Information Nos. 191686 01/191686 03/191733

ONTARIO
SUPERIOR COURT OF JUSTICE
(West Region, Sarnia)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

KEVIN BLAIR PLAIN, AARON ARTHUR MANESS, and THOMAS ADAM JACKSON

Applicants

NOTICE OF CONSTITUTIONAL QUESTION

The Applicants, KEVIN BLAIR PLAIN, AARON ARTHUR MANESS, and THOMAS ADAM JACKSON, intend to question the constitutional validity and applicability of the *Cannabis Act*, S.C. 2018, c. 16, sections 8(1)(b) and 10(2) and to claim a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* and assert that the legislation is inconsistent with the provisions of section 25, section 35.1, and section 52(1) of the *Constitution Act, 1982* and are of no force and effect particularly, that any acts and omissions of the Governments of Canada and Ontario infringe upon their Treaty, inherent, Aboriginal, international, and legal rights pursuant to section 25 and section 35 (1) of the *Constitution Act*, 1982 and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

The question is to be argued before the trial judge on a dated to set at the Courthouse, 700 N. Christina St., Sarnia, N7V 3C2.

AND TAKE FURTHER NOTICE that an application will be made for an abridgement of time for service and filing of this application/constitutional question.

THE APPLICANTS REQUEST:

1. The Applicants, Kevin Blair Plain, Aaron Arthur Maness, and Thomas Adam Jackson (hereinafter referred to collectively as the "Applicants"), request this Honourable Court to, dismiss or, in the alternative, stay the proceedings against them on the basis that the respective Indictments, and the prosecution based thereon, are in violation of their constitutional, inherent, treaty, international, and legal rights, that such violations cannot be justified and that the laws on which the indictment and prosecution are based are of no force and effect in respect to the Applicants.

2. In particular, section 355(b) of the *Criminal Code*, on which the charges against the Applicants are formally based, are constitutionally inapplicable and inoperative in respect to the Applicants in the context and in the circumstances of the present proceedings.

3. Furthermore, to the extent that they are relied upon as the basis for the charges under sections 8(1)(b) and 10(2) *Cannabis Act*, S.C. 2018, c. 16, and any other

statutory provisions relied on by the prosecution (which will sometimes be referred to herein as the "Contested Provisions") are constitutionally inapplicable and inoperative in respect to the Applicants in the context and in the circumstances of the present proceedings.

4. The Applicants assert the following: (i) that their constitutional, inherent, Aboriginal, Treaty, international, and legal rights take precedence over the contested provisions in the context and circumstances of these proceedings; (ii) that these rights have not been extinguished, ceded, or otherwise relinquished; (iii) that these rights have been violated; (iv) that their constitutional rights have been infringed by the Contested Provisions; and (v) the implementation thereof, and that such infringements cannot be justified.

5. In addition, the charges against the Applicants based on the Contested Provisions, in the context and circumstances of these proceedings, constitute a breach of constitutional obligations imposed upon the Queen, inter alia; a breach of the Honour of the Crown, a failure to obtain free prior and informed consent, and a failure to consult the Chippewa/Ojibwe and Ottawa/Odawa Nations, inter alia, the Chippewa/Ojibwe communities/bands of Aamjiwnaang and Kettle and Stony Point.

THE CONSTITUTIONAL, INHERENT, AND INTERNATIONAL RIGHTS INVOKED

6. The constitutional, inherent, and international rights of Applicants which are invoked, and which have been violated include the following:

a. the unextinguished treaty rights of free trade and medical services (prescribing and dispensing) by the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point as a component of the Council of Three Fires, also known as the People of the Three Fires; the Three Fires Confederacy; also known as, the United Nations of Chippewa, Ottawa, and Potawatomi Indians. This is a long-standing Anishinaabe alliance of the First Nations of Chippewa/Ojibwe and Odawa/Ottawa;

b. particularly rights under The Royal Proclamation of 1763; Council held at Amherstburg, Ontario on October 16, 1818; and the Huron Tract Treaty No. 29, all of which are existing treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. These treaty rights, provide, *inter alia*, for the right of the Chippewa/Ojibwe Nation, including the Chippewa/Ojibwe communities/bands of Aamjiwnaang and Kettle and Stony Point, and their members to acquire, transport, exchange and trade goods, including hemp and the derivative products, such as cannabis, and other plant-based medicines, and free of any regulation or constraint by the Crown including any duty of licensing for or on behalf of the Crown;

c. the unextinguished aboriginal right of free trade and to provide medical services by the Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point as a component of the Chippewa/Ojibwe Nation, which is an existing aboriginal right within the meaning of section 35 of the *Constitution Act, 1982*. This aboriginal right includes, in particular, the right to acquire, transport, exchange and trade goods, including hemp

and the like, and other plant-based medicine, and free of any regulation or constraint by the Crown including any licensing for or on behalf of the Crown;

d. the rights of the Applicants, as members of the Chippewa/Ojibwe Nation, an independent, self-governing nation with, as a minimum, residual sovereignty; which is responsible for, inter alia, licensing and any such or similar obligations, imposed by other governments including those of Ontario and Canada; and

e. the rights of members of the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point, as part of the Chippewa/Ojibwe Nation, pursuant to the United Nations Declaration on the Rights of Indigenous Peoples, as adopted and enacted in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, including but not limited to the following: (i) the right to freely determine and freely pursue their economic development (which extends to free trade and commerce); (ii) the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals; (iii) Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard; (iv) the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or

other traditional occupation or use, as well as those which they have otherwise acquired; (v) the right to have States' legal recognition and protection to these lands, territories and resources conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned; (vi) the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources; (vii) the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts; and (viii) the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

7. The Applicants specifically submit that they have constitutionalized treaty rights as well as constitutionalized aboriginal rights to acquire, exchange, distribute, transport and trade goods, inter alia, hemp and cannabis and the like, and other plant-based medicine (sometimes referred to herein as plant medicine) from, with, and to aboriginal and non-aboriginal persons, free of any regulation and licensing, imposition or constraint by the Crown or non-aboriginal legislative bodies and without any obligation to obtain permits or certificates nor any obligation to be

regulated by any federal or provincial body in respect to such goods, and particularly cannabis in the circumstances of these proceedings.

8. The Applicants further specifically submit that the Contested Provisions are inconsistent with, and inoperable and inapplicable to the Applicants in the circumstances of these proceedings, as infringing, without justification, the treaty rights, the aboriginal rights, the rights of the Applicants as members of the Chippewa/Ojibwe Nation and the Chippewa/Ojibwe communities/bands of Aamjiwnaang and Kettle and Stony Point, their right to be exempt from regulation and licensing obligations, and their rights under the United Nations Declaration on the Rights of Indigenous Peoples, as adopted and enacted in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

FACTUAL GROUNDS

I. THE CHARGES AND ALLEGED OPERATION

9. In these proceedings, the Applicants, Kevin Blair Plain, Aaron Arthur Maness, and Thomas Adam Jackson, are charged under section 10(2) of the *Cannabis Act* and under section 355(b) of the *Criminal Code* (hereinafter the “Charges”).

10. The Prosecution alleges these Applicants were respectively in control of a commercial operation that sold cannabis and cannabis products in contravention of the *Cannabis Act* and the Cannabis Regulations. It is alleged that these Applicants, inter alia, did unlawfully possess cannabis for purpose of selling and

did have in their possession property not exceeding $5,000 knowing all property was obtained by the commission in Canada of an offence punishable by indictment.

11. Officers of the Sarnia Police and the Ontario Provincial Police-Provincial Joint Forces Cannabis Enforcement Team attended at the Tashmoo Dispensary located at 1069 Tashmoo Avenue, within the Aamjiwnaang First Nation to execute a search warrant. The arrested the Applicant Kevin Blair Plain, a member of the Aamjiwnaang First Nation. The Tashmoo Dispensery dispenses plant-based medicines, including cannabis and cannabis products, on the lands of the Aamjiwnaang First Nation. It is located entirely in the Aamjiwnaang First Nation and is held by a Certificate of Possession issued to James Kenneth Plain, an Aboriginal/Indigenous person under the Indian Act., R.S.C. 1985, c.I-5 (hereinafter the “Indian Act”).

12. Officers of the Sarnia Police and the Ontario Provincial Police-Provincial Joint Forces Cannabis Enforcement Team obtained a warrant to search the “Reefinery Dispensary trailer” located at 1646 St. Clair Parkway, City of Sarnia, Province of Ontario. Resulting from the execution of the search warrant, the Applicant Aaron Arthur Maness was charged.

13. The Reefinery Dispensary is located at 1644 St. Clair Parkway, within the Aamjiwnaang First Nation. The said dispensary is situated on lands owned under a Certificate of Possession pursuant to the *Indian Act*, R.S.C., 1985, c.I-5

(hereinafter the "*Indian Act*") which at the time of the execution of the warrant, belonged to Sandra Mok, an Aboriginal/Indigenous person. Ms. Mok is a member of the Aamjiwnaang First Nation. The Reefinery Dispensary dispenses plant-based medicines, including cannabis and cannabis products, on the lands of the Aamjiwnaang First Nation.

14. The address 1646 St. Clair Parkway is owned by James Kenneth Plain, an Aboriginal/Indigenous person. The address 1646 St. Clair Parkway is situated within the Aamjiwnaang First Nation, on lands owned under a Certificate of Possession belonging to James Kenneth Plain pursuant to the *Indian Act*. Mr. Plain is a member of the Aamjiwnaang First Nation.

15. Officers of the Anishinabek Police Services ("APS") and obtained a telewarrant to search the Organic Solutions Dispensary. The APS and the Ontario Provincial Police-Provincial Joint Forces Cannabis Enforcement Team executed the search warrant and resulting from the execution same, the Applicant Thomas Adam Jackson as charged.

16. The Organic Solutions Dispensary is located at 6098 Indian Lane, within the Kettle and Stony Point First Nation. This dispensary is situated on lands owned under a Certificate of Possession pursuant to the *Indian Act*, which at the time of the execution of the warrant, originally belonged to Marjorie Elijah, an Aboriginal/Indigenous person. Ms. Elijah was also a member of the Kettle and Stony Point First Nation. The said property remains in the hands of various family

members all of whom are members of the Kettle and Stony Point First Nation. Organic Solutions Dispensary dispenses plant-based medicines, including cannabis and cannabis products, on the lands of the Kettle and Stony Point First Nation.

17. The Aamjiwnaang First Nation lands are lands reserved to the exclusive use of the Aamjiwnaang First Nation pursuant to the Huron Tract Crown Treaty No.29 entered into in 1827 and occupied by the ancestors of the Aamjiwnaang First Nation prior to the Crown imposing its sovereignty imposing its sovereignty upon this First Nation.

18. The Kettle and Stony Point First Nation lands are lands reserved to the exclusive use of the Kettle and Stony Point First Nation pursuant to the Huron Tract Crown Treaty No.29 entered into in 1827 and occupied by the ancestors of the Kettle and Stony Point First Nation prior to the Crown imposing its sovereignty imposing its sovereignty upon this First Nation.

19. The Applicants, Aaron Arthur Maness aged 60 and Kevin Blair Plain aged 52, are Aboriginal/Indigenous persons and members of the Aamjiwnaang First Nation. The Applicant, Thomas Adam Jackson aged 46, is an Aboriginal/Indigenous person and member of the Kettle and Stony Point First Nation.

20. These Applicants, respectively, are members and citizens of the Chippewa/Ojibwe Nation. They are also members of the Chippewa/Ojibwe

communities/bands of Aamjiwnaang and Kettle and Stony Point, two of the communities of the Chippewa/Ojibwe Nation, and are authorized and entitled to invoke the aboriginal and treaty rights, inherent rights, legal rights, and international rights that enure to their benefit as members and as citizens of the Chippewa/Ojibwe Nation.

21. The Applicants are also Indians within the meaning of the *Indian Act* and have significant rights and interests in Aamjiwnaang and Kettle and Stony Point, respectively, each a “Reserve” within the meaning of the *Indian Act*.

THE CHIPPEWAS/OJIBWE OF AAMJIWNAANG AND KETTLE AND STONY POINT, AND THE CHIPPEWA/OJIBWE NATION

21. The Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Pont each respectively constitute a distinct community of Chippewa/Ojibwe with its own laws and governing institutions and always has been an integral part of the Chippewa/Ojibwe Nation.

22. The Chippewa/Ojibwe Nation is a distinct people and the Chippewa/Ojibwe have, since prior to the arrival of Europeans in North America, continuously occupied, possessed, and used the territory which includes a significant part of what is now known as, Wisconsin, Michigan, Minnesota, Southern Manitoba, Southern Saskatchewan, and Ontario. This area encompasses the lands and waters of around Sarnia and Kettle and Stony Point (collectively the “traditional Chippewa/Ojibwe Territory”).

23. Since prior to contact, the Chippewa/Ojibwe Nation has belonged to the Three Fires Confederacy system of the three nations of the Chippewa/Ojibwe, the Odawa/Ottawa and the Potawatomi Nations.

24. The Three Fires Confederacy and their allies controlled a vast part of the continent stretching, north to south, from approximately the 48th parallel south to the borders of the present-day Wisconsin, west to east from the Great Lakes to Peterborough to the Bay of Quinte and to the border of New York State.

25. The Chippewa/Ojibwe Nation and the Three Fires Confederacy have had their own system of government since prior to contact with Europeans, as well as their own laws, institutions, customs, practices and traditions, and the Chippewa/Ojibwe Nation has throughout and to this date functioned as an independent nation with its own government. The Chippewa/Ojibwe Nation and the Three Fires Confederacy have validly maintained this status to the present.

26. Since prior to contact with Europeans, and at all relevant times, the Chippewa/Ojibwe have exercised their traditions, values, customs, spiritual practices and economic activities, have carried on their particular way of life and used and benefited from the lands and resources and earned their livelihood in and from the traditional Chippewa/Ojibwe Territory.

27. The Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point are linked with other communities of the Chippewa/Ojibwe Nation as well as with the other components of the Three Fires Confederacy by a common culture, a common language, common ancestry, common history, common practice in plant-based medicine, family relations and a shared responsibility, imposed by their laws, to protect and enhance the jurisdiction, rights, lands, and interests of the Chippewa/Ojibwe Nation.

28. The Chippewa/Ojibwe communities/bands of Aamjiwnaang and Kettle and Stony Point, respectively exercise jurisdiction within and over the territories of Aamjiwnaang and Kettle and Stony Point. The Chippewa/Ojibwe Nation continues to exercise jurisdiction over the whole of the traditional Chippewa/Ojibwe territory.

29. As members of the Chippewa/Ojibwe Nation and particularly as members of the Chippewa/Ojibwe communities/bands of Aamjiwnaang and Kettle and Stony Point, respectively, the Applicants are beneficiaries of, and entitled to exercise the collective rights of the Chippewa/Ojibwe Nation and the Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point.

30. The French and the British Crowns have historically recognized the Chippewa/Ojibwe Nation as an independent nation capable of maintaining relations of peace and war, and of governing itself under the protection of the French and the British Crowns. Both the French and British Crowns entertained

commercial ties with the Chippewa/Ojibwe Nation. The British Crown entered into treaties with the Chippewa/Ojibwe Nation, the obligations of which they acknowledged, and which remain valid, operative and binding on that Crown.

31. Thus, the Chippewa/Ojibwe Nation became party to several treaties with the European powers and such treaties recognized the right of the Chippewa/Ojibwe as a nation to govern themselves and to carry out trade and other economic activities and to practice plant-based medicine within the traditional Chippewa/Ojibwe territory and beyond it, without restriction, regulation or obligation imposed by the European powers, including the British Crown.

32. Since prior to contact with the Europeans, the Chippewa/Ojibwe Nation has also entered into agreements and treaties with other Aboriginal Nations.

TRADE AS AN INTEGRAL PART OF CHIPPEWA/OJIBWE CUSTOMS, TRADITIONS, AND PRACTICES

33. Since prior to contact with the Europeans, trade in goods, including tobacco, hemp and hemp derived products, medicine, and transport thereof over large distances, have been an integral part of Iroquois and Chippewa/Ojibwe customs, traditions, and practices. Such trade and transport are integral to the distinctive society of the Chippewa/Ojibwe and a central and significant part of that society's distinctive culture. They are a defining feature of Chippewa/Ojibwe society.

34. As farmers, tradesmen and tradeswomen (and medical practitioners), the Chippewa/Ojibwe had a firm grasp of self-interested economic pursuits and effectively understood the notion of trade on a “for-profit” or “commercial” scale.

35. For the Chippewa/Ojibwe and Odawa/Ottawa, trade represented one practice through which forms of status could be achieved by persons perceived to bring about a public benefit through their individual initiative. Influence could be gained within the Chippewa/Ojibwe community through the redistribution of goods acquired in trade through gift-giving and even the internment of valuable “exotic” goods in burials of community members. For the Chippewa/Ojibwe, it was distinctively not their understanding that the purpose of “Daawed”, which is commonly referred to as “trade”, was to gain profit or for individuals to accumulate wealth. Those concepts were foreign to the Chippewa/Ojibwe.

36. The strategic position of the traditional Chippewa/Ojibwe territory, combined with the military power of the Three Fires Confederacy, enabled the Chippewa/Ojibwe and the members of other Three Fires nations, to circulate free of hindrance and acquire, exchange, distribute, and transport goods and thus thrive as traders throughout a vast territory, prior to and after contact with the Europeans.

POST-CONTACT TREATMENT AND THE REGULATION ISSUE

37. Chippewa/Ojibwe trade was beyond the regulatory and administrative ambit of European powers. Such trade instead was regulated and administered by the Chippewa/Ojibwe themselves. Thus, Chippewa/Ojibwe trade was self-regulated. It

was governed in accordance with Chippewa/Ojibwe land and trade law/customs and free of interference and imposition by or obligations to foreign governments.

38. A fundamental aspect of the independence of Chippewa/Ojibwe trade was the absence of any obligation to pay duties, tributes, and other fiscal payments, and the absence of licensing or other regulation by, European powers or the British Crown. As independent entities carrying on open and free trade, the Three Fires Confederacy and the Chippewa/Ojibwe Nation and their members neither sought nor were required to be regulated or licensed by the British Crown or other European powers for any commercial or other activities.

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

40. The system of separate regulation of trade for European subjects provided for in treaties was also entrenched or, as a minimum, reflected in the wording of the Royal Proclamation of 1763, which provided:

> "the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief or any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit […]."

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

42. Moreover, once the British and French Crowns began to vie for control of the New World by establishing settler colonies and military outposts, the Three Fires Confederacy, including the Chippewa/Ojibwe territory assumed a heightened importance as it soon became a buffer zone between the two colonial rivals.

43. The French coureurs des bois sought to gain a direct access to these First Nations. The British merchants relied on the Three Fires Confederacy, including the Chippewa/Ojibwe, to effectively act as middlemen with these groups.

44. In this period (pre-1760), the Chippewa/Ojibwe were valued for their role in the fur trade as the British and French were competing for their business. The French were defeated in 1760. The Chippewa/Ojibwe become important thereafter as a buffer between the British and encroaching settlement in the Thirteen Colonies. Their presence and role as allies of the British remained vital following the American Revolution when settlers/US Army began expanding into the Ohio Valley and attacking Chippewa/Ojibwe villages.

45. The British trading system also came to rely on the capacity of the Chippewa/Ojibwe to trade with distant First Nations located to the west of Chippewa/Ojibwe country with regard to the fur trade and trade in various plants. The formidable collective military power of the Chippewa/Ojibwe effectively

ensured that, in order to trade with nations located to the west of the Chippewa/Ojibwe, the British were forced to secure their goodwill and cooperation.

LEGAL GROUNDS

TREATY RIGHTS

46. The Chippewa/Ojibwe, including the Applicants, are the beneficiaries of the obligations under treaties concluded with the colonial powers, including the Huron Tract Treaty No. 29, as well as under other imperial instruments. This Treaty only requested land for settlement leaving all other rights, such as trade, medicine, commerce, self-governance, unaltered and intact. These obligations were never extinguished nor replaced and are still valid and binding. The Chippewa/Ojibwe, including the Applicants, therefore possess a treaty right to free trade, which includes the right to trade any products on a commercial scale in their traditional Chippewa/Ojibwe territory and in other territories contemplated by the treaties, without any regulation, imposition, or licensing obligation to the European powers and their successors.

47. From the time of contact, European powers and Aboriginal Nations coordinated their separate systems of trade by virtue of treaties in a colonial context of economic interdependence and political and military alliances between these distinct nations. The treaties described in the present application all meet the criteria established in Canadian jurisprudence for the existence of treaties.

48. From the early seventeenth century onward, the Three Fires Confederacy, and more particularly the Chippewa/Ojibwe Nation, concluded numerous treaties with the colonial powers, namely the French and the English. These treaties were essentially diplomatic and commercial in nature, trade being at the forefront of the preoccupations of the Chippewa/Ojibwe in their dealings with the colonial powers. These treaties were a continuation of pre-contact practices.

49. The treaties between newly-arrived European polities and the Three Fires Confederacy and the Aboriginal Nations were negotiated and concluded on a nation-to-nation basis, with parties to the written and oral agreements being equals. Such treaties were, moreover, continually renewed and reaffirmed in diplomatic and trade meetings involving the native and newcomer signatories or parties.

50. From the beginning of the colonial encounter, trade and diplomatic treaties between Europeans and the Anishinaabe, including the Chippewa/Ojibwe Nation and its members were considered indispensable to the European powers and settlers to secure economic and other relations with aboriginal trading partners and thus access to new resources, markets, and trade items.

51. The majority of these treaties were concluded according to the diplomatic language understood at the time by the Chippewa/Ojibwe. These treaties were memorialized by the exchange of wampum belts which conveyed different

meanings, such as trade or peace or war. Knowledge of these treaties has been passed down from generation to generation in the oral tradition of the Chippewa/Ojibwe Nation.

52. The treaty relationship is expressed by the well-known Two Row Wampum, which symbolically illustrates two paths or two vessels travelling down the same river together. One, a birch canoe, was to be for the Indian people, their laws, their customs, and their ways; the other, a ship, was to be for the white people and their laws, their customs, and their ways. Each travelled the river together side by side but in their own boat. Neither was to try to steer the other's vessel and neither vessel would collide with the other.

53. Several treaties, though not a majority, were also recorded in written form by colonial officials. Other treaties are known through the writings of these colonial officials. The Chippewa/Ojibwe had their own system of recording treaties.

54. Although there were agreements with the French and treaties concluded with the British, the Chippewa/Ojibwe (and the other nations which formed the Three Fires Confederacy) negotiated the bulk of the treaties with the British Crown, forming what is today known as the "Covenant Chain", which to this day symbolizes the alliance between the Three Fires Confederacy, including the Chippewa/Ojibwe, and the Crown.

THE COVENANT CHAIN

55. The Anishinaabeg and Haudenosaunee entered into earlier agreements between themselves (Dish, Two Row, Covenant Chain). Other key agreements during this period resulted from the councils at Detroit and Niagara in the 1760s, where the British invoked the Covenant Chain and promised trade and prosperity.

56. The Chippewa/Ojibwe entered into trade relations with the French prior to the British being in the area of Southwestern Ontario. When the English took control of parts of what later became Upper Canada, they built their treaty relationship with the Anishinaabe and their allies. The British treaty relationship with these Aboriginal Nations came to be known as the Covenant Chain.

57. The Covenant Chain is a series of treaties and wampum that were meant to record military and trade alliances (and, in some cases, neutrality pacts) between the British Crown and the primarily the Mohawk nation but they expanded to include other nations and the Three Fires Confederacy, as geopolitical tensions and fur trade competition increased between the French and British.

58. These treaties were also intended to record and formalize the commercial and trading system that existed between the English Crown and the Chippewa/Ojibwe Nation, free from interference the one by the other. Trade, especially the ability to trade free of hindrance, remained a vital and intricate component of the relationship

between these two Nations. This trade included plants and plant-based products and medicines

59. The Covenant Chain was often renewed and strengthened over the course of the seventeenth and eighteenth centuries and trade continued to remain at the forefront of the preoccupations of the Aboriginal Nations. For example, the Covenant Chain was strengthened and Detroit and Niagara in 1760 and 1761, respectively, and again in 1764 where the British made promises, inter alia to free trade, to those Aboriginal Nations in attendance.

60. These Covenant Chain agreements expressly recognize the rights of the Chippewa/Ojibwe to trade freely, not only with the colonial powers, but also amongst themselves as well as with other First Nations. Such trade included the free trade of plants, plant-based medicines, and products.

61. These treaties contain oral terms, which include promises as well written terms, or terms otherwise recorded symbolically. They were also recorded by officials like Sir William Johnson, Superintendent of the Indian Department, who sent them to the Colonial Office in Britain as a record of the policies implemented in North America. In addition to express or written and oral treaty terms, or terms otherwise recorded, other relevant historical circumstances surrounding the conclusion of the treaties of the Covenant Chain further confirm a Chippewa/Ojibwe right of free trade (including commitments during the negotiations, the comprehension of

Chippewa/Ojibwe members at the time of conclusion of the treaties and thereafter, and the subsequent post-treaty conduct of the signatories).

62. Preliminaries and events leading up to the ceremonies of renewal of the Covenant Chain at Detroit and Niagara, as well as other treaties indicate the imperative of trade concessions and trade rights for the Chippewa/Ojibwe Nation, and such invitations and pre-treaty interactions are essential in interpreting the written treaties and determining the intentions of the parties and the nature and scope of agreed provisions. A further example of same is evidenced by treaties negotiated for land south of the Thames River by Alexander McKee in the 1790s, which did not interfere in Anishinaabeg trade practices. Settlers and officials relied on the Anishinaabeg to manufacture goods, hunt and fish, guide and provide provisions.

63. Similarly, treaty negotiations and oral terms of peace and trade treaties also reflect the longstanding trade practices of the Chippewa/Ojibwe Nation and their members and crystallized such customary trade practices into treaty rights to acquire, exchange, distribute and trade goods without interference from or obligations to foreign Crowns, consistent with the practice of trade with other Aboriginal Nations before the colonial encounter.

64. By expressing their assent to the treaties and the Covenant Chain, it was the understanding of the Chippewa/Ojibwe parties that they would have the right to acquire, exchange, distribute and trade goods, including plants, plant-based

medicines and products, without interference from or obligations to foreign Crowns. The Crown had the same intention and understanding.

65. The commercial and trading system recognized by the treaties which constitute the Covenant Chain also recognized the complex commercial and trading system between the First Nations which existed prior to the time of contact with the Europeans and in which the Chippewa/Ojibwe played a vital and dominant role in light of the key geographic position of the territories under their military control.

ROYAL PROCLAMTION OF 1763

66. The pre-contact trade system of the Chippewa/Ojibwe which was recognized in the free trade provisions of treaties with European Powers was once again formally and unilaterally recognized by the British Crown through the Royal Proclamation issued by King George III in 1763 in the wake of the Seven Years War. The Royal Proclamation not only provided for the recognition of aboriginal title, but also acknowledged, at least implicitly, by the regulation of non-aboriginal persons only, that the Chippewa/Ojibwe Nation and its members continued to have free and open trade. The Chippewa/Ojibwe of the Aamjiwnaang and Kettle and Stony Point First Nations fall within the boundaries of the Indian Territory outlined in the Royal Proclamation of 1763.

67. To this day, the treaties of the Covenant Chain and the Royal Proclamation have never been extinguished or replaced, and subsist as binding bilateral instruments,

the rights of which are now constitutionalized. The continuing validity of the peace and trade treaties concluded between the Chippewa/Ojibwe Nation and European powers have been invoked regularly by Chippewa/Ojibwe Nation and its members from the time of their conclusion, regardless of the subsequent unilateral and arbitrary lack of respect and lack of implementation by the Crown of the treaties and of the Royal Proclamation of 1763.

68. The Crown is deemed to have knowledge of its treaty obligations to the Aamjiwnaang First Nation and Kettle and Stony Point First Nation as a component of the Chippewa/Ojibwe Nation and the Three Fires Confederacy, yet the governments of Canada and Ontario have continuously violated the treaties by the imposition of borders, by the enactment of legislation such as the *Excise Act, 2001*, the *Excise Tax Act*, and the *Tobacco Tax Act*, the *Cannabis Act* and Regulations, and by the administrative and prosecutorial measures undertaken pursuant to said legislation, none of which alter the binding and superior force of the constitutionalized treaties of which the Applicants are beneficiaries.

ABORIGINAL RIGHTS

69. In addition to their treaty rights, the Applicants as members of the Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point (as distinct aboriginal societies) also have and invoke an aboriginal right of free trade in a range of goods which they have acquired, used and traded since prior to contact with Europeans.

70. For the purpose of these proceedings, the Applicants assert that their aboriginal right of free trade, confirmed by section 35 of the *Constitution Act, 1982*, includes the right to acquire and use plant-based medicines and products, and to engage in the trade of such plant-based medicines and products with other Chippewa/Ojibwe people and Aboriginal Nations or with non- aboriginal persons, without any imposition by or related obligation to the Crown.

71. The Aboriginal right of the Applicants to freely trade in plant-based medicines and products on a commercial scale shields the Applicants from any regulation, imposition or constraint by the Crown or non-aboriginal legislative bodies. The Applicants therefore have no obligation to obtain permits or certificates, nor any obligation to pay, collect or remit federal or provincial duties or taxes in respect to plant-based medicines and products, in the circumstances of these proceedings.

72. It is submitted that these Applicants acted and conducted themselves pursuant to their aboriginal rights (as well as pursuant to the treaty rights and other rights mentioned herein).

73. Since prior to contact between the Europeans and the Chippewa/Ojibwe Nation, the use and trade of goods, and plant-based medicines has always been a defining and integral feature of Chippewa/Ojibwe culture, traditions, and practices, and is an integral part of the distinctive culture of their aboriginal society.

74. Members of the Chippewa/Ojibwe Nation have continuously used and traded in goods and plant-based medicines with members of other Aboriginal Nations, including on a commercial basis, since prior to contact with Europeans. The post-contact trading activities and conduct of the Chippewa/Ojibwe of Aamjiwnaang of Kettle and Stony Point provides substantial evidence of the extent and importance of the exercise by the Chippewa/Ojibwe of their trading rights and rights to practice medicine, which endures to this day and has formed, since prior to contact, a distinctive feature of Chippewa/Ojibwe culture, traditions, and practices, including for the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point.

75. At the time of contact, Chippewa/Ojibwe traders expanded their trading practices and traditions to trade with Europeans who profited immensely from the trade in goods delivered to them by the Chippewa/Ojibwe.

76. The dispensing of plant-based medicines and products by the Applicants constitutes the modern expression of an aboriginal right and the logical evolution of a longstanding commercial practice which was already firmly established prior to contact between the Chippewa/Ojibwe and the colonial powers.

77. All of the impugned activities of the Applicants occurred within the territorial gambit of their aboriginal rights. The dispensing plant-based medicine at issue originated within and at all times remained within the trading territory of the Huron Tract Treaty 29 and its predecessors, of which the Chippewa/Ojibwe Nation is a part.

78. Until well into the 19th century, there were no borders or boundaries which affected the exercise by the Chippewa/Ojibwe of their aboriginal rights which, in any event, trump the effect of any borders or boundaries.

79. The aboriginal right of the Chippewa/Ojibwe Nation to free trade and to practice plant-based medicine was never extinguished and has never been abandoned by the Chippewa/Ojibwe. Therefore, the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point, including the Applicants, have never lost or ceded their aboriginal rights, whether through extinguishment, surrender, abdication or in any other manner.

EXISTING ABORIGINAL RIGHT TO PROVIDE PLANT-BASED MEDICINE

80. On December 20, 2018, the Federal government released the Cannabis Regulations (the "Regulations") aimed, inter alia, to govern access to medical cannabis.

81. The Regulations authorize medical cannabis sellers to send or deliver cannabis; however, they do not authorize the in-person transfer of cannabis. Since the in-person transfer of cannabis is not authorized by the Regulations, it is therefore prohibited under the *Cannabis Act*.

82. The Regulations prohibit any aboriginal person, including an elder, healer or medicine man or medicine woman, from dispensing medical cannabis in-person to aboriginal medical cannabis patients. Instead, aboriginal medical cannabis

patients must access medical cannabis through an on-line mail order system, in which, a corporation mails the cannabis to the patient.

83. For aboriginal medical cannabis patients, having your plant-based medicine sent by mail from a corporation does not constitute reasonable access or personalized medical services or treatment. It is contrary to the aboriginal approach to traditional healing and delivery of medicine. It is a western medical approach disconnected from culture, families, and community.

84. The aboriginal approach to traditional healing is holistic, localized, and social. The aboriginal approach to traditional healing and plant-based medicine requires a personal relationship between the person dispensing the medical cannabis, the person receiving the medical cannabis, and the medical cannabis. The aboriginal approach to traditional healing and plant-based medicine focuses on the web of relationships between humans, plants, natural forces, spirits, and the land. It is a way of life and a collective dynamic that can be traced back to the beginning of time.

85. There are few medicines that lend themselves more to the aboriginal approach to traditional healing than cannabis. Medical cannabis is a plant medicine, not a pill made in a western biomedicine factory. Aboriginal traditional healing has a strong history with plant medicine.

86. Medical cannabis is an interactive plant-based medicine with many different strains that impact people differently, addressing different conditions, in varying ways. This suggests a more interactive and engaged relationship with the dispenser is important for achieving a therapeutic effect.

87. It is also a psychoactive medicine that also lends itself to the holistic, social, and spiritual aboriginal approach to traditional healing. Aboriginal traditional medicine is spiritual, expressed through the land and ceremonies.

88. Also, cannabis impacts health in many ways some of which enhance the general promotion of psychological and spiritual well-being. The aboriginal approach to traditional healing addresses not just the specific health issue, but also the general promotion of psychological and spiritual well-being using ceremony, counselling, and the accumulated wisdom of elders. The concept of identity plays a key role in the delivery of aboriginal health care.

89. By disregarding the aboriginal approach to traditional healing and plant-based medicine, the Regulations are undermining patient-centred care. Patient-centred care is medical care that is aligned around the values and needs of patients. Patient-centered care is a holistic approach to deliver respectful and individualized care, allowing negotiation of care, and offering choice through a therapeutic relationship in which persons are empowered to be involved in health decisions.

Ensuring that patients are involved in and central to the healthcare process is now recognized as a key component in developing high-quality care.

90. Patient-centred care can help improve a patient's health and lower health service burdens. The World Health Organization encourages patient-centered care as it is “empowering people to take charge of their own health rather than being passive recipients of services.” There have been numerous health care initiatives in Canada that have sought to implement patient-centred care. When the aboriginal approach to traditional healing and plant-based medicine is permitted, the patient is empowered, and the treatment is more therapeutic.

91. Under the Regulations, the patient must wait days or longer for their medicine to arrive by mail. The patient must wait days or longer to register with the manufacturer before even making a purchase. If there is something wrong with the medicine, then it must be repackaged and sent back causing further delays. If the patient is not home when the delivery arrives then it cannot be left at the residence. If a patient does not have a residence, then the system frequently cannot accommodate the patient at all. The mail order system causes delays and interruptions in access to medicine, which undermine patient health and cause unnecessary suffering. Medical cannabis is the only medicine that cannot be accessed in-person and on-demand.

92. The aboriginal medical cannabis patient’s only point of contact is a customer service representative who can be reached by phone. This means instead of an

elder or a medicine man or medicine woman, or even a pharmacist dispensing the cannabis and providing medical or spiritual guidance, it is dispensed by the manufacturer, which is a clear and obvious conflict of interest as they place their corporate interests over those of the individual. Medical cannabis is the only medicine that is required by law to be dispensed by the manufacturer.

93. In addition, the aboriginal approach to growing cannabis requires no pesticides, herbicides, or irradiation. Pesticides, herbicides, and irradiation are widely used by commercial cannabis growers under the Regulations.

94. The Regulations constitute a western biomedicine approach to healing, which is particularly flawed. The Regulations are inconsistent with the traditional aboriginal approach to healing and plant-based medicine. For aboriginal medical cannabis patients, this is not reasonable access nor a traditional approach to healing.

SOVEREIGNTY AND SELF-DETERMINATION

95. The Chippewa/Ojibwe Nation is a sovereign nation under international law with its own people, territory, government, and foreign relations and has and exercises its authority and rights inter alia in and over a significant part of what is now known as Quebec, Ontario, and the United States.

96. The Chippewa/Ojibwe Nation has functioned continuously as a distinct nation and society with its own government, laws, and institutions.

97. The laws of Canada and Ontario do not apply to the Chippewa/Ojibwe Nation and its members to the extent that they are inconsistent with the sovereignty, authority, and jurisdiction of the Chippewa/Ojibwe Nation and its members.

98. Under reserve of the assertion by the Chippewa/Ojibwe Nation of its full and inherent sovereignty, the Chippewa/Ojibwe Nation has retained, and for the purpose of these proceedings the Applicants invoke, as a minimum, the residual sovereignty of the Chippewa/Ojibwe Nation.

99. As part of its residual sovereignty, the Chippewa/Ojibwe Nation has exercised continuously and continues to exercise its authority, jurisdiction and control over its own members and territory with its own society, values, customs, traditions, spirituality, resources, economy, government, laws, and institutions.

100. Since prior to the time of first contact with the colonial powers, the Chippewa/Ojibwe Nation has never ceded or abandoned its residual sovereignty. To this day, the Chippewa/Ojibwe Nation still possesses and exercises the right to govern, control and administer its own society, its institutions and its economy and exercises its self-determination, including in respect to the exclusive control and management of the production and trade, distribution, and sale of all goods and services by its members.

101. Any sovereignty of Her Majesty in Right of Canada or in Right of Ontario cannot be exercised in respect to the Chippewa/Ojibwe Nation to the extent that it is incompatible with the residual sovereignty of the Chippewa/Ojibwe Nation.

102. The residual sovereignty of the Chippewa/Ojibwe Nation includes the immunity of the Chippewa/Ojibwe Nation and its components from any regulation or constraint imposed by the Government of Canada or the Government of the Province of Ontario. Such residual sovereignty extends to an immunity from regulatory oversight and licensing, whether such authority arises under federal or provincial law.

103. The sovereignty of the Chippewa/Ojibwe Nation also includes the control of trade and commerce between its members and the economic activities and practice of plant-based medicine occurring on the Chippewa/Ojibwe Territory, including within and without the boundaries of the Aamjiwnaang and Kettle and Stony Point Reserves.

104. Moreover, as an independent and self-governing society and nation, the Chippewa/Ojibwe Nation has always had and exercised its self-determination, including in respect to economic activities comprising, inter alia, the trade of plant-based products for personal and commercial use and plant-based medicines.

105. The Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point exercise authority, jurisdiction and control in respect to the members of the

Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point, respectively.

106. The Chippewa/Ojibwe Nation and thus the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point have never lost or ceded their sovereignty and jurisdiction, whether through extinguishment, surrender, abdication, or in any other manner.

107. As such, the alleged actions of the Applicants in relation to the possession and sale of cannabis, a plant-based medicine, would have occurred outside the jurisdiction and authority of the Government of Canada and the Government of the Province of Ontario and within the exclusive jurisdiction and authority of the Chippewa/Ojibwe Nation.

ABORIGINAL CONSTITUTION

108. On October 27, 2016, the membership of the Aamjiwnaang First Nation ratified the Aamjiwnaang Chi'Naaknigewin Community Constitution ("Aamjiwnaang Constitution"). The Aamjiwnaang Constitution was signed into law on April 11, 2017 by Chief and Council on behalf of the Aamjiwnaang people.

109. The Aamjiwnaang Constitution conferred upon the Aamjiwnaang people their ancestral right to govern their own lands, resources, commerce, including legal and personal affairs. It established a framework for the sovereignty and independence of the Aamjiwnaang people to self-govern their people.

110. The Aamjiwnaang Constitution establishes the authority and jurisdiction of the Aamjiwnaang people to create and enact legislation that governs their people separate and apart of legislation enacted by Federal and Provincial governments. Accordingly, the Aamjiwnaang Constitution governs supersedes Federal and Provincial legislation within the Aamjiwnaang First Nation.

111. The Aamjiwnaang Constitution enables the Anishinabek of Aamjiwnaang to establish their own laws, including laws regulating the production, distribution, and sales of cannabinoid products; inter alia, cannabis, and such other products containing or derived from same.

112. The individual membership of Aamjiwnaang First Nation ratified its approval of its desire to maintain the rights of its people to dispense plant-based medicine on its First Nation. The people have spoken, and they overwhelmingly support the activities of these Applicants.

113. The Charges against the Applicants and the Contested Provisions are therefore incompatible with and in violation of the residual sovereignty (as a minimum) of the Chippewa/Ojibwe Nation and its component the Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point, and the contested provisions are inapplicable to the members of the Chippewa/Ojibwe communities of Aamjiwnaang and Kettle and Stony Point, including the Applicants.

114. The Supreme Court of Canada has recognized that the European powers treated the Indian nations, including the Chippewa/Ojibwe Nation, as independent nations capable of entering into treaty relationships and as virtually independent nations. The treaties described herein represent an acknowledgment by the Crown of such a nation-to-nation relationship.

115. The right of self-determination is inherent and not dependent on specific constitutional recognition by Canada or Ontario.

ONTARIO POLITICAL ACCORD

116. Nonetheless on August 24, 2015, the Government of Ontario recognized the status of the First Nations as sovereign nations, of which the Chippewa/Ojibwe are one, and the rights of a constitutional order of the Chippewa/Ojibwe Nation. Ontario and First Nations represented by the Chiefs of Ontario signed a historic Political Accord. The Accord creates a formal bilateral relationship framed by the recognition of the treaty relationship.

The Accord reads:

> 1. WHEREAS the First Nations represented by the Chiefs-in-Assembly (hereinafter "the First Nations") and the Government of Ontario (hereinafter "Ontario") wish to move forward together in a spirit of respectful co-existence and with a view to revitalizing the treaty relationship;
>
> 2. AND WHEREAS the First Nations exist as self-governing Indigenous Nations and Peoples with their own governments, cultures, languages, traditions, customs and territories;

3. AND WHEREAS the Ontario provincial Crown's jurisdiction and legal obligations are determined by the Canadian constitutional framework, which includes the common law and treaties entered into between First Nations and the Crown;

4. AND WHEREAS the First Nations and Ontario recognize the importance of strong First Nations governments in achieving a better quality of life for First Nations and creating a better future for First Nations children and youth;

5. AND WHEREAS this Accord expresses the political commitment of the First Nations and Ontario and will guide our positive working relationship. It is not intended to impact the interpretation of the rights, legal obligations or jurisdiction of the First Nations or Ontario.

NOW THEREFORE the First Nations and Ontario agree:

1. That First Nations have an inherent right to self-government and that the relationship between Ontario and the First Nations must be based upon respect for this right. An inherent right to self-government may be given legal effect by specific rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, or through negotiated agreements and legislation;

2. To build upon and link to existing bilateral or other community-led initiatives established between First Nations and Ontario;

3. To host a meeting, at least twice per year, between the leadership of the Political Confederacy and the Premier and an agenda item which will include the joint assessment on the progress on the identified priorities and issues;

4. To work together to identify and address common priorities and issues, that will include, but are not limited to, the treaty relationship, resource benefits and revenue sharing and jurisdictional matters involving First Nations and Ontario; and

5. To work to resolve key challenges and impasses that impact the parties, including but not limited to, exploring the potential for the use of alternative dispute resolution processes.

117. Furthermore, it is submitted that, even under Canadian constitutional law, the Chippewa/Ojibwe Nation enjoys the status of a Third Order of government, distinct from that of Federal Government of Canada and the Provinces and Territories.

118. The self-determination of the Chippewa/Ojibwe Nation encompasses the right to the exclusive control, management, and administration of all facets of the trade in Aamjiwnaang and Kettle and Stony Point and elsewhere in the Chippewa/Ojibwe Territory by members of the Chippewa/Ojibwe Nation, including the Applicants.

119. As such, the Chippewa/Ojibwe Nation and its members enjoy immunity from any obligation of the Government of Canada or the Government of Ontario to be subject to registration to carry out the production, sale, and distribution of cannabis and cannabis products on the Chippewa/Ojibwe reserves or to be regulated and licensed by Government of Canada or the Government of Ontario.

120. The Chippewa/Ojibwe Nation has no duty to carry out the administration of any statute of Canada or Ontario unless it has given its prior consent to carrying out such administration, and, in particular, no obligations under constitutionally inapplicable and inoperative statutes.

121. In this respect, section 83.1(a.1) of the *Indian Act* is a recognition of the right of the members of a distinct nation, the Chippewa/Ojibwe Nation, to be self-regulating over all forms of licensing of commercial matters on Reserve lands.

122. Indians, as defined in the *Indian Act*, were not considered to be Canadian citizens until the middle part of the twentieth century and did not even have the unconditional right to vote in federal elections until 1960. However, this was consistent with the status of the Chippewa/Ojibwe as citizens of a distinct nation, the Chippewa/Ojibwe Nation, enjoying the right to be self-governing and self-regulating.

INTERNATIONAL LAW

123. The Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point, of which the Applicants are members, constitute an Indigenous People within the meaning of the United Nations Declaration on the Rights of Indigenous Peoples of September 13, 2007.

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

125. On May 30th, 2018, the House of Commons adopted Bill C-262. This Bill, also known as “An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples” affirms the Declaration as a universal, international human rights instrument with application in Canadian law, and requires the Government of Canada to take all measures necessary to ensure that the laws of are consistent with that Declaration, which laws would include the *Criminal Code*. Unfortunately, Bill C-262 was not enacted into law however, it was resurrected as Bill C-15.

126. On June 21, 2021, Bill C-15 was assented into law and is known as the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

127. The Applicants, as members of the Chippewa/Ojibwe Nation, hold and assert all the rights of the Chippewa/Ojibwe Nation and the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point affirmed in UNDRIP (and now codified in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.), notably in articles 3, 4, 5, 11, 18, 19, 20, and 37, which include the following:

a. The right to autonomy and self-government in relation to their internal affairs;
b. The right to freely determine their economic, social and cultural development, and to be secure in their enjoyment of their means of subsistence and development;
c. The right to engage freely in their traditional activities and to maintain, strengthen and revitalize their distinct customs, traditions and institutions; and

d. The right to participate in decision-making in matters that affect their treaty, aboriginal, inherent, and other rights.

128. Article 37 of UNDRIP confirms the right of the Applicants, as members of the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point, part of the Chippewa/Ojibwe Nation, to the recognition, observance and enforcement of all treaties, agreement and other constructive arrangement concluded with treaties entered into by the British Crown. The Governments of Canada and Ontario have an international obligation to honour and respect the treaties concluded by the Chippewa/Ojibwe Nation with the British Crown.

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

130. The international law rights of the Applicants as members of the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point pursuant to Articles 3, 4, 5, 11, 18, 19, 20, and 37 of the UNDRIP are not subject to the judicial tests for infringement and justification that apply to existing aboriginal and treaty rights affirmed by Section 35 of the *Constitution Act, 1982*.

131. The Crown has violated all these rights of the Chippewa/Ojibwe set out in UNDRIP and now enshrined in the *UNDRIP*.

132. The charges against the Applicants in the present proceedings and the Contested Provisions are a violation of international law and the rights of Applicants under international law.

INFRINGEMENT

133. The Charges against the Applicants under the Contested Provisions infringe without justification the treaty rights and the aboriginal rights of the Applicants as members of the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point, part of the Chippewa/Ojibwe Nation. Moreover, the administrative mechanisms and actions of the Government of the Province of Ontario and the Government of Canada relating to the regulation and licensing of cannabis and cannabis products, a plant-based medicine, pursuant to the relevant statutes, are, in the context of these proceedings, constitutionally inapplicable and inoperative in respect to the members of the Chippewa/Ojibwe Nation, more particularly to the members of the communities of Aamjiwnaang and Kettle and Stony Point, including the Applicants.

134. The infringement of the constitutional rights of the Applicants cannot be justified by the Crown under the criteria established by the jurisprudence, because there is no compelling and substantive legislative objective which can trump the rights of the Chippewa/Ojibwe Nation and the constitutional, inherent, and international rights, exemptions, and immunities of its members.

135. As a minimum, the Contested Provisions are a prima facie infringement of the rights of the Applicants, particularly for the reasons set out herein and in the Notice of Constitutional Questions filed herein.

136. The Applicants must only establish a prima facie infringement of their constitutionalized treaty, aboriginal and other rights. Moreover, the questions asked in *R. v. Sparrow* do not define the concept of prima facie infringement; they only point to factors which will indicate that such an infringement has taken place.

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

138. With respect to the first branch of the *Sparrow* test, the Applicants take no position on the general legislative objectives pursued by the Governments of

Canada and the Province of Ontario in the enactment of the Contested Provisions of the *Criminal Code*, and the *Cannabis Act*, in respect to their general application. However, the Applicants assert that the legislative objectives must take into account the constitutional, inherent, aboriginal, Treaty, and international rights of the Chippewa/Ojibwe of Aamjiwnaang and Kettle and Stony Point as a component of the Chippewa/Ojibwe Nation and the Three Fires Confederacy, which the Crown, and Parliament, and the Legislature of Ontario failed to do. Consequently, the Crown has not met the *first branch* of the *Sparrow* test in respect to any justification of the infringement of the constitutional rights of Applicants.

139. With respect to the *second branch* of the *Sparrow* test, the Applicants deny that the Governments of Canada and the Province of Ontario have taken any steps to ensure that the Contested Provisions infringe their asserted rights as little as possible. Rather, these governments denied or ignored and have breached these rights.

140. The application of fiscal legislation to the trading activities of the Applicants and other members of the Chippewa/Ojibwe Nation and the Anishinaabe deprives the Applicants of substantially the whole value of their aboriginal and treaty right to trade in goods, to be economically self-sufficient, and to self-regulation.

141. In any event, the operability and applicability of the Contested Provisions constitute an incompatible interference with the fundamental nature and extent of

the constitutionalized rights of the Applicants, are an unreasonable limitation thereof, particularly in the historical circumstances and solemn treaty commitments and honour of the Crown, impose undue hardship and deny the Applicants the preferred means of exercising their rights, and cumulatively violate the essence of those rights.

142. The Charges and the Contested Provisions also violate the residual sovereignty and self-determination of the Chippewa/Ojibwe Nation in the circumstances of these proceedings and are constitutionally inapplicable and inoperative in respect to the members of the Chippewa/Ojibwe Nation, more particularly the members of the communities of Aamjiwnaang and Kettle and Stony Point, including the Applicants.

SECTION 35

143. In addition to the facts set out above, the Applicants set out further facts with respect to the Section 35 argument.

144. The Applicants were dispensing medical cannabis, inter alia, to members of the Anishinaabe people. The Applicants are members of the Anishinaabe people. The aboriginal approach to traditional healing and plant-based medicine, discussed above, has been in existence among the Anishinaabe people long before first contact with Europeans. It is a practice, custom, and tradition that was integral to the distinctive pre-contact aboriginal society. The claimed modern right has a

reasonable degree of continuity with the pre-contact practice. The claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice.

SECTION 7

145. Section 10 of the *Cannabis Act* and its Regulations contravene the Section 7 rights of aboriginal medical cannabis patients by prohibiting aboriginals from dispensing medical cannabis in-person to aboriginal patients.

146. The Applicants have standing to challenge the constitutionality of laws under which they are charged whether or not the alleged unconstitutional effects are directed at them.

147. The Supreme Court of Canada has held, as other cases have, that the cannabis prohibition is directly dependent on the constitutionality of the medical regime. As such, the Applicants have standing to challenge the constitutionality of the medical cannabis regime based on the regime's effects on his own rights under the *Charter* as well as the rights of other cannabis patients.

148. In the seminal cannabis decision of *R. v Parker* (2000), 135 O.A.C. 1, the Ontario Court of Appeal determined that the government must provide "reasonable access" to cannabis for medically qualified patients.

Liberty interest #1 – The right not to have one's physical liberty endangered by the risk of physical imprisonment

149. The possibility of imprisonment infringes the right to physical liberty. Any offence that includes incarceration in the range of possible sanctions engages liberty.

150. The right to physical liberty engages medical cannabis patients who must purchase from the black market for any reason including an inability to access their medicine in a legal manner. The right to physical liberty also engages those who provide medical cannabis to patients who are having difficulty with access or are uncomfortable with access. These compassionate helpers also face risk of imprisonment.

Liberty interest #2 – The right to make personal choices about medical carefree from state interference

151. The right to liberty protects the right to make fundamental personal choices free from state interference.

152. Justice La Forest, writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ on this issue, articulated the liberty interest in *B. (R.) v Children's Aid Society of Metropolitan Toronto*:

> In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal

> autonomy, privacy, and choice in decisions going to the individual's fundamental being. She stated, at p. 166:
>
> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

153. In the context of medical care, the liberty right entitles adults to direct the course of their own medical care.

154. The court in *Carter* noted that the principle that adults should be entitled to direct the course of their own medical care is not just protected by Section 7's guarantee of liberty and security of the person, but also underlies the concept of informed consent.

155. In *Malette v. Shuman*, a leading informed consent case, the Court indicates that the purpose of the doctrine of informed consent is "plainly intended to ensure the freedom of individuals to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others…"

156. In the context of medical cannabis, when a patient is presented with a means of access to medical cannabis, "the simple interference with making a decision about bodily integrity and medical care has been held to trench on liberty."

Security of the Person – The right to make choices concerning one's own body and have control over one's own physical and psychological integrity

157. The right to security of the person is undermined by a criminal prohibition that interferes with a person's choices concerning their physical and psychological integrity. The right to security of the person is breached by a criminal law that restricts a person's reasonable access to medical cannabis reasonably required for the treatment of a medical condition representing a danger to life or health.

158. In *Allard*, the Court found that "security of the person is engaged, even independently of criminal sanction, by the establishment of a regulatory regime which restricts access to marihuana."

Principles of Fundamental Justice - Arbitrariness

159. A law is arbitrary if it imposes limits on liberty or security of the person that are inconsistent with the law's objectives, have no direct connection to that law's objectives, or are unnecessary in order to achieve those objectives. Such a law exacts a constitutional price in terms of rights without furthering the public good that is said to be the object of the law.

160. Where the criminal law intersects with medical treatment, it is a principle of fundamental justice that an administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.

161. An arbitrary, overbroad, or grossly disproportionate effect on one person is sufficient to establish a breach of Section 7.

162. The objective of Section 10 of the *Cannabis Act* is the protection of public health and safety.

Principles of Fundamental Justice – Overbreadth

163. A law violates the overbreadth principle if it is rational in its effect on liberty and security of the person in some cases, but in others it overreaches in its effect and is arbitrary. If it were found that there was a rational connection between the objective of the law and some, but not all, of its impacts then the prohibitions would be overbroad.

SECTION 1

164. On a Section 1 analysis, the government bears the onus on a preponderance of probabilities and must be rigorously held to this standard. The government must pass all stages of the Section 1 analysis, or the legislation fails.

i. The legislative objectives must be pressing and substantial to warrant overriding a constitutional right; and

ii. The means chosen to attain those objectives must be proportional to the ends, in that:

(a) the limiting measures must be carefully designed or rationally connected to the legislative objective;

(b) the limiting measures must impair the right as little as possible; and

(c) there must a proportionality between the deleterious effects of the offending legislation and the legislative objective.

165. The legislative objective is as set out above the protection of health and safety.

166. The means chosen to attain the legislative objective are not proportionate to the ends. The limiting measures are not rationally connected to the legislative objective. The limiting measures do not impair the right as little as possible. There was no proportionality between the deleterious effects of the offending legislation and the legislative objective.

167. Section 1, in contrast to Section 7, looks at whether the negative impact on the rights of individuals is proportionate to the overarching public interest, not just the law's purpose. In this case, the law's purpose and the overarching public interest are the same, health and safety. As such, the law must fail the Section 1 test for the same reason it failed the Section 7 rational connection test. If the law is not rationally connected to its objective, then the limiting measures are not carefully designed or rationally connected to that objective. As well, the limiting measures do not impair the right as little as possible. The law must fail the proportionality test under Section 1.

Section 10 contravenes Section 35

168. Section 10 of the *Cannabis Act* contravenes Section 35 of the *Charter* and is of no force and effect with respect to the Applicant by virtue of Section 52 of the *Charter*.

169. Section 10 of the *Cannabis Act* infringes the Applicants and their community's aboriginal right to traditional healing, which includes selling and trading plant medicine within his aboriginal community. This right has been in existence among the Anishinaabe people long before first contact with Europeans.

170. The test under Section 35(1) of the *Charter* requires:

1st – That the Applicant is acting pursuant to an existing aboriginal right;

2nd – That the right has a reasonable degree of continuity with the pre-contact practice; and

3rd – Any possible justification for infringement is considered.

171. In order to be an 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. The practice, custom, or tradition made the culture of the society distinctive. A court considering such an aboriginal right must take into account the aboriginal perspective but do so but do so in terms that are cognizable the non-aboriginal legal system.

172. The nature of Section 35 suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

173. In interpreting Section 35, where there is any doubt or ambiguity as to what falls as to what falls within the scope and definition, such doubt or ambiguity must be resolved in favour of aboriginal peoples.

CONCLUSIONS REGARDING INAPPLICABILITY AND INOPERABILITY

174. The Contested Provisions of the *Criminal Code* and the Charges based thereon, and Section 10 of the *Cannabis Act*, and the Regulations thereunder, in the context of the present proceedings and in respect to the Applicants and their conduct, violate and are incompatible and inconsistent with:

a. the unextinguished treaty rights of the Chippewa/Ojibwe Nation and the members thereof, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute an unjustified infringement of the constitutionalized treaty rights of the Applicants, which provide, inter alia, for the right of the Chippewa/Ojibwe Nation and its members to acquire and trade goods free of any regulation or constraints by the Crown;

b. the unextinguished aboriginal rights of the Chippewa/Ojibwe Nation and the members thereof, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute an unjustified infringement of the

constitutionalized aboriginal rights of the Applicants, and particularly the right to acquire and trade goods free of any regulation or constraints by the Crown;

c. the status of the Chippewa/Ojibwe Nation as an independent, self-governing nation with at least residual sovereignty, as well as the self-determination of the Chippewa/Ojibwe Nation, are constitutionally inapplicable and inoperative in respect to the Applicants, and constitute a breach as well as an infringement without justification of the authority, jurisdiction and powers of the Chippewa/Ojibwe Nation;

d. the exclusive jurisdiction of the Chippewa/Ojibwe Nation and its members to regulate and license on Reserve land;

e. the rights of the members of the Chippewa/Ojibwe Nation contained or reflected in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, including the right to freely determine and freely pursue their economic development, which extends to free trade and commerce.

OTHER EVIDENCE

175. In support of the present Application, the Applicants will present the evidence of aboriginal witnesses, including testimony based on oral tradition, in addition to expert reports and expert evidence.

FOR THESE REASONS, THE APPLICANTS REQUEST THE COURT:

TO GRANT the present Application;

TO DECLARE the Contested Provisions of the *Criminal Code* as constitutionally inapplicable and inoperative in the respect to the Applicants in the context and in the circumstances of the present proceedings;

TO DECLARE the Contested Provisions of the *Cannabis Act* are constitutionally inapplicable and inoperative in respect to the Applicants in the context and in the circumstances of the present proceedings; and

TO DISMISS the proceedings against the Applicants.

TO MAKE SUCH FURTHER AND OTHER ORDERS AS THIS HONOURABLE COURT MAY DEEM JUST.

THE WHOLE OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 25th day of July 2022 at the City of London, Province of Ontario, Canada.

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