

C A N A D A

PROVINCE DE QUÉBEC  
DISTRICT DE MONTRÉAL

N° 500-17-121419-223

C O U R S U P É R I E U R E

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**DOUG MITCHELL**

- et -

**MICHAEL SHORTT**

- et -

**SHANNON SNOW**

- et -

**FRÉDÉRIQUE LISSOIR**

- et -

**ADAM STERNTHAL**

- et -

**10096547 CANADA INC.**

Demandeurs

c.

**PROCUREUR GÉNÉRAL DU QUÉBEC**

Défendeur

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**D E T A I L E D A F F I D A V I T**

I, the undersigned, **TONYA PERRON**, lawyer and Elected Chief of the Mohawk Council of Kahnawà:ke, representing my community at 1 Church Rd, Kahnawà:ke, J0L 1B0, solemnly affirm as follows:

1. I was first elected as a Chief of the Mohawk Council of Kahnawà:ke ("**MCK**") in 2018. I was re-elected to the MCK in 2021 and am currently serving my second three-year term as a Chief. Prior to that, I practiced criminal law for over 20 years.
2. As such, I have personal knowledge of the matters contained herein, or it is based on the relevant records of the MCK that I have personally consulted, or it is based on information provided to me by the relevant members of the MCK, including MCK's legal counsel and/or our Elders.
3. I make this Detailed Affidavit in support of the plaintiffs' motion for a declaration of constitutional invalidity of articles 9 and 208.6 of *An Act respecting French, the official and common language of Québec*, SQ 2022, c. 14 ("**Bill 96**"), including their motion for a stay of those articles, and for no other purpose.
4. I have incorporated **Kanien'kéha**, the "**Mohawk**" language, throughout this affidavit, as once our language is translated into a foreign tongue, it can lose its meaning and the unique worldview of my people.

## **My Background**

5. I was born in Kahnawà:ke and have lived here most of my life.
6. I never had a chance to learn Kanien'kéha as a child, since neither of my parents had a chance to learn Kanien'kéha themselves. My father's mother was a fluent Kanien'kéha speaker, but passed away without ever teaching him the language. My mother's mother decided not to teach her younger children the language due to assimilationist pressures that her older children were being subject to at school.
7. As a result, my first language is English. My elementary schooling was also in English.
8. Going into high school I knew that I wanted to be of service in some sort of professional capacity to my community one day, either in the medical field or legal field. Being aware of certain language requirements for practising those professions in the province I requested to be placed in French immersion.
9. After that year of intensive French immersion, I took Secondary II-V in English, but I enrolled in a special program of "enriched French." This program involved additional French-language courses and was designed for students coming from an immersion background.
10. After graduating from high school, I went to McGill University's Faculty of Law. There, I continued to perfect my French. In fact, at my own expense I hired French tutor throughout law school, and I took French lessons on the weekends.
11. Now, as an adult, I finally have the opportunity to take introductory Kanien'kéha classes. This is part of a long-term project to revitalize the Kanien'kéha language and make it the language of daily life in Kahnawà:ke. I return to this issue later in my affidavit.

## **Background on the Community of Kahnawà:ke and the MCK**

12. Kahnawà:ke is a community of between 8,000 and 8,500 residents, all of whom are members of the Mohawk nation. It is located just south of Montréal.<sup>1</sup>
13. English is the language that is used for day-to-day communications in our community, although we are in the process of adopting Kanien'kéha as the language of daily life.
14. The MCK is the non-traditional governing body of the community.
15. The Council of Chiefs consists of: one Ohén:ton Í:iente ne Ratitsénhaienhs (Grand Chief) and 11 Ratitsénhaienhs (Chiefs). All 12 positions are filled by elections held

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<sup>1</sup> The MCK also has joint-authority over a tract of land in the Laurentians with our sister community Kanestake.

pursuant to the *Mohawk Council of Kahnawà:ke Election Law*, K.R.L. c. E-1.

16. The MCK is a band empowered entity. As such, the courts and government of Québec have taken the position that MCK is, or is analogous to, a legal person.<sup>2</sup> A direct consequence of this position is that MCK would be subject to articles 9 and 208.6 of Bill 96.
17. There are also legal persons found within our community. Some community members have businesses which are also considered legal persons, as they have been incorporated. Some of these corporations operate in regulated industries (such as a licensed cannabis cultivator). We also have non-profit organizations in the community, some of which are organized as legal persons.
18. The MCK often supports these various businesses and non-profit organizations. In fact, the MCK sometimes creates legal persons.
19. The first language of the community members who run these legal persons is either Kanien'keha or English.

### **The Legal System and the MCK**

20. In this section, I explain how legal decisions are taken by the MCK, and the role that language plays in these decisions.
21. Legal files are brought to a duly convened meeting of the Council of Chiefs. A quorum of 7 Chiefs in attendance is required. Our legal department presents the file to the Council and receives directions from Council. The legal department then implements Council's directions and resubmits a final pleading for approval by Council before that pleading is filed in court.
22. This process can typically take 1-2 weeks.
23. For files that may have a significant impact on collective rights, Council may consult with the community members more broadly. This is part of our continuous tradition of self-government via consensus building and collective decision-making.
24. Meaningful community consultation takes time. First, the community must be educated about the nature of the legal file, so that they can make an informed decision. This generally involves information sessions to brief non-lawyers about the legal issues and what they mean for the community. Second, the community's views need to be gathered. This can involve consensus-building meetings, surveys or polling of the community, or a formal community-wide referendum.

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<sup>2</sup> *Conseil des Innus de Pessamit c. Villeneuve*, 2020 QCCS 274 at para 230; *MoCreebec Council of the Cree Nation c. Québec (Procureur général)*, 2013 QCCS 95 at para 27; *Isaac c. Bonspille*, 2008 QCCS 6005 at para 86, 152, reversed on the merits without criticizing this part of the decision 2011 QCCA 977.

25. These consultation processes take several days to coordinate and conduct at the very least.
26. Failure to meaningfully consult on legal matters that could significantly impact collective rights can result in community backlash against the Council. We are accountable to the community, so we take the obligation to consult seriously – just as we expect other governments to take their obligations to consult with MCK seriously.
27. Since the community's common language is currently English, these consultations are held in English and the legal documents are prepared in English.
28. Accountability and transparency to the community requires MCK to use English. A French legal document would not be intelligible to most Council members, let alone most community members.

### **How Bill 96 Will Affect the Mohawk Community of Kahnawà:ke**

29. For the reasons given in the previous section, the MCK will always need to use English in its written proceedings.
30. In the past, there was no particular consequence to using English rather than French in the courts of Québec. Both were accepted language before the courts of Québec (and the Federal Court for that matter).
31. Now, under Bill 96, the government will require MCK to prepare a certified French translation of its English pleadings and the legal persons within our community will be required to do so as well.
32. This will lead to additional expense, delay, and loss of meaning. I will address costs and delay in subsections (a) to (e) below.
33. With respect to loss of meaning, we already face challenges translating complex cultural and legal notions from Kanien'kéha into English. Many of these notions are incredibly nuanced, and so it is already difficult to express them in English without loss of meaning. To translate them further into French would compound the problem.
34. Moreover, I am personally not aware of any certified translator who can translate between Kanien'kéha and French.
35. Indeed, I have reviewed the website of the Ordre des traducteurs, terminologues et interprètes agréés du Québec, and the Kanien'kéha language is not even listed as a language offered by the Order's members.

### **(a) Aboriginal Rights, the Duty to Consult, and Injunctions**

36. The Crown has a legal duty to consult and when appropriate, accommodate First

Nations. This duty flows from Section 35(1) of the *Constitution Act, 1982* and is therefore constitutional in nature and is required to achieve reconciliation. This duty applies to federal and provincial government actions or decisions that may negatively impact potential or established Aboriginal or treaty rights.

37. The legal and/or procedural aspects of the duty can, under certain circumstances, be delegated to administrative tribunals, Crown corporations and project proponents.
38. Accordingly, MCK is regularly consulted on a wide range of projects, including projects such as the construction of the REM, major port expansion projects, pipelines, bridge construction/deconstruction (Champlain Bridge, Mercier Bridge, Iles-aux-Tourtes), highway expansion and repair work and restoration of heritage buildings.
39. Within the context of these projects, MCK is consulted on various components related to the exercise of rights, including, but not limited to: impacts to cultural heritage (archaeology), impacts to fishing rights (impacts to fish and fish habitat, water quality, erosion), impacts to environmental stewardship rights and responsibilities (i.e. species at risk, loss of wetlands, climate change) and impacts to Aboriginal title and land grievance (i.e. development of Seigneurie of Sault St. Louis lands).
40. The MCK's approach to the implementation of the legal duty to consult and accommodate is based on Kanien'kéha rights, laws, worldview and community consultations.
41. On average, we receive 1-2 new consultation requests per week. Larger requests involve substantial ongoing work.
42. MCK has one in-house lawyer whose primary job is to provide legal services on duty to consult work and the MCK is in the process of hiring a second lawyer uniquely for these files.
43. It is common for important legal disagreements to arise within the context of these consultations, including disagreements on the scope of the duty, the adequacy of avoidance and mitigation measures, and the necessity/appropriateness of accommodation measures.
44. The Crown routinely proceeds with Crown action (including regulatory approvals) to advance projects despite failing to achieve resolution of these disagreements. This often occurs within the context of projects with tight timelines for project approvals, that are sometimes even imposed by statute.
45. As a lawyer and Chief, I am aware that injunctions are a fundamental tool for resolving disputes related to the constitutional right of First Nations to be meaningfully consulted on matters which affect their communities, and I am aware

of important examples of injunctions being sought in this area of law:

46. Timelines for injunctions and related remedies like safeguard orders are often very short, and frequently plaintiffs are required to prove that they acted urgently.
47. Realistically and practically speaking, it would be impossible for MCK to prepare a certified French translation within such short timelines, particularly in light of the need for community consultations.

#### **(b) Judicial Review**

48. Judicial review proceedings could be filed by or against the MCK or one of its agencies.
49. Judicial reviews must be filed within a “reasonable time,” which in most cases has been interpreted to mean 30 days from the decision.
50. As it stands, the MCK’s current consultation process means that we would generally require the full 30-day period to complete community consultations (if necessary), instruct counsel, and approve legal submissions being made on behalf of the MCK.
51. It would be impossible to accomplish all of the above tasks in time to allow for a certified translation to be prepared before the 30-day deadline expires.
52. Additionally, in many of these cases, the creation of translations would be useless, since all parties would be English-speaking. For example, if a community member sought judicial review of a decision by the MCK, all parties would prefer to use English. Resources would be wasted by translations in this case.

#### **(c) Expropriation and Land Takings**

53. The present-day physical environment of our community is defined by a series of historical expropriations and land takings:
  - a. Virtually all of our community’s coastline was expropriated as part of the St-Lawrence Seaway.
  - b. Canadian Pacific has a railroad running through our community due to its expropriation.
  - c. The Honoré-Mercier bridge and Highway 138 are the result of an expropriation and land takings, as are Highway 132 and Highway 207, which bisect the community. Due to these highways, we have around 80,000 to 100,000 vehicles travelling through the community every day.
54. If there were to be further expropriations of our lands, they would almost certainly end up before the courts.

55. Indeed, there has already been litigation before the Superior Court of Québec arising from expropriations of lands adjacent to our community that were expropriated by the provincial Ministry of Transport for the purpose of extending Highway 30; this litigation, in which we were a *mise en cause*, addressed the province's right to give land back to Kahnawà:ke to be added to reserve without having first consulted municipalities that were affected by the decision.<sup>3</sup>
56. Litigation deadlines in expropriation matters are often very short. For example, upon being served with a notice of expropriation, the targeted party has only 15 days to appear before the Tribunal Administrative du Québec, and 30 days to contest the right to expropriate before the Superior Court of Québec.<sup>4</sup>
57. Appeal deadlines in expropriation matters can be even shorter. An appeal from the Superior Court's judgment on the right to expropriate is possible with leave, but if leave is granted, the appellant has only 15 days after filing the notice of appeal to draft, serve, and file the *factum* (appeal brief).<sup>5</sup>
58. It would be impossible for MCK to meet these kinds of deadlines while preparing a certified French translation of our English pleadings.

**(d) Summary: Effects on the MCK**

59. The examples above dealt with injunctions, judicial reviews, and expropriation. But the same problems arise in any kind of litigation involving the MCK or legal persons within the community. Regardless of the nature of the litigation, the requirement to include a certified French translation imposes unnecessary costs and delays simply for choosing to prepare pleadings in English, which is a language that the community understands and functions in on a daily basis.
60. In some cases, these costs and delays will be so severe that using English would be non-viable and the only remaining option would be to use just French in pleadings.
61. However, MCK cannot use French as the only language of its pleadings, since most community members and many Council Chiefs do not speak or read French.
62. It would be impossible for Council to instruct its lawyers or to consult with the community by using only a unilingual French document.
63. As a result, Bill 96 means that in many cases, it will not be possible for MCK or the legal entities within our community to participate in the legal system.
64. Bill 96 will prevent the MCK from accessing the courts in a timely manner, or at all.

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<sup>3</sup> *Municipalité régionale de comté de Roussillon c. Ministère des Ressources naturelles*, 2017 QCCS 3744.

<sup>4</sup> *Expropriation Act*, CQLR c E-24, arts 40(3), 41, 44.

<sup>5</sup> *Expropriation Act*, CQLR c E-24, art 44.2.

65. Bill 96 will directly affect MCK, who would be the entity appearing before the courts, but this effect will be felt generally by all community members.
66. By inhibiting MCK's access to justice, the community it serves is also denied access to justice for its collective rights and obligations.
67. By inhibiting MCK's access to the courts, Bill 96 creates problems of legitimacy and reconciliation among community members more broadly, since collective grievances can no longer be effectively put before the courts.

**(e) Effects on Access to Justice and Perception of the Justice System by Community Members**

68. Legal persons that are owned and/or operated by community members will also face barriers to accessing justice, whether in civil litigation, penal proceedings, tax proceedings, or otherwise.
69. These barriers include the costs and delays of preparing translations, as outlined above. As with the MCK itself, these barriers will serve to discourage and dissuade many legal persons operated by community members from using the justice system entirely.
70. But there is also a less tangible harm, namely undermining the legitimacy of provincial courts.
71. First Nations peoples have historically faced many barriers to accessing justice in this country. Even today, many community members are sceptical about their ability to receive justice from judicial institutions that they perceive as alien to their own values and needs.
72. Many of our community members already feel that the courts are not institutions which were designed to serve them, but rather to control them or deny their grievances. Others might dispute this perception, but it is widely held. Nor is there any denying that, historically, the courts of this country enforced laws that were created to justify injustices perpetuated against First Nations peoples. Those injustices are unthinkable now, but they are not that far in the historical past. Recall that the last residential school in Canada was not closed until 1997.
73. There is thus already a feeling of alienation when First Nations peoples and organizations appear in the provincial and federal courts of this country.
74. Bill 96 creates a language barrier in provincial courts which adds to this lingering feeling of alienation between community members and the provincial courts. Courts are already an intimidating place for First Nations peoples.
75. Adding a language barrier to a system which worked perfectly well in English and French, confirms the feelings of alienation already felt by English speaking First Nations.



76. I understand these feelings. Language is central to culture and identity. I would never plead a case in a language other than my client's language. In my own practice, I always used my client's first language, to ensure that they understood what was being said on their behalf in court.
77. Bill 96 will prevent MCK and legal persons in our community from accessing justice in English. As a result, it will prevent many of us from accessing justice at all.

## **Conclusion**

78. Calls for meaningful access to justice by First Nations peoples have been made many times in this country.
79. For example, the final reports of the Truth and Reconciliation Commission, the Viens Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls all include calls to action respecting increasing First Nations access to all public services including justice. Several of these calls to action address language barriers and increasing translation and access to languages which First Nations use, be it their mother tongue or English.
80. It is hard to see how any progress can be made on the issues raised in these reports if English cannot be effectively used before the courts of Québec.
81. MCK has made a number of attempts to meaningfully engage with the provincial government of Québec on Bill 96, including bringing our concerns to the direct attention of Minister Jolin-Barrette and Minister Ian Lafrenière both verbally and in writing. Upon request for further clarifications, we provided detailed explanations and examples of the impacts of the Bill identified by the MCK in a number of areas.
82. In addition to identifying the specific impacts to education, provision of services, health care, and intergovernmental relations, we raised the issues of access to justice, specifically translation costs, delays and problems, as well as the unique challenges and barriers to First Nations accessing justice. We also highlighted the findings and recommendations of various reports and briefs, including the Viens Commission Report, which contradict the assertion that Bill 96 does not create new barriers or worsen existing ones.
83. Provincial government officials summarily dismissed most of our concerns as unfounded, providing expeditious explanations and reiterating the stated objectives of Bill 96 as evidence that the Bill would not lead to the impacts anticipated by the MCK.
84. Despite the MCK's request to delay the adoption of the Bill to allow for more in-depth engagement to fully address our concerns, the government proceeded with the adoption of the Bill without any such consideration for amendments.
85. Provincial government officials instead proposed to hold discussions in the coming

months to identify measures to respond to our concerns through regulatory or administrative channels, and evoked the possibility of adopting legislation to protect Indigenous languages.

86. Faced with the fait accompli of the adoption of the Bill without amendments designed to address Indigenous People's concerns, and in the absence of meaningful consultation, dialogue and engagement, the MCK has suspended all negotiations with the provincial government.
87. We took this step because the MCK considers Bill 96 to be critical legislation with far reaching implications for, and impacts on core issues such as our language, culture and identity, as well as effective and dignified access to services, among other issues.
88. As a community, we have chosen to revitalize and promote our own language.
89. Many Kanien'keha:ka choose to learn French, just as I did during my own education.
90. But there is a fundamental difference between a choice and a demand. Learning and using outside languages must always be a matter of choice, not obligation.
91. Any attempt to compel the use of another language can only harm the progress of our community and undermine the path towards reconciliation. Creating an additional language barrier within the justice system does not demonstrate a serious commitment to reconciliation.
92. All the facts recited in this Detailed Affidavit are true.

AND I HAVE SIGNED this 11<sup>th</sup> day of July  
2022

DocuSigned by:

*Tonya Perron*

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**Tonya Perron**

Solemnly affirmed via videoconference, in  
Montréal, this 11<sup>th</sup> day of July 2022

DocuSigned by:

*M. Henriot*

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**Magelone Henriot**, Commissioner of  
Oaths for Québec #214206

