

Quebec Court Finds UNDRIP Binding and a Universal Aboriginal Right to Economic Development

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On November 1, 2023, the Quebec Superior Court (Court) released *R. c. Montour*, which considered whether two First Nation-member defendants were criminally liable for importing substantial amounts of tobacco without paying duties under the *Excise Act, 2001*.¹ *R. c. Montour* found that the defendants, as members of the Mohawks of Kahnawà:ke, were exempt from import taxes on tobacco under the *Excise Act, 2001* based on the following:²

- The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) should be given the same weight as a binding international instrument when interpreting section 35 of the *Constitution Act, 1982* (Section 35);³
- The test for Aboriginal rights, originally set out in the Supreme Court of Canada's (SCC) 1996 decision *v. Van der Peet*, must be updated and reformulated to reflect a more modern understanding of Indigenous rights and reconciliation, including those reflected in UNDRIP;⁴ and
- Under the revised approach to determining Aboriginal rights, Indigenous peoples have a general right to economic development within their communities under Section 35.⁵

R. c. Montour's findings represent a notable departure from and potential evolution of existing law. The findings also run contrary to many recent decisions on UNDRIP and Aboriginal rights in other Canadian courts. Given that *R. c. Montour* was released by a superior court, it remains to be seen if its findings are upheld at the appellate level or applied elsewhere in Canada.

UNDRIP Within Canadian Law and the Principle of Conformity

UNDRIP was passed as a United Nations General Assembly resolution and is considered a non-binding form of instrument within public international law. Canadian courts have acknowledged UNDRIP's value in interpreting Canadian legislation but have been clear that it is not binding.⁶

However, Quebec courts have given UNDRIP greater weight within Canadian law than the courts in other Canadian jurisdictions have.⁷ Building upon a distinct 2022 Quebec Court of Appeal decision, the Court in *R. c. Montour* found that UNDRIP "should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)."⁸ The Court reached this conclusion based on the following evidence, which it perceived as demonstrating an intention by the federal government to make UNDRIP

binding:

- The federal government's unqualified endorsement of and subsequent comments on UNDRIP after a lengthy process that had initially begun with a vote against the instrument;⁹
- The federal government's passage of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIP Act) despite having no international obligation to do so;¹⁰ and
- The UNDRIP Act's text. Specifically, the Court focused on the UNDRIP Act's preamble, which affirms UNDRIP as "a source for the interpretation of Canadian law," and sections 2(3) and 4(a), which discuss UNDRIP's "application in Canadian law."¹¹

The Court in *R. c. Montour* did not reconcile its conclusion with contrary findings by other Canadian courts, or guidance from the SCC that non-binding international documents only have persuasive value and thus do not carry the presumption that they are binding on Canadian law.¹²

Departing From Van der Peet and Revising the Aboriginal Rights Test

The Court in *R. c. Montour* set out a new three-part framework for determining whether an Aboriginal right exists under Section 35. This new test differs from the test set out by the SCC in its 1996 decision of *Van der Peet*, which required that in order to be recognized in law, the asserted right must protect "an element of a practice, custom or tradition that is integral to the distinctive culture of the Aboriginal group claiming the right."¹³ *Van der Peet's* test considers ten factors, including the requirement that the right be of central significance to the society in question and have continuity with practices, customs, and traditions that existed prior to contact.¹⁴ In substitution of the *Van der Peet* test, the Court in *R. c. Montour* set out a new test with three elements required to establish an Aboriginal right:

- the parties and court must identify the collective right that is being asserted;
- the party asserting the right must prove that the collective right is protected by their traditional legal system; and
- the party asserting the right must show that the practice or activity at issue is an exercise of that Aboriginal right.¹⁵

The Court relied on the addition of UNDRIP into Canadian law, and perceived changes of how Canadian understand Aboriginal rights and reconciliation since 1996 to justify altering the framework for proving an Aboriginal right.¹⁶

The effect of this evolution appears to reduce the barriers to asserting and establishing Aboriginal rights and potentially expand Aboriginal rights to a broader set of interests or activities which were contemplated by the Indigenous community's traditional legal system. The Court stated that the new framework for establishing Aboriginal rights is intended to emphasize the protection of rights generally, rather than protecting the

specific instances where such rights are exercised.¹⁷

Finding an Aboriginal Right to Economic Development

Based on an application of the new framework for determining Aboriginal rights, the Court rejected both the plaintiff's and defendants' characterizations of the defendants' Aboriginal rights as the right to transport or trade tobacco. Instead, the Court characterized the right as a right to "freely determine and pursue economic development."¹⁸ The Court stated that the right to freely determine and pursue economic development is "shared by all Indigenous peoples" and "intimately tied to the survival and dignity of any nations" as it enables "a myriad of other rights essential to the continuity of Indigenous societies."¹⁹

Tobacco Trade is Protected

The Court found that the traditional legal system of the Mohawks of Kahnawà:ke protects the right to pursue economic development and that the defendants' participation in the tobacco trade, "pursuant to the right of their community to freely pursue economic development," was protected under Section 35.²⁰

The Court further stated that the *Excise Act, 2001*'s regulatory regime for tobacco unreasonably limited the Mohawks of Kahnawà:ke from exercising their Section 35 rights because it requires them to obtain licenses, which could be refused at the Minister of Revenue's discretion, and to pay the revenue-generating tax in order to exercise their constitutional rights.²¹

Rights Can be Infringed if Justified by a Valid, Compelling and Substantive Objective

In considering whether the restraints on tobacco trade rights imposed under the *Excise Act, 2001* could be justified, the Court acknowledged that excise duties are not solely a revenue-raising tool, but also an "efficient tool to reduce tobacco consumption" within Canada's health strategy.²² The Court agreed that the *Excise Act, 2001* had a valid, compelling, and substantial objective, but found that in order to justify an infringement, the Crown must first discharge its duty to consult the Mohawks of Kahnawà:ke about the potential impacts of its legislation.²³

Infringements Cannot be Justified without Consultation

The Court determined that in enacting the *Excise Act, 2001*, the Crown had failed to meaningfully consult the Mohawks of Kahnawà:ke, who had consistently repeated their desire to discuss tobacco regulation.²⁴ The Court found that the Crown was required to consult the Mohawks of Kahnawà:ke on tobacco regulation and to take their concerns seriously. This required efforts beyond simply extending a general invitation to submit written submissions.²⁵ The Court also observed that according to the Crown-Haudenosaunee relationship, consultation should have involved a discussion with Mohawks of Kahnawà:ke in accordance

with Haudenosaunee protocol.²⁶ The Crown's failure to consult the Mohawks of Kahnawà:ke was "exacerbated by the fact that the government took the time to consult with industry associations and representatives to accommodate their needs."²⁷

The Court in *R c. Montour* made no changes to the framework for assessing an infringement of Section 35-protected rights. Given that the *Excise Act, 2001*'s health objectives were found to be valid, compelling, and substantial, the Court might have determined that the regulatory regime's limits on the Mohawks' tobacco trade in Kahnawà:ke were justified if the Crown had adequately consulted and accommodated the Mohawks of Kahnawà:ke.

Conclusion

As the Court itself acknowledges, *R c. Montour* is an abrupt departure from the Supreme Court of Canada's existing law framework for establishing Aboriginal rights. *R c. Montour*'s conclusions that UNDRIP has binding weight within Canadian law and that trade regulations and duties unjustifiably infringe on Section 35 rights are also significant departures from previous rulings by Canadian courts.²⁸

Taken to their logical ends, the alteration of the 1996 *Van der Peet* test, the determination that UNDRIP is binding in Canadian law, and the finding that there is a universal right for Indigenous peoples to freely pursue economic development (including potentially without the constraint of taxes) could each have material implications for Indigenous peoples, Canadian governments, and Canadian society generally. It will be left to other Canadian courts to determine whether these changes are upheld and adopted across Canada, and the extent to which they may alter the existing Canadian legal framework.

¹ *R c. Montour*, 2023 QCCS 4154 [*Montour*]; SC 2002, c 22.

² *Ibid* at paras 1409-1410, 1651, 1689, 1692.

³ *Ibid* at paras 1194-1202.

⁴ *Ibid* at paras 1204, 1211-1214, 1219-1220, 1226, 1234.

⁵ *Ibid* at paras 1375, 1380.

⁶ See Feehan J.A.'s concurring judgment in *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at paras 122-123 [*Altalink*]; *Wesley v Alberta*, 2022 ABKB 713 at paras 144-146 [*Wesley*]; *Simon v Canada (Attorney General)*, 2013 FC 1117 at para 121; *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at paras 103-104; *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at paras 410-416 [*Gitxaala*].

⁷ *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at paras 507-513, cited in *Montour*, *supra* at para 1174.

⁸ *Montour*, *supra* at paras 1175 and 1194-1201.

⁹ *Ibid* at 1183-1185, 1189-1192.

¹⁰ SC 2021, c 14; *Montour*, *supra* at paras 1187-1193.

¹¹ *Montour*, *supra* at paras 1194-1198.

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¹² *Altalink, supra* at paras 122-123, cited within *Montour, supra* at para 1176; *Wesley, supra* at paras 144-146, cited within *Montour, supra* at para 1176; *Quebec (Attorney General) v 9147-0732 Quebec inc.*, 2020 SCC 32 at paras 28-32.

¹³ *R v Van der Peet*, [1996] 2 SCR 507 at para 46.

¹⁴ *Ibid* at paras 54-55, 59-60.

¹⁵ *Montour, supra* at para 1297.

¹⁶ *Ibid* at paras 1204, 1211-1226, 1234.

¹⁷ *Ibid* at paras 1299, 1365-1366.

¹⁸ *Ibid* at paras 1357-1358, 1367, 1370.

¹⁹ *Ibid* at paras 1375-1376.

²⁰ *Ibid* at paras 1381-1388, 1409-1410.

²¹ *Ibid* at paras 1476-1478, 1481, 1489, 1494-1495.

²² *Ibid* at paras 1626-1630, 1634.

²³ *Ibid* at paras 1623, 1635-1636.

²⁴ *Ibid* at paras 1602-1609, 1622.

²⁵ *Ibid* at paras 1517, 1604.

²⁶ *Ibid* at paras 1086, 1522.

²⁷ *Ibid* at para 1619.

²⁸ See for example *Mitchell v MNR*, 2001 SCC 33, a contrary decision by the SCC on the Aboriginal right to the duty-free transport of goods across the US-Canada border.

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