

International Trade and Investment Practicum

THE REGULATION OF TOBACCO TRADE IN AKWESASNE

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Submitted by

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To: Mohawk Council of Akwesasne

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Executive Summary

The Akwesasne community has been trading tobacco as a sovereign Nation for centuries. Despite this legacy, in modern times the community has been heavily impacted by the laws of Ontario, Quebec, the state of New York and the United States and Canadian federal governments. Historically, high tobacco taxes by the Canadian provincial and federal governments led Canadians to Indigenous reserves to buy cigarettes, where they were sold tax free. As this industry grew, the provincial and federal governments became concerned about the loss of taxation revenue and the public health impact of cheap cigarettes. Another concern was that organized crime groups were investing in the tobacco trade and using profits from cigarette sales to fund arms smuggling and drug trafficking operations.

Despite these negative effects, the tobacco industry bolstered autonomy for the Mohawk community at Akwesasne; it brought business opportunities, employment, and revenues that funded projects throughout the community. This divergence in perspective between the Akwesasne community and the Canadian authorities has resulted in arrests, incarceration of indigenous citizens, discontent in the community, and an inability of the Nation to fulfill its economic development. However, recent years have brought cooperation among the parties. In 2013, the Mohawk Council of Akwesasne entered a funding partnership with Ontario intended to assist the Akwesasne community with its efforts to regulate its tobacco industry, which culminating in the adoption of the *Akwesasne Oien:kwa Kaianerenhsera* (the Akwesasne Tobacco Law) by the Mohawk Council of Akwesasne in 2016.

This project focuses on the implementation of the Akwesasne Tobacco Law while situating it within the multi-jurisdictional legal framework described above. This implementation requires the regulation of every segment of the supply chain, including transport, manufacturing, wholesale, retail, and import/export. Specifically, the project develops a draft for a regulation of the transporter segment of the supply chain.

The draft Tobacco Transporter Regulation establishes the administrative framework for tobacco transportation in Akwesasne, including licensing

conditions, procedures for the application for and the revocation or surrender of licenses and the procedural rights of license holders. In addition, its provisions address the obligations of transporters engaging in domestic and cross-border trade, such as the posting of a bond. In combination, these elements of the Regulation aim to allow the Mohawk community to govern the tobacco industry according to their objectives and perspectives.

The Tobacco Transporter Regulation generates economic growth for the community by providing simple, transparent rules and low barriers to engage in trade. In addition, the Regulation facilitates oversight which encourages legitimate trade and increases public safety.

While the project addresses only one part of the supply chain by producing a draft of the Tobacco Transporter Regulation, it also lays the groundwork for future teams to continue to assist the Mohawk Council of Akwesasne in strengthening the Tobacco Law's implementation. This current and future expansion helps fulfil Akwesasne's exercise of its sovereignty over its people, lands, and industries and its inherent right to trade.

1. Introduction and Background

1.1. Project Description

For centuries, the Mohawks of Akwesasne have been trading tobacco on their traditional territory. Their current territory straddles the borders of modern-day Ontario, Quebec, and New York, causing the sovereign Mohawk nation to be heavily impacted by the legal acts and political climates of these jurisdictions. These jurisdictions regulate tobacco trade through a series of federal and provincial laws. However, the Mohawk community of Akwesasne has its own aspirations to regulate the trade. The tobacco trade bolsters autonomy for the Nation, bringing business opportunities, employment, and revenues to fund projects that benefit the Akwesasne community at large. Despite these benefits, the provincial and federal governments continue to be concerned with the tobacco trade and its connection to organized crime and the loss of taxation revenue. Sharing these concerns, in 2013 the Mohawk Council of Akwesasne accepted funding from the Ontario government to continue development of a tobacco regulatory framework that reflects Indigenous perspectives and legal traditions.

This initiative resulted in the 2016 *Akwesasne Oien:kwa Kaianerenhsera* (Akwesasne Tobacco Law). Our project analyzes the implementation of this law by the Mohawk Council of Akwesasne (“MCA” or “Council”) – which exercises jurisdiction over the Canadian or “northern” side of Akwesasne.¹ Based on this analysis, the project proposes a regulation for tobacco transporters. This Transporter Regulation will be a vital step in the future development of a comprehensive tobacco regulatory framework for the Mohawk Nation at Akwesasne.

The project will begin by describing the regulatory landscape of the Indigenous tobacco trade, the history of the “contraband” tobacco trade, and the responses to this trade by the relevant governments.

¹ The Mohawk people refer to the US portion of the Nation as the “southern” portion. These terms will be adopted in this memorandum.

1.2. Regulatory Landscape of Tobacco in Canada

1.2.1. Ontario Provincial and Canadian Federal Taxation

Under section 87 of the *Indian Act*, the personal property of a registered (Status) Indian situated on a reserve is exempt from taxation. The provincial *Tobacco Tax Act* and regulations authorize Ontario's First Nations Cigarette Allocation System. This allocation system, sometimes referred to as a cigarette quota, allows First Nations individuals to buy allocation cigarettes on a reserve, for their personal and exclusive use, while being exempt from Ontario tobacco taxes.²

The following is a summary of federal and provincial tax laws:

1. Status Indians are not exempt from paying federal excise tax when they buy tobacco products on or off reserve (federal excise tax is collected when tobacco leaves the manufacturing facility);
2. Status Indians are exempt from paying the federal Goods and Services Tax ("GST") when purchasing goods on a reserve but are not exempt when goods are imported into Canada from another country. GST must be collected when goods on reserve are sold to Non-Status Indians;
3. Status Indians are exempted from paying provincial tobacco and sales taxes on products sold on reserve.³

Aside from cracking down on the criminal activity revolving around unregulated cigarette trade, both federal and provincial governments are concerned about the effects of access to cheap tobacco on the health of Canadians and the loss of revenue in taxation which come with a rapidly growing contraband market. Research demonstrates that higher taxes on cigarettes do lead to a reduction in number of smokers.⁴ According to the federal government, the contraband

² Ontario, Ministry of Finance, "First Nation Cigarette Allocation System", Tobacco Tax General Information

³ See "Contraband Tobacco", *Non-Smokers Rights Association and Smoking and Health Action Foundation*, (2009) at 6 [*Contraband Tobacco*].

⁴ Robert Schwartz & Teela Johnson, "Problems, policies and politics: A comparative case study of contraband tobacco from the 1990s to the present in the Canadian context" (2010) 31:3 *Journal of Public Health Policy* 342-54 at 346 [*Schwartz and Johnson*].

market threatens public health by undermining the use of taxation as a tobacco reduction measure.⁵

1.2.2. Stamping in Ontario

All packages of cigarettes and fine cut tobacco marked with the Ontario-adapted federal yellow stamp are meant for sale to consumers who have to pay tobacco tax in Ontario. The Ontario-adapted federal yellow stamp indicates that the tobacco products have been purchased in the province through the regular wholesale-retail-consumer chain.⁶

Figure 1: Ontario- adapted federal yellow stamp peach-coloured federal stamp



Unless otherwise permitted in the Ontario *Tobacco Tax Act*, it is illegal for anyone to purchase, possess or sell any quantity of cigarettes or fine cut tobacco not marked with the Ontario-adapted federal yellow stamp.⁸ One of the few exceptions are peach-coloured federal stamps. Packages of cigarettes or fine cut tobacco for sale to First Nations (under the Ontario First Nation Cigarette Allocation System) are marked with a peach-coloured federal stamp. This is illustrated in Figure 2.

Figure 2: peach-coloured federal stamp



⁵ *Ibid.*

⁶ Ontario, Ministry of Finance, "Tobacco Tax", Tobacco Tax General Information. [*Ontario*]

⁷ *Ibid.*

⁸ *Schwartz and Johnson, supra note 4.*

⁹ *Ontario, supra note 6.*

Only First Nations persons are entitled under federal and provincial laws to buy cigarettes bearing the peach-coloured federal stamp on a First Nation territory; however non-Indigenous customers also purchase them. The purchase of Indigenous-allocated cigarettes by non-Indigenous consumers is considered by Ontario, Quebec and Canada to be illegal under their respective legislation.¹⁰

Figure 3 is a graph that outlines the price differential between a carton of 200 “legal” cigarettes and a baggie of 200 “illegal” cigarettes. The wide gap in price points demonstrates how alluring and lucrative the unstamped cigarette trade is.

Figure 3: Price Differentials between “Legal” and “Illegal” Cigarettes in Ontario

Approximate Carton Price / Tax Structure			
Approximate Average Legal Carton Price / Tax Structure			
	Premium Brand	Discount Brand	Value Brand
Manufacturing and distribution costs - profits to manufacturer, wholesaler and retailer – estimated	\$50.00	\$35.00	\$25.00
Federal Excise Duty Tax – imposed on manufacturers and importers – administered by Canada Revenue Agency	\$21.03	\$21.03	\$21.03
Ontario Tobacco Tax – remitted by wholesalers and importers – administered by Ontario Ministry of Finance	\$30.95	\$30.95	\$27.95
Harmonized Sales Tax (13%) - administered by Canada Revenue Agency	\$13.26	\$11.31	\$9.62
Approximate retail price of a carton of 200 legal cigarettes	\$115.00	\$98.00	\$85.00
Approximate Illegal Carton Price			
Carton of 200 cigarettes sold to non-First Nations consumer under the Ontario First Nation Allocation System (price includes Federal Excise Duty, but exempt of PTT and HST)			\$45-\$70
Carton of 200 illegal cigarettes manufactured by a major on-reserve manufacturer in Ontario (price includes Federal Excise Duty)			\$32-\$40
			Baggie of 200 illegal cigarettes
			\$10-\$20

Note: for illustrative and discussion purposes only. Based on estimates from various sources.

Ministry of Finance | ontario.ca/finance - 10 -

The federal and provincial licensing regimes restrict access to cut rag tobacco, one of the rawest forms of tobacco.¹¹ Since manufacturing sites in Akwesasne are not licensed under these regimes, they are constantly in search of raw

¹⁰ This topic will be further described in sections 1.3 and 1.4.

¹¹ Christian Leuprecht, *Smoking Gun: Strategic Containment of Contraband Tobacco and Cigarette Trafficking in Canada* (Toronto: Macdonald-Laurier Institute Publication, 2016) at 16 [Leuprecht].

inputs. Since raw tobacco production is legal in the U.S., manufacturers often turn to U.S.-based Akwesasne manufacturers for their supply of raw tobacco.¹²

1.2.3. What do Canadian Authorities Define as “Contraband”?

The Royal Canadian Mounted Police (“RCMP”) defines “contraband” tobacco as any tobacco product that does not comply with provisions of all applicable federal and provincial statutes regarding importation, marking and payment of all duties and taxes.

The RCMP defines the sources of contraband cigarettes as the following:

1. “Illicit” manufacturing operations located on First Nations territories in Canada and the US;
2. “Illegal” importation of “counterfeit” cigarettes (copies of Canadian cigarette brands) made in countries such as China;
3. Canadian brand-name cigarettes shipped to reserves and diverted back to domestic market to be sold without all applicable taxes paid.¹³

According to the RCMP’s Contraband Tobacco Enforcement Strategy, manufacturing operations in the First Nations territories of Akwesasne/St. Regis, Kahnawake in Quebec and Six Nations and Tyendinaga in Ontario are the predominant sources.¹⁴ The RCMP have publicly stated that there are eleven unlicensed cigarette factories operating in Kahnawake, eleven to thirteen in Akwesasne/St. Regis and seven in Six Nations.¹⁵ However, the MCA have confirmed that there are no tobacco manufacturers that are currently producing on the northern side of the territory.¹⁶

¹² *Ibid.*

¹³ *Contraband Tobacco, supra* note 3 at 5.

¹⁴ Saint Regis is the official name of the southern portion of Akwesasne, which shares territory with the United States.

¹⁵ *Contraband Tobacco, supra* note 3 at 5.

¹⁶ Interview with Mark Martin and Kyrie Ransom, 20 March 2019, 101 Tewesateni Road, Cornwall Island, ON. Further discussions with Bonnie Cole, Legal Counsel for the Department of Justice on 17 April 2019 have confirmed that there is one federally licensed manufacturer but that manufacturer has not begun production yet.

1.3.A History of the Trade in “Contraband” Tobacco

1.3.1. The 1980s and 1990s

In the 1980s, the government of Canada invoked a public health strategy to curb national usage trends and increased the price of cigarettes through tobacco taxation.¹⁷ Although this contributed to a thirty percent drop in per capita consumption between 1980 and 1993, it led to a growing trade in contraband tobacco. This trade involved Canadian manufacturers of brand name cigarettes that began exporting cigarettes to United States duty-free warehouses.¹⁸ The cigarettes were then reintroduced into Canada through the Akwesasne/St. Regis First Nation reserve where they were sold tax-free.¹⁹ Canada considered this to a contravention of Canadian tax legislation, which requires cigarettes sold to non-indigenous customers to be stamped and taxed.²⁰ These shares of unstamped and untaxed Canadian cigarettes rose to close to 30% of the domestic market in 1993.²¹ In 1993 Canadian tobacco manufacturers exported 1.8 billion cigarettes, four times the amount exported in 1992.²² Officials estimated that between 80-95% of all cigarette exports to the US were re-entering Canada.²³ It was estimated that 80% of the contraband market was supplied through the Akwesasne/St. Regis First Nation reserve. In response, the federal government amended the *Excise Act 2001* and *Customs Act* to make it an offence to be in possession of the proceeds of cigarette smuggling activities.²⁴ Sections 230 to 232 of the *Excise Act 2001* make it an offence to possess or launder money or property derived from the illegal

¹⁷ *Contraband Tobacco*, *supra* note 3 at 3.

¹⁸ *Contraband Tobacco*, *supra* note 3 at 5; Tu Thanh Ha, “Legacy of Big Tobacco's scheme lives on in reserves”, *The Globe and Mail* (2 August 2008) [*Big Tobacco*].

¹⁹ *Contraband Tobacco*, *supra* note 3 at 5.

²⁰ *Schwartz and Johnson*, *supra*, note 4 at 344.

²¹ *Contraband Tobacco*, *supra* note 3 at 3.

²² Margaret Beare, “Organized corporate criminality- Tobacco smuggling between Canada and the US” (2002) 37:3 *Worldwide Political Science Abstracts* 225 at 232 [*Beare*].

²³ *Ibid* at 233.

²⁴ *Beare*, *supra* note 22 at 232.

production, possession or sale of spirits, wine or tobacco products and gives federal enforcement authority to seize the proceeds.²⁵ Although authorities were aware of the trafficking through this route, they were reluctant to conduct seizures due to the multi-jurisdictional context of the trade.²⁶ When seizures did occur, underlying grievances would often make standoffs uneasy and confrontational. In 1988, the RCMP made 17 arrests and seized \$450,000 worth of tobacco in relation to a Kahnawake tobacco vendor.²⁷ This resulted in a 29-hour armed standoff between RCMP and Mohawks, who blocked highways in protest of the arrests.²⁸ Additionally, the impact of the “Oka Standoff” of 1990, a conflict between Mohawks of Oka and Quebec police, made further enforcement hostile and tense.²⁹

Large operations of organized crime grew and flourished in connection with the trade in contraband tobacco which was facilitated by the lack of monitoring and enforcement. Major legal manufacturers of cigarettes operated the largest smuggling ring of contraband tobacco to avoid taxes. When Canadian authorities targeted these corporate smuggling rings, Imperial Tobacco Canada Limited and Rothmans Benson and Hedges signed an agreement in 2008 to pay \$1.15 billion in criminal fines and civil restitution for their involvement in tobacco smuggling from 1985-1993. Additionally, JTI-MacDonald Corp. and Northern Brands International pleaded guilty and paid \$550 million in criminal fines and civil restitution.³⁰ The landscape of contraband tobacco changed, with unregulated manufacturing of cigarettes increasing while smuggling of legally

²⁵ Martin Cauchon and Jim Peterson, “Excise Act, 2001. Explanatory Notes and Draft Regulations”, Legislative Comment on Excise Act 2001 (2201) Government of Canada.

²⁶ Sweeting J, Johnson T, Schwartz R. *Anti-Contraband Policy Measures: Evidence for Better Practice*. Toronto, ON: The Ontario Tobacco Research Unit, Special Report Series. 2009 at 52 [Sweeting]. This multi-jurisdictional context will be discussed below in Chapter 3.2.

²⁷ *Leuprecht, supra* note 11 at 21.

²⁸ *Ibid.*

²⁹ Canada, Library of Parliament, *Legislative Summary of Bill S-16: An Act to amend the Criminal Code (trafficking in contraband tobacco)* (Ottawa: 2013) at 3 [Legislative Summary of Bill S-16].

³⁰ *Legislative Summary of Bill S-16, supra* note 29 at 52.

manufactured cigarettes ceased to be an issue.³¹ Collectively, the provinces lowered their taxes, providing further incentive for manufacturers to stop smuggling. At the same time, lower tax rates resulted in significant increases in youth smoking.³²

1.4. Reactions to Trade in Unregulated Tobacco

1.4.1. Federal and Provincial Legislative Responses

In 2011, Ontario amended the *Tobacco Tax Act* by passing Bill 186. The Bill served to intensify punishments for contraventions of the *Tobacco Tax Act* while simultaneously requiring provincial registration for anyone who falls within the Act's definition of persons who "produce, process, sell or distribute" raw leaf tobacco in Ontario.³³ From the perspective of the Ontario government, this means that there are legal requirements for members of the Akwesasne community who engage in the tobacco industry while located within Ontario's jurisdiction.

In 2013, the Ontario government implemented important changes to the *Tobacco Tax Act*. For one, the government passed amendments to better track the movement of raw-leaf tobacco as it moved through the supply chain. Additionally, the changes increased penalties for those convicted of illegal tobacco offenses, including steeper fines and forfeiture of illegal seized tobacco items.³⁴ This made unregulated cigarette production more difficult and would have served as an incentive for Akwesasne producers to switch to a more regulated production system, whether it be one regulated by the Akwesasne community or another government.

At the same time, the federal government redoubled its efforts to address the issue through criminalization and law enforcement. In 2014, Parliament passed

³¹ *Ibid.*

³² *Legislative Summary of Bill S-16, supra* note 29 at 17.

³³ Bill C-186, *An Act to amend the Tobacco Tax Act*, 2nd Sess, 39th Parl, 2011.

³⁴ Katie Furtick and Julian Morris, "Why Canada's governments should butt out of tobacco taxes" *Financial Post* (20 January 2014).

Bill S-16, which enacted the *Tackling Contraband Tobacco Act*. This *Act* made changes to the *Criminal Code* to create section 121.1, a new offence for trafficking contraband tobacco, and provides minimum penalties for repeat offenders.³⁵

1.4.2. Enforcement and Policing

Policing measures at different times have involved the RCMP, The Canadian Army, the FBI, the OPP, the Surete du Quebec, the New York State Police, the Akwesasne Mohawk Police and later the Mohawk Sovereignty Security Force.³⁶

The early 2000s were characterized by a drop in seizures of unstamped and untaxed cigarettes.³⁷ In response, police enforcement and policy began to prioritize measures to increase the low seizure rates. In 2008, the Minister of Public Safety and the Assistant Commissioner of RCMP announced the “RCMP Contraband Tobacco Enforcement Strategy”.³⁸ This included fifty new officers under the “RCMP Anti-Contraband Tobacco Force” which targeted organized crime in an effort to reduce the availability and demand of contraband cigarettes.³⁹ The Enforcement Strategy involved Akwesasne Mohawk Police Services and First Nations’ leaders and communities.⁴⁰ Between 2007 and 2011, the RCMP seized nearly four million cartons of cigarettes worth \$80 million in retail value.⁴¹ The RCMP statistics report a consistent and rapid rise in contraband cigarettes.⁴² While many studies reveal the difficulties with

³⁵ *Legislative Summary of Bill S-16, supra* note 29.

³⁶ Ruth Jamieson, “Contested jurisdiction border communities’ and cross-border crime- the case of Akwesasne” (1999) 30: *Crime, Law and Social Change* 259 at 261 [*Jamieson*].

³⁷ *Legislative Summary of Bill S-16, supra* note 29 at 1.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Matthew B. Stanbrook, “Fighting contraband tobacco: an opportunity for First Nations leadership and partnership” (2013) 185:7 *Canadian Medical Association Journal* at 547.

⁴¹ Christopher Curtis, “Tobacco trade lights fire in Mohawk economy” *Montreal Gazette* (4 April 2013).

⁴² *Schwartz and Johnson, supra* note 4 at 346.

ascertaining accurate seizure rates, this information is still demonstrative of large distribution networks that are highly flexible and resilient.⁴³

In 2008, 48.6% of contraband cigarette sales took place in Ontario and 40% of contraband sales took place in Quebec. In 2008, the RCMP estimated that there are approximately 105 organized crime groups involved in the illicit tobacco trade.⁴⁴ According to the RCMP, of those crime groups, 70% are also involved in drugs and weapons trafficking and money laundering.⁴⁵ The following seven agencies share responsibilities in addressing contraband tobacco:

- Canada Border Services Agency (CBSA)
- Canada Revenue Agency (CRA)
- Department of Finance
- Department of Public Safety
- Health Canada
- Office of the Director of Public Prosecution
- RCMP⁴⁶

Both federal and provincial authorities have been reluctant to enforce law on reserves for reasons related to jurisdictional ambiguity and fear of confrontation and violence.⁴⁷ Alternative policy responses such as reducing Canadian taxes to the level of taxes in the US, raising export taxes, and aggressive policing on reserves are either not viable options or have had negative long-term repercussions.

1.4.3. The Quebec Government

Over the years Quebec has passed numerous amendments to its *Tobacco Tax Act* that have been correlated to the successful reduction of contraband tobacco in the region. In 2004 the Quebec government amended the *Tobacco Tax Act*

⁴³ *Sweeting, supra* note 26 at 44.

⁴⁴ *Sweeting, supra* note 26 at 44; “90 per cent of illegal cigarettes made in Akwesasne: RCMP”, *CBC News* (24 April 2008).

⁴⁵ *Sweeting, supra* note 26 at 44.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

to make it illegal to sell or ship raw tobacco to unlicensed manufacturers. In 2006, Quebec enforcement personnel intercepted 250,000 kgs of tobacco leaf bound for the Kahnawake reserve.⁴⁸

Another legislative response was Bill 59 which amended Quebec's *Tobacco Tax Act* in 2009 by placing temporary prohibitions on the issuance of new licences for tobacco manufacturers, shortening the validity period for existing certifications, and requiring more extensive permits for tobacco manufacturing equipment.

1.4.4. The US Government

Most unregulated cigarettes flooding the Canadian market come from the dozen or so manufacturing facilities located on the American side of the Akwesasne territory.⁴⁹ This territory straddles the border, making police presence and monitoring difficult. However, as most of the "illicit" product moves into Canadian markets, prevention and enforcement measures are not a priority for US authorities.⁵⁰

In 2009, the CBSA and RCMP partnered with US Customs and Border Protection, the US Coast Guard and the US Immigration and Customs Enforcement in creating the "Integrated Border Enforcement Teams" (IBETs).⁵¹ The IBETs patrol the Canada-US border through land and sea to confiscate drugs, weapons and tobacco.⁵² While the significance of the IBET partnership for the Akwesasne people has yet to be understood, it demonstrates a policy strategy on behalf of both federal governments to crackdown on the larger smuggling rings involved in contraband tobacco.

⁴⁸ *Contraband Tobacco*, *supra* note 3 at 7.

⁴⁹ *Ibid*

"90 per cent of illegal cigarettes made in Akwesasne: RCMP", *CBC News* (24 April 2008).

⁵⁰ In 2008, a New York Franklin County district attorney declared that contraband cigarette production and smuggling at the Canada/US border is not a priority for US law enforcement: "Illegal Canada-bound tobacco 'not even an issue' for U.S.: N.Y. attorney" *CBC News* (26 November 2008).

⁵¹ *Schwartz and Johnson*, *supra* note 4 at 349.

⁵² *Ibid*.

However, these enforcement mechanisms may not be necessary in the face of intended structural changes to the tobacco industry by the 2016 Akwesasne Tobacco Law.

2. Akwesasne Tobacco Law

This section provides a comprehensive introduction to the background, history and context of Akwesasne, its traditional trade in tobacco and its relationship to other governments.

2.1 Tradition and Tobacco

Tobacco is one of the four sacred plants of the Mohawk and other Indigenous peoples. It continues to play an important role in the traditions and ceremonies of the Akwesasne people. Tobacco trade is viewed as an inherent right that can bring long-term economic benefits to uplift communities and families out of poverty and into opportunity.

2.2 Tobacco and the Indigenous Right to Trade

The Haudenosaunee people, more widely known as the Iroquois Confederacy, consists of the following six nations, the Mohawk, Oneida, Onodaga, Cayuga, Seneca and Tuscarara.⁵³ Trade within and between these Nations has existed since time immemorial.⁵⁴ When Europeans came in contact with the Nations, the tribes conducted and regulated their own internal affairs.⁵⁵ The tribal sovereignty which facilitated trading practises existed before the advent or involvement of the nation state. In 2012, the Assembly of First Nations reaffirmed these trading rights through Resolution 22, entitled “Inherent Right of Nation to Nation Trade”. The Resolution outlines the First Nations’ Inherent Right to trade which encompasses the right to acquire, possess, store,

⁵³ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press 2010) at 72.

⁵⁴ “Resolutions Update Report for 2011 Resolutions”, *Assembly of First Nations* (July 2012) at 16.

⁵⁵ William C. Canby, Jr, *American Indian Law in a nutshell*, 6th ed (West Academic Publishing, 2015) at 73.

transport, handle, regulate or retain First Nation-manufactured products without restrictions as to the quantity or proposed use.⁵⁶ Today, there is general consensus among Mohawks that the right of First Nations to free trade and travel across the Canada-US border is recognised and preserved under the 1784 Jay Treaty.⁵⁷ Article 3 of the Treaty stated that Great Britain and the United States would allow First Nations people who lived on either side of the newly established border the right to “freely carry on trade and commerce with each other”.⁵⁸ Neither Canadian courts nor the Canadian federal government recognize the application of the Jay Treaty.⁵⁹

In 2007, *The United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) was adopted by the United Nations General Assembly. Articles 3 and 5 affirm Indigenous rights to freely pursue, maintain and strengthen their political, economic, and social development. Article 20(1) affirms the right of Indigenous peoples to enjoy their traditional forms of subsistence and development.⁶⁰ In 2015 Bill C-262, “*An Act to ensure that the law of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*” was put to the Canadian House of Commons for a vote. Currently in Second Reading in the Senate, the harmonization of Canadian laws with UNDRIP is yet to be seen.⁶¹

2.3 Jurisdictional Issues

In 2016, the Mohawk Council of Akwesasne designed a First Nations Justice System based on customary laws which incorporate traditional restorative

⁵⁶ “Resolutions Update Report for 2011 Resolutions”, *Assembly of First Nations* (July 2012) at 16.

⁵⁷ *Jamieson*, *supra* note 36 at 263.

⁵⁸ Canada, Standing Senate Committee on Aboriginal Peoples, *Border Crossing Issues and the Jay Treaty* (Parliament of Canada, Senate of Canada, 2016) at 8.

⁵⁹ *Mitchell v Minister of National Revenue*, 2001 SCC 33; 1 SCR 911; *Francis v The Queen*, [1956] SCR 618.

⁶⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) arts 19 and 32 [UNDRIP].

⁶¹ Canada Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2018 (First Reading in the Senate 31 May 2018).

principles in the lawmaking, adjudication and enforcement responsibilities of their government.⁶² This is the first Indigenous legal system in Canada which operates outside a federal framework and was drafted by the community exclusively. Justices and prosecutors can enforce 32 laws over civil matters from tobacco regulations, elections and property and wildlife conservation. Criminal matters are settled outside the territory, in federal or provincial courts.⁶³ With the creation of an independent Indigenous court system comes the possibility that Canadian courts will not be able to recognize the Mohawk court. However, the Canadian federal and provincial authorities are alive to this issue and are currently in discussions to develop a framework to recognize the new legal system.⁶⁴

2.3.1 Governance – General

The everyday governance of the Mohawk Nation is layered with the relationship between Canada, the United States, Ontario, Quebec and New York State. There are three separate Aboriginal councils which hold jurisdiction over parts of Akwesasne:

1. The Saint Regis Mohawk Tribal Council (“SRMTC”) assumes jurisdiction over the southern portion of Akwesasne. It was set up by New York State in 1802.⁶⁵ Today it shares territory with the state of New York and is federally registered under the US Bureau of Indian Affairs.⁶⁶
2. The Mohawk Council of Akwesasne (“MCA”) assumes jurisdiction over the northern portion of Akwesasne. This northern portion shares territory with the Ontario and Quebec governments and is federally registered under Canada’s *Indian Act*.
3. Mohawk Nation Council of Chiefs (“MNCC”) is the traditional and historic government of the Mohawk people. While the SRMTC and the MCA

⁶² Mohawk Council of Akwesasne, “Justice” online: <<http://www.akwesasne.ca/justice/>>.

⁶³ Giuseppe Valiante, “Akwesasne creates first independent indigenous court in Canada” *The Global and Mail* (2 October 2016) [*Mohawk Court*].

⁶⁴ *Ibid.*

⁶⁵ *Jamieson, supra* note 36 at 261

⁶⁶ “Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs”, (17 January 2017), Federal Register, online: <<https://www.federalregister.gov/documents/2017/01/17/2017-00912/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian->>.

were activated by the colonial legal systems of Canada and the United States, the MNCC pre-dated the creation of these countries and was sanctioned by the Haudenosaunee Six Nations (Iroquois) Confederacy.⁶⁷

2.3.2 Governance – Mohawk Council of Akwesasne

The Mohawk Council of Akwesasne is a community government elected by residents of the northern portion of Akwesasne. There is an election every 3 years where four Chiefs are selected from the three districts within Akwesasne: Kawehno:ke (Cornwall Island), Kana:takon (St. Regis) and Tsi Snaihne (Snye).⁶⁸ There are 12 District Chiefs and one Grand Chief which collectively compose the Mohawk Council. They are elected by the entire Akwesasne community to take responsibility on different areas of community work and objectives.⁶⁹

2.3.3 MCA Attempts at Tobacco Regulation

The MCA made initial attempts to engage in the regulation and control of tobacco more than 30 years ago. In 1985, the MCA passed a by-law under the authority of section 81 of the *Indian Act* which exempted Mohawks from paying taxes on cigarettes and other tobacco products.⁷⁰ The preamble of the by-law highlights the importance of the cigarette tax exemption in promoting Mohawk culture and values as well as controlling the sale of tobacco products.⁷¹ In 1987, the MCA passed a subsequent Resolution empowering the Mohawk Licensing Commission to place quotas on Mohawks who were granted tax-exemption on cigarettes.⁷² These Resolutions applied to the Ontario and

⁶⁷ “Mohawk Nation Council of Chiefs”, (accessed 13 April 2019), online: <<http://www.mohawknation.org/>>.

⁶⁸ Mohawk Council of Akwesasne, “History & Resources: About MCA” online: <<http://www.akwesasne.ca/history-resources/about-mca/>>.

⁶⁹ *Ibid.*

⁷⁰ Akwesasne Mohawk Council, By-Law, Resolution #1985/86-500, *Tax Exempt Cigarettes*, (28 September 1985).

⁷¹ *Ibid.*

⁷² Akwesasne Mohawk Council, By-Law, Resolution #1987/88-519, *By-Law Respecting the Sale of Tax Exempt Cigarettes and other tobacco products*, (29 February 1988).

Quebec provinces. The Resolution built on the 1985 By-Law, granting cigarette tax exemption permit holders the opportunity to apply for an increase in cigarette allocations. The 1987 Resolution also included an additional section outlining the policy concerns of the distribution and sale of the tax-exempt tobacco products.⁷³ The Resolutions had the purpose of ensuring “orderly conduct of business in tobacco products on the territory of the Akwesasne and to protect collective rights of the Mohawk people”.⁷⁴ Additionally, the Resolution included a provision requiring periodic inspection of the businesses possessing tobacco sale permits to ensure compliance.⁷⁵

Attempts to address the unregulated tobacco trade and its negative effects on the community of Akwesasne were not restricted to legislative measures. The following letter illustrates the frustration of the MCA when a federal Canadian policy failed to consider its impact on the health and safety of the Akwesasne community.

2.3.4 Open Letter to Prime Minister Chretien

When the federal government proposed to increase tobacco taxes in 2000, Akwesasne Grand Chief Michael Mitchell submitted an open letter to Prime Minister Chretien strongly advising against the new regulations.⁷⁶ Chief Mitchell warned that the tax increase of \$15 per carton will “set the smuggling ring back into motion”, and drive Canadians to Akwesasne to buy contraband cigarettes provided by organized crime groups.⁷⁷ He highlighted that the profits from contraband cigarettes flow into other illicit activities such as narcotics, arms smuggling, and human trafficking, all operated through the Akwesasne territory. The Grand Chief continued to warn about the damaging effects of the crime ring on health and young persons.⁷⁸ He emphasized that as contraband

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Letter from Grand Chief Michael Mitchell to Prime Minister Chretien (2000) in 18:4 Windspeaker.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

cigarettes begin to flood Akwesasne, addiction rates will rise, health complications will increase, and growing amounts of unregulated cigarettes will end up in the hands of young people – the very group that the government is purporting to protect with this policy.

The Grand Chief then criticized the failure of the federal government to cooperate with Akwesasne authorities to address the issue. The Grand Chief discussed initiatives he led, such as the Akwesasne Territorial Protection Unit, all of which were disregarded by Canadian authorities.⁷⁹

This letter illustrates the profound frustration and mistrust of the federal government in the Akwesasne community. Actions by the government posed a risk of harm to the community, yet the same government refused to cooperate with them to solve the problem.

2.4 Akwesasne Tobacco Law (2016)

In 2013, Ontario provided \$476,115 in funding to the MCA as part of a pilot project to aid in the Council's development of an Akwesasne Tobacco Law and Regulatory Framework.⁸⁰ The project's objective was to regulate the manufacturing, wholesale and sale of Tobacco Products within the Akwesasne territory. The Council hoped to generate revenue from the licensing of actors involved in the tobacco trade and from stamping fees, which was to be used for government services and to develop economic activity in Akwesasne.⁸¹

In 2016, the MCA passed the *Akwesasne Oien:kwa Kaianerenhsera* (Akwesasne Tobacco Law) ("Tobacco Law") in exercise of its jurisdiction over the tobacco-based economy on the northern portion of Akwesasne Lands.⁸² In addition to providing rules to regulate the possession, sale, purchase, manufacture and transportation (including export and import) of tobacco

⁷⁹ *Ibid.*

⁸⁰ Don Smith, "Akwesasne Tobacco Pilot Project funded by Ontario Government", *Cornwall Free News* (2 May 2013).

⁸¹ *Ibid.*

⁸² *Akwesasne Oién:kwa Kaianerénhsera (Akwesasne Tobacco Law)*, 2016, Kaiahnehronshera iehiontakwa Number: 2016-02, Mohawk Council Resolution 2016/2017-#075 [*Tobacco Law*].

products on Akwesasne Lands, it outlines the objectives of First Nations controlling all aspects of commercial tobacco in Akwesasne. Its aims include protecting young members of the community from tobacco use, facilitating trade between First Nations and Indian tribes and enhancing the economic development of the community of Akwesasne.⁸³

The MCA relied on its inherent right of self-government to pass the Tobacco Law. However, Ontario's position regarding the Tobacco Law's relationship to the Canadian legal system is not yet clear. This uncertainty brings the possibility that a Canadian court will not have the statutory authority to recognize the Tobacco Law. While this risk has not yet materialized, its possibility is an important consideration for the MCA despite Ontario's support in their enactment of the Tobacco Law.⁸⁴

At the end of 2017 the Ontario Ministry of Finance signed an Agreement-in-Principle with the MCA to share a portion of provincial tobacco tax revenues with communities that agree to regulate on-reserve tobacco sales. Furthermore, the 2017 Ontario Budget announced the province's intention to collaborate with First Nations on changes to the *Tobacco Tax Act* to ensure effective coordination of provincial legislation with First Nation tobacco laws.

This section will introduce the Tobacco Law, which provides the framework for our project's deliverable.

2.4.1 Introduction to the Tobacco Law

The Akwesasne Oién:kwa Kaianerénhséra ("Tobacco Law") was enacted on June 17, 2016 by the Mohawk Council of Akwesasne ("MCA").

2.4.1.1 Preamble and Purpose

The Preamble of the Tobacco Law outlines five purposes:

⁸³ The impact of this piece of legislation will be discussed in greater detail in Chapter 2.4 of the memorandum.

⁸⁴ Neither the Ontario nor Canadian legislatures have announced a delegation of statutory authority to the MCA, and the Tobacco Law does not purport to draw authority from any statute. Therefore, should an unhappy litigant take a decision from the Akwesasne Court to a Canadian court, it is unclear whether the court would be able to recognize the Tobacco Law.

- 1) protect the overall well-being of its young members concerning tobacco use;
- 2) minimize the damaging effect regarding health that tobacco use has on the community;
- 3) regulate the growing, manufacturing, distribution and retail sale of Tobacco Products on Akwesasne Lands;
- 4) facilitate trade between First Nations, Indian Tribes and other recognized indigenous peoples; and
- 5) enhance economic development for the community of Akwesasne.

Despite the numerical ordering, these purposes are best understood not to be hierarchical, but instead to complement each other as equivalent policies pursued by the law.⁸⁵

2.4.1.2 Scope of Application and Policy Objectives

Section 3 begins the “General Provisions” of the law. Section 3.1 defines the Tobacco Law’s jurisdiction, making clear that the law is territorial to the Akwesasne Lands. Therefore, all persons, regardless of citizenship or nationality, are bound by the law when they are on Akwesasne Lands.⁸⁶ Akwesasne Lands are defined to exclude the southern portion of the reserve – that portion which shares territory with the State of New York. Section 3.4 prohibits any handling of tobacco except in accordance with the Tobacco Law. Section 3.5 distinguishes between sacred tobacco and commercial tobacco and clarifies that the Tobacco Law does not apply to sacred tobacco.

Section 3.7 demonstrates an attempt to achieve comity with other legal systems after decades of tension between Akwesasne and the provincial and federal governments of Canada. The provision states that compliance with the Tobacco Law does not relieve a person from also complying with federal or provincial acts or regulations. In the past, federal and provincial laws were evaded by entering Akwesasne, where those laws were not enforced.⁸⁷ This provision

⁸⁵ Meeting with Kyrie Ransom, Mohawk Council of Akwesasne.

⁸⁶ *Tobacco Law*, *supra* note 81, subsection 3.1.

⁸⁷ While the federal Canadian government exercises general jurisdiction over “Indian” reserves, and provincial laws apply through the federal delegation of s.88 of the *Indian Act*, these laws have not been enforced in Akwesasne for political reasons. Namely, these authorities wanted to avoid open conflict or potential violence given the historically tense relationship between the two sides.

attempts to prevent this problem by making it clear that compliance with legislation adopted by the MCA does not relieve a subject from compliance outside of it. Since actions outside of Akwesasne do not directly affect the Nation, the inclusion of this provision demonstrates respect toward the surrounding jurisdictions.

2.4.2 Operation of the Law

The Akwesasne Tobacco Law seeks to regulate tobacco trade through a licensing and stamping system throughout the tobacco supply chain.

2.4.2.1 Authorities Under the Tobacco Law

The law delegates authority to several Mohawk government agencies. The primary authority is the Akwesasne Licensing Commission (“Commission”). The Commission has the general authority to administer the Tobacco Law and to develop regulations. The Commission also has the specific authority to grant or deny licenses.⁸⁸

Tobacco Compliance Officers (“Compliance Officers”) are government officials authorized by the Council to make reports, carry out investigations and conduct other duties to assist in administering the Law.⁸⁹

Akwesasne Mohawk Police Service Officers (“Mohawk Police”) generally only handle criminal matters within Akwesasne Lands. However, the Tobacco Law grants the Mohawk Police the authority to seize tobacco products and equipment from unlicensed manufacturers from Akwesasne Lands.⁹⁰

Stamping Agents are government officials authorized by the Council to monitor the affixation of stamps on Tobacco Products. They collect fees in exchange for stamps. Manufacturers must pay stamping agent’s fees per gram of raw tobacco delivered to the manufacturer’s facility.⁹¹

⁸⁸ *Tobacco Law*, *supra* note 81, subsection 6.1.

⁸⁹ *Tobacco Law*, *supra* note 81, subsection 2.1.

⁹⁰ *Tobacco Law*, *supra* note 81, subsection 12.2.

⁹¹ *Tobacco Law*, *supra* note 81, subsection 8.17.

2.4.2.2 Licensing – Manufacturers

As Akwesasne citizens do not grow tobacco within the Nation, the supply chain begins with the manufacturer.⁹² All manufacturers are required to hold a Manufacturer's License.⁹³ In addition to the general licence eligibility outlined in section 7.3, a Manufacturer's License requires a criminal records check, a financial history, the payment of a security deposit, and a demonstration of compliance with the manufacturing facility requirements.⁹⁴ These requirements are outlined in section 8.16, and include conditions regarding size, health, safety and environmental conditions, and inventory lists.⁹⁵

The security deposit must be in the form of a bank draft or certified cheque payable to the Commission and is to be deposited into an interest-bearing account.⁹⁶ The amount payable will be determined by the Manufacturers Regulation which is not yet operational.⁹⁷ The security deposit may be used to ensure payment of fees, to compensate the Council for clean-up of environmental contamination, to cover the cost of remediation or to assist with liability costs incurred by Council as a result of actions by the License Holder.⁹⁸

Licensed Manufacturers can only sell tobacco products to Licensed Wholesalers and Licensed Vendors through a Bonded Warehouse or through an export permit.⁹⁹ The Bonded Warehouse is a secured building where tobacco products are stored or stamped to indicate that the stamping agent's fee has been paid.¹⁰⁰

⁹² Interview with Mark Martin and Kyrie Ransom, 20 March 2019, 101 Tewesateni Road, Cornwall Island, ON. Besides the lack of a market for raw tobacco, the climate in Akwesasne does not support the tobacco plant. Mr. Martin and Ms. Ransom explained that the only commercial tobacco product market that exists is for cigarettes.

⁹³ *Tobacco Law*, *supra* note 81, subsection 8.2.

⁹⁴ *Tobacco Law*, *supra* note 81, subsection 8.4.

⁹⁵ *Tobacco Law*, *supra* note 81, subsection 8.16.

⁹⁶ *Tobacco Law*, *supra* note 81, subsection 8.6 and 8.7.

⁹⁷ *Tobacco Law*, *supra* note 81, subsection 8.5.

⁹⁸ *Tobacco Law*, *supra* note 81, subsection 8.11.

⁹⁹ *Tobacco Law*, *supra* note 81, subsection 5.6.

¹⁰⁰ *Tobacco Law*, *supra* note 81, subsection 2.1.

2.4.2.3 Licensing – Transporters

Section 9 governs tobacco transporters. The section is short, with only five provisions. By contrast, section 8 (manufacturers) contains 29 provisions and section 10 (vendors and retail sales) contains 14 provisions.

Subsection 9.1 requires any person transporting more than one Box of tobacco products to have a Tobacco Transporter License provided by the Akwesasne Licensing Commission.¹⁰¹

Under section 2, one Box is defined as 50 Cartons, and one Carton holds 10 packages. Therefore, one Box holds 500 packages of tobacco product. Subsection 9.1 does not require a licence for tobacco transport below this threshold.

Subsection 9.2 expands on the general license eligibility criteria by adding two additional requirements that are specific to tobacco transporters. These requirements are a copy of a valid driver's license and a driver's abstract.¹⁰²

In addition to the two requirements added in subsection 9.2, subsection 9.3 preserves the ability to develop further requirements through regulations.¹⁰³ This provision recognizes the sparse nature of the current regime and empowers the Council to create any number of new conditions on the tobacco transport regime. Our deliverable could be implemented through the delegated authority of this provision.

Subsection 9.4 requires Tobacco Transporter License holders to only transport Tobacco Products to, from, and on behalf of other holders of licenses issued by the Akwesasne Licensing Commission.¹⁰⁴ This provision strengthens the entire regime by ensuring complementarity between different segments of the supply chain. For example, those transporting tobacco can only purchase from manufacturers, wholesalers, retailers, or exporters who are also licensed by the Commission. This complementarity helps prevent the movement of unregulated

¹⁰¹ *Tobacco Law, supra* note 81, subsection 9.1.

¹⁰² *Tobacco Law, supra* note 81, subsection 9.2.

¹⁰³ *Tobacco Law, supra* note 81, subsection 9.3.

¹⁰⁴ *Tobacco Law, supra* note 81, subsection 9.4.

or unreported products and helps ensure the system is subject to oversight by the Akwesasne authorities.

Oversight is also enhanced by subsection 9.5, which requires tobacco transporters to have in their vehicle both their Tobacco Transporter License and the relevant bill of lading for the shipment they are carrying.¹⁰⁵ Like the previous subsection, this provision strengthens the system by ensuring transparency and oversight among all license holders in the supply chain.

2.4.2.4 Licensing – Vendors and Retail

The licensing system that governs manufacturing and transporting is mirrored with regards to vendors and retailers. Vendors selling tobacco products for personal consumption must be licensed under subsection 10.1.¹⁰⁶ Subsection 10.3 mandates a minimum retail price for tobacco products sold on Akwesasne Lands.¹⁰⁷

Subsection 10.5 relates to products manufactured outside of Akwesasne Lands. These products – which have not been stamped under the Akwesasne manufacturing regime – must be stamped by a licensed stamping agent in exchange for a stamping agent’s fee before they can be sold.¹⁰⁸

Where the tobacco products are manufactured in Akwesasne, their sale must be from a licensed manufacturer to a licensed vendor through the bonded warehouse.¹⁰⁹ However, products obtained through the Ontario First Nations Cigarette Allocation System can be purchased from Council or its designate.¹¹⁰ Regardless of from whom they were purchased, only those products with proper packaging and stamps may be sold.¹¹¹ These requirements complement

¹⁰⁵ *Tobacco Law, supra* note 81, subsection 9.5.

¹⁰⁶ *Tobacco Law, supra* note 81, subsection 10.1.

¹⁰⁷ *Tobacco Law, supra* note 81, subsection 10.3. The provision states that the minimum price will be set by Regulation. This regulation is not currently operative.

¹⁰⁸ *Tobacco Law, supra* note 81, subsection 10.5.

¹⁰⁹ *Tobacco Law, supra* note 81, subsection 10.8.

¹¹⁰ *Tobacco Law, supra* note 81, subsection 10.9(a).

¹¹¹ *Tobacco Law, supra* note 81, subsection 10.9(e).

the sections on manufacturing and transporting to ensure that there is oversight throughout the system.

2.4.2.5 Licensing – Wholesalers

Like all other participants of the supply chain, wholesalers must carry a Wholesaler’s License and are prohibited from possessing unstamped tobacco products.¹¹² Those found in violation are subject to investigation, suspension or revocation of the Wholesaler’s License, or a ticket.¹¹³

Where a wholesaler intends to establish a warehouse on Akwesasne Lands, they are required to provide information regarding their proposed facility, the licensed manufacturers they intend to buy product from, and the external suppliers or vendors they intend to import from or export products to.¹¹⁴ Should the wholesaler wish to export product, those products must be included on a products directory and be destined for delivery to a licensed vendor.¹¹⁵

2.4.2.6 Revenue

The Tobacco Law generates revenue through the licensing and stamping system described above. Every participant in the tobacco industry is required to hold a license, and each license includes an application fee. While the revenue will primarily be used to administer the law, surplus revenue may be distributed throughout the community.¹¹⁶

Stamping fees also generate revenue for the Council. Additionally, a percentage of these fees are set aside to create a Tobacco Legal Fund.¹¹⁷ This

¹¹² *Tobacco Law, supra* note 81, subsection 11.1.

¹¹³ *Tobacco Law, supra* note 81, subsection 11.2.

¹¹⁴ *Tobacco Law, supra* note 81, subsection 11.3.

¹¹⁵ *Tobacco Law, supra* note 81, subsection 11.5. The provision does not further explain the nature of the Tobacco Products directory, and it is not mentioned in any other part of the Tobacco Law.

¹¹⁶ *Tobacco Law, supra* note 81, subsection 5.2.

¹¹⁷ *Tobacco Law, supra* note 81, subsection 4.6.

fund may be expended as Council deems appropriate to assist a licence holder.¹¹⁸

2.4.3 Enforcement, Offences and Compliance

2.4.3.1 Enforcement

Section 12 outlines the enforcement provisions of the Tobacco Law. Subsection 12.1 states that Compliance Officers have the authority to (a) conduct investigations and inspections; (b) seize tobacco products or equipment from unlicensed manufacturers; and (c) carry out other responsibilities enumerated in the Tobacco Law.¹¹⁹

Subsection 12.2 grants the same authority of investigation, inspection, and seizure to the Mohawk Police.¹²⁰ Subsection 12.3 holds that Compliance Officers have the responsibility and the duty to investigate all potential violations of the Tobacco Law.

Subsection 12.4 clarifies what types of inspections can occur, while subsection 12.5 requires Compliance Officers to make regular activity reports, with recommendations, to the Akwesasne Licensing Commission.

Subsection 12.6 provides for strong enforcement and strict penalties for violations. The provision states that tobacco products that are handled without the appropriate license are subject to immediate seizure.

Subsection 12.7 imposes the same strict penalties for tobacco products not stamped in accordance with the Tobacco Law or products not on the list of approved product brands maintained under subsection 6.9.

The strict enforcement is further advanced by subsection 12.12, which prohibits any person from obstructing a Compliance Officer in any way.

¹¹⁸ *Tobacco Law, supra* note 81, subsection 4.7.

¹¹⁹ *Tobacco Law, supra* note 81, subsection 12.1.

¹²⁰ *Tobacco Law, supra* note 81, subsection 12.2.

2.4.3.2 Offences

Section 13 outlines offences under the Tobacco Law. Subsection 13.1 states that the Commission shall develop a regulation designating offences where a Compliance Officer may issue a ticket.¹²¹ Subsections 13.3 and 13.4 outline the process by which a Compliance Officer may issue a ticket.

Subsection 13.6 allows for penalties. The provision explains that any person who contravenes the Tobacco Law or one of its regulations may be found guilty of an offence and liable to (a) a fine; (b) suspension or termination of a license; or (c) confiscation and forfeiture of tobacco products.¹²²

Taken together, the Enforcement and Offences sections of the Tobacco Law grant broad powers to the Mohawk Police and Compliance Officers and demonstrate the willingness of the Akwesasne authorities to ensure that the law is respected.

2.4.3.3 Compliance

The Tobacco Law is not currently operational. Therefore, statistics about compliance are not available.

¹²¹ *Tobacco Law*, *supra* note 81, subsection 13.1.

¹²² *Tobacco Law*, *supra* note 81, subsection 13.6.

3. The Tobacco Transporter Regulation

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This part of the memorandum is withheld at the request of the beneficiary.

4. Conclusion

The relationship between the Mohawks of Akwesasne and their Canadian and US neighbours in relation to tobacco trade has been tense at times. The 1980s, 90s, and 2000s were characterized by frustration, conflict, and tragedy. Policy measures of other jurisdictions had a profound impact on Akwesasne by bringing organized crime, addiction, health effects and punitive measures – yet the MCA was not consulted on any of these measures. While changing eras brought new policies, the tobacco trade has often been characterized by inconsistency and uncertainty.

The most recent decade has brought cooperation rather than antagonism. Funding and support provided by the Ontario government resulted in the 2016 enactment of the Akwesasne Tobacco Law. The Tobacco Law is a comprehensive effort by the MCA to regulate its tobacco industry in a manner that achieves comity with other jurisdictions and addresses long-term challenges related to enforcement and compliance. Other key objectives pursued by the Tobacco Law include protection of health and safety, environmental protection and economic development.

These objectives are further pursued through the Tobacco Transporter Regulation proposed in this memorandum. The proposed regulation implements the transporter segment of the supply chain and lays the groundwork for future projects to address manufacturing, wholesale and retail, and import/export. This Regulation, in conjunction with the Tobacco Law serves to facilitate the Mohawks of Akwesasne exercising their Nation's sovereignty and their inherent right to trade.

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