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Positioning Indigenous Law in the Legally Pluralistic State of Canada

Frankie Young*

Abstract

The *Beaver v Hill* decision is a key legal decision in Canada that deals with the application of private international law to resolving a family law dispute involving Indigenous litigants. Chappel J, for the trial court, found that it was appropriate to apply private international law principles to resolve a private law matter where Indigenous litigants are concerned. On the contrary, Lauwers J, for the Court of Appeal, found that the section 35(1) claim raised by the respondent was the best means to resolve the matter. Without supplying a well reasoned analysis, Lauwers J found that the trial court erred in applying private international law principles on the grounds that Indigenous law and Aboriginal law are not considered foreign law. Lauwers J is correct that Aboriginal law is not foreign law. Indeed, these common law principles have evolved over time and are meant to regulate dealings between the state, third parties, in some cases, and Indigenous peoples. On the contrary, Indigenous law is wholly distinguished from Aboriginal law. Indigenous legal principles have existed since time immemorial and regulate the relationships within Indigenous communities. While all legal traditions are derived from the cultural norms within a community of citizens, for Indigenous communities these cultural norms have evolved through continuous interpretation by elders and law-keepers. These legal traditions are foreign to the common law just as the civil law is foreign to the common law. I argue that Lauwers J erred in finding that private international law principles should not be applied to resolve private law disputes that involve Indigenous litigants because he failed to recognize that, in keeping

* Assistant Professor at Western Law School, Western University, Canada. Thank you to the three anonymous reviewers, and Professors Ghislain Otis, Dwight Newman and John Borrows, whose helpful comments assisted in strengthening this article. Any errors remain my own. frankie.young@uwo.ca.

with choice of law principles, any legal order that is not considered the law of the forum is considered foreign law. Further, given the high bar to meet in asserting section 35(1) claims, it is disempowering to Indigenous Nations to assert that the section 35(1) claims are the only means for Nations to assert the application of Indigenous law.

Keywords: choice of law, indigenous law, legal pluralism, family law, private law

I. Introduction

On 12 October 2018 the Ontario Court of Appeal (ONCA) released its decision in *Beaver v Hill*,[1] involving a private family law dispute between two Haudenosaunee litigants and members of the Six Nations of the Grand River, Ms Beaver (the applicant) and Mr Hill (the respondent). This case raises larger and contentious issues around the applicability of Indigenous law to resolve private law disputes involving Indigenous litigants. One of the issues the ONCA was tasked with was determining whether the Superior Court had erred in applying conflict of law principles to find that Ontario courts, and not the Haudenosaunee Confederacy, had jurisdiction to hear the matter. The ONCA rejected the application of private international law principles and instead found that asserting a constitutional claim under section 35(1) is the most effective route to resolve jurisdictional disputes involving Indigenous litigants.[2] Notwithstanding, many section 35(1) claims have not had positive outcomes because of the high bar that Indigenous petitioners must meet to successfully make out a claim.

I assert that to resolve private law disputes, in some cases it will be appropriate to apply conflict of law principles to determine Indigenous jurisdiction or the applicability of Indigenous law. Presumptions that section 35(1) claims are the only recourse available to Indigenous litigants should be avoided. Furthermore, while the trial court engaged in a jurisdictional analysis because choice of law was not raised by Mr Hill, I contend that it is entirely appropriate for an Indigenous litigant to plead foreign law as a means to argue that, rather than the law of the forum, Indigenous law should be applied to resolve the dispute. Pleading foreign law as a means to assert law other than the law of the forum is well recognised in Canadian jurisprudence.[3] Because Indigenous laws in Canada have historically operated as separate legal orders long before European contact, an Indigenous litigant who

1 [2018] ONCA 816 (application for leave to appeal to SCC dismissed July 4, 2019).

2 The Constitution Act 1982.

3 For example: *Boulanger v Johnson & Johnson Corp* [2003] 64 OR (3d) 208 (Div Ct); *General Motors Acceptance Corp of Canada v Town and Country Chrysler Ltd* [2007] 88 OR (3d) 666; *Phillips v Ford Motor Co of Canada* [1971 2 OR 637 (CA); *Hunt v T&N plc* [1993] 4 SCR 289.

pleads Indigenous law as 'foreign' law is simply asserting that the decision-making process should be governed by an *alternative* set of laws rather than the laws of the forum in question.

II. Background

After a five-year relationship which produced one son, Ms Beaver, who lived off reserve with their son, and Mr Hill, who lived on reserve, experienced a breakdown in the domestic relationship. Ms Beaver made an application before the Ontario Superior Court (ONSC) for custody, spousal support and child support.[4] After initially responding to the Ontario court, Mr Hill subsequently gave notice that he was challenging the jurisdiction of the court and the applicability of Ontario law. He filed a Notice of Constitutional Question (which was amended numerous times and was still found to be deficient by both levels of court) to assert that, pursuant to section 35(1) of the Constitution, he had an Aboriginal right of self-government which was being infringed by the imposition of Ontario family law, and the infringement was not justified.[5] The key legal issue was whether jurisdiction should be decided via the application of the conflict of law principles respecting jurisdiction, or via the section 35 constitutional framework respecting the determination of Aboriginal rights claims.[6]

A. Position of the applicant

Ms Beaver sought a declaration that the ONSC had jurisdiction to hear the application, pursuant to section 97 of the Courts of Justice Act 1990, and under the common law rules respecting jurisdiction. She raised the traditional ground of attornment to contend that Mr Hill attorned to the jurisdiction of the court when he initially served and filed an Answer and Claim in reliance on Ontario legislation.[7] Ms Beaver's counsel also submitted that under the principles of private international law, *jurisdiction simpliciter* was established such that, even if the Haudenosaunee are considered to be sovereign peoples with their own laws, a real

4 *Beaver* (n 1) [1]-[2].

5 ibid [2]-[3].

6 ibid [48]. This framework was initially articulated in *R v Sparrow* [1990] 1 SCR 1075, expanded upon in *R v Van der Peet* [1996] 2 SCR 507 and affirmed in *Lax Kw'alaams Indian Band v Canada (Attorney General)* [2011] SCC 56. The claimant must first characterise the asserted Aboriginal right and then demonstrate the existence of the pre-contact practice, tradition or custom that was integral to the distinctive pre-contact Aboriginal society. The claimant must also demonstrate that the right is a continuation of a pre-contact practice. Next, a claimant must demonstrate that there has been an infringement of the right established. If an infringement is proven, the Crown has the burden to prove that it is justified.

7 *Beaver* (n 1) [27].

and substantial connection existed between the litigants and Ontario.[8] Ms Beaver asserted that although the court can decline to assume jurisdiction in cases where it is clear another forum is more appropriate to determine the outcome of legal proceedings (in accordance with the doctrine of *forum non conveniens*), no evidence was presented to support this position and the material facts were not pleaded appropriately.[9] Ms Beaver further claimed that individuals lack standing to assert a constitutionally protected Aboriginal right to self-government. Therefore, the general principles respecting jurisdiction should apply.[10]

B. Position of the respondent

Mr Hill asserted that jurisdiction ought to be determined via the application of the section 35(1) tests articulated by the Supreme Court of Canada (SCC) for the determination of Aboriginal rights and the justification of infringement framework.[11] Most notably, Mr Hill contended that the general common law rules on which Ms Beaver relied are intended to apply to "foreign litigants, legal processes and laws"; he maintained that these principles do not apply because he is not a foreigner and the laws of the Haudenosaunee are a part of Ontario law.[12] Finally, he alleged that section 35(1) constitutional protection should supersede (and not be rendered subordinate to) the law respecting jurisdiction.[13] Mr Hill argued that because jurisdiction goes to the heart of his argument — and he sought the jurisdiction of the Haudenosaunee Confederacy — the dispute could only be settled after a fair hearing of his Aboriginal rights case where evidence is presented on current and pre-European contact practices, customs and traditions of the Haudenosaunee.[14]

C. Judgement of the superior court of ontario

Chappel J rendered the decision for the Ontario Superior Court. To render a binding decision, it must be found that the court has jurisdiction over the parties to the litigation and the subject matter of the dispute.[15] Chappel J first considered whether the conflict of law principles were relevant in *intra-provincial* jurisdiction disputes between two Ontario citizens. She found that indeed they applied because

8 ibid [29].
9 ibid.
10 ibid [26].
11 ibid [2], [34].
12 ibid [34].
13 ibid [34].
14 ibid [37].
15 Stephen Pitel & Nicholas Rafferty, *Conflict of Laws* (2nd edn, Irwin Law 2016) 1.

Mr Hill asserted an "alleged right to be governed by a complete system of dispute resolution, adjudicative processes and laws for handling Family Law matters that is independent of Ontario's court system, processes and laws".[16] Because the claim raised the preliminary issue around which forum should hear the matter and which laws should apply to resolve the dispute, Chappel J found the conflict of law principles were intended to address such queries.[17]

While she recognised Mr Hill's asserted constitutionally protected Aboriginal rights added complexity to the analysis, she nonetheless noted that the SCC has emphasised that when constitutional values are at issue, conflict of law principles ought to be malleable and adapted to account for such values.[18] The ability to adapt the common law in the face of constitutional challenges — especially since inquiries around the relevant legal culture that should determine these *sui generis* rights are normative inquiries — permits an analysis that incorporates the conflict of law principles while protecting Aboriginal rights.[19] As such, she opined that the starting point should be the conflict of law principles respecting jurisdiction, while also factoring in the constitutional issues.

In analysing whether the ONSC had jurisdiction, Chappel J considered the related two-step test: (1) determination of whether the court has or can assume jurisdiction (jurisdiction *simpliciter*) and (2) if jurisdiction *simpliciter* is established, whether the court should decline to take jurisdiction.[20] Due to the section 35(1) constitutional challenge (and the attornment issue raised), Chappel J modified the approach. Rather than only considering the family law legislation governing custody and access issues, or the rules of court permitting the court to assume jurisdiction *simpliciter* at step one of the analysis, she considered whether the court should exercise its discretion to decline jurisdiction to allow the constitutional challenge to proceed in the ONSC.[21] This approach would presumably allow for a full assessment of the jurisdiction issue based on the section 35(1) framework regarding Aboriginal rights claims. Chappel J cautioned however that although Aboriginal rights are critical and must be protected, the court is not obliged to consider them in a vacuum. As such, if Aboriginal rights are not pled and advanced

16 *Beaver* (n 1) [53].

17 ibid.

18 ibid [54]; *Morguard Investments Ltd. v De Savoye* [1990] 3 SCR 1077; *Hunt* (n 3); *Tolofson v Jensen* [1994] 3 SCR 1022*; and* Van Breda v Village Resorts Ltd. [2012] SCC 17.

19 *Beaver* (n 1) [55]; *R v Van der Peet* [1996] 2 SCR 507; *R v Sappier* [2006] 2 SCR 686; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; Mark Walters, 'British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v British Columbia' (1992) *17* QLJ 350, 412-13.

20 *Beaver* (n 1) 57.

21 ibid [65]-[67].

in a timely manner, to promote reconciliation the court must balance the interests of all parties involved.[22]

Chappel J further considered the principle of constitutional restraint such that if a case can be decided on constitutional and non-constitutional grounds, it should be decided on non-constitutional grounds where possible. In fact, she found that a court is not compelled to rule on a constitutional argument simply because one is raised.[23] She went on to determine the factors that should be considered in deciding whether to decline jurisdiction. She reiterated that where one party relies on the doctrine of *forum non conveniens*, that party has the onus to prove that the proposed alternative forum (in this case the Haudenosaunee Confederacy) is more appropriate than the forum which the opposing party is asserting.[24] This doctrine ensures the litigants a process to efficiently resolve the issue of forum. The SCC has held that a party must show that, based upon clear connecting factors, an alternative forum is more appropriate and the court should decline to exercise jurisdiction on the basis of *forum non conveniens*.[25] Notably, Mr Hill did not raise the issue of *forum non conveniens*, nor did he assert a forum or process in which he sought to proceed. Nevertheless, Chappel J found that a prolonged and complex constitutional proceeding should not be incorporated into the doctrine of *forum non conveniens* to resolve a preliminary issue as to the applicable alternative forum, procedure and law.[26]

Chappel J found that while courts have a duty to protect Aboriginal rights there is no absolute obligation to allow a full hearing of such claims where, from the outset, there are fatal deficiencies in the pleadings.[27] She also determined that Mr Hill did not have standing to assert the claim to self-government as an individual. In finding that the amended constitutional claim failed to set out a reasonable claim or defence in law, she dismissed Mr Hill's amended answer without leave

[22] ibid [68].

[23] ibid [69]; Phillips v Nova Scotia (Commission of Inquiry Into Westray Mine Tragedy) [1995] 2 SCR 97; R v Lloyd [2014] BCCA 224; Peter Hogg, Constitutional Law of Canada (5th ed, Supplemented, Vol 2, Thomson Reuters 2016) chapter 59, page 22.

[24] *Beaver* (n 1) [70].

[25] *Van Breda* (n 19) [82].

[26] *ibid [70]-[71].*

[27] *Lax Kw'alaams* (n 6).

to amend and found that Ms Beaver's application for custody, spousal and child support would proceed under Ontario law.[28]

D. Judgement of the ontario court of appeal

Lauwers JA, writing for the ONCA, overturned Chappel J's finding that the conflict of law principles applied.[29] He held that it was an error of law for her to apply the conflict of law principles because "[a]boriginal rights or Indigenous law do not constitute 'foreign law', even conceptually".[30] There was no analysis provided for this finding. Rather, Lauwers JA focused on the relevant framework that deals with section 35(1) rights and the overarching constitutional principles that should be considered to assess Mr Hill's standing as an individual litigant asserting a constitutional claim to self-government.[31] Ostensibly, these principles underscore the *sui generis* nature of Aboriginal rights, the evolution of constitutional law in this regard and the importance of specific tests set out by the SCC when assessing section 35(1) claims. Despite the communal nature of Aboriginal rights, Lauwers JA found that the combined principles and the nature of the claim asserted demonstrate that Aboriginal rights are exercised by individuals — thus have both collective and individual aspects — and in appropriate circumstances individuals can assert Aboriginal or treaty rights.[32]

He found that it was premature to dismiss Mr Hill's constitutional claim because the interests at stake were critical and Mr Hill's section 35 claim could not be evaluated at such an early stage of the proceeding and on such a deficient record.[33] He held that it is incumbent upon the court to consider an amendment as a means to remedy an insufficient cause of action and so Mr Hill was given leave to appear before another Superior Court judge to amend his constitutional claim.[34] It

[28] *Beaver* (n 1) [128]-[129].
[29] ibid [17]-[18].
[30] ibid [17].
[31] ibid [28]-[34].
[32] ibid [36] citing Justice Lebel in *Behn v Moulton Contracting Ltd.* [2013] SCC 26 [33]; comprehensive analysis at [39]-[69].
[33] ibid [13]; *Spar Roofing and Metal Supplies Ltd. v Glynn* [2016] ONCA 296 [37].
[34] *Beaver* (n 1) [13]-[14].

is clear that Lauwers JA placed considerable weight on constitutional principles as a way for Indigenous litigants to have their legal rights recognised.[35]

III. Analysis

There is no doubt that the ability of Indigenous Nations to resolve legal disputes under traditional law has been the subject of much discourse in Canada. In July 2018, Canada released the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, which emphasise that "interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws"[36] should be underpinned by the recognition of Indigenous Nations' inherent jurisdiction and legal orders. The Truth and Reconciliation Committee also advocates for the recognition and implementation of Indigenous legal systems as an act of reconciliation.[37] Further, the United Nations Declaration on the Rights of Indigenous Peoples affirms the right of Indigenous people to maintain their legal systems and customs.[38]

Canada is recognised for its cultural and legal diversity.[39] Arguably, Indigenous law — which *pre-dates* European contact by thousands of years — ought to be treated as a separate legal system from which laws are "freely chosen by persons desiring to do so".[40] Other countries, for example South Africa, recognise that weight ought to be given to customary law in resolving private law disputes involving Indigenous peoples, and the conflict of law principles are applied to determine the appropriate applicable law.[41] Lauwers JA's default position that favours the application of Canadian law to determine an Aboriginal right to

[35] ibid [78]. It is worth noting that the court took issue with the long drawn out proceedings of which both parties contributed to the procedural morass.

[36] Minister of Justice and Attorney General of Canada, 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples' (2018) <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> Principle 4 (accessed January 25, 2021).

[37] Truth and Reconciliation Commission of Canada, Truth and Reconciliation (*Commission of Canada: Calls to Action*, 2015) < http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>, No 42, 45(iv) (accessed January 25, 2021).

[38] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Resolution 61/295 (13 September 2007) UN Doc A/RES/61/295, articles 5, 24.

[39] Ghislain Otis, 'Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights?' (2018) 8 UC Irvine Law Review 207, 213.

[40] Hadley Friedland, 'Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System' (2016) 67 UNBLJ 269, 13-14.

[41] Customary law is recognised in the Constitution of South Africa*:* C Rautenbach, *Introduction to Legal Pluralism in South Africa* (5th edn, LexisNexis 2018) 19; South African Law Commission, 'The Harmonisation of the Common Law and the Indigenous Law: Report on the Conflicts of Law' (*South African Law Commission Project 90,* 1999) 14-20; *Gumede v President of the Republic of South Africa* [2009] (3) SA 152 (CC) [22].

self-government presupposes that the application of this law is the best route for recognising distinct Indigenous legal systems. However, the rule of law asserted by Lauwers JA has historically been the same law that has upheld the dominant legal order or was applied to find Indigenous legal orders invalid.[42] Arguably, Lauwers JA's scepticism of the application of the conflict of law principles in this case was misguided and these principles should not be precluded as a propitious option for resolving private law disputes involving Indigenous peoples.

A. Pleading foreign law as an option

For litigants like Mr Hill, pleading foreign law, that is, the law from which a case should be resolved under, is a voluntary option.[43] Foreign law is any law other than the law of the forum — for example in an interprovincial context — and a litigant must plead proof of foreign law.[44] Typically, one of the parties must raise the choice of law for the court to even consider it, otherwise the legal matter is resolved under the law of the forum. Choice of law rules are those procedural rules that are applied by a court to determine which forum's law should apply to the matter at hand. Notwithstanding that the ONSC engaged in a jurisdictional analysis,[45] I argue that the choice of law rules could better serve the purposes sought here.

Albeit, Mr Hill did not plead foreign law and so the forum is not obligated to apply the choice of law principles, especially since foreign law is considered as a matter of fact and would have to be proven by Mr Hill.[46] There are likely several reasons why Mr Hill's counsel did not consider choice of law to resolve the issue at hand. First, the parties clearly misunderstood the nature of 'foreign law'. Mr Hill alleged that he is not a foreigner, and Haudenosaunee law is, rather than foreign law, *a part of the common law system* in Ontario.[47] Lauwers JA also asserted that both Aboriginal rights *and* Indigenous law should not fall within the scope of conflict of law principles because they "do not constitute 'foreign law', even conceptually".[48] Certainly Aboriginal rights are a part of Canadian constitutional law and are *not*

[42] John Borrows, *Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism' in Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 113.

[43] *Pettkus v Becker* [1980] 2 SCR 834 [854].

[44] *Boulanger* (n 3).

[45] It is trite law that the Superior Court has jurisdiction over constitutional and family law issues, and on appeal Mr Hill conceded the jurisdiction of the court. Beaver (n 1) [11]; *Canada (AG) v Law Society of British Columbia* [1982] 2 SCR 307 [326]-[327].

[46] *Hunt* (n 3) [308].

[47] *Beaver* (n 1) [34].

[48] *Beaver* (n 1) [17].

foreign law by any measure. Mr Hill's right to assert a constitutional claim is not disputed.

Wholly distinguished from Aboriginal rights, however, Indigenous laws have historically operated as separate legal orders long before European contact.[49] On its face, characterising Indigenous law as foreign law seems out of place. Indeed, Professor Karen Drake considers it ironic to characterise Indigenous traditions as foreign law within Indigenous traditional territories.[50] However, pleading 'foreign' law simply means asserting that the decision-making process should be governed by an *alternative* set of laws other than the laws of the forum in question.[51] In challenging the jurisdiction of the Ontario court, Mr Hill described the Aboriginal right he was relying on as "the Haudenosaunee right to be subject, sole [stet] and exclusively, to the family law and child support and parenting processes under Haudenosaunee law".[52] He further added that this right is "characterized as the exercise of an inherent right to self-government, which is recognized and affirmed as an Aboriginal and Treaty right by section 35 of the *Constitution Act, 1982*".[53] However, he went on to indicate that the Haudenosaunee have "not accepted the *imposition of Canadian laws* that touch on matters central to their society, namely governance and the application of provincial and federal statutory regimes that infringe on their core identity as a people".[54] Ostensibly, Mr Hill did not see the contradiction in asserting that Canadian law (the Aboriginal rights framework) should be applied to determine something as central to the Haudenosaunee as the right to self-government (thus the application of Haudenosaunee law), but denies that Canadian law applies to resolve the current family law dispute.

Moreover, when Mr Hill argued that applying conflict of law principles is offensive because he is not a foreigner and Indigenous law is not foreign law, rather a part of the common law of Ontario,[55] he directly contradicts his assertion that, rather than Ontario law, the separate and valid laws of the Haudenosaunee should apply. In fact, Mr Hill's Amended Answer asserted the existence of "a robust law, a dispute resolution system, which, among other things, determined how disputes within and between families were to be resolved" that "has been

[49] *Friedland* (n 42) [13]-[14].

[50] Karen Drake, 'Indigenous Oral Traditions in Court: Hearsay or Foreign Law?' in Karen Drake & Brenda L Gunn (eds) *Renewing Relationships: Indigenous Peoples and Canada* (Native Law Centre 2019) 3.

[51] Dicey and Morris, *Conflict of Laws* (15th edn, Sweet and Maxwell 2018); Pitel & Rafferty (n 16) 3; Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University Press 2019); *Beaver* (n 1) [52].

[52] *Beaver* (n 1) [6] ([29] of factum).

[53] ibid.

[54] ibid ([38] of factum).

[55] ibid [34].

practiced continuously since the time of contact with European settlers, despite the operation of other, colonial legal systems".[56] Although the claim was structured as a section 35(1) claim — one that had considerable defects[57] — what Mr Hill sought as an end result was for the court to apply Haudenosaunee law as the relevant law. Arguably, Haudenosaunee law is foreign to the Ontario rules governing these matters. This certainly appears to be a conflict of law issue because central to the function of the law of conflicts is that a pathway is provided to resolve controversies where law is being asserted other than the law of the forum.[58] Both Mr Hill and the ONCA struggled with the ability to reconcile Indigenous peoples and their law as having foreign elements to the forum.

Lauwers JA found that presumably Mr Hill would have no other means to assert Haudenosaunee laws and protocols, other than through a section 35 claim.[59] This is simply not true. Chappel J sought to reconcile the ways that private international law could intersect with constitutional principles to resolve these kinds of issues. Furthermore, Lauwers JA conceded that, under the current analysis, it is not clear whether Haudenosaunee law would entirely displace or simply modify Ontario family law such that Mr Hill's key assertions in his pleadings could, rather than supplant Ontario law, merely inform the process.[60] From this standpoint, there is no guarantee that simply proving a right to self-government and that the infringement by Ontario law is not justified would confer the right to have Haudenosaunee law automatically applied. Mr Hill would still have to deal with the fact that Ms Beaver and the child live off reserve, while Mr Hill lives on reserve. The relevant applicable law would still be an outstanding issue.

B. Indigenous legal traditions

Aside from the ambiguity around the nature of foreign law, the issue of how to treat Indigenous law as an effectual component of the multi-juridical Canadian legal system continues to be debated. Common law courts have erroneously

[56] ibid [3].
[57] ibid [89]; *Beaver* (n 1) [13].
[58] Gregory S Alexander, 'The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam' (1976) 70(4) Northwestern University Law Review 602, 602.
[59] *Beaver* (n 1) [65].
[60] ibid [67].

treated Indigenous law as *evidence and fact* rather than as law.[61] This has not set good precedent for how to reconcile Indigenous law in the greater Canadian legal system, thus grave concerns have been raised around justice and fairness in cases involving Indigenous peoples. For instance, in *Coastal GasLink Pipeline Ltd. v Huson*, Wet'suwet'en customary law was not recognised as an effectual part of Canadian law, but could be considered as evidence in deciding a case; as such, the Wet'suwet'en peoples were found to be subject to the laws of British Columbia in resolving the legal issue in question.[62] However, numerous other legal decisions have recognised Indigenous legal orders as a part of the Canadian pluralistic legal system. In *Pastion v Dene Tha' First Nation*, the federal court found that "[i]ndigenous legal traditions are among Canada's legal traditions" and "form part of the law of the land".[63] Further, in *R v Marshall* the SCC cited, with approval, John Borrows: "[a]boriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law".[64]

Barring a clear recognition of Indigenous legal orders as binding in their own right, similar to how Quebec civil law is recognised as having the same force and effect as the common law, Indigenous peoples (and ostensibly the courts) are likely to presume that the only recourse is to use the common law to assert section 35(1) claims. In fact, this case is an astounding example of how Mr Hill was seemingly

[61] *R v Van der Peet* [1996] 2 SCR 507 [84]-[91]; Drake (n 50) 17-21; Minnawaanagogiizhigook (Dawnis Kennedy), 'Reconciliation *W*ithout Respect? Section 35 and Indigenous Legal Orders' in Law Commission of Canada (ed) *Indigenous Legal Traditions* (UBC Press 2007), 87-89; Val Napoleon & Hadley Friedland, 'An Inside Job: Engaging with Indigenous Legal Traditions through Stories' (2016) 61*(4)* McGill LJ 725, 735.

[62] Coastal Gaslink Pipeline Ltd. v Huson Wet'suwet'en [2019] BCSC 2264 [128]. We see a similar line of reasoning in Logan v Styres, (1959) 20 DLR (2d) 416 where the ONSC found that the Haudenosaunee members of the Six Nations Indian Band were both under the protection of the laws of the land of Ontario, and were also subject to such laws. These decisions negate the legal rights of the Indigenous Nations at issue to be subject to their own laws.

[63] Pastion v Dene Tha' First Nation [2018] 4 FCR 467 [8]; see also Alderville First Nation v Canada [2014] FC 747 [26]; Connolly v Woolrich [1867] 17 RJRQ 75 (Qc Sup Ct); Re Adoption of Katie E7-1807 32 DLR (2d) 686 [36], [38]; Henry v Roseau River Anishinabe First Nation Custom Council [2017] FC 1038 [8]. For other cases that affirm the legitimacy of Indigenous law see Alexander v Roseau River Anishinabe First Nation [2019] FC 124; Campbell v British Columbia (Attorney General) [2000] BCJ No 1524. In fact, in the historical decision of *Connolly v Woolrich* [1867] 17 RJRQ 75 (Qc Sup Ct), the Quebec Superior Court held that a marriage entered into under Cree law could still be recognized under Quebec law. Further, in *Casimel v Insurance Corp. of British Columbia* [1993] BCJ No 1834 (QL) (BCCA), the BCCA considered the significance of customary adoption for the Carrier people (also known as Dakelh or Yinka Dene). The effective adoption of the late Chief Ernest Casimel by his grandparents was found to be legally binding. Both of these decisions recognized family law matters under customary law.

[64] *R v Marshall* [2005] SCC 43 [130].

of the view that his only recourse in law was to use the very system which he claims does not have jurisdiction over significant Indigenous legal matters to *make a substantive finding in law* that a section 35(1) constitutional right exists to be governed under Haudenosaunee customary law. Notwithstanding, the Haudenosaunee have historically disputed the legitimacy of the Canadian judiciary, asserting the right to be governed by their own laws.[65] Scholars and lawyers also express concern about whether claims under section 35(1) are a justiciable means to give effect to Indigenous people's laws.[66] Not only is there a high bar to meet but section 35(1) claims can take years to resolve.[67]

C. Choice of law rules

It can certainly be argued that choice of law rules are Canadian state law in the same way that section 35(1) is. Therefore, it is by virtue of a Canadian legal rule that foreign law could be received and given effect by Canadian law. However, the choice of law rules are largely procedural rules that determine which substantive law should apply. This is distinguished from applying substantive law to determine a critical legal finding related to Haudenosaunee self-government. This is also not to say that the choice of law principles would not have their own challenges for Indigenous parties asserting them. Central to the choice of law process is that a litigant is required to characterise the claim — which is critical to identifying the choice of law rule that determines the applicable law — and must precisely plead evidence of the content of the asserted law.[68] The connecting factors that favour the application of the pleaded law would need to be identified because choice of law principles are predicated on the principle of proximity such that the dispute is resolved according to the law most proximate to the dispute.[69] Mr Hill would thus need to deal with the fact that Ms Beaver and the child live off reserve, thus are connected to the law of Ontario, and spousal and child support are usually decided by the law of the forum. In *Kearney v Willis*, the court considered the choice of law under similar circumstances and, rather than applying the law where the

[65] *Sero v Gault* [1921] 64 DLR 327 (ONSC); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (University of Toronto Press 1999) 117; *Logan v Styres* (1959) 20 DLR (2d)416.

[66] John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016) 27-40; Val Napoleon & Hadley Friedland, 'Indigenous Legal Traditions: Roots to Renaissance' in Marcus Dubber (ed) *Oxford Handbook of Criminal Law* (Oxford University Press 2014); Borrows (n 44).

[67] *Delgamuukw* (n 20). The trial lasted 374 days and new trial ordered due to a technicality.

[68] *Pitel & Rafferty* (n 16) 252.

[69] ibid 209.

respondent lived, the court applied the law of the forum because the child was born and raised there.[70]

Further, Mr Hill would have to overcome the fact that Ms Beaver disputed the existence of a specific "robust law" to deal with Haudenosaunee family disputes.[71] While the burden is on Mr Hill to provide evidence of the asserted law, if it is not clear to the court which rules from the Haudenosaunee legal system are to be applied to resolve the dispute, Mr Hill may not be successful.[72] Moreover, even if the law is proven by Mr Hill, Ms Beaver would want to opt out of the application of Haudenosaunee law. Certainly Indigenous litigants asserting Indigenous law and protocols may not prevail in every claim. However, the courts and Indigenous litigants should avoid presumptions that section 35(1) claims are the only recourse available to Indigenous litigants to assert Indigenous jurisdiction or the application of Indigenous law to resolve private law disputes. This has the effect of negating the choice of law process as a viable means to address issues of justice about *which legal system* should apply,[73] when the choice of law process clearly goes to the heart of a claim such as Mr Hill's.

This case raises unresolved questions that courts and governments will have to turn their attention to moving forward. Will courts in Canada give effect to legal decisions rendered under Indigenous law? How will the complexities of the numerous Indigenous, provincial and federal jurisdictions be reconciled? Given issues around access to justice in general, how will Indigenous litigants deal with pleading expert evidence under conflict of law principles? These questions are beyond the scope of this commentary. However, because recognising Indigenous law is a work in progress, a combination of mechanisms will be required to give effect to Indigenous law.

It is incumbent upon courts and governments to develop new understandings of what constitutes law to consider the unique position of Indigenous law in the development of the legal system in Canada. It should be noted here that Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families* is also in the process of being finalized in Canada. This legislation affirms the legitimacy of Indigenous law in that Nations will be empowered with developing policies and laws that flow from their particular histories, cultures, and circumstances. Eventually Indigenous law, recognized through this legislation's framework, will be applied to resolve these kinds of family law matters. While this is very good

[70] *Kearney v Willis* [2001] 15 RFL (5th) 96 (Nfld UFC).

[71] *Beaver* (n 1) [66].

[72] *Pitel & Rafferty* (n 16) 222-23.

[73] Ugljesa Grusic, *'Historical Development and Current Theories' in Paul Torremans et al (eds)* Cheshire, *North and Fawcett Private International Law* (15th ed*n*, Oxford University Press 2017) 37.

news for this area of law, it does not mean that conflict of law issues may not still arise. Conflict of law principles should not be precluded as a mechanism for giving effect to Indigenous legal orders to resolve private law disputes involving Indigenous peoples.

IV. Conclusion

This judgment has serious socio-political repercussions. Lauwers JA's reasoning failed to give effect to private international law principles as a means to resolve Indigenous litigants' private law disputes under Indigenous law. It was found that the pleadings played a critical role in defining the issues in this case.[74] In fact, the ONCA found that "the ramshackle way in which the constitutional claim was asserted and [was] being developed" did not give "justice to the seriousness of the claim".[75] This speaks to the difficulties in framing constitutional claims in this regard. Clearly, with the right guidance, a more effective constitutional claim could be pleaded. However, the choice of law principles are designed to resolve the kind of queries raised by Mr Hill.

Rather than reverting to Aboriginal rights claims by default, private international law could be a means for Indigenous peoples to assert Indigenous jurisdiction and choice of law in resolving private law disputes. Choice of law principles have been applied in legal disputes in Canada to recognise that, where appropriate, laws other than the law of the forum should be applied to resolve a particular legal dispute. Given the longstanding recognition of Indigenous laws as an effectual part of Canada's pluralistic legal traditions, it should not be out of the realm of possibility that an Indigenous claimant would want to assert the application of Indigenous laws to resolve a legal dispute. Perhaps in some cases, as is likely the case here, the Indigenous litigant will not have the strongest set of facts. However, the *Beaver v Hill* decision raises the larger issue of how Canada's legal system is going to deal with the interplay between *all* of Canada's legal traditions going forward. In the furtherance of justice and equity, measures ought to be taken to give effect to the rich Indigenous legal traditions of Canada's Indigenous peoples. Indeed, as was so eloquently noted by English scholar Cheshire:

> "[w]hen the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient, and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to apply the foreign rules".[76]

[74] *Beaver* (n 1) [30].
[75] ibid [13].
[76] *Torremans* (n 75).