released a discussion paper on the Excise Act review in 1997. This paper outlined a proposal for a revised legislative and administrative federal framework for the taxation of alcohol and tobacco products.
>
> The review was guided by the following three objectives: first, to promote a modern legislative framework for a simpler and more certain administrative system that recognizes current industry practices; second, to facilitate greater efficiency and fairness for all parties, leading to an improved administration and reduced compliance cost; and third, to ensure the continued protection of federal excise revenues[1100].
>
> […]
>
> In summary, the new legislative and administrative framework for taxation of spirits, wine and tobacco products will provide: a simple and more certain taxation structure; equal treatment for all parties; improved administration and lower compliance costs; greater flexibility for businesses to organize their commercial affairs; and enhanced protection of excise revenues[1101].
>
> [the Court's emphasis]

[1632] That gives the impression that the *Excise Act, 2001* has little to do with health concerns. But, at the end of the presentation of the new framework, it appears clearly that s. 42 is part of the government's comprehensive strategy to improve the health of Canadians by discouraging tobacco consumption. Bill C-47 is presented as including three additional measures, one of which being the implementation of federal tax increases on tobacco products:

> The third measure implements the federal tax increases on tobacco products that were announced on November 1, 2001. Like the April 2001

[1100] Exhibit AGC-5, *HOC – volume 137 – number 162 – 1st session – 37th Parliament – March 22, 2002 – HAN162-E (Volume 2)*, p. 10042.

[1101] *Idem,* p. 10043.

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> measures I referred to earlier, this tobacco tax increase is part of the government's comprehensive strategy to improve the health of Canadians by discouraging tobacco consumption. These increases re-establish a uniform federal tax rate for cigarettes across the country and amount to $2 per carton of cigarettes for sale in Quebec, $1.60 in Ontario and $1.50 in the rest of Canada. The increases are co-ordinated with provincial tobacco tax increases. The government has always said that it would continue to work toward restoring tobacco taxes to pre-1994 levels as quickly as possible. The measures in Bill C-47 are one more step in the process of restoring tobacco tax rates in ways that will minimize the risk of renewed contraband activity.
>
> In closing, let me say that the three elements of the bill all deserve to be passed without delay. It makes sense to implement a new Excise Act for addressing a longstanding need of both industry and government to rationalize the ships' stores provisions and to approve the tobacco tax increases for reducing tobacco consumption[1102].
>
> [the Court's emphasis]

[1633] It is interesting to note that a Senior Policy Analyst of the Canadian Cancer Society testified before the Standing Committee on Finance and the Standing Senate Committee on Banking, Commerce and the Economy in support of the increase of taxes on tobacco products provided for in Bill C-47. He presented a report to the committee including evidence regarding the impact of higher tobacco prices on tobacco use[1103].

[1634] It also appears from public documentation that the subsequent modifications of the *Excise Act, 2001* to increase the excise duty aim at reducing smoking, and not simply at increasing Crown revenue[1104].

[1635] In light of the above, the Court concludes that the Attorneys General have met their burden to demonstrate that the legislation pursues a valid, compelling and substantial objective.

[1636] As important as this objective might be, however, it does not override the Crown's obligation to consult in the absence of exceptional circumstances. Moreover, even if an objective is valid, the Court must examine whether the infringement is consistent with the Crown's fiduciary obligation to the Aboriginal peoples concerned.

[1102] *Idem*, p. 10044.

[1103] CANADA, HOUSE OF COMMONS, *Standing Committee on Finance*, 1st session, 37th Parliament, n°089, April 17th, 2002.

[1104] See for instance Exhibit AGC-41, *Equality Growth A Strong Middle Class – Budget 2018,* p. 4; AGC-36, *A Recovery Plan for Jobs, Growth and Resilience – Canada Budget 2021 (Volume 7)*, p. 4.

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D.1.3 The fiduciary obligations and the honour of the Crown

[1637] The honour of the Crown and its fiduciary obligations are not limited to consultation. Other factors must be taken into consideration. In *Tsilhqot'in*, the Supreme Court established that the "Crown's fiduciary duty infuses an obligation of proportionality into the justification process"[1105].

[1638] One of the elements of proportionality is that the incursion in the protected right must be necessary to achieve the government's goal. The Court has previously acknowledged that the price of tobacco is an efficient tool to reduce tobacco use.

[1639] The Court still wants to underline that the evidence does not indicate that the Mohawks of Kahnawà:ke do not value the protection of their community's health to the same degree as does the broader Canadian society. Indeed, historical evidence shows that the Mohawks of Kahnawà:ke have long been worried about the impact on their community of drugs, such as alcohol[1106].

[1640] The absence of consultation blocked the possibility of exploring avenues that might have led to achieving the government's goal, while limiting the infringement of an Aboriginal right. What is more, given that Indigenous peoples are amongst the first victims of tobacco use[1107], their input on a law aimed at reducing the use of tobacco was even more critical to the quest to achieve the government's goal.

[1641] Another important consideration in assessing the measures adopted by the Crown is that the benefits expected from achieving that goal must not outweigh the adverse effects on the Aboriginal interest.

[1642] It goes without saying that the benefits expected are huge, being the avoidance of the death of thousands of peoples. Nonetheless, the adverse effects must not be underestimated.

[1643] First, the legislation has an important impact on the criminalisation of members of the community. This is all the more important in the current context where the overrepresentation of Indigenous peoples in the criminal system is well known and alarming.

[1644] Second, the impact on economic development cannot be minimised. Peggy Mayo and Dr. Alfred testified as to the importance of the trade as a source of employment in the community and of financing for different initiatives. As well, Dr. Alfred explained how the tobacco trade allowed the men of the community to stay close

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[1105] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 87.

[1106] See for instance Exhibit WM-30D, Milton W. HAMILTON, *The Papers of Sir William Johnson*, vol. XIII, Albany, The University of the State of New York, 1962, p. 164-165.

[1107] Indigenous peoples have a prevalence of smoking two to five times higher than amongst non-Indigenous peoples: Exhibit AGC-35, *Canada's tobacco strategy, 2018 (volume 7),* p. 2; AGC-29, *New Directions for Tobacco Control in Canada, 1999 (Volume 5),* p. 6.

to their families, instead of leaving for the entire week, as was the case when the main source of employment was high-steel iron work.

[1645] Third, Dr. Alfred also testified on the importance of the tobacco industry in the eyes of the community, which sees it "as a means of developing [their] capacity to govern [themselves], and as a political act against the controlling nature of Canada's view of sovereignty and dismissal of [their] sovereignty as nation"[1108]. Thus, there is a negative symbolic impact that results, which also inevitably prejudices the relationship between the Mohawks of Kahnawà:ke and the Crown.

[1646] By themselves, these considerations might not be sufficient to prove a breach of the Crown's honour or of its fiduciary duties. Nevertheless, they underline the necessity for proper consultation, and this consultation did not take place.

[1647] For all those reasons, the Court concludes that there has been an infringement of the Crown's honour and of its fiduciary duties that is not justified. The Court must now turn to the infringement of the Covenant Chain.

D.2 Justification of the infringement of the Covenant Chain

[1648] There is not much that needs to be said in a case such as this, where the infringement in itself is the absence of discussion. The Attorneys General fail at the first step of the test, i.e., the duty to consult and accommodate.

[1649] In general, it will be difficult for the Attorneys General to demonstrate that a violation of an obligation to discuss is justified. Of course, there could be exceptional circumstances, such as a situation of emergency requiring immediate action. Such circumstances, however, were not present here. The *Excise Act, 2001* was the modernisation of a provision that had existed for years. Moreover, the government found the time to meet other members of the industry.

[1650] The Court, therefore, must conclude that the infringement of the Covenant Chain is not justified.

E. CONCLUSION

[1651] The Court concludes that the Attorneys General have not met their burden to prove that the infringements of the Aboriginal and treaty rights are justified.

VII. THE REMEDY

[1652] The last issue the Court must address is the question of the appropriate remedy.

[1108] Transcriptions, 2021-09-16, p. 11 (Alfred).

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[1653] On June 7th, 2018, it was decided that the constitutional challenge would be heard only once a jury would have rendered a verdict on the charges laid against the accused[1109].

[1654] On May 9th, 2019, a jury found the Applicants guilty of fraud, conspiracy and criminal organization offences in connection with the importation of bulk tobacco without payment of duties under the *Excise Act, 2001*. Once the verdict of guilt has been rendered, the jury was discharged.

[1655] This situation leaves the Court with the issue of the remedy when a jury, after a criminal trial, has found the accused guilty of offences based on a disposition which, by virtue of s. 35(1) and s. 52, is of no force and effect with respect to the Applicants.

A. POSITION OF THE PARTIES

A.1 The Applicants

[1656] The Applicants plead that the appropriate remedy is a stay of proceedings under s. 52 or s. 35(1). They consider that an acquittal is also available.

A.1.1 Stay under s. 24(1)

[1657] The Applicants state that they are not alleging an abusive process or prosecutorial misconduct and therefore they are not looking for a stay pursuant to s. 24(1)[1110].

A.1.2 Declaratory relief under s. 52 of the *Constitution Act, 1982* leading to a stay of proceedings or an acquittal

[1658] The Applicants initially sought a declaratory relief under s. 52 of the *Constitution Act, 1982* and wanted the Court to declare inapplicable both the relevant provisions of the *Criminal Code*[1111] and s. 42 of the *Excise Act*, *2001*[1112]. During the Opening Submissions, the parties made clear that the Applicants are no longer challenging the provisions of the *Criminal Code* themselves[1113].

[1109] *R.* v. *Hill*, 2018 QCCS 2635.
[1110] Final pleadings, 2022-10-28, p. 108, l. 1-5.
[1111] S. 380(1)(a) (fraud); s. 465(1)(c) Cr. C. (conspiracy), s. 467.11 Cr. C. (participation in the activities of a criminal organization) and s. 467.12 Cr. C. (commission of an offence for a criminal organization).
[1112] *Consolidated closing memorandum of fact and law of the Applicants*, para. 592-595.
[1113] Transcriptions, 2021-09-13, p. 163, l. 21- p. 170, l. 9 (opening submissions).

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[1659] Regarding the effect of the declaration, the Applicants believe that the Court could enter either a stay of proceedings or an acquittal on some or all the charges[1114]. However, given the circumstances of the case, and the participation of non-Indigenous parties regarding the charges of conspiracy, they accept that a stay of proceedings could be just and appropriate[1115].

[1660] The Applicants however consider that there are cogent arguments to support the availability of an acquittal as a remedy in this case. They notably refer to the common law power of the Superior Court to control its own process and procedure and to the fact that a motion to quash an indictment goes to the jurisdiction of the Court and that such motion may be brought at any time according to the jurisprudence of the Supreme Court. They also consider that it is more consistent with the Constitution that the judge deciding the constitutional issue retains jurisdiction to acquit. They refer to the text of s. 11(d), which states that "any person charged with an offence has the right to be presumed innocent until proven *guilty according to law*" (emphasis by the Applicants). For the Applicants, "it challenges our assumptions about the rule of law to accept that a jury can find a person charged with an offence guilty under a law that is subsequently determined to be constitutionally inapplicable to that person"[1116].

[1661] In reply, the Applicants explain that their understanding of Justice Pennou's decision regarding bifurcation is that the Court would retain the same jurisdiction as in a case where a judge is sitting alone. Their understanding was that the jury part would go first, but the ultimate outcome would be "defeasible" and overruled on constitutional grounds[1117].

A.1.3 Stay of proceedings pursuant to s. 35(1)

[1662] The Applicants also consider a possible stay of proceedings pursuant to s. 35(1). After reminding their position regarding their procedural treaty rights encompassed in the Covenant Chain, they plead that "Crown violations of procedural treaty rights can entitle aboriginal claimants to remedies or declarations in respect to the Honour of the Crown"[1118].

[1663] For the Applicants, it is dishonourable for the Crown to not respect its duty to consult a treaty partner while relying on criminal law enforcement to regulate the conduct of individual beneficiaries of the substantive right to trade[1119]. They argue that if a stay of proceeding is available as a remedy for Crown conduct that either

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[1114] *Consolidated closing memorandum of fact and law of the Applicants*, para. 596, 599.
[1115] *Idem,* para. 597-598.
[1116] *Idem*, para. 601; Final pleadings, 2022-04-04, p. 157, l. 9 – p. 166, l. 22.
[1117] *Idem*, p. 157, l. 14- p. 158, l. 17.
[1118] *Consolidated closing memorandum of fact and law of the Applicants*, para. 609, quoting *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 CSC 69, para. 57.
[1119] *Idem*, para. 610.

compromises the fairness of an accused's trial or risks undermining the integrity of the judicial process, a Crown conduct inconsistent with the Honour of the Crown and which undermines the collective rights and interests of an Indigenous people also warrants a stay[1120].

[1664] The Applicants submit that the « impossibility of judicial supervision of complex aboriginal and treaty rights […] and the inability of courts to give effect to historic infringements and non-implementation by the Crown of treaty rights […] has led to the pronouncement of novel remedies tailored to the unique circumstances of the constitutional disputes involving Aboriginal or Métis peoples"[1121].

[1665] Therefore, they consider that if the Court concludes that the Crown has failed to discharge its constitutional duty to consult in respect to the tobacco trade of the Mohawks of Kahnawà:ke and to reach an accommodation based on their rights on the one hand, and that the activities of the Applicants fall within a reasonable accommodation of those rights on the other hand, it would then be appropriate and just to pronounce a stay of proceedings under s. 35(1)[1122].

A.2 The MNCC

[1666] Essentially, the MNCC considers that the appropriate remedy is a declaration by the Court and an adjournment to allow negotiations.

[1667] The MNCC pleads that the prerequisites for granting a declaratory relief are present: the Court has the required jurisdiction, the unfulfilled treaty rights are real, the MNCC and the Applicants have a genuine interest in their fulfillment and the Attorneys General oppose any recognition of those rights. A declaration "would underline the importance in the reconciliation endeavour of the maintenance of the honour of the Crown through keeping treaty promises and actively maintaining treaty relationships"[1123].

[1668] The MNCC argues that a stay is not an appropriate remedy if it means that they will not be able to come back to the Court if negotiations fail[1124].

A.3 The Attorneys General

[1669] The Attorneys General oppose a remedy pursuant to s. 35(1). Granting a remedy under s. 35(1) in criminal proceedings would be entirely novel and is not

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[1120] *Fresh as amended consolidated constitutional pleading*, para. 153.
[1121] *Consolidated closing memorandum of fact and law of the Applicants*, para. 617, quoting *Manitoba Métis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14 et *Ahousaht Indian Band and Nation* v. *Canada (Attorney General)*, 2021 BCCA 155.
[1122] *Consolidated closing memorandum of fact and law of the Applicants*, para. 618.
[1123] *MNCC final pleadings*, para. 376-377.
[1124] Final pleadings, 2022-01-31, p. 22, l. 5-21.

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necessary[1125]. They insist on the difference between a civil proceeding where an Indigenous community or Indigenous individuals would frame the litigation, and a criminal proceeding where the debate is framed by the charges and the activities of the Accused[1126]. The question in a criminal proceeding is only whether the charges against the Accused can be sustained[1127].

A.4 The Prosecution

[1670] The Prosecution explains that there are only two existing remedial schemes: one under s. 24(1) of the *Charter* and one under s. 52(1) of the *Constitution Act, 1982*. These two schemes serve different remedial purpose: s. 52(1) is a remedy for laws that violate *Charter* rights either in purpose or in effect, while s. 24(1) is a remedy for government acts that violate *Charter* rights[1128].

[1671] By contrast, s. 35(1) is not in itself a remedial scheme. The Prosecution argues that it would undermine the framework established by the Supreme Court in *Ferguson* to consider s. 35(1) as generating an autonomous remedy[1129]. The Charter must be seen as a whole, and in that context, s. 52 is the disposition which concern the validity of legislation. It has a specific role with regards to the validity or the effect of legislation, and if a case falls within its purview, there is no need to create a new remedy[1130].

[1672] In the case at hand, the Prosecution considers that there is no allegation of abuse of process or prosecutorial misconduct, and therefore, the appropriate remedy is to be found under s. 52 of the *Constitution Act, 1982*[1131]. Moreover, remedies under 24(1) of the *Charter* are not available, as s. 35(1) of the *Constitution Act, 1982*, is not part of the *Charter*[1132].

[1673] The normal remedy should be in principle a declaration that s. 42 of the *Excise Tax, 2001*, is of no force and effect with respect to the Accused, which would in turn lead to their acquittal[1133]. However, in the present case, the Applicants have already been found guilty by a jury. Accordingly, the Prosecution states that acquittal is no

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[1125] Final pleadings, 2022-03-28, p. 122, l. 5-10.
[1126] *Idem*, p.122, l. 17- p. 123, l. 4.
[1127] *Idem*, p. 123, l. 5, quoting *R.* v. *Marshall*, [1999] 3 S.C.R. 533, para. 7, 11, 13.
[1128] *Re-amended response of the Prosecution to the Accused's "fresh as amended consolidated pleading", on the matter of the appropriate constitutional remedy in a criminal context*, para.14-20, quoting *R.* v. *Ferguson*, 2008 CSC 6.
[1129] Final pleadings, 2022-03-28, p. 146, l. 23- p. 147, l. 1.
[1130] Final pleadings, 2022-03-29, p. 7, l. 9- p. 9, l. 18, quoting *R.* v. *Ferguson*, 2008 SCC 6, para. 63-66.
[1131] *Re-amended response of the Prosecution to the Accused's "fresh as amended consolidated pleading", on the matter of the appropriate constitutional remedy in a criminal context*, para. 21.
[1132] *Idem*, para. 37.
[1133] Final pleadings, 2022-03-29, p. 12, l. 8 – p. 23, l. 2, quoting notably *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 116-117; *R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 60-61; *R.* v. *Desautel*, 2021 SCC 17, para. 9, 14.

longer an option[1134]. The only option to enforce a declaration under s. 52 of the *Constitution Act, 1982*, would be a common law stay of proceedings[1135]. The Prosecutor makes a parallel with the "arrest of judgment", a common law stay of proceedings before the *Charter*, which was ordered in a situation where, after a guilty verdict but before sentencing, the offences were found to be abrogated or not in force yet[1136].

[1674] Finally, the Prosecution asserts that there is no automatic impact on the continued detention of things seized, but it is not a contested question[1137].

B. THE LAW

[1675] Usually, when an Aboriginal or treaty right is recognized under s. 35(1), the impugned legislation is declared of no force and effect for the accused, which leads to an acquittal[1138].

[1676] This solution is consistent with s. 11(*g*) of the *Charter* which states that "[a]ny person charged with an offence has the right […] not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations".

[1677] The question takes on a new dimension when a verdict of guilt has already been rendered by a jury after a criminal trial, the verdict has been recorded and the jury has been discharged.

[1678] It is well-established that the "sacrosanct" nature of the jury verdict makes it exceptional to vacate an adjudication of guilt[1139]. The Supreme Court reiterated in

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[1134] *Re-amended response of the Prosecution to the Accused's "fresh as amended consolidated pleading", on the matter of the appropriate constitutional remedy in a criminal context*, para. 31-33; Final pleadings, 29-03-2022, p. 49, l. 1- p. 60, l. 8, quoting *R*. c. *Alexandre*, 2010 QCCS 2640 (affirmed 2012 QCCA 935 and 2012 QCCA 1355, leave to appeal refused, SCC, 20-12-2012, n°34998 and 35019), para. 24, 27, 30; *Durand* c. *R.*, 2012 QCCS 2508 (affirmed 2019 QCCA 1416, leave to appeal refused, SCC, 09-04-2020, n°38876), para. 11-18; *R.* v. *Henderson*, 2004 CanLII 33343 (Ont. C.A.) (leave to appeal refused, SCC, 30-06-2005, n°30711), para. 29-31.

[1135] *Idem*, para. 38-46; Final pleadings, 2022-03-29, p. 27, l. 15- p. 31, l. 15.

[1136] *Re-amended response of the Prosecution to the Accused's "fresh as amended consolidated pleading", on the matter of the appropriate constitutional remedy in a criminal context*, para. 42.1-42.4; Final pleadings, 2022-03-29, p. 31, l. 16 -p. 43, l. 21, referring to *R.* v. *Jacobson*, 1988 CanLII 5253 (SKCA), and Bryan A. GARNER (ed.), ***Black's Law dictionary***, 11th ed., 2019, online (WestLaw).

[1137] Final pleadings, 2022-03-28, p. 147, l. 11-15.

[1138] See for instance *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 116-117; *R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 60-61.

[1139] *R.* v. *Henderson*, 2004 CanLII 33343 (Ont. C.A.) (leave to appeal refused, SCC, 30-06-2005, n°30711), para. 30.

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Burke the general rule enunciated in *Head* that changes to a criminal verdict post-discharge are prohibited. According to the general rule "post-discharge, a trial judge is *functus* and has no authority to alter a recorded verdict"[1140].

[1679] In *Burke*, the intended verdict by the jury was to declare the accused guilty. However, for several reasons, the trial judge, court registrar and both counsels heard "not guilty". The Supreme Court recognized that it was a rare exception to the rule that the trial judge has no authority to alter a recorded verdict. The judge was allowed to recall the jury to inquire into the alleged error and correct the recorded verdict accordingly. The Supreme Court thus recognizes an exception when there is an alleged error that do not challenge the validity of the verdict or the deliberation or mental processes of the jurors[1141]. By opposition, the alleged error must not "involve the jury reconsidering its verdict or completing its deliberations"[1142].

[1680] In *Henderson*[1143], the Ontario Court of Appeal reminded the limited jurisdiction of a trial judge once a jury has rendered its verdict:

> [29] A trial judge's jurisdiction to alter a jury's verdict, order a stay or declare a mistrial after a jury verdict is extremely limited. The normal rule is that following the delivery and recording of a verdict by the jury, the trial judge is *functus* in respect of that verdict, which cannot be altered, except on appeal. The rule is somewhat different in a judge-alone trial. In that case, where the trial judge has entered a verdict of acquittal, the verdict is final and cannot be subsequently altered by the trial judge. However, where a trial judge convicts an accused but has not yet sentenced him or her, the trial judge is not *functus* in respect of that charge, and can, in exceptional circumstances, vacate the adjudication of guilt before sentencing: R. v. Lessard (1976), 1976 CanLII 1417 (ON CA), 30 C.C.C. (2d) 70 at 73-75. (Ont. C.A.); R. v. Benns, [2004] O.J. No. 182 (C.A.).

[1681] The Ontario Court of Appeal then enunciated some narrow exceptions to the rule, i.e. where the jury does not render the verdict it intended and where the accused raises a defence of entrapment. The Court developed on the latter exception as follows:

> [31] The second exception is where the accused wants to raise the defence of entrapment. Because entrapment is a defence that does not vitiate the culpability of the accused but involves unlawful conduct in the procurement of the offence by the state, the defence is determined by the trial judge only after the jury has found the accused guilty. That verdict is not impugned by

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[1140] *R.* v. *Burke*, 2002 SCC 55, para. 52; *R.* v. *Head*, [1986] 2 S.C.R. 684.
[1141] *R.* v. *Burke*, 2002 SCC 55, para. 53.
[1142] *Idem*, para. 53.
[1143] *R.* v. *Henderson*, 2004 CanLII 33343 (Ont. C.A.) (leave to appeal refused, SCC, 30-06-2005, n°30711). See for more recent application of *Henderson*: *R*. v. *Miguel Orlondo Zavala-Martinez*, 2019 ONSC 1087; *R.* v. *Maligaspe*, 2023 BCSC 126; *R.* v. *Taylor*, 2011 ONSC 5734.

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> the stay application. Procedurally, the trial judge does not record the jury's verdict of guilt, but conducts the stay application, and if the accused satisfies the judge on a balance of probabilities that he or she was entrapped, the judge may order a stay on the basis of abuse of process: R. v. Mack (1988), 1988 CanLII 24 (SCC), 44 C.C.C. (3d) 513 (S.C.C.).

[1682] In *Henderson*, the trial judge had concluded that he had jurisdiction to decide on a motion for a stay for abuse of process after the jury had found the accused guilty and the verdict had been registered and the jury discharged. The Court of Appeal concluded that it was an error:

> [46] However, what is clear is that such motions must be brought at a point when the trial judge is in a position to deal with the matter with the jury, and if a stay is not appropriate, to give a remedy during the trial. Counsel cannot save such motions to be brought only if the accused is convicted. Once the jury has delivered its verdict, matters that involve the conduct of the trial and that could have affected the jury's verdict can only be raised on appeal.

[1683] In *Drouin* c. *R.*[1144], the Quebec Court of Appeal was seized with the question of whether a Court was *functus officio* to decide on a motion under s. 11(*b*) presented after a guilty verdict has been rendered by a jury.

[1684] For the Court of Appeal, the question in *Head* was to know if a jury, once discharged, could be called back to re-examine its verdict; or to complete or rectify the communication and inscription of the verdict which they have attained before being discharged. The context was therefore very different than in a motion on unreasonable delay. In *Henderson*, the decision was founded on the fact that the Court could have ordered other remedies than a stay of proceedings if it had been raised earlier. In a *Jordan* motion, on the contrary, the remedy would always be the same, i. e. a stay of proceedings, whatever the timing of the motion. The Court of Appeal concluded that a trial judge is not *functus officio* to order a stay of proceedings under s. 11(*b*), despite a verdict of guilt rendered by a jury.

[1685] In *Jacobson*, the Saskatchewan Court of Appeal was seized of an appeal of an order to set aside a verdict of guilt by a jury. The trial judge had determined that the indictment was null as the incident giving rise to the charge happened before the offence charged came into existence. The Court of Appeal considered that the judge had no power to amend the verdict of the jury or substitute a conviction for a lesser included offence, and that "his only power was to arrest judgment and to discharge the appellant from the indictment"[1145] under s. 672 of the Criminal Code (then s. 600) which reads as follows:

[1144] *Drouin* c. *R.*, 2020 QCCA 1378 (leave to appeal refused, SCC, 6-05-2021, n°39494, 39498).
[1145] *R.* v. *Jacobson*, 1988 CanLII 5253 (SKCA), para. 12.

> Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before April 1, 1955, or any practice or form that existed immediately before April 1, 1955, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is inconsistent with this Act.

[1686] The Saskatchewan Court of Appeal reminds s. 1007, a provision of the former *Criminal Code*[1146], which stated that an "accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence". The Court continues:

> [15] Section 1007 was a codification of English common law. Three cases, which are the mirror image of this case, state the power and duty to arrest judgment: R. v. Denton (1852), Dears. 3; 18 Q.B. 761; 19 L.T. 216; 21 L.J.M.C. 207; 17 Jur. 453; R. v. Mawgan (Inhabitants) (1830), 8 A. & E. 496; 7 L.J.M.C. 498; 2 J.P. 517; 2 Jur. 841; and R. v. McKenzie (1820), R. & R. 429. They are all cases where the accused was charged in an indictment based on legislation that was repealed before trial. In each case the judgment was arrested after a finding of guilt by a jury. That power and duty still exists in Canadian law and the trial judge properly exercised it in this case. See also R. v. Fortier (1964), 1963 CanLII 1108 (QC CA), 41 C.R. 211 (Que. Q.B., Appeal Side), where a conviction by a jury was quashed on appeal because the offence was not proclaimed in force at the time of the alleged offence[1147].
>
> [the Court's emphasis]

C. ANALYSIS

[1687] The Court retains that the current jurisprudence defines very strictly the conditions to enter an acquittal once a jury has rendered a guilty verdict and has been discharged. These conditions are not met. In the present case, it is more than correcting an error in the recording of the true intention of the jury. It requires putting aside the verdict of the jury to substitute the verdict of the trial judge. Even though in the context of a directed verdict, a judge might withdraw the case from the jury and enters the acquittal personally, in such situation no verdict has yet been rendered.

[1688] There seems to be more room in the jurisprudence when the remedy sought is a stay of proceedings, as the exceptions on entrapment[1148] and s. 11(*b*) motion demonstrate.

[1146] *Criminal Code*, R.S.C. 1927, c. 36.

[1147] *R.* v. *Jacobson*, 1988 CanLII 5253 (SKCA), para. 15.

[1148] Still, the judge in principle does not record the jury's verdict of guilt before deciding on the entrapment motion: *R.* v. *Henderson*, 2004 CanLII 33343), para. 31 (Ont. C.A.) (leave to appeal refused, SCC, 30-06-2005, n°30711.).

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[1689] After careful considerations, the Court considers that the closest situation to the present circumstances is the case where an accused has been found guilty by a jury of a non-existent offence and that a Tribunal became aware of the situation before sentencing, as illustrated in *Jacobson*. In such circumstances, the solution is not an acquittal but an arrest of judgment under s. 672 Cr.c.

[1690] It is true that if there had not been a bifurcating hearing or if the judge was sitting alone, the Applicants would have been entitled to an acquittal. While the Court finds this observation puzzling, there are important considerations that justify the sacrosanct nature of the jury verdict. As the Applicants expressed that they would be satisfied by a stay of proceedings, it is unnecessary to engage in a debate that could shake this principle. The common law stay of proceedings is an adequate remedy to the exceptional circumstances of this case.

[1691] As it is not necessary to address the question, and that the parties have raised serious arguments which do not allow a succinct answer, the Court will show restraint and leave the debate on the possibility of a stay of proceedings under s. 35(1) to another case where no other options will be available.

D. CONCLUSION

[1692] The Court concludes that the criminal procedures against Derek White and Hunter Montour should be permanently stayed.

VIII. CONCLUSION

[1693] **FOR THESE REASONS, THE COURT:**

[1694] **GRANTS** the *Fresh as amended consolidated constitutional pleading*;

[1695] **DECLARES** section 42 of the *Excise Act, 2001,* S.C. 2002, c. 22, constitutionally inapplicable and inoperative under section 52 of the *Constitution Act, 1982* in respect of the Applicants Derek White and Hunter Montour, as it violates their Aboriginal and treaty rights as guaranteed by sec. 35(1) of the *Constitution Act, 1982*;

[1696] **ORDERS** a permanent stay of the criminal proceedings against Derek White and Hunter Montour.

_____

SOPHIE BOURQUE, J.S.C.

2023 QCCS 4154 (CanLII)

THE FRESH AS AMENDED CONSOLIDATED CONSTITUTIONAL PLEADING

Mtre James O'Reilly
Mtre Nathan Richards
Mtre Gordon Campbell
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Counsels for Derek White and Hunter Montour

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Mtre Geneviève Bourbonnais
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Mtre David Lucas
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Mtre Paul Williams
Counsel for the MNCC

Mtre Vincent Boutet-Lehouillier
Mtre Patrice Peltier-Rivest
Counsels for his Majesty the King (DCPP)

Hearing dates evidence: September to December 2021
Hearing dates final pleadings: January to April 2022

CRIMINAL JURY TRIAL

Mtre David Moffat
Mtre Corinne Girard
Mtre Guy Marengère

Counsels for his Majesty the King (DCPP)

Mtre Pierre L'Écuyer
Counsel for Derek White

Mtre Louis Gélinas
Counsel for Hunter Montour

2023 QCCS 4154 (CanLII)

Hearing dates March to May 2019

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APPENDICES

1- TREATY OF 1664

2- TREATY OF 1677

3- COUNCIL OF JULY 14, 1701

4- COUNCIL OF JULY 15 AND 16, 1702

5- COUNCIL OF MARCH 13, 1725

6- COUNCIL OF SEPTEMBER 26 TO 29, 1725

7- TREATY OF 1735

8- TREATY OF 1742

9- COUNCIL OF APRIL 24 TO 26, 1748

10- COUNCIL OF OCTOBER 30 AND 31, 1753

11- TREATY OF 1754

12- TREATY OF KAHNAWÀ:KE, 1760

APPENDIX

1	The Selected Documents: Treaties and Tobacco Trade, Tab 1, Treaty of 1664, O'Callaghan (1853) *Documents Relative to the Colonial History of the State of New York, Vol. III*, "Articles between Col. Cartwright and the New York Indians", pp. 67-68. Exhibit AGC 70 D, Vol.1, Tab 34.
2	The Selected Documents: Treaties and Tobacco Trade, Tab 2, Treaty of 1677, *The Livingston Records*, 1666-1723, Lawrence H. Leder ed. (The Pennsylvania Historical Association, 1956), pp. 38-39. Exhibit Key-1.
3	The Selected Documents: Treaties and Tobacco Trade, Tab 3, Council of July 14, 1701. O'Callaghan ed. (1854) *Documents Relative to the Colonial History of the State of New York,* Vol. IV, pp. 692-693. Exhibit WM- 30C. Vol.1, Tab 5.
4	The Selected Documents: Treaties and Tobacco Trade, Tab 4, Council of July 15 and 16, 1702, O'Callaghan (1854) *Documents Relative to the Colonial History of the State of New York*, Vol. 4, pp. 982-985. Exhibit MW-30C, Vol.1, Tab.6
5	The Selected Documents: Treaties and Tobacco Trade, Tab 9, Renewal of the Covenant Chain: Council of March 13,1725, *Minutes of the Albany Commissioners of Indian Affairs,* Att a Meeting of the Com.rs of the Indian affairs in Albany.
6	The Selected Documents: Treaties and Tobacco Trade, Tab 10, Council of September 26 to 29, 1725, *Minutes of the Albany Commissioners of Indian Affairs*, Att a meeting of com.rs of Ind.n Affairs in Albany, Sept. 27-29, 1725.

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APPENDIX

7	The Selected Documents: Treaty and Tobacco Trade, Tab 12, Treaty of 1735, *Minutes of the Albany Commissioners of Indian Affairs, At a meeting of y.e Commissioners y.e 30 July 173[5] & Peter Wraxall, An Abridgment of the Indian Affairs* (Cambridge: Harvard University Press, 1915), August 1, 1735, pp. 192-195. Exhibit WM-30C, Vol.1, Tab 10.
8	The Selected Documents: Treaties and Tobacco Trade, Tab 17, Treaty of 1742, *Minutes of the Albany Commissioners of Indian Affairs, Att A Meet.g of the Com.rs of Indian Affairs at Albany 28* Septemb.r 1742. Exhibit WM-30C, Vol.1, Tab 11.
9	The Selected Sources from Dr. Beaulieu's Report in Reply to Dr. Parmenter, Renewal of the Covenant Chain: Council of April 24-26, 1748, *The papers of Sir William Johnson, A conference at Onondage*, April 24th, 1748, PSWJ, 1:157, 158,162. Exhibit AGC-70E, Vol.2, Tab 58.
10	The Selected Documents: Treaties and Tobacco Trade, Tab 18, Renewal of Covenant Chain: Council of October 30 and 31, 1753, *Minutes of the Albany Commissioners of Indian Affairs*, at a Board of Commissioners met at Robert Lotteridges.
11	The Selected Documents: Treaties and Tobacco Trade, Tab 19, Treaty of 1754, *Minutes of the Albany Commissioners of Indian Affairs,* At a Meeting of the Commissioners of Indian Affairs at the House of Robert Laterage, August 13-14, 1754. Exhibit WM-30C, Vol.1, Tab 15.
12	The Selected Documents: Treaties and Tobacco Trade, Tab 20, Treaty of Kahnawà:ke, 1760, *Papers of Sir William Johnson, (Albany, 1962), Vol. 13, pp. 163-166, Indian Conference, Montreal*, September 15 and 16, 1760.Exhibit WM-30D, Vol. 1, Tab 33.

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APPENDIX 1

[1] The Selected Documents: Treaties and Tobacco Trade, Tab 1, Treaty of 1664, O'Callaghan (1853) *Documents Relative to the Colonial History of the State of New York*, Vol. III, "Articles between Col. Cartwright and the New York Indians", pp. 67-68. Exhibit AGC 70 D, Vol.1, Tab 34.

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Col. Nicolls to the Governor and Council of Boston.

[New England, I. 204.]

To the Governr and Councill of Boston.

Gentlemen.

I have herewith sent yow a copy of a Cõmission from the Lds Commissioners of Prizes wherein I am empowered as one of the Sub-Cõmissioners for New England whilst His Maty shall be in hostility with the Dutch. In prosecution of the trust reposed in mee as Sub-Cõmissioner I am oblig'd to give yow advertisement hereof, and that yow will please to give strict order in all your ports from time to time that seizure be made of all and every Dutch ship vessell or goods belonging to the States of the United Provinces of the Netherlands their subjects or inhabitants within any of their dominions, as also if any prizes shall be brought into any of your ports by any persons cõmissionated thereunto by his R. Hs the Duke of Yorke, that yow will please to cause the same to be preserv'd entire without imbezlement, with all their papers, bills of lading or other writinges, untill such a legall prosecution can be made as is directed by His Maties authority to the Lds Cõmissioners, and given at large in their Lps instructions to mee and Capt. Phillip Carteret, as Sub-Cõmissioners in N. England; wherein your assistance and concurrence is requisite for His Maties service, as also that some able and fitting persons be chosen in your Colony to sitt as a Court of Admiralty when occasion presents. Be pleased also to remitt unto me Yor proceedings herein, according to the resolutions yow shall take; and if in this or any other quality I can render myselfe serviceable to yourselves you may cõmand mee as

[About July,] 1664. Yor affte humble Servant

R. Nicolls.

Articles between Col. Cartwright and the New York Indians.

[New England, I. 207.]

Articles made and agreed upon the 24th day of September 1664 in Fort Albany between Ohgehando, Shanarage, Soachoenighta, Sachamackas of ye Maques; Anaweed Conkeeherat Tewasserany, Aschanoondah, Sachamakas of the Synicks, on the one part; and Colonell George Cartwright, in the behalf of Colonell Nicolls Governour under his Royall Highnesse the Duke of Yorke of all his territoryes in America, on the other part, as followeth, vizt —

1 Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had from the Dutch.

2. That if any English Dutch or Indian (under the protecctõn of the English) do any wrong injury or violence to any of ye said Princes or their subjects in any sort whatever, if they complaine to the Governor at NewYorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccõn shall be given; and the like shall be done for all other English Plantations.

3. That if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be

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made to y^e^ Sachims and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaccòn shall be given to any of His Ma^ties^ subjects in any Colony or other English Plantacòn in America.

4. The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the protecccòn of His Ma^tie^ are included in these Articles of Agreement and Peace;

In confirmacòn whereof the partyes above mencòned have hereunto sett their hands the day and yeare above written

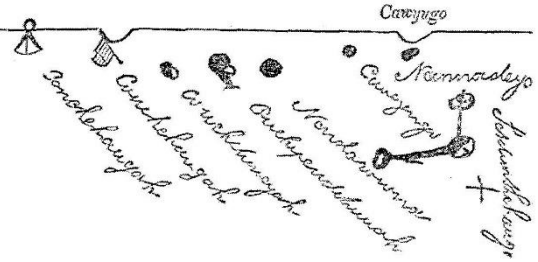
GEORGE CARTWRIGHT

In the presence of

T. Willett
John Manning
Tho. Breedon
Dan. Breadhead

Smith John his marke

Stephen an Indian his marke



THESE ARTICLES following wer likewise proposed by the same Indian Princes & consented to by Colonell Cartwright in behalfe of Colonell Nicolls the 25^th^ day of September 1664.

1 That the English do not assist the three Nations of the Ondiakes Pimekooks and Pacamtekookes, who murdered one of the Princes of the Maques, when he brought ransomes & presents to them upon a treaty of peace.

2. That the English do make peace for the Indian Princes, with the Nations down the River.

3. That they may have free trade, as formerly.

4. That they may be lodged in houses, as formerly.

5. That if they be beaten by the three Nations above mencòned, they may receive accommodacòn from y^e^ English.

Col. Nicolls to the Secretary of State.

[State Paper Office, Trade Papers. XVI. 42.]

Fort James in New Yorke
this day of October 1664.

Right Hon^ble^

Since my last by Capt. Hill and Capt. Groves here is arrived Capt. Hyde, to whose more ample relation of the reducing Delaware Bay, I must referre my selfe. My instructions to Sir Rob^t^ Carr tooke the effect which was design'd, for by a distinct treaty and agreement with the

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APPENDIX 2

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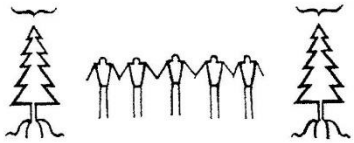
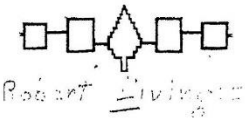


THE LIVINGSTON INDIAN RECORDS

1666-1723



Edited by
LAWRENCE H. LEDER

THE PENNSYLVANIA HISTORICAL ASSOCIATION
GETTYSBURG, PA.
1956

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Proposicons made to the Mohekandrs and other River Indians by Major John Pynchon and James Richards Genten Commissioners from ye Colonies of Mattasshusetts & Cannatticut in ye Court house at Albany ye 24th of Aprill 1677:

Arnout Cornelisse Interpreter

Wie are informed yt you these river Indians haue not engaged in ye late unhappy Warr against ye English,[1] but yt you have satt still according to ye Comand of ye Honble: Governr of New Yorke &c. And wee being of ye same naton, under ye same Prince, and soe as one With ye sd Governr; Wee doe therefore acknowledge these River Indians or freinds and Neighbours, expecting well from you to carry it towards us as frinds & good neighbours and soe demeaning of your selves. Wie looke yt you should timely discover any attempte of Mischeif yt you may heare of agst ye English, and yt you doe not henceforward harbour or Entertaine any yt shall remain or enemies, and yt have evill designes agst us, and in all things act as good and true freinds to ye English naton, and wee shall bee and remaine ye same to you, and desire yt ye sd freindship may be With these Indians among us; Doe prest 2 Belts and some Zeawant

True Coppy Attests /S/ John Pynchon
/S/ James Richards

The Mahikanders and other River Indians Sachems Answer upon ye Prop: of Major Pynchon &c: in ye Court 24 April 1677

1. The Christians and wee many years ago have always been freinds & brethren and now of Late years ye Govr. Genl: is become or father, we being now butt a very few, and ye Christians of ye North are our Bretheren & wee are glad to see each other att this present time for to speak & give Presents on to ye other. do give a hank of Zeaut:
2. Wee are glad Brethren to see yu in friendship and do thank

[1] The attack by the Eastern Indians on the settlers in the Kennebec area of Maine. Andros' "Short Account of . . . New-York," c. 1678. O'Callaghan, 3: 255.

He crossed Lake Ontario and went up the Oswego River. Then, crossing Oneida Lake, after a short carry he paddled down the Mohawk River until he reached a village of the Flint People (Mohawks). As was the custom for travelers at that time, he made a fire near the village and waited for an invitation to enter.

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APPENDIX 3

The Selected Documents: Treaties and Tobacco Trade, Tab 3, Council of July 14, 1701. O'Callaghan ed. (1854) *Documents Relative to the Colonial History of the State of New York*, Vol. IV, pp. 692-693. Exhibit WM- 30C. Vol.1, Tab 5.

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Propositions of Canada Praying Indians and the Answers thereunto.

[New-York Papers, L. M., M 42.]

Propositions made by the Sachims of the Canada praying Indians, belonging to their Castle called Cachanuage, to the Comissioners for the Indian Affaires in Albany the eight and twentieth day of June 1700.

Sagronwadie Cheife Sachim, Speaker

Brethren

Wee are come here to trade with you as formerly, and therefore desire you to use us well, and receive us kindly being only come upon the score of trade; doe give 10 Bever skins.

Brethren

Wee desire you to be kind to us and not too dear with your goods, for I made up this Company and incouraged them to come hither; therefore be cheap. Doe give 10 Bever skins.

Brethren

I must again repeat and desire you to be kind to our people, and let them have such things as they have occasion for, reasonable; for wee see the loaves of bread are but small, and the Sachims of the Five Nations that are here tell us that if we goe lye in your houses you will not suffer us to carry any bevers from thence to other houses, but compell us to trade them at yo^{r} own prices. Doe give 9 Bever skins.

In all 29 Bevers w. £41 English

Answer to the Sachims of Cachneuage.

Brethren.

We have taken your proposition into consideration and do assure you of kind entertaintment, and you shall have the privilege to go into your friends houses where you please, and if you find you are not well used by them, you may remove to any other house, to your own content and satisfaction. They had some Wampum given them.

Propositions made by the Com^{rs} for manageing the Indian Affaires to the Sachims of the Canada Praying Indians, in Albany the third of July 1700.

Brethren.

We are glad to see you here and we doubt not but you have received full satisfaction and content in that matter you came for, and found goods cheap & reasonable; and although you have deserted your native country and gone over to strangers where every thing is much dearer then here, yet you see we make no difference, but treat you as kindly and friendly as our own people.

As you are sensible you have the same freedom of trade as our selves, so when ever you or any of your people design the like, you shall allwayes have the same protection; and since you alledge that [it] is your love to the Xtian religion, which makes you desert your native country, and run to Canada, to be instructed of the French priests, we hope in a short time to have Protestant Ministers to instruct your kindred and relations in the Xtian true religion, which togeather with your love for your country hope will prevaile upon you to come and live among your kindred, your fires burning still in your castles, the same houses you left being still ready to receive you, with all the stores of plenty to make you live for ever happy.

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We do give you a fatt hog, some venison and a barrill of strong beer to be merry with your friends of the Five Nations that are here, and 21 pounds of powder and 14 barrs of lead, to hunt provision by the way.

The Canada Praying Indians repley; the said Sagrouwadie their Sachim being Speaker.

Wee are now come to trade and not to speake of religion, only thus much I must say, all the while I was here before I went to Canada I never heard any thing talked of religion or the least mention made of converting us to the Xtian faith, and we shall be glad to hear if at last you are so piously inclined to take some pains to instruct your Indians in the Xtian Religion. I will not say but it may induce some to return to their native country.

I wish it had been begun sooner that you had had ministers to instruct your Indians in the Xtian faith; I doubt whether any of us ever had deserted our native country; but I must say I am solely beholden to the French of Canada for the light I have recéd. to know there was a Saviour born for mankind, and now we are taught God is every where, and we can be instructed at Canada, Dowaganhae or the utter most part of the earth as well as here.

Rob^{t} Livingston Sécry
for the Indian Affairs.

A true Copy
(signed) Bellomont.

Propositions of the Five Nations to the Commissioners of Indian Affairs.

[New-York Papers, L. M., M 43.]

Propositions made by y^{e} Sachims of the Five Nations to y^{e} Commissioners for the managing the Indian Affairs; in Albany y^{e} 30th of June 1700.

Present—P. Schuyler Esq^{r}
P. Van Brugh Mayor
Jan Jansz Bleeker Record^{r}
Johannes Schuyler, David Schuyler, Johannes Rooseboom, Evert Wendell, Wessel Ten. Broek } Ald^{n}
Tho: Williams Sheriffe

Dekanissore Speaker
Onado, another Onondager
Sedgehewanne a Cayouger
Suchquaniende, Scanagrechties } Sinnekes

These five are impowered by the Five Nations who spoke in y^{e} presence of Aqueendero & Henry y^{e} Maquase.

Brother Corlaer & quider

Wee are come here with a lamentable complaint that the Dowaganhaes or far Nations have now again kill'd many of our people att their hunting; all which is done by y^{e} instigation of y^{e} French as y^{e} said far Indians themselves confess; nay some of y^{e} said Nations have warned us to be upon our guard, for y^{e} French charged them to doe itt.

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APPENDIX 4

The Selected Documents: Treaties and Tobacco Trade, Tab 4, Council of July 15 and 16, 1702, O'Callaghan (1854) *Documents Relative to the Colonial History of the State of New York*, Vol. 4, pp. 982-985. Exhibit MW-30C, Vol.1, Tab.6

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DOCUMENTS

RELATIVE TO THE

COLONIAL HISTORY

OF THE

STATE OF NEW-YORK;

PROCURED IN

HOLLAND, ENGLAND AND FRANCE,

BY

JOHN ROMEYN BRODHEAD, ESQ.,

AGENT,

UNDER AND BY VIRTUE OF AN ACT OF THE LEGISLATURE ENTITLED "AN ACT TO APPOINT AN AGENT TO PROCURE AND TRANSCRIBE DOCUMENTS IN EUROPE RELATIVE TO THE COLONIAL HISTORY OF THE STATE," PASSED MAY 2, 1839.

EDITED BY

E. B. O'CALLAGHAN, M. D.

VOL. IV.

ALBANY:

WEED, PARSONS AND COMPANY, PRINTERS.

1854.

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As to what you say about 8 of your nations warring with the Naudowasses, when your Sachims come next year I will be ready to give them my best advise about that subject till when I shall suspend my Judgment.

P SCHUYLER
ROB^{t} LIVINGSTON Sêcry
for y^{e} Indians Affairs

PROPOSALLS made by his Excell^{cy} Edward Lord Cornbury Capt^{n} Gên^{ll} and Gov^{r} in Cheif of her Maj^{tys} Province of N. Yorke &^{c} and Vice Admirall of y^{e} same to y^{e} 5 Nations of Indians called Maquase, Oneydes, Onnondagues, Cayouges and Sinnekes in Albany y^{e} 15th July 1702

PRESENT—Coll P^{r} Schuyler of her Maj^{tys} Councill
Capt James Weemes Major Wessells
The Mayor, Recorder, & Aldermen & sundry gent^{n} come from York & Albany wth many of the Principal Inhabitants

Brethren

I am much greived that I must begin our conference with the melancholy Story of the death of y^{e} most high & mighty Prince William y^{e} third whom God in his infinite mercy has been pleased to take to himself about 4 months agoe, by whose death y^{e} Succession of y^{e} Crown of England Scotland France & Ireland is fallen to y^{e} most high and mighty Princesse Anne whom God long preserve to reign over us

I am appointed by Her Maj^{es} Royall Commission to succeed the late E of Bellemont deceased in the command of this Government, & doe therefore assure you in y^{e} name of that great princesse Anne Queen of England &c my mistresse that you shall have all y^{e} Protection favour & Countenance imaginable as long as you continue in due obedience @ subjection to the Crown of England as your Ancestors have done before you, and I have sent for you in the beginning of my Governm^{t} to renew the Covenant Chain between us according to y^{e} ancient Custome wherein is included all Her Majesties subjects in this main of America, viz Virginy, Maryland, New England and all y^{e} rest of y^{e} English Provinces and Colonies in this Northern Continent and hope it will be more lasting and bright now on y^{r} parts, than ever it was formerly, and that you will answer that good Character I have heard of you in England

I understand y^{e} French of Canada have lately made a Fort at Tjughsaghrondie, between the lake of Swege and Ottawawa at which y^{e} brethren seem much concerned, I desire to know y^{e} truth of y^{t} matter and what force they have there and how many men they have in Garrison with y^{e} farr Indians

I am desirous to know y^{e} State and condition of your country y^{e} Strength of your People how many have deserted their native Country since y^{e} Peace & gone to Canada, and what are y^{e} Causes of their desertion, and what would be the proper meanes to retreeve them and prevent the rest from the like defection

I am also desirous to know in what State you are with your neighbours called the Twightwighs Dionondadees and the other Nations lying contiguous to them whether y^{e} intended Treaty of Peace with those farr Indians has had its desired effect, and if not where the difficulty lyes

It is also requisite I should hâve an account of your late Treatys with y^{e} French of Canada whether Publick or Private, and whether any of your Sachims are gone thither lately, and

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upon what businesse, what late Messages you have received from y^e^ Gov^r^ of Canada what Fortifications y^e^ French have made lately and how situate or whether they have made any further Incroachments upon y^e^ Brethren's Land, that I may be able truly to represent things home to my great Mistresse Queen Anne

Now to show y^e^ brethren that I concele nothing from you of any News that comes from Europe, I doe now acquaint you that we have a Rumor that there will be a warr between England and France, and I am informed y^e^ French of Canada design to keep back their Indians from committing any Acts of Hostility, and some of y^e^ Canada praying Indians that are now here a trading, seem to be very fond of a Peaceable hunting and are desirous that I may be instrumental and contribute towards their future Peace and Tranquility; I need not tell you what y^e^ French are, I understand that you have had the Tryall of them often to your Cost, if they be reall in this it is because their Interest leads them to be, I doe not design to trust them neither would I have y^e^ Brethren doe it but be upon their Guard, nevertheless if y^e^ warr breaks out I would not have y^e^ Brethren be y^e^ first aggressors nor commit any Acts of hostility upon the French or their Indians without directions from me, but if y^e^ French begin first upon us or any of y^e^ Brethren in League with us, we must joyn unanimously and make warr upon them with all Vigor, & not make a lingring war as y^e^ former was I know they will be threatening of you and forcing Priests upon you in your Country but I must tell you not to fear the one nor suffer the other as you tender y^e^ Preservation of y^e^ Covenant Chain

I hear that you Onnondagues are going to build your Castle 8 miles nearer Susquehanne River towards y^e^ Southerd, I wish I had been here sooner to advise you to build your New Castle nearer us towards Oneyde where there is better land and more convenient to be assisted upon occasion

There has been great divisions and annimosities among you of late not only occasioned by the French of Canada, but by some evill affected men among [you] who to serve their own private ends and gratify their own malice without regard to the honour and Interest of her Majesty or the Welfare of this Province have encouraged Faction and parties first among the Christians and then among the Brethren if you will discover who they are, I will take such a course with them that they will be cautious another time and I hope you will also take care that those incendiaries be curb'd and severely punished, and for the future you are only to hearken to those whom I shall appoint to manage the Indian Affairs & none els.

I have received express commands from y^e^ great Queen of England my mistresse to build such Forts for our and your security as I shall see convenient I design to goe about it with all expedition, first with y^e^ Fort at Albany and then at Schennectady and oy^r^ out Garisons which I design to view speedily to which Forts you and your Wifes and Children may retire in time of danger where y^e^ shall be succor'd and protected from all assaults of y^e^ Enemy

As to the 2 Ministers that were appointed for y^e^ Instruction of y^e^ Brethren in y^e^ Christian Faith one here at Albany and y^e^ other at Schonectady I understand that y^e^ Brethren have been told that y^e^ Minister of Schonectady was alone appointed for y^t^ work and not y^e^ Minister here, I desire to know who is the Author of that Story since I find upon your own request 2 years agoe, the Minister here was directed to take pains with you and learn your language y^e^ better to enable him to serve you in y^e^ work of y^e^ Gospell and y^e^ interpretesse appointed to be his assistant in that affair as formerly I reckon this has been foment^d^ by those Restlesse Spirits, who of late have endeavoured to disturb the peace of the Government, but I shall take care to prevent such wickednesse for y^e^ future, and you may be assured that those that are inclined to be Christians shall have all y^e^ Incouragem^t^ imaginable

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Priviledge of Trade with us as y^e^ Brethren of y^e^ 5 nations have where you find better pennyworths then at Canada, & if y^e^ inclination to your Country or the Christian Religion will induce you to return to your people and kindred the same houses which you left are still open to receive you with all the Treasure of a Plentiful Country which can make you for ever happy

As to the question you ask whether I think you Governour is Reall in his Proposalls to you of neutrality you will be the best judges of that, if y^e^ Warr breaks out, only I must be plain with you and Reall too, y^t^ if you suffer y^r^ selves to be deluded by y^e^ French or any oy^r^ to make Warr upon any that we are in allyance with, you must expect to loose not only the benefitte of y^e^ peaceable Hunting which you so much value, but we will all joyn to destroy those that shall first take up the hatchett to kill any of y^e^ Brethren that are link'd in our Covenant Chain was given to the said 3 Indians

3 Faddom Strouds. 3 Bags Powder. 3 Lac^d^ Hatts 15 Barrs Lead 6 Faddom of Tobacco

JOHANNES BLEECKER Maijor — P SCHUILER
J ABEEL Recorder
JES ROOSEBOOM Aldm^n^ — ROB^t^ LIVINGSTONE Sec^y^ for y^e^ Indian Affairs
DAVID SCHUILER Ald^mn^
WESSEL TEN BROECK Aldm^n^
JOHANNIS SCHUILER Aldm^n^ — DIRCK WESSELLS Justies of Pace

Albany 16 July 1702

The 3 Canada Praying Indians answered.

Father Corlaer

We thank you for easing of our minds, our hearts are light and rejoyced at your answer we will take care to give our Sachims an account of what you have said, we reckon it would be a great Crime if we should not deliver this message which is of so great moment, with all y^e^ faithfullnesse Imaginable

You need not doubt but we will comply with what your Lordship Proposes as being very desirous to continue in the Peace and Tranquility we now enjoy

Father

We shall not answer to this belt particularly now you may expect an answer to it in the Spring from our Castle

JOHANNIS BLEECKER Maijor — P SCHUILER
J ABEEL Recorder
JES ROOSEBOOM Aldm^n^ — ROB^t^ LIVINGSTONE Sec^y^ for y^e^ Indian Affairs
DAVID SCHUILER Aldm^n^
WESSEL TEN BROECK Ald^n^ — DIRCK WESSELLS Justies of Pace
JOHANNIS SCHUILER Ald^n^

PROPOSITIONS made by his Excellency Edward Lord Cornbury Capt^n^ Generall @ Governour in Cheife of her Majesties Province of New York &^c^ to the River Indians in Albany y^e^ 17 July 1702

Children

I doubt not but you have heard the sad News of the death of y^e^ High and mighty Prince King William y^e^ 3^rd^ whom God was pleased to take to himself about 4 months, by whose

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I shall not burthen your memories with more discourse, only one thing I must recommend to you to send those Gent^{n} whom I shall appoint to manage y^{e} Indian Affaires here an account of all news, that comes to your Country & of all remarkable occurances among you, who will take care to send me an account thereof with all convenient Speed

Now Brethren I shall conclude with a hearty Recommendation to keep an Inviolable Fidelity and obedience to the Great Queen Anne my mistresse and to continue in a Steddy affection and Friendship with us your Brethren and Fellow Subjects, You cannot give y^{e} Queen a better Testimony of your Loyalty to her than by keeping a Covenant Chain firm bright and inviolable and being obedient to her commands, upon these Terms I doe take upon mee to assure you of y^{e} Queens motherly care and Protection of you & in token of Her Majesty's grace and favour to you I doe give you a present by Her directions Viz^{t}

1 Belt & 500 gilders strung Wampum	1500 C^{t} Lead in 1000 Barrs
100 Gunns	1 Cask of Pipes
5 p^{s} Strouds	600 lb Powder in 200 bags
2 p Duffells	100 Gals of Rumm in 50 kegs
2 P^{r} Blanketts	1 Cask of Tobacco Spunn
80 Hatchets	2500 Flints
15 Lac'd Hatts	100 Pare Stockings
150 Knives	200 Wheat Loaves
15 Brass Kittles	12 Casks of Beer

5 Live Cattle

Sinnonquerese a Maquase Sachim stood up and prayed that y^{e} Rum given in y^{e} present might be lodged somewhere till their Conference was over since they are now just begunn and if their People shou^{d} fall a drinking they would be unfitt for businesse, upon which it was ordered to be lodged in M^{r} Livingstones seller

P Schuyler

Johannes Bleecker May^{r}
J Abeel, Recorder
Jes. Reeseboom Ald'man
David Schuijler Aldm^{n}
Johannis Schuyler
Alderman.

Rob^{t} Livingstone
Sécry for the Indian Affairs

Dirck Wessells
Justice of Pace

His Excellency my Lord Cornbury's answer to the Canada Maquase Praying Indians in Albany y^{e} 16 day of July 1702

Children

Being informed that you are inclined to return to Canada speedily, I shall not detain you but give you an answ^{r} to what you proposed to me, tho' in effect you have heard it answered yesterday in y^{e} Publick Propositions to y^{e} 5 nations.

I return you thanks for your complement in bidding me welcome to my Government & wishing me well I shall be so far from envying your happiness in your peaceable Hunting that I will rather contribute towards it as you desire, provided you hearken not to the French to disturb any of the brethren which are in League with us; for tho you have deserted your native Country & subjected yourself to the French, yet you see that you have the same

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APPENDIX 5

The Selected Documents: Treaties and Tobacco Trade, Tab 9, Renewal of the Covenant Chain: Council of March 13,1725, *Minutes of the Albany Commissioners of Indian Affairs*, Att a Meeting of the Com.rs of the Indian affairs in Albany.

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[0226] **111a**

Att a meeting of ye Commision.rs of ye Indian affairs
in Albany the 13th of March 1724/5
[Not in Wraxall]

Present
Henry Holland
Rob.t Livinston J.r
Peter van Brugh
Evert Banker
John Collins } Esq.rs Com.rs
Philip Livingston
Evert Wendell
Henry van Renselaer
David van Dyck

Five Sachims of Cachnawage & Scanrinadie
in Canada being arrivd here made the following
Speech before ye Com.rs by ondatsagto their Speaker

Brethren

We are now mett together and desired that some
of the Maquas Sachims might be present. [and-crossed out] at this meeting
and are glad to see [some-crossed out] a few of y.m here, we hope you
do not Expect yt we Shall Speak in fine polishd words. Since
we are but youngsters. our ancestors understood affairs
better than we, for we Shall Speak in plain terms and
tell you our minds freely. in what we are going to Say --
which we ought to have done Some time Since, So hope
youl Excuse us, it Seems that our frindship and amity
Declines [and-crossed out] as if we were no Brethren, therefore
we do now come to renew it, at this place wh. is the
seat fixd to treat about publick Matters & do now kindle
the fire up. gave a belt of wampum

Brethren,

There has long since been a Strict frindship between
your and our ancestors and now is between us wh. we now Renew
we tell yow
there are Six Sachims att ye Castle,
of Cachnawage two whereof have been accepted as
Children of this Govern.t to devulge & make known
unto you what mischief ever Should threaten you, one
whereof is Since dead in whose Stead you have appointed
another who is now here to acq.t yt what he knows
Concerning matters of moment gave a belt

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[0227] **112**

Brethren

Last year the Gov.t mett ye Sachims of ye Six Nations
here and did Renew ye Covenant with ym. and Spoake
in a peaceable manner which was very welldone
you desired us to that we Should use our uttmost Endeav.rs
to appease ye Eastren Indians to be at peace with N England
at our Return home we did what lay in our power till
we were prevented by [ym-crossed out] ye news we heard yt ye English
had cut aff a Castle of those Indians. then we were
ashamd to act further in yt. affair. Since we were
taken as Spies of our Country and were pointed at by those
Indians who told us we were at peace, and [illeg.-crossed out] went there
dayly.
whilst they are in a Bloddy war. if you had write to ye.
Gov.r of N England, and he had kept his people from
Insulting ye Indians our Endeavors might have had ye
desired Effect. we did what we Could but you have not
kept your word to acqt: ye. people of N England. gave a
belt.

Brethren When you appointed D Cannihogo to be a Child of
this Government, you desired him to let you know whatever
Should occur in Canada in Relation to ye publick affairs
and now he is Come on purpose to tell you that we are
Informd then when his Ex.cy your Gov.r was here last
Summer, he desired ye Six Nations for Liberty to build
a tradeing house in ye Indian Country, the Indians appointed
the place at ye west end of ye onneyde lake, on w.h his
Ex.cy ye. Gov.r Said it was no proper place and Insisted
Strongly to have it built at ye mouth of ye onnondage
River near ye Cadarachqua lake w.h at last ye. Indians
Consented. now if that tradeing house be built at that
place (which is the only passage of ye french to go [to ye-crossed out]
from
Montreal to ye. farr Indians and land first possesed by y.m)
[illeg.-crossed out] therefore we are come to acquaint you on purpose that
[illeg. crossed out]

[sidebar] the Gov.r of Canada is Strongly Resolved to break down
that house and yt. may create a quarrel between y.o & him.
[illeg.-crossed out] to prevent that we would advice you to keep ye trade within
your walls as
formerly and then you may gett some Bev.rs for otherwise youl gett
none for this may Interrupt your trade. therefore its best that there
be no house built and y.n ye. french might be prevaild on not to [be-crossed out]
build a fort at [Ochniagara] -- gave a large blak belt of wampum

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[Crossed out portion continues on first part of next page and appears to say:
"we acquaint you that Certainly a war
will Issue between [ym] and you [so if] you be Inclind

[0228] **112a**
peace keep the trade within your walls as formerly, then
you may gett Some bevers. but Else none for there will
be no longer pease then untill that tradeing house be
built, and then youl gett no more bevers. [illeg.]
youl be ye occassion of it yourselves gave a large belt of
blak wampum]

Brethren We are wittnesses that ye. onnondages Some
years Since accepted Mons.r D Longuiel Govern. of Montreal
as a Child, but as they had no Convenient place for him
to Reside in, [illeg.=crossed out] he went thither & built a house
there, on w.h Coll.o Schuyler went thither & demolishd
that house, Since it was a breach of ye. Covenant Chain
in ye onnondages for Consenting that building, and so
agreed it Should be broaked open again w.h ye Indians
In Canada took [illeg.], that ye french Should not dwell
among ye. Indians, now if you build a tradeing house
at ye mouth of ye onnondage River you may Expect ye
french will break it down as Coll.r Schuyler
did that at onnondage w.h we likd all very well
gave a belt

Then the sd. french Indians Said the Maquase
Brethren
our ancestors livd all in one Country and were
one people but it seems Every one is gone were he pleasd
and its fallen our lott to be Setld in Canada. you
sent us lately a belt of wampum that we Should
keep ye Covnant Chain [illeg.-crossed out] inviolable w.h we promise
on our Side to do. and do Expect youl pform it on your
Side according to your promises

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[0261] **129** [Not in Wraxall. Gap in pagination.]

Att a Meeting of the Com.rs of
the Indian affairs in Albany ye. 16th
day of [13th] March 1724/5

Present
Henry Holland
Robt Livingston Junr
Peter van Brugh
Evert Bancker
John Collins } Answer from the Com.rs to the Sachims of
Ph. Livingston Cachnawage & Schawanadie
Evert Wendell
Henry VanRenslaer
David van Dyck

Brethren

We heard the Speech you made to us last Saturday. We are glad you explaind your Selves yesterday, and clear'd up the mistake that happen'd, which is to our Satisfaction, and that you are come to accompany our Child hither to Inform us of the french designs, tho' you do not Speak in such a Stile as you say your Ancestors could do. yet we are pleas'd to find you as honest men as they were, and that you speak your minds freely & in plain terms, You do well to renew the friendship that has always been between us & your Nations at this place appointed to treat about publick Affairs, and that you kindle up the fire here after your manner, which we do in like manner in your Castles, and do expect you will keep firm to your former promises & engagements as we assure you we will do ours gave a Belt ---

Brethren The Union & friendship that has been between our and your Ancestors, and now is between us, which we expect you'll keep Inviolable, We have long since been Informed that there are six Sachims at Cachnawage our of which number two have been accepted by us as Children of this Governmt. and are glad that one of them is now come to do his Duty & to acquaint us what he knows Concerning matters of moment in rela= =tion to publick Affairs, and do thank you for Informing Us

[0262] **129a**

Us of the Designs of the Gov.r of Canada to demolish the house our Gov.r has leave from the 6 Nations to build at the mouth of the Onnondage River near the Cadarachqui

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lake being Land belonging to them, but we can't [Tell]
you when that is to be done, or when he shall be plead'd
to give Directions for building of it, You know he has
liberty for so doing, and it's agreed between the two Crowns
of Great Britain & ffrance in the 15th Article of the last
Treaty of Peace made at Utrecht in 1713 giving free liberty
to all the American Indians to go on Acco.t of Trade where
they please without giving any molestation to them
either from the English or the ffrench Subjects, and it is
also agreed that the ffrench shall not meddle with any
of the five Canons or Nations of Indians give a Belt
Brethren

It was not withour Sufficient Reason that Coll.
Peter Schuyler broke Down the house Mon.sr DLonguiell
had built at Onnondage Since it is Land belonging
to the five Nations who are Subjects to the King of
Great Britain, We can't think that the Gov.r of Canada
will presume to offer to demolish a house our Govern.t
designs to build on Land belonging to the English w.ch
if he did would be in him a breach of the Peace w.ch
he will not offer to do tho he does tell you so, We shall
acquaint our Gov.r of his Designs and we assure you he'll
be glad for the Intelligence you brought give a belt
Brethren

We are glad you usd your Endeavours to appease
the Eastern Ind.ns to forbear any further Acts of hostilitys
against our Brethren of N England, We remember you
promid'd to do so, but not that we made you any pro=
=mises to write to the Gov.r of N England to keep his
people at home, w.ch was absurd in you to think
[whilst] there was no agreement of a Cessation of Arms
and that the Eastern Ind.ns did daily murder of our
Brethren without Intermission, We do renew the
ancient Covent. and friendship that has always been
between us & your Nations, and desire D Canehogo
to continue to be an Obedient Child to Inform us of
whatever designs there may be in Canada against
this Governmt for which he shall be well rewarded
Gave a Belt After

[0263] **130**

After the Com.rs had ended this Speech they ask'd
whether they had no other news, D Canehogo said --
I am come hither and have undertaken this Journey
on purpose to Inform yopu the Com.rs of the Designs of the
ffrench that they will break down the trading house

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your Gov.r intends to build & withall to tell you that the
Gov.r of Canada has about two months ago sent Carpenters
to Cadarachqui to build two Vessels there who are
continually to be imployed to bring Beavers & Skins
from Ochjagara as far as they can be brought thro'
the Lake in them and then to be loaden in Canoes
and Convey
d to Montreal and that he designs to build
a Strong ffort at Ochjagara and another Vessel above
that ffall to bring Beavers & Skins thither

Albany 16th March 1724/5

[Not in Wraxall.]
May it please your Excellency

We hope this may find your Excel.y in pfect health
do Imbrace this Opportunity to acquaint your Excel.y that
a few days since arriv'd here five Sachims of the ffrench
Ind.ns from Canada who Inform us that the Gov.r of Canada
designs to break down the house your Excel.y intends to
build at the Mouth of the Onnondage River, and yt.
he has sent Carpenters to build two Vessels at Cadarachqua
to transport all the Beaver & peltry from Ochjagara thro'
the Lake as far as they can go down towards Montreal
and there to empty them in Canoes to bring them thither
as also that he intends to build a strong ffort at Ochja:
=gara, and a Vessel above that ffall as may appear by
the enclosed minutes. We have answer'd them in the
best manner we are able, which we hope your Excel.y
will be pleas'd to approve off, we can't but expect
that the Gov.r of Canada will use all possible Endeavours to
Interrupt our trade with the farr Ind.ns and will try all
Experiments to frustrate your Excell.ys good Intentions
for promoting the Interests of this province, If the Gov.r
of Canada puts his designs in Execution in building a
ffort at Ochjagara the ffrench will Stop all the Ind.ns
there and that will determine and make void all the
Attempts that have hitherto been made to Increase our
Trade

[0264] **130a**

Trade, which we can never expect to be flourishing
if this building cant be prevented to be made where=
=fore hope your Excel. will be pleas'd to use proper
reasures wt. our Sinnekes not to Consent any fortifi=
=cation to be made by the ffrench at that place, wt.
Submission to your Excel.y we are humbly of opinion

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APPENDIX 6

The Selected Documents: Treaties and Tobacco Trade, Tab 10, Council of September 26 to 29, 1725, *Minutes of the Albany Commissioners of Indian Affairs, Att a meeting of com.rs of Ind.n* Affairs in Albany, Sept. 27-29, 1725.

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our Consent and knowledge since that time
twice done mischief once they have taken an
Indian, and at another time a Negroe Boy
but we hear they are both sent home
Whoever it be that goes out a fighting
either from Canada or from any of our Castles
it is without our order and Consent, and
if peradventure any of our people should
come over the Limitts preserved by our
Treaty in 1722 and should be taken prison.rs
we desire they may be sent home as those
two persons have been sent to
We desire that you will keep that peace

[0296] **146a**
[Document has been edited in a different hand. Wraxall has partial summary p. 160 et seq.]

Att a meeting of the Com.rs of
the Ind.n Affairs in Albany the
26th of September 1725

p.sent
Henry Holland
Peter van Brugh
Evert Bancker
Henry Renselaer
Philip Livingston Twelve of the Sachims of Onnondage
Cayouge and Tuscaroras being arriv'd at this City
last night appear before this Board, Say to be
appointed to enquire concerning some Affairs
since there are so often reports spread among
us and to see if wee cant prevent such Stories
first we desire you to Repeat unto us the treaty that has been [made] between ye govern.t of virginia & his Indians and our severall nations. which [smear] done they [said] [smear]it
so agreed on, as it was Enterd. then they said by DKanasore their Speaker

Brother asharigo
We made a Treaty with ye the Gov.r of Virgin.a
in 1722 in behalf of the Christians & Indians
of that Governm.t in which treaty we engag'd
to be security for the Ind.ns living in Canada, who
have to our great grief and without our Consent
or knowledge since that time twice done mis=
=chief there once they [have taken - crossed out] took an Ind.n & another
time a Negroe boy, but we hear they are

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both sent home
Whoever it be that goes out a fighting
either from Canada or from any of our Castles
it is without our Consent & Order, and if perad=
=venture any of our people should come over the Limitts
prescribed by our Treaty of 1722
and should be taken prison.rs We desire
they may be sent home as these two prison.rs
have been sent back [you (here gave a belt.-crossed out]
We desire that they [you-crossed out] will keep that
peace and Treaty which was made between
[you - crossed out]

[0297] **147**
them [You - crossed out] and us in 1722 inviolable, which we
promise to do on our parts, for if either of Us
should break it it might be both our Ruins
gave a Belt to Confirm the peace and to
keep the Covenant Chain bright and Clear
if it might be grown Rusty
Brother Corlaer We come to make our Complaints to
you that we are but poor having no powder
we have bought as much as we were able to
purchase, but it proves so bad that it will
hardly give any Report and when it has
been one night charg'd in a Gun we can't
fire it;
Brother Corlaer We desire you not to sell us such bad
powder for the future we have often com=
plain'd on that Subject and now all the Six
Nations in General Join'd in it that there
may be good powder sold them, for it is a
great Deceit to sell a Comodity that is not
Good especially powder which is our chiefest
support
Brother Corlaer We in behalf & by the express command
of all the Six Nations desire you to have Com=
=passion on Us and our young Men to Supply
them with powder Lead and flints to go hunting
for they are not able to buy it, and your Loss
cannot be great for the Skins they gett must
all come to be Sold here Gave a few Skins

[0298] **147a**
Brother Corlaer We desire you to extend and continue
your favour on Us in Sending us a Smith this

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fall to work for the Onnondages Cayouges
Oneydes and Tuscaroras who might conveniently
supply those four Nations, the Sooner he can
be sent the better to make what is necesary before
our young men go on their hunting those Smiths
that have been last at Onnondage have
made but indifferent work for which if
you think fitt you may reprove them
but please to send any that is good if
it be the same we shall be glad to accept
them or other that is good
[ones?] Gave Seven hands Wampum

Brother You desired our Consent to build a trading house
on the Onnondage River which we have
Consented to We see now some inconveniency
in it, that there might some mischief
arise from it by the Quantity of Strong
Liquor that is sold there because our
people are unruly when they are drunk
they might comit some mischief to our
Brethren or they to [us-crossed out] them w.ch should grieve
us very much, If you are inclin'd to keep
this trading place and build such a house
while [for-crossed out] our your Ind.ns [go-crossed out] often to there w.t an
Intent
to buy powder but find none & then buy Rum
with those Skins they design'd to lay out in
powder [wherewith-crossed out] but instead of that they get drunk &
are

[0299] **148**

are troublesome to prevent any mischief
we desire you will for the future bring
there powder instead of Rum which we
might fetch here Gave seven hands of Wamp.m
We beg you to supply us with provisions
during our stay here

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Att a meetting of the Com.rs of
the Ind.n Affairs in Albany the
27th Day of Sept.r 1725

[Not in Wraxall.]
Present
Henry Holland
Peter van Brugh
Evert Bancker
Hend.k v Renselaer
Philip Livingston

Seven Sachims of the Cachnawage Skawinnadie and Rondax being arriv'd this Day, appearing before this board they were made wellcome by seven hands of Wampum who after that Said

Brethren You told us Just now that you were very glad that we are safe arriv'd at this place while many accidents might have hap= =pen'd to Us in our Voyage hither either by Water or otherwise as this is the place appointed between you and the five Nations for the place to treat about publick affairs We do not come unawares but have sent seven hands of Wampum as a Letter before to acquaint you of it, Our Chief bussiness that we are come about is to treat with the Gov.rs of N York & Boston, Wherefore we desire you to provide us with a Convenient Room to lodge in and to meet about the Bussiness we are come for that we may deliver our Message as soon as may be. We have no Wampum to give you in Return for w.ch desire you'll excuse Us.

[0300] **148a**

The Comiss.rs said
We have provided a Convenient house for you with provisions and other Necessaries you shall have occasion for during your stay in this City We expect you'll deliver your Message this afternoon

Answer of the Com.rs to the Speech the five Nations made yesterday

Brethren We are very glad to hear you'll endeavour to prevent the evil Reports that are comonly

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spread among you but the only way is then
not to hearken to what shall be infus'd in
your Ears by Evil persons who endeavour
to delude you and breed a Division among
you
What you say in Relation to the
Gov.r of Virgin.a we shall send a Copy of it to
our Gov.r & he will no doubt send it to
him, but we must exhort you not to suffer
any of your people to go beyond the bounda=
=ries fix'd and agreed to by the Treaty &
peace you made with that Governmt. in 1722
and that will prevent all Jealousies you have
of the Brethren of that Governmt. for we
are Certain they will never molest you if
you do not excite them to it and it will all=
=ways be expected that you answer for the mis=
=chiefs that shall be comitted either by your
people or those for whom you are become
Security

[0303] **150** [Continues from 148a]
Security, so keep them all from going
over the boundaries Stipulated, and you
will then do what is expected from you
by the Governm.t of Virgin.a
We are sorry to find that you are so
impoverished that you are not able to purchase
powder sufficient for your men to go a hunting
and that what you have bought proves
so extream bad. We shall acquaint our
Gov.r of it, and desire him to write to
England that better powder may be made
for you, but we conceive that the greatest
Reason of your poverty is occasion'd by your
going a fighting against people who
never do molest you, and it were far better
for you to mind your hunting and that
would enable you to buy what you may have
Occasion for
We shall acquaint the Gov.r of your
Request for a Smith to reside at Onnondage
he will no doubt send one to work for you
and as many Nations as he can supply
[and yt. he be pleased to prove a good bellows for you-crossed out]
We are glad to see that you have such a

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Concern for the peace and good understanding
that is between us and you & to pvent all
mischiefs that might insue by occasion of
your people in Drink at the new trading
place on the Onnondage River, We shall desire
our Gov.r to pvent traders to sell any Rum
to any of ye five Nations but only to the
far Ind.ns but they shall supply you there
[with-smudged]

[0304] **150a**

with powder and Lead if any of your people
should have Occasion for it, if our Traders
should have no Rum to sell to the far Ind.ns
they can't well gett Sale for their Ind.n Goods
We desire you to be kind to all traders
that shall go to trade on the Onnondage River or lakes &
to encourage and Invite all far Ind.ns to
carry on their trade w.t our people, they being
able to supply them much Cheaper then
the french can do
In Expectation that you will be Civil to all
our people that may come among you we
shall supply your psent urgent want & necessity
of Ammunition to enable your people to go a
hunting and have order'd that you shall
receive three barr.ls powder Lead and flints

The Indians said
We forgott yesterday to tell you that the
Smith's bellows that is at Onnondage is old
and not fitt for any further service, if the
Gov.r should be so favourable to us as to allow
us a Smith We hope he will send us a pair
of Bellows. it beginns to be cold the sooner
it be done the better before winter Setts in.
We expected that you would send our proposal
about Virgin.a to our Brother Corlaer & desire him to forward ye
Same to the Gov.r of Virgin.a. You have recom=
=mended us to keep our Treaty and friendship
with him & his Indians
we hope & expect he will do the same, those
that bring us evil Reports do probably
bring

[0305] **151**

Bring him bad news, We desire he will

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not hearken to it
You have recomended unto us we should
be kind to your people, that design to go a
trading in our Country we hope you never
heard any Complaints that we insulted
any of them nor any of the far Ind.ns We
promise to give them all the Encouragem.t
in our power & assist them in what we
are able; We return you thanks for your
kind supply of powder lead and flints

The Com.rs ask'd the Ind.ns what propositions
Mons.r Lequele had made to them in their
Country

DKannasore said we have already told
Lowrence Claese that proposition w.ch we
doubt not but he acquainted you with, but
we omitted to tell him that as Mr Longuille
was going away & we had answer'd him
He said fathers I desire that you be not
surpriz'd when any blood shall be shed on
the Onnondage River or at the side of the
Lake for we and the English can't well
abide one another, do you not meddle with
the Quarrel butt Set Still smoke & be neuter
DKannasore sd. to have sent a belt of
Wampum to Canada to answer the Gov.r there
to the above proposition w.ch Imports that
they are very much surpris'd how he can
propose such a thing that they should
trample on the Blood of their Brethren in
their own house & Country & not take any
notice

[0306] **151a**
notice of it, how he could expect it whilst
he makes no mention of his Ind.ns who are
numerous whether they would stay at home
or be concern'd in any quarrel that shall arise
if you have a mind to fight go to sea and fight
where you have Room

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Att a meeting of the Com.rs of the
Indian Affairs in Albany the 28th
Day of Sept.r 1725

[Not in Wraxall.]
Present
Henry Holland
Peter van Brugh
Evert Bancker
Philip Livingston
Hend.k v Renselaer

The Sachims of Cachnawage Rondax and
Skawinnadie Ind.ns came this day before this Board
and laid down seven hands of Wampum to wype off
the Tears (after their manner) of those who are in
mourning for the man who some of their vilest
people have killed this Summer at Saraghtoge
and are come to heal that breach

Brethren We shall begin with telling you that our
Ancestors have very prudently forseen in their
first entring of peace & the Covenant of friend=
=ship together, that when any accident or
mischief should happen [on-crossed out] either on the one side
or other, should be no breach of the Covenant
and friendship but that it should be reconcil'd
and made up by the aggressors in the best
manner it can be done

Brethren Our people have Comitted a barbarous murder
in killing the Man at Saraghtoge, We do acquaint
you it has been done without our Order or knowledge
but as they belong to our tribes we are answerable
for that mischief and breach and desire you'll
forgive

[0307] **152**

forgive it and pass that fault Over, and desire
that you'll put the vail from your faces & be
Joyfull and Sitt in the Light, that we may see
one another with Joy and Gladness, We have brought
an Ind.n woman to give in lieu of the man you
lost, tho it be not our maxim to do so yet we do
it to satisfie you for the breach that is comitted

Brethren You Sett as one who is sick of excessive
[grief - crossed out] Drinking for the sorrow and grief of the man you
have lost, but for a medicine we lay down
this belt of wampum, to heal & Comfort your
hearts, that mischief has been Comitted on the

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Score of going to fight ag.t N England, for the
young Men are unruly & can't well be kept
from assisting the Eastren Ind.ns ag.tt N England
therefore we desire you to use your uttmost En=
deavour that an End may be put to this War.

Brethren We have had several Conferences Concerning
the wellfare of us all, and you have allways
given us the honour to [be-crossed out] Call in the chiefes & Indians
living in Canada, and therefore we desire you
to forgive us that murder that has been comitted
by some of our vilest people & bury it in everlasting
Oblivion and that it may be forgott & not
upbraid or Reproach us for it That the path may be Clear & open
for us all & free from all Stones & Stumbling
Blocks, and that whenever we shall meet one
another it may be with kindness and friendship
Give a Belt of Wampum

The Com.rs told the sd Ind.ns to have receivd
seven hands of Wampum from them whereby
they

[0308] **152a**

They desired to treat w.t the Gov.rs of N York and
Boston & the Six Nations at this time, that they
had sent Notice according to their desire to Boston
but the Gov.r there has sent word that he is to
have a Treaty with the Ind.ns engag'd in the War
about this time, and he desir'd the Com.rs to
receive the Message they had to deliver in
Relation to that Governm.t w.ch this Board was
now ready to receive

To which the sd. Ind.ns mad answer that they
would deliver their Message to this Board in Case
they would send for Coll.o John Schuyler Agent
for the Governm.t of the Massachusetts Bay, that
they had done in Relation to the Governm.t of
N York, and they had agreed to treat w.t him
alone in Case he could not be psent here, The Com.rs
told them they would not hinder Coll. John Schuy
=ler from being present but had reasons to suspect
he would not come, and if they would not deliver
their Message as desired by the Governm.t of Boston
they might expect this Board would acquaint
him of it, and they might do their pleasure to
treat w.t Coll.o Schuyler alone, that no pson would
hinder their so doing, but had one thing more

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to offer, to desire them that if any of yr people
were inclin'd to go to Boston to pay the Gov.r
their a Visit they would be well entertain'd
and kindly received

Att a meeting of the Com.rs
of Ind.n Affairs in Albany
the 29th of Sept.r 1725

Present
Henry Holland
Peter v Brugh
Evert Bancker
Philip Livingston
Henry v Renselaer

Brethren

We have consider'd on the propositions
you made yesterday & can't forbear to reproach
you

[0229] **113** [Not in Wraxall. This is the second part of the September 29 1725 entry that begins on p. 152a.]

You for the base & perfideous Action comitted
this Summer by some of your people in murdering
One of his Maj.es Soldiers & Subjects at a a time when
we thought no ill of you, Especially since we
had not long before cultivated a good understand
=ing between our Brethren of N England & your
several tribes, that you should be at peace & neuter
in the War, and had on that Score made a free
and open path for you to come freely to this
place to trade gave a Blanket --

It is true as you say that our Ancestors in their
first making the Covenant and friendship have
prudently forseen that no mean accident or
mischief that should be Comitted or happen
either on the one side or other should make
a breach of that Covenant, but that must be
understood of such Acts as are done on Surprise
or in heat of blood, but this base Action has
been done deliberately and with a Design as
we suppose to break the Amaty and good
Understanding thas [sic] has has been long since between
Us and to Stop up the Road that has been made
open and Clean for you to come hither gave a blkt
But such base Murders as this should be
punished on the Comitters of them, w.ch we should

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have required had you not come to mediate and
reconcile that Affair, and since you do come
and acknowledge that this murder has been
Comitted by some of your vilest people & wt out
your Consent, We shall at your Instance, Desire
our Gov.r to forgive you that Injury on Condititon
that you promise to become Security to Deliver up
to

[0230] **113a**

To Justice such of your people as shall for the
future offend in the like nature, and we do now
accept of the Squa instead of the Man as a
Token of your Repentance and sorrow for what
is past give a Belt

It is with great Concern that we must
tell you how little regard you have to your pro=
=mises and engagements your several tribes
made so lately to this Governm.t & in particular
to the Governm.t of Boston, A new Instance of
your breach of these promises we have had no
longer than yesterday, by your telling us as an
excuse [of-crossed out] that your people on pretence of going to
War [with-crossed out] [to] N England to assist the Eastern Ind.ns
they came on our fronteers and killed on of our
people, by which we plainly see that there is no
Dependence on any of your promises, for no sooner
you return home but you are put on by ye french
to any thing they please to molest us, but do
expect that you will faithfully perform all
your former Engagements & promises you have
in such solemn & publick manner of your own
Accord enter'd into with this & the neighbouring
Governm.ts & in particular that of Boston, So if
you will have a free & open Road we expect you to
demean your Self peaceably towards all his
Maj.es Subjects and pform your promises w.ch we
have allways done on our side Give a Belt.

They answer that they have w.t Attention
heard what we have s.d and do faithfully promise
to pform their Engagements, that they are not fully
Impowered

[0231] **114**

Impowered to promise to become security to
deliver up to Justice those of their people who

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transgress for the future, but that article in
particular they shall comminicate to their
Sachims when they gett home and bring an
answer as soon as possible

Albany 29th Septem.r 1725 [Not in Wraxall]

Sir

We have been honour'd with yours of the
17th Instant [yt] your Messenger whom we have
detained four days expecting the arrival of
the Cachnawage Rondax & Shawinnadie
Indians with whom we had a Conference
yesterday in Relation to this Governm.t w.ch
being ended, We told them to have rec.d seven
hands of Wamp.m from them whereby they
desired to treat w.t your Governm.t w.ch they did
acknowledge, on that we acquainted them that
you are to have a Treaty about this time at Boston with
the Ind.ns engag'd in the War, and that you had
desired us to receive any Message they had to
deliver you, that you kindly accept the Testimony
of their Amity and good Affection towards you
They wrould deliver their Message in presence of Coll. Jn.s
Schuyler & not to us wt out him alledging that he is
your Agent, perceiving they were not inclind
to deliver their Message w.t out him, We must take
leave to refer you to him who we doubt not will by
this Opportunity acquaint you w.t what they came
to say. We heartily wish it did lye in our power
to serve you in Relation to this Ind.n War, We have
propos'd to them that some of their number should
go and pay you a visit at Boston but can't find that
any are inclined to go tho we assur'd them of your frien=
ship & kind treatm.t tow.ds them, We hope you will have
success in making a firm and lasting peace w.t the [illeg. blot]
Ind.ns w.t respect we remain Henry Holland
Philip Livingston Peter van Brugh
Henry Renselaer Evert Bancker

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APPENDIX 7

The Selected Documents: Treaty and Tobacco Trade, Tab 12, Treaty of 1735, *Minutes of the Albany Commissioners of Indian Affairs*, At a meeting of y.e Commissioners y.e 30 July 173[5] & Peter Wraxall, *An Abridgment of the Indian Affairs (*Cambridge: Harvard University Press, 1915), August 1, 1735, pp. 192-195. Exhibit WM-30C, Vol.1, Tab 10.

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they conceive that that Charge will fall on the traders, and the allowence to defray the Contingiences we conceive will fall short of aur disbursement

There has Lately been a french man from montreal with a pass from the Gov:r of Canada who informs us that a large Stone Fort is build ing on the west side of the lake at crown point opposite to their wooden Fort which we conceive will be of dangerous Consequence to his Maj:s Fronteers in Case of a war, with much Esteem & Respect we are

[2-0096] **II-65**

At a meeting of y.e Commissioners y.e 30 July 173[5]
[See Wraxall p. 193 for summary.]

PSent
P. Livingston
W. Dyck
S. Bleeker
R. Gerritse
John DePeyster
Dirk T. Broeck
J. Schuyler
Cor. Cuyler

Rec.d a Letter from his Ex:cy of y.e 22.th Instant directing us to send Lawrence y.e Interpreter to Sachims of y.e 6 Nations to meet his Ex:y here on [ye] 8. Sep:r next Resolved that y.e s:d Interpreter [illeg.] for nither to Receive his.

att a meeting of y.e Com:s for y.e Indian affairs in Albany y.e 31:st July 1735 [See Wraxall p. 193 for summary.]

Sund.ry Sachims of Cachnawage in Canada being arrivd here last night appeared before this Board, who my Com:s in name of his Ex:y our Gar: made y.m wellcome by telling y:m they were glad y.t safely arrivd here, and y:t Care would be taken to provide y.m with provisions dureing their Stay here y.e [3] hands of wampum was forwarded yesterday to y.e maquase -- The s.d Sachims Return y.e Com:s thanks for their kind Reception and telling y.m y.t they will be provided with victualls dureing their Stay its y.e goodness of God who has preserved us y.t we Enjoy y.e blessing to see Joyfully [illeg.] & no [illeg.] Continuences & give their Respects to his Ex:cy & y.e gentlemen, the purport if their mesage is to Rectify what our ancestors have formerly Concluded with this Governm.t
We Com:s Replyd y:t they are glad to hear they are come on such a good message

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[2-0097] **II-65A**

att a meeting of the Com: of y.e Indian
affairs in albany p.mo Aug.t 1735
[See Wraxall p. 193 for brief summary.]

Present
Ph: Livingston
W.m Dick
Mynd. Schuyler
John Schuyler
Hend Renselaer
St. Groesbeek
Ab: Cuyler
Ph. Schuyler
Dirk T. Broeck
Rutger Bleker
Reyer Gerritse
Nicolas Bleeker
John D Peyster
John Schuyler Jun.r
John Lansingh
Cor: Cuyler

The Sachims of Cachnawage by their
Speaker Sconondo Stood up & said Brethren its the com[on]
maxim among them that when messengers be sent to treat of peace
first to Smoake a pipe together which they hope will be gran[ted]
them & whereby they will be convinced of the Commissioners sincerity, as
well as of their good intention in what they are to say w.h y.e
Com:s Consented to do; whereon a Calamat of peace was offerd to
all y.e gentlement who tooke each a Whif out of s:d Calamat and
told y.m that as this was their maxim to Smoake together to shew
their Sincerity to each other; among the Christians is to drink
a glass of wine & each others good health w:h was done

then adarajechta Stood up and Said
Brethren
It is gods goodness that we have y.e happyness to see each
other today, yesterday we told you to Speake to you this day, what we
Shall say will be in name and behalf of the Gov:r of Canada Cachna
wage, Kieghsowanne & Canosodago, our ancesters have had and made
Treaties together which has been handed down to us to Renew & Rectify
which we are now come
Brethren
We desire that you to be attentive to what we come to say, we shall now
Repeat y.e message w:h has lately been sent to y.e Canachnawages
by two nations, you sent s.d message to us by an Indian who was here to
trade whom you Supposd would deliver it faithfully, you told us

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how our ancestors have kept y.e Road from hence to Canada Clean
& fair that you on your side where Inclind to keep s:d Road for y.e future
in like manner for s:d three nations, and y.t if it Should So happen y:t
any difference or dispute might happen with any whom ever it might
be, that notwithstanding such difference s.d Road should be kept
Clean & be free for all to use it peaceably to & form our Respective
Castles & habitations; The belt you sent us; we Rec:d God, has indued
us with knowledge & wisdom y.e one more & y.e oy.r Less, we found some
fault when we Rec:d your belt in y.e message you sent, y.e belt was in y.r own
name but not in y.e name of your selves & [ye] six nations, we have Consu[lt]
ed in Relation to y.e Contents of s:d belt and perceive thereby that you
was Inclind to Conclude & keep a Lasting peace with y.e s.d Indians
we do in y.e name of these before mention'd approve of same & thank
y.e Gentlemen

[2-0098] **II-66**
y.e Gentlemen heartily for this good message on w.h they gave a belt

Then atawakhooi Stood up and said
Brethren
It is by the goodness of God y.t we are now assembld together it is very
well known to Every one y.t out Brethren Corlaer & y.e Six nations are
firmly united together, wherefore we now Speake out of one mouth y.e
Gov:r of Canada & s.d three nations to their Brethren Corlaer & y.e Six
nations that what you do Promise that you will faithfully perform
it; not to Speake only with y.e mouth but from y.e bottom of y.r hearts,
gave a belt of wampum
Brethren
We Speake in behalf of those above mentioned; that while there is a war
with y.e Indians to y.e Southward and Some of our young warriours who go
out to war ag.st s.d Indians as well as those of y.e Six nations and if
peradventure any of y.m may happen by mistake to kill one oy.r y.t that
may not be a breach of y.e treaty & Covenant we now make but y.t such
breach made be made up with y.e Sachims of the Respective places. gave
a belt of wampum
Brethren
We are all very well Convincd y.t what is Evil has Generally
y.e greatest Impression on y.e minds of men, and if any of you: we mean
you & y.e Brethren of y.e Six nations have any Evil in y.r hearts to purge
y.r Selves y.t you may Speake to us with a pure heart as we do to you gave
a belt of wampum
Brethren
It is well known to every one y.t y.e five nations have long Since waged war
ag.t y.e Indians at y.e Southward and in y.e mean while our Indians
are also in war with s.d Indians our Request is y.t in case y.t it may
happen y.t any of our Indians may happen to be sick wounded or

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Scatterd in their Return home, we desire y.t y.e Six nations, if they meet with y.m do Assist Succour & Relief y.m & bring y.m to their habitations w.h y.e Gov:r of Canada & our Nations would be very thankfull for such kind hospitallities give a belt of wampum
Brethren
We are Come along y.e Road which our ancestors have made but its so much out of Repair y.t we could hardly pass it hither we had a very Cloudy Sky y.t we could hardly find y.e way, but now we hope that all our hearts maybe Clear & open without any dissumilation as in a fair Sun Shiny day without any Clouds from morning till night, gave a belt
Brethren
We have done wh[ich] we had to say now we have some what to propose in behalf of our warriours that when any difference may hap= =pen between our nations & y.e Six nations this Calamet pipe of peace may be logd at onnodage & that all differences may be made up & Reconcilld there between us & s.d nations;

[2-0099] **II-66A**

Att a meeting of the Com.s of the Indian affairs in Albany y.e 2. aug.st 1735
[See Wraxall p. 193.]

Present
Ph: Livingston
W.m Dick
Mynd.t Schuyler
John Schuyler
Hend Renselaer
St Groesbeek
Abr Cuyler
Ph. Schuyler
Rutger Bleeker
Dirk T Broeck
Nicolas Bleeker
John D Peyster
Edw. Holland
John Schuyler Jun.r
Johs Lansingh
Cor. Cuyler

Answer made by the Com.s to the Sachims & Indians come from Canada to their speech made by them yesterday.

Brethren
We Rejoyce with you that it hath pleased the almigh ty to give it in your hearts to come on such a good Errand,

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and has granted you a Safe Journey to this place that
we may see one another with Chearfull Countenances to
confirm our former treaties which have been Concluded
between our ancestors which we hope may be kept Inviola
ble by you and by those who have deligated you to treat
with us;
Brethren
you told us yesterday that you Spoake & treated
in behalf of y.e Gov.r of Canada, the Indians of Cachnawage
Kieghsowanne & Canosodage that you was deligated by y.m
to Renew with us y.e former treaties made between our ances
ters in behalf of our Gov.r which we do Ractify & Confirm
with you & all y.e Indians Living in Canada which treaty we take to
be y.t you and all Indiens Resideing in Canada Should live with all
y.e Subjects of y. Great King of Great Brittain in a perfect frindship
and neutrality in case there should happen to be a war between y.e king
of Great Brittain & y.e king of France, and in Case you do keep Strickly
to that agreement & treaty; we should then forever live in good unity to
gether and have free Recourse to & from your habitations at all times as
well on acct of trade as otherwise and be treated & Received by us as
friends & fellow Subjects to y.e best of kings and y.t you on y.r Side & in
behalf of s:d Nations whom you Represent Shall not molest nor anoy
any of y.e English Subjects give a belt
Brethren
We have been very attentive to what you said in Repeating y.e message
we sent you by ondaghsego, one of y.e Sachims of Cachnawage w.h we find
he has faithfully deliverd you we are pleasd to hear that you and
those whom you sent are Inclind as well as we to keep y.e Road open & clean
from hence to Canada & y.e Severall habitations in the like manner
as our ancestors have done and that nothing will prevent or interupt y.e
amicable understanding w.h now Subsists between your severall nati
ons & us w.h friendship you may be assurd shall be kept inviolable on our
side & expect the same from you w.h we Expect you will Rectify & Confirm
in y.e most Solemn manner according to y.r maxim, give a belt
We

[2-0100] **II-67**
We are convinc'd y.t it hath pleased god to in due you with knowledge &
wisdom the one more y.n the oy.r the fault you find in us when you Rec.d y.e
belt we sent that it was in our own name, and not in y.e name of us & y.e Six
nations: we had such a good oppertunity by the Pson who we trusted with
y.t message that we could have no time to acquaint our Brethren y.e Six na=
tions with it we are So well assurd of the gen.l Inclination & disposition of y.m
y.t we dare take on our selves, what we conclude with you that they will in
y.e most publick manner confirm & Radify at our desire; we shall take an
oppertunity at y.e first meeting of y.e Sachims to acquaint them with the

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Renewing of y.e Covenant Chain & y.e former treaties with you which have
Subsisted between us and as we find your gen.l good disposition and incli=
nation as also those Indians whom you Represent to Conclude a Lasting
peace & friendship with us, as well as you find we have to do the Like with
you from y.e bottom of our hearts. give a belt
Brethren

We have considerd what you have said in behalf of those by whom you
are deligated in Relation to the war you and y.e Six nations have with the
Indians liveing to the southward we do promise in behalf of our Brethren
y.e Six nations in Psence of y.e few Sachims of the maquase & Sachim of Cayouge,
that if for the future any of you or they may Peradventure kill one another
thro mistake that that shall be no breach of y.e treaty & Covenant now
made but that such unhappy accidents shall be amicably Reconcilld & made
up by them

we are as well as you Convincd y.r what is Evil has generall y.e
Strongest Impression on y.e minds of men, but we do assure you that no Evil
Can harbour in our hearts ag.t you but they are pure & Clean which you may
be perswaded will always be so as long as you keep this treaty & covenant on
y.r parts inviolable and the Riad shall y.n be allways kept clean & open to this
place and be joyfully Recd with great friendship without disimulation as
in a fair Sun Shiny day, gave a belt
We have long since been acquainted y.t y.e Six nations have had war ag.st y.e
Indians to y.e southward and y.t the Indians Resideing in y.r habitations
have assisted y.m; we have often Recomended to y.e Six nations to Recon
cile & make peace with y.e Indians to y.e Southward while they are in peace
& friendship with his maj.ies subjects in those parts and hope you will
Joyn with y.m; we have often Recomended to y.e Six nations to Recon
cile & make peace with y.e Indians to y.e Southward while they are in peace
& friendship with his maj.ys subjects in those parts and hope you will
Joyn with y.m to make such Reconciliation while those Indians as we
hear they are a peace able people who never do Molest nor anoy you however we do
in the behalf of y.e Six nations promise y.t in Case any of y.e people be found
by them y.t they shall be usd with all y.e kindness & humanity w.h brethren
ow to each ay.r in assisting Releasing & bringing you to y.r habitations,
give Strings of wampum ---

[2-0101] **III-67**A
Brethren
We Shall at y.e Request of your warriours Send your
Calamet pipe to onnondage, where all the differances
between you and the Six nations are to be made up &
Reconcilld,
We desire that you may give up your names as well
Sachims as warriours who are now present at this treaty
for Confirmation of what you have Promisd on your
Side, that it may be Seen by your posterity who has

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been present Consented & Concluded it
they gave their names who are as follows

D'Cariehoga	orachjawachte
agarieyachtha	Sconondo
T'seegochie	osahsedageerat
Canadagaje	Soneejasee
adonienarickho	Karichariego
Tahassa	Tojachjago
Sagorancax	
Thorondieraghton	

after Some Consultation one of the Sachims Stood up & Said

Brethren
We Return you thanks for what you have Said in Repeating our Speech, and the Reply you have made which is to our generall Satisfaction and Solemnly promise to perform y^e^ Engagements wee now made

[2-0102] **II-68**

By vertue of a Letter from his Ex.^ly^ William Cosby Esq.^r^ &.^c^ dated y.^e^ 22.^d^ July the Com.^s^ gave the following Instructions to Lowrence Claese y.^e^ Interpreter
By the Com:^s^ of the Indian affairs at Albany
To Lowrence Claese y.^e^ Interpreter [Not in Wraxall.]

Whereas his Excell.^y^ William Cosby Esq.^r^ Cap.^t^ Gen.^l^ & Gov.^r^ in Chief of the Provinces of New york New Jersay &.^ca^ hath directed us by his Letter dated y.^e^ 22.^d^ July to send you to the Sachims of Six nations to Invite y.^m^ to meet his s.^d^ Exl.^y^ at albany on y.^e^ 8.^th^ day of September next to Renew y.^e^ Covenant Chain with them, you are therefore hereby Required to go forthwith to y.^e^ said Sachims and acq.^t^ them that his Ex.^ly^ our Gov:^r^ will meet them here on y.^t^ day and desire them then to be here on that day percisely hereof fail not, given under our hands the 2.^d^ aug.^t^ 1735

Signd by the Com.^s^

[2-0104] **II-69**

Albany y.^e^ 14.^th^ august 1735 [Not in Wraxall.]

May it please your Excell.^cy^
In persuance to your Ex.^lys^ directions we dispatched Lourence Claese y.^e^ Interpreter to invite y.^e^ Sachims of the six nations to meet y.^r^ Ex.^cly^ here on y.^e^ 8.^th^ Septem.^r^ next
Inclosed your Ex.^ly^ has copy of a treaty we made with Deputies of Indians Living in Canada who have given us assurances to be neuter in case of a Rupture between y.^e^ french, as they are

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APPENDIX 8

The Selected Documents: Treaties and Tobacco Trade, Tab 17, Treaty of 1742, *Minutes of the Albany Commissioners of Indian Affairs*, Att A Meet.g of the Com.rs of Indian Affairs at Albany 28 Septemb.r 1742. Exhibit WM-30C, Vol.1, Tab 11.

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[2-0440} **II-236**

Att A Meet.g of the Com.rs of Indian
Affairs at Albany 28 Septemb.r 1742
[Summarized in Wraxall p. 229.]

The Sachims mentioned in yesterdays minute Appeared
at this Board ~~to whom the Com.rs Spoake as follws~~
~~Brethren~~
the Com.rs asked them on what business they Came here
whether it was to renew the Treaty Subsisting between
them and us, if So they Could begin their Speech, The
Indians Answered That they had often been desired to
Come down to renew That Treaty, That they were now Come
for that Purpose, and As they Had been desired to Come
here, they thought it proper that the Com.rs Should first
Speak to them, Then the Com.rs Spoak to them As follows
Brethren

We Are glad to see you Here at this place of treating
where the fire Always Burns and which has of old been
Looked upon As such

Gave A Belt of Wampum

We Are glad to see you Here with Chearfull Countenances
to renew the Covenant so Long since made between our
forefathers and so frequently renewed between us and you
and particularly Seven years ago, we shall now repeat
the Substance of that Covenant which is as follows
That you and All the Indians liveing in Canada shall
Live with the Subjects of the King of Great Brittain
not only in this Province but All other his majesties
Subjects in A perfect frindship and neutrality, in Case
there should Happen to be A War Between the King of
Great Brittain and the french King, And That we shall
for Ever live in Unity and peace together and have free
recourse to and from Each Others habitations, Att All
times as well on Account of Trade as on Other business
and receive one the other At All times as Brethren and not
molest Each Other in the Way to And from Each other
But that the same remain Always free and Clear without

[2-0441] **II-236A**

Any Manner of Interruption from Each Other. The
reason That We desired you to Come here is this, That
you As Well As we might be Mindfull of this Covenant
and That we by Seeing One Another and Smoakeing a
Pipe together, might have the Stronger Impression
on Our Minds of what has formerly been Transacted
Between us and That the said Covenant may be kept

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Inviolable for Ever not only Between us but our
Children after us, As A token That it shall be so on
our side We give this belt and Expect the Same
Engagements from you At that time

29.th September 1742 [See Wraxall p. 229.]
The Sachims Answered
Brother Corlaer and Queder

It has been agreed between our forefathers That if Any
mischance should Happen between Any of our people
that it Should be Amicably Settled. An Indian of
the five Nations has Lost his life Amongst Us, which
we have made up with them and wiped their Tears
from their Eyes, which was also part of our business
here.
You told us yesterday that this is the place of Treatys
where the fire does and Always Shall burn as a token
that we take it for such we give this Belt
Brethren

You told us Also that our forefathers had made an
Inviolable Covenant together and that you had thought
fitt to renew that Covenant for which we thank you
And Are rejoyced At the wisdom you have expressed in
your speech to us, you gave us a Belt whereby we
Are Linked together in such a manner That we Can
never be Seperated, but Always remain joyned firm
to Each Other And We the Caghnawages, Schawenedes and
Orondax in the name of All the Indians belonging To

[2-0442] **II-237**
Canada, in the Presence of the five nations Give this
Belt as A token That we Will for Ever observe this
Treaty and Covenant inviolable, what we now say
proceeds from the bottom of our hears and not from the
Lips only
It is now seven years since we mett together, we now
wipe of the Tears from the Eyes of All of us, which may
Be Occasioned by the deaths of All that have died since
our Last meeting

Give A Belt

We have yet one thing to Say That you should take
Care of the fall At Osweego, There Are Already a great
Many People killed there by means of the Rum and by
other means, wherefore we desire you Will take Care
That no Such things May happen for the future
The Commissioners Answered

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APPENDIX 9

The Selected Sources from Dr. Beaulieu's Report in Reply to Dr. Parmenter, Renewal of the Covenant Chain: Council of April 24-26, 1748, *The papers of Sir William Johnson, A conference at Onondage, April 24th, 1748*, PSWJ, 1:157, 158,162. Exhibit AGC-70E, Vol.2, Tab 58.

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THE PAPERS OF SIR WILLIAM JOHNSON

Prepared for publication by
The Division of Archives and History

JAMES SULLIVAN Ph.D. ed.
Director and State Historian

VOLUME I

ALBANY
THE UNIVERSITY OF THE STATE OF NEW YORK
1921

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Ganughsharagey[1] Castle within a days journey of this Place and desired we might by no means break up e're you come But desired we should buy what Hogs Corn &ca we could which we have done, and are all here ready to hear your News and return you thanks for Considering and supplying our Wants. So we finish for this day: Returns another Belt of Wampum.

My answer to the aforegoing.

Brethren of the five Nations I return you all my most hearty thanks for your kind Welcome, and assure you I am very glad to see you all well here, at the old Meeting Place of our Forefathers whose Steps I have now traced here in order to keep the Road clean and open, according to the agreement made when We first joined in Brothership, which I hope you all remember.

Brethren

I must now tell you I am come here by your Brother the Governour's Orders, to speak to you and tell you his News, But as I am a little fatigued after my Journey Cannot speak to you this day Wherefore desire to meet you all here tomorrow Morning When I shall tell you my Message as also your Brothers News So hope you may be easy in your Minds and Content yourselves so long And I will this Night provide a Feast for your Sachems and another for the Warriours & dancers who I hope will be merry which is my greatest pleasure to make & see them so. Finished for this day. Wampum given by me.

April 25: 1748.

My Speech

Brethren of the five Nations I have made what Dispatch I could to meet you here, but the danger of travelling these roads now is so great that I did not think it safe to come without a Guard, Which together with the Battoes with Presents Stores &ca. has delayed me longer than I expected. I am very sorry for it upon your Account But now I shall make Amends by making what dispatch I can.

Brethren of the five Nations I will begin upon a thing of a

[1] Canaseraga.

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long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, 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, at which you were much surprized but finding what it contained pleased you so much, being Things for your Purpose, as our People convinced you of by shewing you the use of them, that you all Resolved to take the greatest care of that Vessel that nothing should hurt her Whereupon it was agreed to tye her fast with a great Rope to one of the largest Nut Trees on the Bank of the River But on further Consideration in a fuller meeting it was thought safest Fearing the Wind should blow down that Tree to make a long Rope and tye her fast at Onondaga which was accordingly done and the Rope put under your feet That if anything hurt or touched said Vessel by the shaking of the Rope you might know it, and then agreed to rise all as one and see what the Matter was and whoever hurt the Vessel was to suffer. After this was agreed on and done you made an offer to the Governour to enter into a Band of Friendship with him and his People which he was so pleased at that he told you he would find a strong Silver Chain which would never break slip or Rust to bind you and him forever in Brothership together and that your Warriours and Ours should be as one Heart, one Head, one Blood &ca. and that what happened to the one happened to the other After this firm agreement was made our Forefathers finding it was good and foreseeing the many Advantages both sides would reap of it, Ordered that if ever that Silver Chain should turn the least Rusty, offer to slip or break, that it should be immediately brightened up again, and not let it slip or break on any account for then you and we were both dead. Brethren these are the words of our Wise Forefathers which some among you know very well to be so. Now Brethren understanding or hearing that

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the French our and your Common Enemy were endeavouring to blindfold you and get you to slip your hands out of that Chain, which as our Forefathers said would certainly be our destruction, I now out of a tender regard for your Safety and Welfare as well as Ours, conjure you not to listen any more to the deceitful French who aim at nothing more than to destroy you all if in their power; but stick fast to the Old Agreement which you will find the best. A large Belt of Wampum.

Brethren of the five Nations in the next place I must tell you I am sent here by Order of your Brother the Governour as also the Governour of Boston to stop your going to Canada, they having heard (to their great concern) that you were determined soon to go that way again which is quite contrary to your Engagements and Contrary to the Custom of all Nations in the World in Time of War. Bretheren you take wrong the first Message I sent you with a Belt of Wampum, by imagining I meant to stop up all your Roads, for I only meant that Road leading to Canada You may remember your Brother the Governour, and I ever since the War desired and pressed you all to use your Interest every other way where you had or could make any Now I must tell you and assure you that he and I are of the same Mind still and desire you by this Belt of Wampum to use your Interest everywhere you can But by no means whatsoever offer to go to Canada. A Belt.

Brethren I am to assure you that if you stay home from Canada, That your Brothers the Governour of York &ca. will endeavor as soon as possible to get back your Flesh and Blood from Canada, which you say is the only thing induces you to go. This they would have tryed before now for, but that you went down last year, when they imagined you might get them but finding that would not do, I desire you now by this Belt of Wampum not to try any more but leave it entirely to your Brother &ca. who will use their Endeavours and are most likely to succeed. A Belt.

Bretheren of the five Nations You all came to me last Spring

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with several Belts of Wampum, desiring Liberty to go to Canada, and take the last Tryal to fetch your Flesh & Blood (the Caghnawagees) from there, which was agreed to at your earnest Request, & promise of returning back again in a Month But instead of that you staid there the whole summer and did not bring one of your Flesh & Blood along with you, which makes me think that, that was not your Business there, only to talk with our Enemy the Governour of Canada, which is quite Wrong. You at the same time begged earnestly that I would keep all the Warriours of the five Nations at home (altho then ready to go) until you returned which I expecting would be about a Month agreed to fearing as you told me That their going to War while you were there would overset what you went about and might be the occasion of all your Deaths in case they had Committed any Hostilities in the French Country while you were there now Brethren I am sorry I've Reason to tell you that I think your going to Canada last year, has been the occasion of our loosing several of Our people whose Scalps I dont doubt you have seen brought in there in Triumph while our Hands were tyed here by you which was a hard case and should you now talk or think of going that way again what must the Consequence be Nothing surer than death and an everlasting Scandal forever Wherefore Brethren I most earnestly desire you all by this Belt of Wampum not to listen any more to the deceitful French who have ever been your Enemy nor offer to look that way now. A Belt.

Brethren of the five Nations. I desire you to open your Ears and mind what I say to you As I have in the beginning reminded you of the old Agreement made by our noble Forefathers which was that we were and should ever remain as one Flesh, One Blood, one Heart, One Head &ca. and that what happened to the One happened to the other Now Brethren you see we have got the Frenchman's Ax sticking fast in our Heads Day after Day, and the five Nations also, Some of the most Principal you see were murdered the other day in their own Fields by the

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French and Cachnewagees. You the five Nations have not hurt the Cachnewagees as yet tho' in your Power often to do it; So that it appears plainly by their using the five Nations in such a barbarous unprecedented Manner that they aim at nothing else but to quarrel with and destroy you which has ever been their View as you all by Sorrowful Experience have formerly seen and felt when they used to destroy your Castles and sacrificed such Numbers of your brave Predecessors that there lies large Heaps of their Bones ever since scattered over the whole Country. That alone any Man would think was sufficient to stir up an Everlasting Resentment in you against such a set of barbarous People if there remained the least Spark of that great Spirit in you which your brave Ancestors were noted through the World for.

Wherefore Brethren as you may plainly see they mean to sacrifice You as well as us if they could; I now desire you if there remains the least spark of that noble spirit in you which your brave Ancestors were noted to have through the World that you may now follow your brother's desire and use the Ax against them which you have so long in your Hands. A very large Belt.

Brethren of the five Nations I have one thing to desire of you which as Brothers I expect you will be sincere and tell me: your going to Canada last year and desire of going there now makes me think you cannot be sincere or hearty in your Brothers Cause, for it is impossible to be true to both Wherefore I desire you to drop the one intirely and stand by your own Brethren, otherwise I insist upon your declaring your Sentiments That I may when I return give an Account of it to your Brother and likewise to your Father the King. A Belt.

Brethren of the five Nations as I have desired and expect you will all Mind your Brother the Governour's News This is to assure you if you do That the King your Father has sent orders to the Governour to take care of your Castles and Familys while your Men are out at War And has ordered me to look out proper places to erect Forts for your Safety which I have done since I

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came up here and will immediately set about building them provided you all agree to it, and come together, I have also one thing further to tell you Brethren That the King your Father has sent you a parcel of Goods for the use of your Families as a Token of his Love to all those who are Hearty in his Cause and mind this News I expect you will soon see and Receive 'em from your Brother the Governour at Albany where I desire you may be all ready to come and meet him when called upon. A Belt.

April 26th 1748

The five Nations Answer

Brother We are very thankful to you for reminding us of the old Agreement made by our Forefathers and are overjoyed to hear that you have found it out, and hope you will take care not to let it be lost again, for we are sensible that keeping up to them Rules laid down to us thereby is the only way to enable us & You to withstand our Enemies and preserve our Lives wherefore you may depend upon it That all the arts or Cunning Ways of the French which its true they use a great deal of shall never get us to drop our Friendship to you our Brethren. A large Belt.

Brother As you have now stopped the Road to Canada and desire us by no means whatsoever to go that way We the five Nations now assembled here Cant help telling you That we think it very hard and cruel to be hindred from Fetching our own Flesh and Blood from thence who lye rotting and dying in Irons when We are offered them only to go for them. Had you got them from thence as you have your own People We should not think of going to Canada as Friends but in another Manner, However upon your promise of redeeming them soon We all agree to your desire and promise you we will not go to Canada nor look that way before you make a Tryal for the redemption of our People And as you say you have so many French prisoners We think you may easily do it if you have a Love for us. There is nothing in the World would give us all a greater Pleasure than to have our people from thence Wherefore beg earnestly

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Brother you will make haste and We assure you by this Belt of Wampum that we shall not go to Canada. A Belt.

Brother What you say is Right about our going down to you last Spring for Liberty to go to Canada to take the last Tryal for our Flesh and Blood the Caghnawagees. We assure you when we went away we had no other View and thought to return again immediately but as we were at Mont Real the News of the five Nations killing and taking several French just come there which we did not expect upon that We were all ordered to Quebec where they were going to put all in Goal however they did not but kept us there as prisoners 92 Days and so come away at last with only two of Our prisoners who were in Irons The Governour telling us that if we come or sent this Spring for the rest he would let them go provided the five Nations Committed no Hostilities in that Time, If they did the least Harm He assured us that he would then immediately put all the Prisoners to Death Now Brother as to your Hands being tyed by us It is true we begged of you that the Warriors of the five Nations might not go a Fighting to Canada until we returned But only to scour about the Woods near Home, which we thought best not imagining at the same Time That there would be so much Mischief done as there was, Expecting when we got there to prevail with the Caghnawagees to be easy at least if we could not get them along with us Which we find we could not being too much under the Directions of the French. Now Brother as we have told you the affair we hope you will not blame us as you have done But be assured that our Resolution is to live and die by you. A Belt.

Brother We listen to you with open Ears and mind what you say you may depend upon it And we hope you will not make a doubt of it that our firm Resolution is to keep up in every Step to the Rules laid by our Forefathers And we have your Ax so long in Hand we assure you that we have been ever since we first took it up always ready to make use of it in Conjunction with you and will ever Continue so. A Belt.

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Brother As you desired us to open our Minds and tell you our Resolution, We now tell you in Answer to that Our firm Resolution is to stand by you as Brothers for ever and to make use of the Ax we have in our Hands whenever it is thought requisite But brother we were in hopes to have used it before now to some Purpose As you told us two years ago that you were then ready to march with your Army against Canada but instead of an Army you only sent out small Parties several of whom were by that means cut to pieces. Had you gone on with your Army and Ships as you told us you would and assisted us properly to get over the Foreign Indians to our Interest Who offered their Services, then we should have been able with the loss of a few Men to have drove the French and his Allies into the Great Lakes and drown them. But as you have not done that which we are sorry for we tell you now Brother that according to your desire we used what Interest we could that way and have gained a Considerable Number of the Foreign Indians who were ready to join you & us But as there is no Sign of an Army now Nor the Encouragement given to them which they expected We cannot pretend now to say what they will do. A Belt.

Brother As you have now taken a View of some of our Castles and told us the Governour Our Brother ordered you to Fortify them provided we all agreed to it and Come together We return him and you many thanks for your Care of us and shall as soon as possible move & come together and then we will acquaint you of it and expect you will then fulfil your promise. We also return you many Thanks for the Presents brought us Now which saved us a great deal of Trouble of going down so far and fetching them which would fall hard upon several of our old People. We also assure you we will be ready to go and meet our Brother the Governour when he calls us. A Belt.

Brethren of the five Nations I now return you all my hearty thanks for your ready and agreeable compliance to all my desires which I hope will tend much to your Advantage as well as Ours for by such a good agreement between us We shall the better be

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able to preserve Our Lives and destroy our Enemies. Brethren if what you now promise me this day comes from the Bottom of your Hearts, as I expect it does then I shall return to your Brother the Governour with a chearful Heart and tell him you are still sincere and true to your engagement and I dare assure you all that you will ever find him so to you in every respect.

A Belt.

JOHN RUTHERFURD TO [WALTER?] BUTLER

A. L. S.

New York 29th Aprile 1748

To CAPTAIN BUTLER

SIR:

When I returned here I found there was nothing to be expected against Canada so thought it best to take the opportunity of The Oswego to make a short trip to London to setle some of my private affairs. As I talked over matters with you at Albany when I expected to have been sent elsewhere I need add very litle here but to desire you to add the three Men to the duty Roll as we agreed & one for Capt Cleland as Lt, & another as Agitant as I find The Governour intends he should do that duty at Albany, I must beg the favour you would assist Capt Cleland & show him any Civilities in your power, as I'm sure you'l be very fond both of his Company & Mrs Clelands. I hope you'l find a way not to allow me to be at more expence in the main than the other Captains & endeavour if any how possible to keep the Company full & charge the expences of recruiting in the pay Roll which after next pay day which is the sixth, you must peruse & sign befor Serjt Morris carrys it to the Mayor beginning the 6th of June & adding the five as above. I shall see you at Albany befor the River freezes if I'm not very unlucky in passages so wishing you & Your Family all health & happyness I am Sir

Your most obedt humble servant

JOHN RUTHERFURD

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APPENDIX 10

The Selected Documents: Treaties and Tobacco Trade, Tab 18, Renewal of Covenant Chain: Council of October 30 and 31, 1753, Minutes *of the Albany* Commissioners *of Indian Affairs*, at a Board of Commissioners met at Robert Lotteridges.

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At a Board of Commissioners met
at Robert Lotteridges Octo:r 30 1753

Present
Coll Myndt Schuyler
M:r Jacob C: Ten Eyck
The Recorder
M:r Corn:s Cuyler
Robert Sanders

Two Indian Seachims of Kagnawague
(to wit) Onorogigta & Sanagowana
with Several other Warriors of that
Cassell, Appeared before us, And Expressed
Great Joy to meat us here all in perfect
Health and gave one Bever Skin

Then they further said that they were Come in obedience of a Massuage by a Belt of wampen which this Board had sent them on the 3.d Instant, And that they had agreeable to this Boards Request, Brought down with them Two of the Penselvania Prisoners, That this Board had Alrady Agreed for one of them And that for the other They Expected to Receive for the Bringing And Mantaining of him Dollars and wampen to Enable them To purchase an other to fill up his place in that Tribe he was Given to, whereupon they gave a Belt of wampen

And said further out of the name of all the Seachims of That Cassel that there has been one of their men Kilt near this place Last year, and that they were Glad we had so Prudently Recon ciled it with them, and that they would for the future so all In their power to keep friendship & the Road allways open

and gave few Strings of wampen

and said further for themselves and by order and in Behalf of all the Seachims & warriers of their Cassell, that as there had been few years ago a warr Carryed on between us & them to their Great Grief, occasioned Thro, the Variance That their then was Between our King & the french King, who Then had Declared wars Against Each other, & Requested of us That what had Been then Committed or done By Either side was To be for Ever Buried in oblivion and that their then Entering Into that warr was against their Inclinations, tho' Impossible for them at that time to avoid it thereupon gave one belt

and further said they Came to Renew the old Covenant Chain and that they would for Ever Keep it Bright & Clean Bright & free from Roast & thereupon gave 3 Bever Skins

and added that as they had lately Lost One of their men,

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In one Countrey, they wished that we would be so good as to have Him Brought, and Buried at the Carrying place, & then gave Two Bever Skins

[SU1-0418] Series 1, **Lot 680, Page 13**

at a Board of Commissioners me[eting]
at Robert Lotteridges Octo:r 31: 1753

Present
Coll Mynd:t Schuyler
M:r Jacob C: Ten Eyck
The Recorder
M:r Johns Beeckman
M:r Corn:s Cuyler
Coll Marchell
Rob:t Sanders

The Board Replyed the Seachims & Warriers of the Cagnawagua Cassell on their Speech of Yesterday to this Board By Arent Stevens Interpreter of this Province as follows

Bretheren

We Thank you for the Joy you Expressed To meat us here at this time, and we do Assure you that we are likewise Glad to have this oppertunity, to Smoak a pipe with you Here, and to see you all Enjoy Perfect health, Then gave few Strings of wampen

Bretheren We are Glad to see you Brought in Obedience to our Belt of wampen sent to you, some time ago, the Two Pensilvania Bretheren Taken in time of peace, we will on our parts give You what we have promised for the Mantaining and Bringing of Them here, and as you seem to Insist to have for the one Dollars And wampen, we will by no means Differ with you for that But do now Reward you for Mantaining & Bringing [em] here the one According to To our words to you some time ago, and for the other Agreeable To your Desire now in Dollars & wampen But were amazed To hear you had taken our Bretheren Captives in time of peace and Desire of you that the Like may Never hapen again Then paid them for the Bringing & Mantaining of them

Bretheren

We are Exceeding Glad to hear you are all Satisfied and Contented with our Conduct, in that Affair of one of your Men at the halfmoon last year and Died in your Cassell & Gave few Strings of wampun

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Bretheren

What you said Relating the Late war to have
Been Commenced by Both Kings, we Confess to be true, But
we were Extreamly Surprized to hear you had taken up the
Hatchet Against us, and thereupon Immediately Committed Hosti
lities against us, Since you and the Rest of the Indians in Canada
Had so few Years Before Intered with us in a Sol[e]mn Covenant
To Committ no hostilities Upon us, In Case of a Repture
Between the Brittish & french Crowns, However we hereby

[SU1-0419] **Series 1, Lot 680, Page 14**
Hereby Desire of you, not to make or Middle for the Future,
In time of warr with any British Subjects, Where upon
Gave a Belt of wampen
Bretheren We are Glad you are Come to Renew the old
Covenant Chain, and we do hereby Assure that of our side
We will keep the same Bright, and the Road between us and
You Clear from all filt and Dirth, and the fire allways
Burning for you and all yours to Come & Smoak your pipes
When you please, And you may Depend that our friendship
will be towards you of a Long Duration, Whereon gave one
Piece of Strouds
Bretheren, And as you are here But few in Number, we
Therefore Desire of you That two Seachims of Each of your Nations
(to wit) of the Cagnawagues, Canosedagues, Rondacks & Onnagongues [Annagongues?]
Do Come here the next Spring to Confirm the same Whereon
Gave them one Belt of wampen

Att a Board of Commissioners Met
at Rob:^{t} Lotteridges Novb^{r} 3: 1753

Present
C^{oll} Myndert Schuyler
M^{r} Recorder
M:^{r} Corn:^{s} Cuyler
M:^{r} Joh:^{s} Beeckman
Robert Sanders

Resolved that Coppys of the following
Letters be sent, the first to Governour
De Lancey the Last to Governour
Hamilton by David Hendricks & Jabaz
Evens with Mess:^{rs} Cuylers & Sanders Acco:^{t}
amounting to £ 40: 5: 6 in the whole,
There Inclosed & that the minutes of the
of the Board with s:^{d} Seachims And warriors
Coppies thereof be Inclosed in Govern:^{r} D Lancys
Letter & that there by given by this Board
To s:^{d} Seachims Twelve [illeg.] for a [Sail?]

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APPENDIX 11

The Selected Documents: Treaties and Tobacco Trade, Tab 19, Treaty of 1754, *Minutes of the Albany Commissioners of Indian Affairs*, At a Meeting of the Commissioners of Indian Affairs at the House of Robert Laterage, August 13-14, 1754. Exhibit WM-30C, Vol.1, Tab 15.

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By Dirk Van Der Hyden (By Order of the Commissioners Vide Minutes July 27: 1754) Returned, and Appeared to this Board & Braught the following Answer Viz:[t]
He Went from Schaghkook to Killian De Redders: the first Day and Proceeded In his Jorney from there to the Carrying Place &c:[a] the fifth Day he Came to Crown Point Where he found 16 Souldiers In the fort, But Before he Came there, heard Som Dancing after the Indian fashon, When he Resolved to Retorn Back, But on a second Consideration, he Went forward and Laid his Canoe Down By the Wind Mill Where he Slept that Night, In the Morning Som Annagongues Came to him, & Bid him Welcome, So he Went In the fort, Where the Commander tould him that he Did Not Come there of his Own Accord, But that he Wass Sent there and Asked the Reason, he Confessed that he Wass Sent there, and told him for Reason, that as he Sent Spies in Our Country Without Touching or Stoping at Any Place in Our Country, Gave as Reason to Mistrust them, the Commander Replyed that they had been there to Carry Letters.
He further Says that there Was 14 Tents about the fort, Which Contained Workman, that Were About Repairing the fort

Also Anonragète, Sanatsiowane, and Siohahiren Who Represents Oroniadadickha 3 Seachems and Several Warriers of the Cagnawage Cassel Appeared Before us, Saying they Were Now Ready to hear What We have to Say

[SU1-0460] **Series 1, Lot 680, Page 52**

August 12th
The Comissioners of the Indian affairs Replyed them
By Jacobus Clement as Interpreter
Bretheren we Desired You Last fall (vide Minutes of October 31. 1753) as You then Wass But few In Number that two Seachems out of Each of your Cassels, to Wit, of the Cagnawages, Cannssedage, Rondaks and Annogungues, to Come Down this Spring to Confirm the Old Covenant, And are You here Accordingly

To Which the Seachems and Warriers Replyed

it is true You Did So, But We that are now here Speak In the Name of All the Said Nations, and We Command and Are Master of All the Rest.

then the Commissioners Asked them, Why All the Nations Did Not Come Down as they Desired them,

they Replyed that the Canosedages Where All Busy In their Own affiars. and Could Not Well Spare time to Come With them, And as for the Rondaks, and Annogungues, they Overtook them At Cruinpoint, and In preceding of their Jorney, they Concluded, they Would Go In Compony to Albany, and when they Came to Lake Sacrama, they Said

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they Would go No Further then Schackok, and as they (the Cagnages) Were the Greatest in Power they Left it Intirely to them, and if the Commissioners Were Inclyned to Speak With them In friendship, they Might Come to the Carrying Place, Where they had Kindled their fire

The Said Commissioner[s] Appointed the Day after to Morrow to Speak further With them

Resolved By this Board that Robert Wendle Be Sent for to Attend there to Morrow Morning As soon as Possible

==========

At a Meeting of the Commissioners of Indian Affairs
at the House of Robert Laterage August 13th 1754

Present
the Mayor
the Recorder
Col M: Schuiler
Cornelius Cuiler
John B: V: Renselaar
Peter Winne
Jacob C Ten Eick
Cap Peter Dowe

Robert Wendle Appeared to this Board
Resolved that Said Wendle Go fortwith up to
Schachtekook and Desire the Annagungue
Seachems to Come Down to Albany

[SU1-0461] **Series 1, Lot 680, Page 53**

At a Meeting of the Commissioners ~~of the Indian Affiars~~ at [the?]
House of Robert Laterage August 14th 1754

Present
Cap Cornelius Cuiler
The Mayor
Col: M. Schuiler
the Recorder
Jacob C: Ten Eick
Cap John B: V: Rensalaar
Cap^{t} Peter Winne
Cap^{t} Peter Dow

M:^{r} Antony Bleeker Appeared hier and Informed
this Board that Between 40 & 50 of the Onyde Indians
are Ready to Remove to Caneda, In Order to Live there
and further Said, that In his opinion Cap^{t} Teady
Magin has the Most Interest among them, to Stop
them

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Whereas We Conceive it Expedient
and Necessary for his Majestys Service, and the Welfare and Interest of
this Province, that Cap^{t} Teady Magin, and Arent Stevins the Provincial
Interpreter, Be Sent to Said Cassel, and Desire them Not to Go
Resolved that a Copy of the following Instructions Be Delivered
to Cap Teady Magin and Arent Stevinse Provincial Interpreter

———

Instructions for Cap^{t} Teady Magin & Arent Stevins
Provincial Interpreter

You the Said Cap: Teady Magin, are hereby Required and
Directed, to Proceed Without Loss of time, from hence to Schonegtande
Where Arent Stevins is to join You as Interpreter, and from thence
to Onyde, and Tell the Onyde seachems, that We are Informed that
a Great Number of them are Agoing to Remove to Caneda In Order to Live there;
and that We Desire them, to Do their Utmost Indeavour, to Make
a Stop to their Going, and Also to Acquaint the Mohaxs and
Canejoharry Seachems, With Your Message
Given Under Our Hands
at Albany August 14th 1754

Myndert Schuilder
Robert Sanders
Cornelius Cuiler
Jacob C. Ten Eick
Sybrant G:^{s} V: Schajck
Peter Winne
John B: V: Renselaar
John Beekman
Peter Dow

Resolved that a Letter Be Wrote to
Arent Stevins, of Which the following
is a Copy.
Albany 14. august 1754

Mr Stevins

Sir. You are here by Required, forthwith to go With Cap: Teady
Magin to Onydy; and there Use Your Utmost Indeavour In Con-
=junction With him, to Stop the Onyde Indians from Going to
Caneda and hereof fail Not at Your Peril
We are Your Humble Servants

Myndert Schuylder
Robert Sanders
Cornelius Cuiler
Jacob C: T: Eick &:^{ca}
as Above

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[SU1-0462] **Series 1, Lot 680, Page 54**

August 14th
Then appeared Before this Board the Seachems and Warriers
of the Cagnawag Cassel, to Whoom the Commissioners Made the
following Speech

Bretheren We are Glad to See You here at this Day, In
Obediance of Our Request to You Last fall (Vide Minutes of October
31 1753) --- then gave few Strings of Wampon

Bretheren if You have Lost Any of Your ~~Man~~ People
We herewith Wipe the Tears Out Of Your Eyes, that We May See Each
Other as Clear as the Sun Shines In a fair Day at Noon, and Speak
to Each Other Without Sorrow. Whereupon Give a Belt of Wampon

Bretheren as You Came But few In Number Last fall
to Renew the Old Covenant Chain, We therefore then Desired You
that two Seachems, out of Each of Your nations (to wit) Cagnawages,
Canassedages, Rundaks, and Annogungues, Should Come Down Last
Spring. and We are Glad to See You here, for Your Selves & in
Behalf of the Other[s] Your Allies

Bretheren: We Now Again, Renew the Old Covenant
Chain With You and Your Allies, Which has Been Made By Our
forefathers, and Desire You, and All Your Allies, to keep the Same
Bright, Clear, and free from Rust; as Long as the Sun and Moon
Indures, and that No Dark Clouds May Come In
the Way, So that You and We May Walk and Go Without fear or
Terror; and Live Always In frindship, With Each Other. and if In
Case an Open War Should Break Out, Between the King of Great
Briten, and the french King We Desire You to Stand Neuter, and
Commit No hostilities On any of his Majesties Subjects. and We Do Now
Again (as Wee Also Did Last fall) Assure You; that We of Our Side, Will
Keep the Said Covenant Chain Bright, Clear & free from Rust and
filt, and the Road Between us and You Clear from All filt and
Dirt, and the fire Burning
And as We are Informed, that You have Now Stopt the Annagonges
And Rundax, of Doing Mischief to Our People, We Sincerely thank
You for it; and Desire and Expect You Will Do the Same, at
All times, and Acquaint us thereof if Any thing Should happen
for the future

then Gave a Large Belt of Wampon

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[SU1-0463] **Series 1, Lot 680, Page 55**

August}
14th }
Then the Cagnawage Seachchems and Warriers Replyed
Bretheren We Rejoyce with You to Behold it hath Pleased
God that this Day We have a Conferrence together; We Dont
Doubt, But You Likewise have had Sorrows together; We herewith
Wipe Away the Tears out of Your Eyes: and Open Your hearts, that
You May hear and Understand
then Give few Strings of Wampon
Bretheren, We thankfully Receive Your Belt of Covenant, and to Confirm
the Same, We, for Selves, and In Behalf of the Canussedages, Rondax
and Annagungas, Give You this
then Give a Belt of Wampen
Bretheren You Did Also Give thanks for that We Stopt the Rondax
And Annagungues, and Sent A Great Number Back.
In our Conferrence With them (Vide Minutes of the 12th Instant)
they told us, that Some of them, Would Go to Schagkook, And
Renew their Covenant With the Schachkok Indians; We Said, that
May Be, the Commissioners Would Send for them to Albany. they
Answered No, they Will Not, for their fire Was Kindled at the
Carrying Place.
Notwithstanding all that, We Shall Keep our Selves firmly
to the Covenant Chain, and Shall Always Do, as We have Done
Now: and Moreoever Shall Give You Intilligence, if Any
Ill Design is Intended Against You.
Bretheren You Also Say that No Cloud, Shall Come In the
Sky But What You Will Seperate and Clear, as Much as
Lays In Your Power. And that You Will Keep the Road Open;
and Clear from all filt and Dirt. and if a War Should Break
Out Between the King of Great Britan and the french King.
You Desire us to Keep our Selves Neuter.
We Cannot Give a Proper Answer to that, Since We have heard
that Your Governor has Given the hatched to the Mohawk Indians,
Which We Shall Go and Enquire into: and Answer You that
Paragraph, When We Return. and if Any of You are Inclind
to Go Along With Us, to hear What We Say, You May and Welcome
We [Desire] You Also, to Provide us a Waggon to Schonegtande, and a horse to the Mohacks
Resolved that A Waggon to Schonegtande and a horse from
there to the Mohacks Be Provided for the Seachems. And that
Jacobus Clement Go Along With them, and Observe their Speech,
And Make Report thereof to this Board

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[SU1-0464] **Series 1, Lot 680, Page 56** [This page should come after page 57 rather than before.]

have Said, that Your fire Was Burning at the Carrying Place
We Desire You to Tell us Who had Directed You, to Make or
Kindle the Same there, for We are Strangers to that fire, and
Know of No Other fire [than?] In this Town Burning
The annagangue Seachems Replyed
Bretheren for those that are Asleep, this is to Open their Ears
And heart, that they May hear and Understand
then gave few Strings of Wampon
Bretheren We have Made the fire at the Carying Place
Long Ago, and Also two Years Ago and the french have
Scattered the Same, and Now Bretheren We are Come
from Alsecantikoke to Look to the fire the Same Decreasing, M:r
Liedies Was to take Care thereof
Bretheren We are Exceeding Glad that the fire is hier Now
Kindled; and We Like it Very Well that the Road is Open and
if Any Trees Should fall therein We Shall take them out and keep the Same Always
Clear. and We Shall for the future, Come here as to Our own
House, and if By Chance, We Come to Schaghkok, or [Below]
Schaghkok, Where We Might find Blod, Maybe of a Wounded: dog
: We Shall Not Cross the Same, But avoid it; and so Come and [Enquire]
of this Board Where that Might Proceed from: and Not Return Back
to Our Cassel, that they May Not See Blood to Our Shoes. Now
Bretheren You Must Certainly Belive that We are Your Bretheren
and take us to Be Such. and Now We of Secantekok have Opened
the one half of the River. and Bear Witness thereof.
then Gave a Belt of Wampon
Bretheren here is Also three Indians out of Matsissque Cassal, Who Also
Opens the Other half of the River, as far as the Same Exends,
and Assure You that, of our Side, this Road Shall Be kept Open
and Never Stopt; Unless Stopt By You.
Bretheren Be Assured that We Masiesque Indians Open the
Road to this our house: and Since this Road has Been a Good
Road to Our forefathers, We therfore Clear the Same, that it May
Be as Good as Evir it has Been
Dont Mind Bretheren if Maybe Bad Wind or Tydings
Should Bloe In Your Ears, for that Proceeds from the Devil
then Give a Belt of Wampon
Bretheren We Also affirm to have Authorized the Cagnawage

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APPENDIX 12

The Selected Documents: Treaties and Tobacco Trade, Tab 20, Treaty of Kahnawà:ke, 1760, *Papers of Sir William Johnson, (Albany, 1962), Vol. 13, pp. 163-166, Indian Conference, Montreal, September 15 and 16, 1760.*
Exhibit WM-30D, Vol. 1, Tab 33.

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THE PAPERS OF SIR WILLIAM JOHNSON

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INDIAN CONFERENCE

Df.[1]

[*Montreal, September 16, 1760*]

1. Br. Warry.[2]

We are glad to meet you and thank you for your friendly Advice [*of*][3] sent us from Oswego, [*we have complied*] that we should keep out of the Way; We have [*acted*] paid a due Regard [*to it*] thereto and thank the Great Spirit above who allows us to meet together this Day in so Friendly a Manner.

a String

2. Brn. of ye. Nats.

I[*t*] [*gives*] gave us great Pleasure of your having resolved at Swegachy to accompany our Brother Warry. as far as here. Your coming along was very necessary and of mutual Service We therefore most sincerely [*thankt*] return you our hearty Thanks for it.

a Belt.

3. Br. Wy.

We heard and took to heart the good Words you spoke to us yesterday; We thank you most heartily for [*them*] renewing and strengthning the old Covenant Chain [*of*] which before this War subsisted between us, and we in ye. Name of every Nation here prest. assure you [*to*] that we will hold fast [*of*] the Same, for ever hereafter.

4. Br. Wy.

We are greatly oblidged to you for opening the Road from this to [*Albany*] your Country we on our parts assure you to keep it clear of any Obstacle & use it in a freindly Manner —

5. Br. Wy.

You desired of us to [*see*] deliver up your People who [*may*

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[1] In New York Historical Society. Jelles Fonda Journal, but in hand of Daniel Claus.

[2] Brother Warraghiyagey. Therefore addressed to Sir William.

[3] Words italicized and in brackets are crossed out in the manuscript.

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