

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No.: C.A. :

C.S.: 505-01-137394-165

COURT OF APPEAL OF QUEBEC

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HIS MAJESTY THE KING

APPELLANT – Prosecution

and

**ATTORNEY GENERAL OF QUEBEC**

with an office at 1 Notre-Dame Street East,  
8<sup>th</sup> floor, Suite 8.00, Montréal (Québec) H2Y  
1B6

APPELLANT - Intervenor

v.

**HUNTER MONTOUR**

domiciled at the residence linked to P.O.  
Box 357, Kahnawake, (Quebec) J0L 1B0

and

**DEREK WHITE**

domiciled at the residence linked to C.P.  
2279, Kahnawake, (Québec) J0L 1B0

RESPONDENTS – Accused

and

**ATTORNEY GENERAL OF CANADA**

with an office at 200, boulevard René-  
Lévesque West, East Tower, 9<sup>th</sup> floor,  
Montréal (Québec) H2Z 1X4

and

**MOHAWK NATION COUNCIL OF CHIEFS**

with an office at Box 366, Rooseveltown  
New York (United States) 13683

IMPLEADED PARTIES – Interveners

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**NOTICE OF APPEAL**  
(Section 676(1)(c) of the *Criminal Code*)

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## Overview

1. Since the late 1980s, Canada has resorted to continually increasing excise duties to discourage Canadians from smoking (Canadian Tobacco Control Strategy). As a result, the number of smokers has fallen from 50% of the population in the 1960s to 15% today.
2. During this period, organizations began importing cigarettes or partially manufactured tobacco clandestinely into Canada to supply cigarette factories with the aim of selling them on the Canadian market at prices excluding excise duties. Such activities seriously undermine meeting the legitimate and compelling objectives of eliminating tobacco use among Canadians, protecting public health, public safety and national security, and reducing organized crime.
3. Between 2014 and 2016, the Respondents introduced partially manufactured tobacco clandestinely into Canada by tractor-trailers without declaring it at the border and without possessing a tobacco licence issued under *the Excise Act, 2001*, S.C. 2002, c. 22 (the "**Excise Act, 2001**"), which regulates the importation, transportation, distribution, or manufacture of tobacco products.

## I-FACTS

### **THE ACTS**

4. The Respondents are Mohawks of Kahnawake. From November 2014 to March 2016, Respondent Derek White directed his own criminal organization and participated in the activities of the criminal organization of the late Sylvain Éthier to smuggle 23 53-foot-long tractor-trailers, each containing approximately 13 tons of bulk tobacco. For each truck that escaped border controls, Respondent Derek White helped defraud the Canadian government of \$1.7 million in excise duties alone. Respondent Hunter Montour participated in the smuggling activities of Derek White's criminal organization. The vast majority of the Respondents' accomplices in the smuggling operations were non-aboriginal.
5. On March 30, 2016, in the district of Longueuil, the Respondents were charged with the following offences:

- a) **Charge no. 1. Derek White.** Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal and elsewhere in Québec and Canada, committed an indictable offence under the Criminal Code or any other Act of Parliament for the benefit of, at the direction of or in association with a criminal organization, thereby committing the indictable offence set out in section 467.12 of the Criminal Code.
- b) **Charge no. [2]. Hunter Montour.** Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal and elsewhere in Québec and Canada, for the purpose of increasing the capacity of a criminal organization, facilitating or committing an indictable offence under the Criminal Code or any other Act of Parliament, knowingly, by act or omission, participated in or contributed to an activity of the criminal organization, thereby committing the indictable offence set out in section 467.11 of the Criminal Code.
- c) **Charge no. 3. Derek White.** Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal and elsewhere in Québec and Canada, conspired with Robert Jr DIPECO, Sylvain ETHIER, Paul JEAN and others to commit an indictable offence, namely: Fraud against the Government of Canada, thereby committing the indictable offence set out in section 465(1)(c) of the Criminal Code.
- d) **Charge no. 4. Derek White.** Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal and elsewhere in Québec and Canada, conspired with Robert Jr DIPECO, Sylvain ETHIER, Paul JEAN and others to commit an indictable offence, namely: Fraud against the Government of Québec, thereby committing the indictable offence set out in section 465(1)(c) of the Criminal Code.
- e) **Charge no. 5. Derek White.** Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal, and elsewhere in Québec and Canada, defrauded the Government of Québec, by deceit, falsehood or other fraudulent means, of a sum of money, in excess of \$5,000.00, thereby committing the indictable offence set out in section 380(1)(a) of the Criminal Code.

- f). **Charge no. 6.** *Derek White. Between November 17, 2014 and March 30, 2016, in Kahnawake, district of Longueuil, in Montréal, district of Montréal and elsewhere in Québec and Canada, defrauded the Government of Canada, by deceit, falsehood or other fraudulent means, of a sum of money, to a value exceeding \$5000.00, thereby committing the act of under section 380(1)(a) of the Criminal Code.*
6. On June 7, 2018, Justice Michel Pennou J.C.S, ordered that the constitutional voir dire regarding the Respondents' arguments on their aboriginal and treaty rights be held after the jury trial, should the jury return a guilty verdict.
  7. As of April 1, 2019, the Respondents were tried before a jury presided over by Justice Sophie Bourque of the Superior Court of Québec (the "**Judge**"), district of Longueuil.
  8. On 9 May 2019, after a 43-day trial, the jury returned a guilty verdict on counts 1, 2, 3 and 6.
  9. On September 13, 2021, the voir dire on the constitutional issues raised by the Respondents began in Montreal before the Judge.
  10. On 7 April 2022, after 62 days of hearings, including 24 days of oral argument, the Judge took the case under advisement. Approximately 19 months later, on November 1, 2023, the Judge handed down a 365-page decision on the constitutional issues (the "**Decision**").
  11. The Judge declared that section 42 of the *Excise Act, 2001* violated the Aboriginal and treaty rights of the accused and declared it inapplicable and of no force and effect with respect to them by virtue of section 52 of the *Constitution Act, 1982*. As a result, the Superior Court ordered a permanent stay of the criminal proceedings against the accused.
  12. This file does not contain any confidential information.

#### **NOTICES OF CONSTITUTIONAL QUESTIONS**

13. Although the Respondents announced at the outset of the proceedings their intention to file a constitutional defence based on section 35 of the *Constitution Act, 1982*, the first Notice of Constitutional Questions under articles 76 and 77 of the *Code of Civil Procedure* was not filed until July 27, 2018, only after Justice Michel

Pennou, in his decision of June 7, 2018, ordered the Respondents to file a notice.

14. There are four versions of the Notice of Constitutional Questions. The latest amendment was filed on 22 November 2021, ten days before the close of the instruction of the constitutional voir dire on 2 December 2021.
15. In the first three versions of their Notice of Constitutional Questions, the Respondents alleged the existence of numerous treaties that would have guaranteed a right to “free trade” in tobacco, with the *Covenant Chain* only being a representation of this series of treaties. It was only in the last amendment to the notice that the Respondents added the argument that the *Covenant Chain* constituted a meta treaty, or a treaty in its ownright, which would guarantee the Mohawks the right to be consulted when a dispute arose between them and the Crown, including with respect to any law or regulation pertaining to the tobacco industry.
16. In addition, the Respondents alleged the existence of an aboriginal right to trade tobacco and an ill-defined right to *residual sovereignty* of the Mohawk Nation that would confer control, authority and jurisdiction over its members, its territory, and the activities of its members, including economic activities. The Respondents also alleged rights under *the United Nations Declaration on the Rights of Indigenous Peoples* (the "**UNDRIP**"), which would require the Crown to obtain the free, prior, and informed consent of the Mohawk Nation before adopting legislative and administrative measures that might affect their rights.

#### **INTERLOCUTORY DECISIONS**

17. During the constitutional voir dire, the Superior Court rendered four interlocutory decisions, which are also the subject of this appeal.
18. On February 11, 2020, the Intervenor, the Mohawk Nation Council of Chiefs (the "**MNCC**") filed a 73-page "communication" asking the Superior Court to adjourn the criminal proceedings to allow time for consultation between the MNCC and the two Attorneys General (the "**AGs**"). On March 27, 2020, MNCC replaced this "communication" with a true motion entitled *Motion in Support of an Application for an Adjournment and an Order for Consultation* (the "**Motion for Consultation**").

19. On 29 June 2020, even before the Court decided to grant the MNCC intervener status, the Judge held a hearing on the *Motion for Consultation*. On 15 September 2020, the Judge delivered her oral conclusions<sup>11</sup> on the *Motion for Consultation* (the "**Conclusions on the Motion for Consultation**"), granting it in part. In so doing, the Judge ordered the AGs to "publicize" the Respondents' Notice of Constitutional Questions. The Judge also stated that she would draft a future judgment with the details of her reasoning. This judgment has still not been handed down. The Appellants are appealing the *Conclusions on the Motion for Consultation* and the reasons of the judgment to come.
20. On the same day, the Judge also ruled on a motion by the Respondents challenging the admissibility of Captain Dany Dufour's expert report filed by the Attorney General of Québec (the "**AGQ**"). The report explained the evolution, operation, and impacts of the illicit tobacco industry in general and its link to organized crime. The Superior Court granted the motion and declared the report inadmissible. The judge stated that she would draft a future judgment with the details of her reasoning. This judgment has still not been rendered. The Appellants are appealing this decision and the reasons for the upcoming judgment.
21. On November 30, 2020, the MNCC duly filed a motion to intervene in which it again requested an adjournment of the proceedings on the grounds that the Covenant Chain would confer a procedural right to discussion and negotiation between the Mohawks and the State on any matter of discord between the two.
22. On February 19, 2021, the Judge granted the MNCC the right to intervene as a party for the "limited" purpose of providing the Court with the "Mohawk Nation's perspective" (the "**Intervention Decision**"). However, the Judge denied the MNCC the right to argue the existence of a treaty right giving the Mohawks a procedural right to negotiation. The appellants are appealing the *Intervention Decision*.
23. On 27 September 2021, during the trial, the Attorney General of Canada (the "**AGC**") objected to the admissibility of certain parts of Dr Mark Walters' report,

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<sup>1</sup> See the minutes of 15 September 2020. A written version of the oral submissions was delivered on 18 September 2020.

arguing that these parts constituted inadmissible legal opinion. The Judge took the objection under advisement and dismissed it in her final decision. The Appellants appeal the decision dismissing this objection.

### **THE DECISION ON CONSTITUTIONAL VOIR DIRE**

24. On the constitutional front, the Judge ruled principally on two important issues: treaty rights and aboriginal rights.
25. On the issue of treaty rights, the Judge concluded that the Covenant Chain was not only a symbol of the treaty relationship between the British and the Mohawks, but was a treaty in its own right, protected by section 35 of the *Constitution Act, 1982*. According to the Superior Court, this general, unwritten treaty still guarantees a "conflict resolution process" that requires the Crown to discuss issues or disagreements between the parties at "contemporary Covenant Chain council sessions" "with the aim of reaching a consensus and ultimately resolving the issue at hand." Given that trade in general is one of the issues that must be discussed in the Covenant Chain Councils and that the Government of Canada did not discuss the question of tobacco trade in the Covenant Chain Councils prior to the adoption of the *Excise Act, 2001*, the judge was of the opinion that the Respondents had no obligation to pay excise duties on tobacco smuggled into Canada or to comply with the regulatory framework of the *Excise Act, 2001*.
26. With respect to the issue of aboriginal rights, the judge overturned the test developed by the Supreme Court of Canada (the "**SCC**") in the *Van der Peet*<sup>2</sup> decision and replaced it with a new test, which avoids the need for the Court to consider historical evidence regarding the practices, customs and traditions integral to the aboriginal group at the time of contact with Europeans. The new test focuses on the existence of rights in the traditional indigenous legal system and/or in UNDRIP. The judge determined that the aboriginal right at issue in this proceeding was a *generic* right to "freely pursue economic development" and found that there was sufficient evidence to support the conclusion that the acts alleged against the Respondents amounted to the exercise of this generic aboriginal right.

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<sup>2</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507 [**Van der Peet**].

Consequently, the judge was of the opinion that the Respondents had no obligation to pay excise duties on tobacco smuggled into Canada or to comply with the regulatory requirements of the *Excise Act, 2001*.

27. Ultimately, the judge imposed upon the Crown a duty to consult prior to the adoption of trade and taxation legislation (including the *Excise Act, 2001*), as well as a duty to discuss prior to the implementation and enforcement of trade and taxation legislation (including the regulation and management of the tobacco industry). Finally, the Court concluded that there is a duty to accommodate and reach consensus on the taxation regime.

## **II - GROUNDS OF APPEAL**

28. The Appellants maintain, for the reasons that follow, that the Judge erred in principle, in law and in fact with respect to the following rulings: 1) the declaration that section 42 of the *Excise Act, 2001* constitutes an unjustified infringement of the Respondents' aboriginal and treaty rights and is therefore inapplicable and of no force and effect with respect to them; 2) the order staying the criminal proceedings against the Respondents; 3) the four interlocutory rulings on constitutional voir dire, namely the *Conclusions on the Motion for Consultation*, the decision rejecting Captain Dany Dufour's report, the *Intervention Decision* regarding the MNCC, and the decision rejecting the objection to certain parts of Dr Mark Walters' report:

- 1) The Court's findings go beyond Canada's constitutional framework by, among other things, creating a new constitutional obligation for the Crown to "discuss through Covenant Chain Councils" with certain First Nations prior to enacting legislation; declaring Aboriginal peoples to be sovereign nations; transforming the principle of reconciliation; and incorporating a wide range of generic rights into section 35 of *the Constitution Act, 1982*.
- 2) The Judge erred in principle and in law by failing to comply with the rules of procedural fairness at trial, in particular by failing to comply with the *audi alteram partem* rule, by deciding issues that were not properly and timely brought before the Court in the Notice of Constitutional Question, and by asserting that principles such as the Honour of the Crown and reconciliation imposed special



obligations on the Crown's representatives at trial and on the Court itself.

- 3) The Judge erred in law and in fact by departing from the well-established jurisprudence of the SCC in determining whether the treaties alleged by the respondents are in fact treaties and, if so, in determining the scope and content of the treaties based on the appropriate factors and rules of interpretation. In particular, the Judge erred in law and in fact in concluding that the Covenant Chain is an unextinguished treaty of peace and friendship and that it includes a conflict resolution procedure.
- 4) The Court erred in law and in fact by failing to follow and apply the SCC's well-established jurisprudence on aboriginal rights, in particular by failing to correctly characterize the alleged aboriginal right at stake and by departing from the *Van der Peet* test to establish the existence of an "aboriginal right to economic development".
- 5) Because she did not apply the appropriate tests under section 35 of the *Constitution Act, 1982*, the judge erred in law and in fact in her analysis of the extinguishment of an aboriginal or treaty right, its infringement, and the justification for that infringement.
- 6) The Judge erred in law by concluding that the *notion of reconciliation* as a principle underlying the interpretation of section 35 of the *Constitution Act, 1982* had to be radically modified.
- 7) The Judge erred in law in her interpretation of the *UNDRIP* and the *United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14), in particular by expanding their scope in a manner inconsistent with the state of the law.
- 8) The Judge erred in law and in fact as regards the legislative and regulatory framework for trade, taxation, and border controls applicable to products subject to excise duty, such as tobacco.
- 9) The Judge made errors of fact in assessing the credibility of certain expert witnesses and in evaluating their testimony, namely Dr. Amber Adams, Dr. John W. Parmenter and Dr. Mark Walters.

- 10)** The Judge erred in rejecting the PGC's objection to the admissibility of part of Dr Mark Walters' report.
- 11)** The Judge committed errors of law and fact in her *Conclusions on the Motion for Consultation*.
- 12)** The judge made errors of law and fact in rejecting Captain Dany Dufour's report.
- 13)** The Judge committed errors of law and fact in her decision on the MNCC's *Motion to Intervene*.
- 29.** At trial, the Appellant, the Director of Criminal and Penal Prosecutions, was represented by Me Corinne Girard, Me David Moffat, Me Guy Marengère, Me Vincent Boutet-Lehouillier and Me Patrice Peltier-Rivest, whose offices are located at 393, rue St-Jacques, bureau 600 Montréal (Qc), H2Y 1N9. The Appellant, the Attorney General of Québec, was represented by Me Daniel Benghozi and Me Stéphanie Lisa Roberts, whose offices are located at 1 Notre-Dame Street East, Suite 8.00, Montréal (QC), H2Y 1B6. The respondent, the Attorney General of Canada, was represented by Me Geneviève Bourbonnais, Me Stéphanie Dépeault, Me Sean Doyle and Me David Lucas, whose offices are located at 200, boulevard René-Lévesque West, Montréal (QC), H2Z 1X4.
- 30.** At the trial on the constitutional voir dire, the Respondents were represented by Me Nathan Richards, whose offices are located at 800-407, boulevard Saint- Laurent, Montréal (QC), H2Y 2Y5, Me Gordon Campbell, whose offices are located at 8, rue St. George O., Alexandria (Ontario), PO Box 310, K0C 1A0, Me Vincent Carney and Mr. James O'Reilly, whose offices are located at 1155, boulevard Robert-Bourassa, bur. 1009, Montréal (QC), H3BB 3A7. At the criminal trial itself, the Respondents were represented by Me Pierre L'Écuyer, whose offices are located at 507 Place d'Armes, bur. 1212, Montréal (QC), H2Y 2W8, and Me Louis Gélinas, whose offices are located at 507 Place d'Armes, bur. 1212, Montréal (QC), H2Y 2W8.
- 31.** At the constitutional voir dire trial, the respondent, the MNCC, was represented by Paul Williams, whose offices are located at: PO Box 91, Grand River Territory,

Ohswéken (Ontario) N0A 1M0.

32. This notice is served on the Respondents Derek White and Hunter Montour and on the Clerk of the Superior Court of Québec, District of Longueuil.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**TO GRANT** the appeal;

**TO REJECT** the Notice of Constitutional Questions dated 22 November 2021;

**TO SET ASIDE** the declaration that section 42 of the *Excise Act, 2001* does not apply to the Respondents;

**TO SET ASIDE** the order staying the criminal proceedings against the Respondents;

**TO SET ASIDE** the decision on the *Motion for Consultation*;

**TO SET ASIDE** the decision to reject Captain Dany Dufour's report;

**TO SET ASIDE** the *Decision on intervention* by the respondent, MNCC;

**TO MAINTAIN** the objection to the admissibility of certain parts of Dr Mark Walters' report;

**TO DISMISS** the Respondents' constitutional defence;

**TO REFER** the matter to the Superior Court of Quebec to be dealt with in accordance with the law, including sentencing;

**TO MAKE** any order required in the interests of justice.

December <sup>1</sup>. 2023, in Montreal

*Bernard Roy (Justice-Québec)*

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Bernard, Roy (Justice - Quebec)  
(Daniel Benghozi, Eric Bellemare, Valérie Gourvil and Maxence Duchesneau)  
Counsel for the appellant Attorney  
General of Québec

30 November 2023, in Montreal



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Vincent Boutet-Lehouillier and  
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**COURT OF APPEAL OF QUEBEC  
DISTRICT OF MONTREAL**

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v.

**HUNTER MONTOUR**

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Defendants

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**ATTORNEY GENERAL OF CANADA**

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**MOHAWK NATION COUNCIL OF CHIEFS**

IMPLEADED PARTIES - Interveners

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**NOTICE OF APPEAL**  
**(Section 676(1)(c) of the *Criminal Code*)**

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**COPY**

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**Bernard, Roy (Justice - Quebec)**

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/ BB1721 / 0400-CM-2018-000545

(Daniel Benghozi, Eric Bellemare, Valérie Gourvil and Maxence Duchesneau)