

A Misstep on the Road to Reconciliation

By: David Leitch

Matter commented on: *R c Montour*, [2023 QCCS 4154 \(CanLII\)](#)

Critics of the Supreme Court of Canada’s definition of aboriginal rights in *R v Van der Peet*, [1996 CanLII 216 \(SCC\)](#), [1996] 2 SCR 507 may applaud the Quebec Superior Court’s decision in *R c Montour*, [2023 QCCS 4154 \(CanLII\)](#) that attempts to re-write this definition so that it conforms to the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). But this post maintains that court-based battles of this kind do little to promote reconciliation. The Declaration will better promote reconciliation by being implemented through new treaties and federal legislation drafted in consultation with Indigenous peoples.

Background

The case started as the criminal trial of two members of the Mohawk Community of Kahnawake who were charged with offences relating to the importation of tobacco from the United States into Canada without paying taxes under the federal *Excise Act, 2001*, [SC 2002, c 22](#). When the accused raised treaty and aboriginal rights defences, Justice Sophie Bourque granted intervenor status to the Mohawk Nation Council of Chiefs (the MNCC), the traditional government of the Mohawk Nation and part of the Iroquois Confederacy.

After hearing evidence and submissions from the accused, the MNCC, the Prosecutor and the Attorneys General of Quebec and Canada, Justice Bourque arrived at two principal conclusions:

1. The “Covenant Chain” relationship between the Iroquois Confederacy and the British Crown constitutes a treaty with a built-in conflict-resolution process that still binds Canada and that requires the resumption of “Council” meetings between Canada and the Mohawk Nation Council of Chiefs to resolve ongoing tobacco trade disputes between Canada and the Mohawk Community of Kahnawake (at paras 891, 947, 1051); and,
2. Indigenous Peoples living in Canada possess a newly defined aboriginal right under section 35 of the to freely pursue generic economic development and this right includes the right of members of the Mohawk Community of Kahnawake to import tobacco from the United States into Canada, a right that was unjustifiably infringed by the federal *Excise Act, 2001* (at paras 1410, 1522, 1651).

Why Justice Bourque Should Have Stopped After Reaching her First Conclusion

I salute Justice Bourque's reliance on the Mohawk language and Haudenosaunee law and diplomacy to illuminate the historical relationship between the Iroquois Confederacy and the British Crown. I leave to the higher courts the question of whether the conflict-resolution process embedded in the Covenant Chain relationship constitutes a modern constitutional imperative that, if not observed, protects the right of members of the Mohawk Community of Kahnawake to import tobacco from the United States without paying excise tax.

I note, however, that in reaching her first conclusion, Justice Bourque made no mention of Article 37 of the Declaration, reproduced in its entirety in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#) (the *UNDRIP Act*). In view of her finding that the Covenant Chain was a treaty, Article 37(1) was clearly relevant. It states:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

In addition, section 5 the *UNDRIP Act* states:

The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

Had Justice Bourque considered Article 37(1), she might well have observed that this was a case where the law of Canada is already consistent with the Declaration: both require Canada to fully respect treaty rights. This would have been worth mentioning in reaching her first conclusion.

Why Justice Bourque's Second Conclusion Was a Misstep on The Road to Reconciliation

Justice Bourque accorded great importance to the Declaration in reaching her second conclusion. She wrote:

The endorsement of the UNDRIP without qualification and the adoption of the *UNDRIP Act* are more than additional instruments in the Aboriginal law landscape. They are also expressions of more profound changes. The entire societal landscape in which *Van der Peet* was decided has changed. (at para 1205)

But given the nature of the issues before her, it is difficult to understand why Justice Bourque made no reference to Article 36 of the Declaration. It states:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Instead, to justify her daring decision to re-write the Supreme Court's definition of aboriginal rights, Justice Bourque referred to three other Articles of the Declaration which she set out and interpreted at as follows:

The Court is convinced that the right to freely pursue economic development is one of the generic rights shared by all Indigenous peoples. It is intimately tied to the survival and dignity of any nations. Without it, Indigenous societies are not only deprived of the opportunity to flourish, but they could also be threatened with the inability to meet their basic needs. Moreover, as previously stated, a myriad of other rights essential to the continuity of Indigenous societies depends on the right to pursue economic development. (at para 1375)

This interpretation is supported by the UNDRIP, which illustrates that there is a consensus amongst the states that have endorsed it that Indigenous peoples have the right to pursue economic development:

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 20: Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. [...] (at para 1376)

Of course, the Declaration must be read as a whole and I do not doubt the significance of any of its Articles. But Article 36 was clearly the most relevant Article for the case before Justice Bourque. It too recognizes the importance of economic development but does so in the context of Indigenous peoples divided by international borders. This is the Article of the Declaration that identified the very obstacle to reconciliation facing the parties before the Court and that created a new opportunity for them to rethink and remove it. In my view, Justice Bourque could have relied on Article 36 to promote reconciliation in two ways.

First, she could have brought Article 36 to the attention of the parties and recommended that they pursue the new opportunity it created to resolve their differences through a new treaty. The Covenant Chain had produced many treaties in the past and could produce another one now. She could then have adjourned the hearing to allow the parties to negotiate a new treaty.

Second, if the parties refused or failed to negotiate a new treaty, Justice Bourque could have issued a decision referring to Article 36 of the Declaration but based on existing Canadian law by relying on the findings she made in reaching her first conclusion, as set out above, and on section 35 of the *Constitution Act, 1982*. This decision could have held that:

1. the Two-Row Wampum protocol allows either party to “repolish” the Covenant Chain by initiating new Council meetings for the purpose of negotiating a new treaty; (at para 615)
2. the Covenant Chain requires the parties to **successfully** negotiate a new treaty in order to maintain the unbreakable bond between them; (at paras 1063 to 1084)
3. as a treaty, the Covenant Chain has constitutional status in accordance with section 35 of the *Constitution Act, 1982* and so will the new treaty; and
4. the new treaty will make it unnecessary for the Court to define or redefine aboriginal rights under section 35 of the *Constitution Act, 1982*.

Why Judicial Definitions of Aboriginal Rights Are Not the Best Way to Promote Reconciliation

Section 2(3) of the *UNDRIP Act* says:

Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.

Litigation about how to define aboriginal rights under section 35 can only delay the application of the Declaration in Canadian law. Presumption of conformity arguments of the kind Justice Bourque accepted (at para 1175) require the Court to compare the Declaration right to the section 35 aboriginal right as defined or re-defined by the Court. This approach ensures that the Declaration remains before the courts, unimplemented, for many years to come. Justice Bourque’s definition of aboriginal rights has already been appealed and it will take several years for the Supreme Court of Canada to hear and decide the ultimate appeal. In the meantime, other Trial Judges might attempt to re-define other aboriginal rights to conform to other Articles of the Declaration, necessitating further appeals to the Supreme Court of Canada.

Section 2(2) of the *UNDRIP Act* says:

2 (2) This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

If the *Act* is to be construed as upholding the rights of Indigenous peoples under section 35 of the *Constitution Act, 1982*, then the courts should generally regard legislation intended to implement the Declaration the same way. It is hard to imagine that there will be any or many cases in which the courts are asked to find that such legislation abrogates or derogates from section 35 rights.

In my view, the courts serve reconciliation best by staying out of the business of defining aboriginal rights as much as possible and by instead encouraging the parties as much as possible

to implement the Declaration through legislation drafted in consultation with Indigenous peoples and through new treaties.

We now have a recent example of how it should work. In *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#) the Supreme Court of Canada demonstrated that it is entirely possible to determine the constitutionality of federal legislation implementing the Declaration even though that legislation also explicitly recognized a limited aboriginal right to self-government under section 35. The Court said the first issue could be decided without deciding the second:

It should be noted that the Attorney General of Canada, as well as a number of the interveners before this Court, argued that s. 35(1) protects Indigenous peoples' inherent right of self-government "in relation to child and family services", as the very wording of the Act affirms. This Court has not yet addressed the question, and it is unnecessary for it to do so in this case to provide the requested opinion on the constitutionality of the Act. (at para 112)

In fact, this is the main reason we need the Declaration in Canada: the courts have not exactly been busy defining aboriginal rights since 1982. More than 40 years later, the section 35 box is still largely empty. In my view, filling it up with aboriginal rights re-defined by the courts in light of the Declaration would take many, many more years, cost a lot of money and not serve the goal of reconciliation.

Take, for example, the *Indigenous Languages Act*, [SC 2019, c 23](#). It clearly states that "section 35 of the *Constitution Act, 1982* include[s] rights related to Indigenous languages" (at s 6). But since there has never been a court case determining what exactly those language rights are, the section 35 box is still empty on that issue and Indigenous parents still don't have the right to educate their children in their own languages in publicly funded schools. Nor should it be assumed that the courts would necessarily agree that a re-defined section 35 includes the right of Indigenous parents to educate their children in their own languages in publicly funded schools, even though inter-generational transmission of those languages largely depends on the existence of such a right.

It's Parliament, not the courts, that should fix this problem by amending the *Indigenous Languages Act* so that it implements Article 14 of the Declaration. That Article not only recognizes the right of Indigenous parents to educate their children in their own languages in publicly funded schools but their right to do so "in a manner appropriate to their cultural methods of teaching and learning".

Federal legislation implementing the Declaration in this, and in many other areas of Indigenous life, would make Canadian law consistent with the Declaration and enforceable in Canadian courts. Such legislation could also be made binding on the Provinces and Territories as is *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, [SC 2019, c 24](#).

Ordinary federal legislation would not create constitutional rights, of course, but it would effectively implement the Declaration. New treaties would do both, implement the Declaration and create constitutionally protected rights.

Why No Consideration of Abuse of Process Issues?

Justice Bourque may have believed that she was obliged to rule on the aboriginal rights defence in order to complete the criminal trial or because her first conclusion on treaty rights might be overturned by a higher Court. However, she appears to have given no consideration to the possibility that she could have rejected that defence on abuse of process grounds. The Prosecution may not have raised this issue, but abuse of process is ultimately about the Court's own inherent power to prevent the misuse of its procedure.

When the accused raised treaty and aboriginal rights defences, the Case Management Judge (not Justice Bourque) ordered the criminal trial to proceed first, leaving the treaty and aboriginal rights defences for consideration in a separate hearing, *R c Hill*, [2018 QCCS 2635 \(CanLII\)](#). It was during the course of this separate hearing that Justice Bourque issued a separate decision on February 19, 2021, *R c Montour*, [2021 QCCS 714 \(CanLII\)](#), granting intervenor status to the Mohawk Nation Council of Chiefs.

But neither the Case Management Judge nor Justice Bourque referred to the Supreme Court of Canada's decision in *Behn v Moulton Contracting Ltd.*, [2013 SCC 26 \(CanLII\)](#) on abuse of process. The facts of that were set out in the headnote as follows:

After Crown had granted timber sale licences and road permit ("authorizations") to company to harvest timber in two areas on territory of First Nation, number of individuals from First Nation erected camp that, in effect, blocked company's access to logging sites — Company brought tort action against these members of Aboriginal community, who argued in their defence that authorizations were void because they had been issued in breach of constitutional duty to consult and because they violated their treaty rights — Company filed motion to strike these defences — Courts below held that individual members of Aboriginal community did not have standing to assert collective rights in their defence.

Writing for a unanimous Court, Justice LeBel agreed with the lower courts, stating the following:

It is true that Aboriginal and treaty rights are collective in nature: [citations omitted] However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed. (at para 35)

But a final decision on this issue of standing is not necessary in this appeal, because another issue will be determinative, that of abuse of process. (at para 36)

The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they

had standing, themselves or through the FNFN [Fort Nelson First Nation], they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move. (at para 37)

The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence. (at para 42)

It is not clear from Justice Bourque's decision that the accused, the Iroquois Confederacy, or the Mohawk Nation Council of Chiefs had ever previously attempted to challenge the *Excise Act, 2001* based on treaty or aboriginal rights. Nonetheless, Justice Bourque gave no consideration to whether the attempt to rely on treaty and aboriginal rights defences constituted an abuse of process. Had she done so, of course, we might not now have the benefit of her first conclusion which, as explained, could have advanced reconciliation.

And yet, there was a second abuse of process issue which Justice Bourque failed to consider, one which might have allowed her to reach her first conclusion and stop there. In the *Behn* decision, Justice LeBel also made or quoted with approval the following statements of law:

Unlike the concepts of *res judicata* and *issue estoppel*, abuse of process is unencumbered by specific requirements. ... the doctrine of abuse of process:

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. (at para 40)

The issue in the case before Justice Bourque could have been whether the accused were attempting to relitigate the Supreme Court's decision in *Mitchell v Minister of National Revenue* [2001 SCC 33 \(CanLII\)](#). The facts of that case were set out as follows in the headnote:

Status Indian, Member of Mohawk First Nation, territory of which extended over border between Canada and United States, purchased goods in United States for gifts and resale to First Nations persons in Canada — Status Indian crossed border, declared goods and claimed Aboriginal or treaty-right exemption from Customs duty — Minister declined exemption and litigation of matter ultimately proceeded to Supreme Court of Canada — Aboriginal or treaty-right exemption was not established — Status Indian was liable to pay duty on goods.

In *Mitchell*, the treaty rights defence was rejected by the lower courts and not appealed. It was only the aboriginal rights defence that was considered, and unanimously rejected, by the Supreme Court of Canada, with Justice Binnie writing his own concurring judgment. Moreover, the Supreme Court rendered this decision after hearing from several Indigenous intervenors, including the Mohawk Council of Kahnawake.

Justice Bourque acknowledged the Attorney General of Quebec's submission that the accused "should be held to be in a position similar to that of the *Mitchell* case, since, in both cases, it was about crossing the border with goods for trade withing their communities within their communities" (at para 1362). Yet she did not consider the abuse of process issue raised, albeit perhaps only implicitly, by that submission, namely, that the accused were attempting to relitigate the Supreme Court's rejection of the aboriginal rights defence in *Mitchell*.

Conclusion

The Declaration and the *UNDRIP Act* do indeed create new opportunities to rethink and remove old obstacles to reconciliation. But those opportunities are best realized through new treaties and federal legislation that implement the Declaration, not through more litigation about how to define or re-define aboriginal rights. In my view, the *Montour* decision is a misstep on the road to the reconciliation.

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