

Promoting Diversity in the Courts: Hon. Mark A. Montour

John Caher: Welcome to Diversity Dialogues, a production of a New York State Unified Court system and its Office of Diversity and Inclusion. I'm John Caher.

For National Native American Heritage Month, we are proud to feature a truly historic figure, the Honorable Mark Montour. Judge Montour, who was recently promoted to the Appellate Division, Fourth Department, is the first Native American in New York State history ever elevated to any of the four Appellate Division departments.

A member of the St. Regis Mohawk Indian Nation, Judge Montour was the first Native American ever elected to a state level judicial position. He was elected the Supreme Court in 2013 and has served as Acting Administrative Judge for the Eighth Judicial District and Supervising Judge for the Genesee and Wyoming County town and village Courts. Judge Montour also chairs the New York State Tribal Courts Committee, serves as state facilitator for the New York Federal, State and Tribal Courts and Indian Nations Justice Forum, he is a member of the Advisory Committee on Judicial Ethics. He is a graduate of the University of Buffalo School of Law and Canisius College.

Judge, thank you for joining us. Please tell us where you grew up and what your parents did.

Judge Montour: Well, I was born in Buffalo. I grew up in Tonawanda, New York. My father was a maintenance foreman for the Chevrolet Forge Plant and my mother was a nurse, registered nurse. She gave up nursing when I was young because we had seven children and her responsibilities were dedicated more towards rearing us rather than exercising her nursing responsibilities.

John Caher: Now, the name "Montour" is pretty famous in Mohawk lore and the Iroquois Confederacy. Tell me about your roots and how important that was growing up and how that may have shaped you as a person.

Judge Montour: Well, my dad, as I mentioned, was working at the Chevrolet Forge plant. He was a maintenance foreman, so he was involved with all the furnaces that were utilized in manufacturing parts for the automobile industry. And in doing that, he was required to oversee restructuring of furnaces. And these furnaces were all made with asbestos. And back then, no one really had any idea of the dangers of asbestos, or if they did, they never really publicized them. And that ultimately led to his death in 2020.

So with respect to growing up with my heritage, my dad was born in 1925. Both my grandparents are Mohawk, full Mohawk, as my dad is. I'm one half. During that timeframe, the boarding schools, residential boarding schools, were in play. And I never had a chance to ask my dad about this. We never really discussed it. I regret not having been able to discuss this with him. But we did not grow up with a native heritage. I think a lot of it has to do with, and I have to surmise, with the fact that the boarding schools were still popular when my dad was born and when we were born. The boarding schools existed from the 1850s to the 1970s.

John Caher: Wow.

Judge Montour: And children were taken from their households, from their families, forced into these schools and they were not allowed to discuss their culture. They were not allowed to use their language or practice their religion. So I'm surmising that was the basis for us not growing up with our heritage. So I didn't really stress my heritage till probably later in life, but has had a significance in my upbringing and my children's upbringing now.

John Caher: I understand. There was a time when it may have been quite disadvantageous to highlight your background.

Judge Montour: Correct. Correct.

John Caher: Now, you say you reconnected or connected with your background as you got a little older. And so how did you develop a relationship with the St. Regis and what is the relationship you have with them now?

Judge Montour: Well, I have roots in Akwesasne, which is the official word for St. Regis. St. Regis is a French name. So the Akwesasne territory is commonly known as the St Regis territory. I'm also a member of the Caughnawaga registry, which is the Kahnawake territory. It's just south of Montreal. So I'm registered on the Kahnawake territory and am an enrolled member in the Akwesasne or St. Regis territory.

My connection really developed when I became a Supreme Court judge because at that point in time I was appointed to the Tribal Courts Committee. We may want to discuss that later, but there are nine Native Nations, recognized nations, here in New York State. I don't know if everyone's familiar with that. I bring that up with a lot of people and they're, "I thought there was just the Seneca. I live here in Western New York." But there are nine nations. I'm an enrolled member, so I do have a connection with them and communicate with them quite regularly. There

are various Tribal Court issues that we discuss on a very regular basis. St. Regis Mohawk tribe was very instrumental in supporting me for my appointment to the Fourth Department, which was recently done in September.

John Caher: You mentioned the Tribal Courts Committee, which I believe was established a couple decades ago by then Chief Judge Judith Kaye. What exactly does it do?

Judge Montour: Well, again, there are nine Native nations here in New York State—two on Long Island and then the seven throughout what is deemed to be New York State, what we recognize today as New York State. And there's various justice systems that each nation has, whether there are “constitutional systems” such as the Senecas or the St. Regis Mohawk Tribe or the Oneidas. When I say “constitutional,” they have their own constitutions now. They have elected offices. They have elected counselors. They have elected judges.

For example, here in Western New York the Seneca Nation has a Tribal Peacemaker Court. They have a Court of Appeals, and they have a Supreme Court. And we're dealing with the New York State court systems and we're dealing with federal court systems. So the idea behind the Tribal Courts Committee was to galvanize these various state, federal and tribal courts.

A mission that we have here with the Tribal Courts Committee is to develop educational programs for judges and tribal chiefs and Indian communities, to exchange information among tribes and nations and agencies, to coordinate the integration of the ICWA training—the Indian Child Welfare Act— for child care professionals, attorneys, judges and law guardians, and to develop mechanisms for the resolution of jurisdictional conflicts and inter-jurisdictional recognition of judgments, and to ICWA enforcement.

Now, in developing mechanisms of resolution for jurisdictional conflicts, you need to understand that even though there's those constitutional court systems that the Oneidas, St. Regis Mohawks, and Senecas have, the Tuscarora, the Tonawanda Senecas, the Onondagas and until recently, the Cayugas, had a traditional form of resolving conflicts with the tribal chiefs in conjunction with the clan mothers. A problem would come before them and [the tribal chiefs and clan mothers] would resolve these issues. So there's interplay between those traditional forms of government as well as our state court jurisdictions as well as federal court jurisdictions. Now, most the tribal nations do not have criminal

jurisdictions. So those are generally held in federal court. If there's jurisdiction given to the state court, they also have the ability to oversee those particular matters.

John Caher: Now, the Fourth Department, where you sit, probably includes more Native American settlements than the other three departments combined. I mean, you've got the Oneida and the Onondaga and the Cayuga and the Tuscarora and the four bands of the Senecas, the Tonawanda, Cattaraugus, Allegheny, and Oil Springs. What sort of legal issues arise or can arise that are unique to those various entities?

Judge Montour: At the Fourth Department, we really are geared toward addressing matters that have been brought forth in those lower [state] courts. The issues which would be more related to native issues would be handled in those particular courts, whether it's an Indian Child Welfare Act issue in Family Court, or a matter involving a contract dispute in Supreme Court.

If I can give an example, when I was sitting as a Supreme Court justice, a trial judge, I oversaw 25% of the integrated domestic violence cases in Erie and Chautauqua counties. Studies have shown that children who are reared in an abusive home are in danger of mimicking their parents' abusive tendencies. Therefore, when I was sitting in matters involving domestic violence, I'd emphasize to the parents that they must make every effort to break the chain of abusive behavior to insulate future generations.

When you stepped into my courtroom at 92 Franklin Street in Buffalo, New York, you'd see various artwork displayed. There's the trial of Red Jacket displayed in my courtroom, a Chippewa Indian Village painting and there's a painting of the Treaty of Greenville. And I had a portrait of Red Jacket himself.

So if you came into my courtroom, there was that Native American sense or flavor. And what I attempted to impress upon parents, whether there's an abusive situation where these children are witnesses to traumatic events, whether seeing or hearing a family member being threatened or beaten, it can shatter a young child's sense of safety and security with long term consequences. So with that in mind, I tried to impress upon the parents a philosophy of Native Americans. It's called the Seventh Generation Principles. It's taught by Native Americans that we must consider how it's going to affect our descendants seven generations into the future. To live by this principle, one would have to ask prior to any undertaking, "How is it going to affect the land, water, air, animals, birds, plants, and the future of our children seven generations into the future?"

So again, I tried to impress on perpetrators that their actions have adverse effects generations going forward. So my hope was to break that chain. So those were efforts that we made at the lower court, at the trial level, which generally, I'm not going to see in my position now sitting on a panel reviewing decisions by the trial courts.

John Caher: I think it's fascinating that you were able to invoke the wisdom of your heritage to resolve to address an issue with people who did not share that heritage. The whole seven generation principle is fascinating!

Judge Montour: Yes, it is. I was speaking to some law students the other day and indicated to them, if government leaders had had a similar philosophy decades ago, generations ago, maybe we wouldn't be having these same problems that we're having now experiencing with climate change and the planet, how Mother Earth is really suffering.

John Caher: Now in 1974, you would've been, I don't know, a sophomore or junior in high school, I guess. A contingent of the Mohawks led by Art Montour, who I understand, is not a relation of yours, descended from Canada and took possession of some 600 acres of the Adirondacks claiming aboriginal rights and leading to a three-year armed standoff. Do you remember your thoughts at that time or were you even cognizant that all that was going on?

Judge Montour: Well, as I indicated previously, I wasn't exposed to my native heritage growing up. And then as a junior in high school at that point in time, I really was not involved with that. But I do understand the mechanics behind that now. Apparently back in the early 1700s, John Brandt was a Mohawk chief. He sold thousands of acres to the state for pittance of \$1,500. And the US government has a trust relationship with Native Americans established in the Constitution. It is called the Non Intercourse Act, which says that states cannot purchase and turn to land with Native nations in an attempt to take land unless it's ratified by Congress. And this wasn't done, obviously. This was a sale from Chief Brandt to the state of New York for \$1,500. And so basically, the Non Intercourse Act was not followed.

So, Art Montour led a contingent, which lasted for a period of three years, to bring attention to the fact that these lands were taken improperly and in an attempt to gain recognition and maybe have those returned. And recently, there have been various court decisions or efforts by the state of New York to return native lands to Native nations. An example is, the Onondagas just received back a thousand acres from the state of New York in Onondaga territory. And this is significant. It's the

first time such a large acreage has been returned to a Native nation. And the idea is that the natives, the Onondagas, will take steward of this property and exercise traditional means of preserving the property, bringing it back to its state of nature. And it's very significant in that regard. Again, it's of over a thousand acres that have been returned to the Onondaga nation.

When you look at Onondaga Lake, it was a dead lake for longest period of time. Back in the 19th century, early 19th century, industrial development, growing population led to increases in sewage and industrial discharges that took their toll on the water quality of Onondaga Lake. Swimming was banned in 1940. Fishing was banned in 1970. And it deals with industrial pollution, wastewater pollution, pollution from the ground run off. And the lake was basically dead. Recently, there's been efforts to clean up the lake. You've had to dredge the bottom of the lake because the soil is just so contaminated. And recently in the last 10 years, the lake is showing some resurgence.

And another recent decision was the US District Court in Akwesasne affirmed the 1796 boundary treaty. There's been dispute over the reservation boundary. And again, back to that Non Intercourse Act, in 1824 and 1825. New York State attempted to purchase approximately 2000 acres of reservation land from the tribe without the presence of a federal commissioner and subsequently ratified, and/or a subsequently ratified Federal Act. So therefore, it's commonly known as the Hogansburg Triangle. So just recently in March of this year, the Federal District Court did recognize that treaty, recognized that that acreage, the Hogansburg Triangle, is reservation land. It didn't indicate that it had to be returned yet, but it's a first step towards achieving that result.

John Caher: Something I find fascinating and gratifying actually, is that basically what we have here is a conquered minority with very, very little political clout. The Native American voting bloc is basically nonexistent. Yet the courts are entertaining their lawsuits. And as you mentioned, in several cases ruling in their favor. That seems to say something good about our justice system.

Judge Montour: It's recognizing the atrocities that have existed historically. I think it's very difficult, and in my position as the chairman of the Tribal Courts Committee, we have responsibility of educating, bringing knowledge to various judges and courts that you're dealing with a *separate sovereign nation*. You're dealing with a nation that you need to recognize, that is required to receive notice under, for example, ICWA, the Indian Child Welfare Act, where the nation could exercise jurisdiction over this

particular dispute involving an Indian child. And I think it's important that we continue to educate various judges and court clerks, court staff. I see it a lot in Family Court where a new judge is elected and a new judge doesn't have any familiarity with ICWA. So it's necessary for us to go out, meet with the judge, meet with their staff, give them some education on ICWA so that going forward, the act can be followed.

John Caher: What inspired you to pursue a career in the law?

Judge Montour: Well, when I came out of high school, I had different ideas on what path my life was going to take. I stumbled upon an elective constitutional law class when I was an undergrad. I found it interesting, started to explore it a little bit more. I transferred on to Canisius from UB. I did take another criminal procedure course from an attorney instructor and ended up taking my degree in political science, taking the LSAT, going to law school. Ultimately, that same professor from Canisius who taught the criminal procedure course hired me in my first job.

John Caher: Were there any Native American role models for you in the law?

Judge Montour: I happen to be the very first Native American ever elected to a state judgeship position, so it's difficult to say that was a Native American role model when I was growing up. Ely Parker comes to mind as a Tonawanda Seneca, who was instrumental in studying the law. He studied law with a private firm down in the Southern Tier. He would've been in a position to take the bar exam. However, because of his race, at that time, he was prohibited from taking the bar exam. There are efforts today to possibly have Ely Parker admitted to the New York bar.

He is a Tonawanda Seneca. Again, that's a traditional form of government. Ely Parker, again, studied law, but he also was a chief with the Tonawanda Seneca at a young age. And he left that position, gave up that position to become a member of the United States Army. He befriended US Grant and was present at the surrender of the Southern forces, Confederate forces. He copied the treaty or the surrender agreement. So he was very instrumental. He was close with the US Grant, Ulysses Grant.

John Caher: Now, what does it mean to you, to your community to be the first Native American to serve on the second highest court in the entire state?

Judge Montour: It's a tremendous responsibility that I take on every day through my responsibilities as that the chairman of the Tribal Courts Committee. We deal with issues affecting Native nations on a daily basis.

For example, the Tribal Courts Committee now is attempting to have signage by the governor of the Unmarked Burial Site Protection Act. It's been approved unanimously by the Assembly and the Senate and it's before the governor right now. And there's been some delay in having that signed. There's some reluctance on some government agencies to have it signed.

There are only three states in the United States—one being New York—that do not protect unmarked burial sites. And if you look back in history, the Native Americans occupied what is referred to as New York State before “discovery.” Natives were already here, so I don't know if you can discover something where it's already occupied. Anyhow, Natives were buried throughout the state at unmarked areas. And-

John Caher: What is the reluctance to have it enacted

Judge Montour: It's hard to say. They really haven't verbalized what their reluctance is. Development is taking place throughout New York State and development digs up graves. These grave sites have been desecrated. And it's just not Native Americans. It's African Americans. It's Revolutionary War soldiers who were buried in mass graves that were never marked. And what happens is the developer can come through, dig it up, and just toss it away.

There's another bill we're working on, the Treaty Rights Law. Various treaties have afforded Native Americans the ability to hunt, fish, and gather on all their natural territories, which happen to be off reservation. But members are being ticketed for either hunting or gathering out of season. And so this Treaty Rights legislation just attempts to codify those treaty rights that already exist.

John Caher: What do you wish that non-indigenous people better understood about Native Americans in general and the Mohawk tribe in particular?

Judge Montour: Our history. Our culture. I've talked to many friends who are totally unaware of the residential boarding schools. "When did this happen? How did this happen? Where did this happen?" Residential boarding schools existed not only in the United States but in Canada, where young children were removed from their families. They died at these schools. The living conditions were horrible. There were no medicines. There was no food. Their culture was taken from them. Their hair was cut. They were clothed differently. They couldn't speak their language. They were given other names. They couldn't see their family members. "How can this exist?" people ask me, people say. So it's our history. It's our culture.

And we're still here. People need to understand that. It's still going on today—the taking of land, the taking of cultures, the genocide, if you will, that has existed. I think that's one of the responsibilities that I have, we have, is to educate people, and let them know we're still here.

John Caher:

Well, hopefully this podcast is a start. Judge, I want to thank you for your time and for what you're doing and wish you all the best in your new position.