

Appendix 1

Chronological List of Cases Studied

THE FULL TEXT OF ALL CASES IS AVAILABLE FROM THE CANADIAN LEGAL INFORMATION INSTITUTE AT <http://www.canlii.org>. Please note this information was provided courtesy of the author and does not necessarily reflect UBC Press editorial guidelines.

1. *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 1983 CanLII 18.
2. *Guerin v. The Queen*, [1984] 2 S.C.R. 335; 1984 CanLII 25.
3. *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332; 1985 CanLII 8.
4. *Dick v. The Queen*, [1985] 2 S.C.R. 309; 1985 CanLII 80.
5. *Simon v. The Queen*, [1985] 2 S.C.R. 387, 1985 CanLII 11.
6. *R. v. Horse*, [1988] 1 S.C.R. 187; 1988 CanLII 91.
7. *R. v. Francis*, [1988] 1 S.C.R. 1025; 1988 CanLII 31.
8. *Canadian Pacific Limited v. Paul*, [1988] 2 S.C.R. 654; 1988 CanLII 104.
9. *Roberts v. Canada*, [1989] 1 S.C.R. 322; 1989 CanLII 122.
10. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; 1989 CanLII 34.
11. *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution)*, [1989] 2 S.C.R. 788; 1989 CanLII 39.
12. *R. v. Horseman*, [1990] 1 S.C.R. 901; 1990 CanLII 96.
13. *R. v. Sioui*, [1990] 1 S.C.R. 1025; 1990 CanLII 103.
14. *R. v. Sparrow*, [1990] 1 S.C.R. 1075; 1990 CanLII 104.
15. *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; 1990 CanLII 11.
16. *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; 1991 CanLII 75.
17. *R. v. Jones*, [1991] 2 S.C.R. 110; 1991 CanLII 31.
18. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; 1992 CanLII 110.
19. *Williams v. Canada*, [1992] 1 S.C.R. 877; 1992 CanLII 98.
20. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; 1994 CanLII 113.
21. *R. v. Howard*, [1994] 2 S.C.R. 299; 1994 CanLII 86.
22. *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; 1994 CanLII 27.
23. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; 1995 CanLII 145.
24. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [1995] 4 S.C.R. 344; 1995 CanLII 50.
25. *R. v. Badger*, [1996] 1 S.C.R. 771; 1996 CanLII 236.
26. *R. v. Nikal*, [1996] 1 S.C.R. 1013; 1996 CanLII 245.
27. *R. v. Lewis* [1996] 1 S.C.R. 921; 1996 CanLII 243.
28. *R. v. Van der Peet*, [1996] 2 S.C.R. 507; 1996 CanLII 216.
29. *R. v. Gladstone*, [1996] 2 S.C.R. 723; 1996 CanLII 160.

30. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; 1996 CanLII 159.
31. *R. v. Pamajewon*, [1996] 2 S.C.R. 821; 1996 CanLII 161.
32. *R. v. Adams*, [1996] 3 S.C.R. 101; 1996 CanLII 169.
33. *R. v. Côté*, [1996] 3 S.C.R. 139; 1996 CanLII 170.
34. *Goodswimmer v. Canada (Minister of Indian Affairs and Northern Development)*, [1997] 1 S.C.R. 309; 1997 CanLII 371.
35. *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119; 1997 CanLII 344.
36. *St. Mary's Indian Band v. Cranbrook*, [1997] 2 S.C.R. 678; 1997 CanLII 365.
37. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; 1997 CanLII 302.
38. *R. v. Williams*, [1998] 1 S.C.R. 1128; 1998 CanLII 782.
39. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217; 1998 CanLII 793.
40. *R. v. Sundown*, [1999] 1 S.C.R. 393; 1999 CanLII 673.
41. *R. v. Gladue*, [1999] 1 S.C.R. 688; 1999 CanLII 679.
42. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; 1999 CanLII 687.
43. *R. v. Marshall*, [1999] 3 S.C.R. 456; 1999 CanLII 665.
44. *R. v. Marshall*, [1999] 3 S.C.R. 533; 1999 CanLII 666.
45. *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783; 2000 SCC 31 (CanLII).
46. *R. v. Catcheway*, [2000] 1 S.C.R. 838; 2000 SCC 33 (CanLII).
47. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; 2000 SCC 37 (CanLII).
48. *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633; 2000 SCC 52 (CanLII).
49. *R. v. Deane*, [2001] 1 S.C.R. 279; 2001 SCC 5 (CanLII).
R. v. Deane, 129 O.A.C. 335, [2000]; 2000 CanLII 17047 (ON C.A.).
50. *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; 2001 SCC 33 (CanLII).
51. *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746; 2001 SCC 85 (CanLII).
52. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146; 2002 SCC 31 (CanLII).
53. *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816; 2002 SCC 54 (CanLII).
54. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245; 2002 SCC 79 (CanLII).
55. *R. v. Powley*, [2003] 2 S.C.R. 207; 2003 SCC 43 (CanLII).
56. *R. v. Blais*, [2003] 2 S.C.R. 236; 2003 SCC 44 (CanLII).
57. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259; 2003 SCC 45 (CanLII).
58. *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585; 2003 SCC 55 (CanLII).
59. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; 2004 SCC 73 (CanLII).
60. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; 2004 SCC 74 (CanLII).

61. *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220; 2005 SCC 43 (CanLII).
62. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; 2005 SCC 69 (CanLII).
63. *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686; 2006 SCC 54 (CanLII).
64. *McDiarmid Lumber Ltd. v. Gods Lake First Nation* [2006] 2 S.C.R. 846; 2006 SCC 58 (CanLII).
65. *R. v. Morris*, [2006] 2 S.C.R. 915; 2006 SCC 59 (CanLII).

Appendix 2: Judicial Careers

Judge Birth place	Educatio n	Ag e at ca ll	Career/ practice	Teaching	Age at bench
Hon. Rolland Almon Ritchie Halifax	King's College, B.A. Oxford, B.A.	24 NS	Halifax practice WW II Commission on Newfoundlan d's terms of union	Dalhousie	49 SCC
Hon. Robert George Brian Dickson* Yorkton, SK	U. Manitoba , LL.B.	24 MB	Insurance WW II Winnipeg firm	U. Manitoba	47 Man.Q .B.
Hon. Jean Beetz Montreal	U. Montreal , B.A. LL.L. Rhodes Scholar, B.A.	24 ? QC	Trudeau adviser	U Montreal	46 Que.C .A.
Hon. Willard Zebedee Estey (son of James W. Estey, SCC) Saskatoon	U. Sask. B.A., LL.B. Harvard, LL.M.	28 ON	WW II Toronto firm	U. Saskatche wan	54 Ont. H.C.
Hon. William Rogers McIntyre Lachine, QC	U. Sask. B.A., LL.B.	29 SK BC	WW II Victoria firm		49 B.C.S .C.
Hon. Julien Chouinard Quebec City	Laval, B.A., LL.L.Rho des Scholar, B.A.	24 QC	Quebec City firm Quebec Deputy Minister of Justice	U. Laval	46 Que.C .A.
Hon. Antonio Lamer* Montreal	U. Montreal , LL.L.	24 QC	Law practice	U. Montreal	36 Que.C .A.
Hon. Bertha Wilson Scotland	U. Aberdeen , M.A.,	35 NS 36 ON	1949 emigrated Toronto firm		52 Ont.C .A.

	Teacher cert. Dalhousie U., LL.B.				
Hon. Gerald Eric Le Dain Montreal	McGill U., B.C.L. Lyon.	25 QC 44 ON	WW II Montreal firm Le Dain Commission	McGill U. Osgoode Hall	51 F.C.A. .
Hon. Gérard V. La Forest Grand Falls, NB	St. Francis Xavier, U NB, B.C.L. Rhodes Scholar, B.A., Yale, LL.M., J.S.D.	23 NB	Federal Department of Justice Assistant Deputy Attorney General Corporate adviser	UNB U. Alberta	55 N.B.C .A.
Hon. Claire L'Heureux-Dubé Quebec City	U. Laval , LL.L.	25	Family break Quebec firm at 42	Taught family law at Barreau	46 Que.S .C.
Hon. John Sopinka Broderick, SK, to Hamilton at eight	U. Toronto, B.A., LL.B.	27 ON +	Toronto Argonaut Toronto law firm (called to six bars)	Osgoode U. Toronto	55 SCC
Judge Birth place	Education	Age of cal 1	Career practice	Teaching	Age at bench
Hon. Charles Doherty Gonthier Montreal	Bac. Paris McGill U., B.C.L.	24 QC	Montreal firm		46 Ont. S.C.
Hon. Peter de Carteret Cory Windsor	U. Western Ontario, B.A. Osgoode, LL.B.	25 ON	RCAF pilot Holden Murdoch		49 Ont.H .C.
Hon. Beverley McLachlin* Pincher Creek, AB	U. Alberta, M.A.,	26 AB 28C	Edmonton, Fort St. John,	UBC	38 B.C.C o. Ct.

	LL.B.		Vancouver firms		
Hon. William Stevenson Edmonton	U. Alberta, B.A., LL.B.	24	Edmonton firm Last PC case	U. Alberta	41 Alta. DistCt.
Hon. Frank Iacobucci Vancouver	UBC, Cambridge U., B.Com., LL.B., Diploma International Law, LL.D.	33	NY firm Deputy Minister of Justice Consultant to federal and provincial governments	U. Toronto	51 F.C.
Hon. John C. Major Mattawa, ON	Loyola U., U. Toronto, B.Com., LL.B.	27 AB	Calgary firm Inquiries re bank failures		60 Alta. C.A.
Hon. Michel Bastarache NB?	U. Moncton, B.A. U. Montreal, LL.L. U. Ottawa, LL.B., Nice, public law	33 NB 38 AB 39 ON	Legal translator Life insurance VP Ottawa and Moncton firms	U. Moncton U. Ottawa	48 N.B.C.A.
Hon. William Ian Corneil Binnie Montreal	McGill U., B.A. Cambridge U., LL.B., LL.M. U. Toronto, LL.B.	27 GB 28 ON 36 YK	I C. J. counsel, Tanzania Associate Dep. Min Justice, McCarthy Tetreault	Osgoode Hall	59 SCC
Hon. Louise Arbour Montreal	U. Montreal, B.A., LL.L.	24 QC 30 ON	Law clerk, SCC Law Reform Commission Women's prison inquiry Int. Crim. Ct.	Osgoode Hall, York	40 Ont.H.C.
Hon. Louis LeBel	College	23	Quebec firm	U. Ottawa,	45

Quebec City	des Jesuits, B.A. U. Laval , LL.L. U. Toronto, LL.M. U. Laval D.E.S.			U. Laval	Que.C .A.
Hon. Marie Deschamps Repentigny	U. Montreal, LL.L. McGill, LL.M.	23	Montreal firms		38 Que.S .C.
Judge Birth place	Education	Age at cal 1	Practice		Age at bench
Hon. Morris Fish Montreal	McGill U., B.A. U. Paris, B.C.L.	26 QC 30 PEI 36 AB	<i>Montreal</i> <i>Star</i> journalist Montreal firm Cliche Commission	McGill U., U. Ottawa, U. Toronto	50 Que.C .A.
Hon. Rosalie Silberman Abella Stuttgart, to Toronto at four	U. Toronto, B.A., LL.B.	26 ON	Litigation , Toronto Marshall Inquiry	U. Toronto	30 Ont. Famil y Ct.
Hon. Louise Charron Sturgeon Falls, ON	Carleton U., B.A. U. Ottawa, LL.B.	26 ON	Ontario firms Assistant Crown Attorney	U. Ottawa	37 Ont.C .A.
Hon. Marshall Rothstein Winnipeg	U. Manitoba, B.Com., LL.B.	26 MB	Quebec firms	U. Montreal	49 F.C.
Average age		26			47

Appendix 3: Judicial Reasoning Profiles

3.1 Decisions re Indigenous Rights

Judge * appointed Chief Justice written judgments in bold	Appointed	Retired	Number of decisions	Colonial	Post-colonial
Hon. Rolland Almon Ritchie	05-05-1959	31-10-1984	1	9.0	5.0
Hon. Robert George Brian Dickson	26-03-1973	30-06-1990	12	8.0	5.6
*18-04-1984			4	8.5	6.0
Hon. Jean Beetz	01-01-1974	10-11-1988	9	8.2	4.9
			2	9.0	3.3
Hon. Willard Zebedee Estey	29-09-1977	22-04-1988	7	8.9	4.8
			1	9.5	6.8
Hon. William Rogers McIntyre	01-01-1979	15-02-1989	8	8.7	4.3
Hon. Julien Chouinard	24-09-1979	06-02-1987	5	8.6	5.1
Hon. Antonio Lamer	28-03-1980	06-01-2000	36	8.6	4.6
*01-07-1990			11	8.8	4.5
Hon. Bertha Wilson	04-03-1982	04-01-1991	11	7.6	5.8
			4	6.8	7.2
Hon. Gerald Eric Le Dain	29-05-1984	30-11-1988	4	8.8	4.1
Hon. Gérard V. La Forest	16-01-1985	30-09-1997	26	8.5	4.4
			7	8.4	4.8
Hon. Claire L'Heureux-Dubé	15-04-1987	01-07-2002	41	8.0	4.8
			7	8.9	4.8
Hon. John Sopinka	24-05-1988	24-11-1997	23	8.5	4.5
			3	7.8	5.4
Hon. Charles Doherty Gonthier	01-02-1989	31-07-2003	27	7.9	5.2
			2	6.5	6.8
Hon. Peter deCarteret Cory	01-02-1989	01-06-1999	29	8.4	4.5
			5	8.8	4.4
Hon. Beverley McLachlin	30-03-1989		44	8.0	4.8
*07-01-2000			15	7.8	5.1
Hon. William Stevenson	17-09-1	05-06-1	4	8.5	3.5

	990	992			
			2	9.5	2.5
Hon. Frank Iacobucci	07-01-1 991	30-06-2 004	38	8.4	4.7
			6	7.6	5.8
Hon. John C. Major	13-11-1 992	25-12-2 005	36	8.3	4.7
			2	8.5	4.0
Hon. Michel Bastarache	30-09-1 997		21	7.7	5.3
			4	7.8	6.0
Hon. William Ian Corneil Binnie	08-01-1 998		21	7.6	5.4
			4	7.5	6.3
Hon. Louise Arbour	15-09-1 999	30-06-2 004	14	8.0	5.2
Hon. Louis LeBel	07-01-2 000		17	7.7	5.2
			2	9.5	3.2
Hon. Marie Deschamps	07-08-2 002		7	7.4	5.4
Hon. Morris Fish	05-08-2 003		4	7.1	5.1
Hon. Rosalie Silberman Abella	30-08-2 004		2	6.5	4.4
Hon. Louise Charron	30-08-2 004		2	6.5	4.4
Male average:				8.2	4.8
Female average :				7.4	5.0
Total judgment average :				8.0	4.9

3.2: Decisions re Non-Indigenous Rights

Judge * appointed Chief Justice	Appointed	Retired	Number of decisions	Colonial	Postcolonial
Hon. William Rogers McIntyre	01-01-1 979	15-02-1 989	1	1.5	10.0
Hon. Antonio Lamer*	28-03-1 980	06-01-2 000	6	4.5	8.9
Hon. Bertha Wilson	04-03-1 982	04-01-1 991	2	2.0	9.8
Hon. Gérard V. La Forest	16-01-1 985	30-09-1 997	4	3.8	9.1
Hon. Claire L'Heureux-Dubé	15-04-1 987	01-07-2 002	8	4.6	9.0
Hon. John Sopinka	24-05-1 988	24-11-1 997	3	4.2	9.0
Hon. Charles Doherty	01-02-1	31-07-2	8	4.8	4.8

Gonthier	989	003			
Hon. Peter deCarteret Cory	01-02-1 989	01-06-1 999	4	4.9	9.1
Hon. Beverley McLachlin*	30-03-1 989		8	4.6	9.0
Hon. William Stevenson	17-09-1 990	05-06-1 992	1	4.0	7.5
Hon. Frank Iacobucci	07-01-1 991	30-06-2 004	7	5.3	8.6
Hon. John C. Major	13-11-1 992	25-12-2 005	5	4.8	8.7
Hon. Michel Bastarache	30-09-1 997		4	4.3	9.1
Hon. William Ian Corneil Binnie	08-01-1 998		5	4.8	8.7
Hon. Louise Arbour	15-09-1 999	30-06-2 004	3	4.7	8.8
Hon. Louis LeBel	07-01-2 000		3	4.0	8.8
Male average:				4.2	8.5
Female average :				4.0	9.2
Total judgment average :				4.2	8.7

Appendix 4: ASSESSMENT OF REASONING

See the explanation of the study's methodology in Chapter 4 for selection criteria. The 62 cases included in the basic study resulted in 96 judgments. Three decisions released in December 2006 raised the number of cases assessed to 65, including 100 judgments. A particular judge or judges was identified as the author of 88. Both majority and minority judgments were assessed. (Note that minority judgments may either concur for different reasons or dissent.)

Some judgments were assessed separately for non-Indigenous parties. *Lac Minerals* had no Indigenous parties. Because of significant differences in historical experience, the *Secession Reference* was assessed separately for Quebec, Canada and Indigenous peoples.

No evaluation is considered conclusive or authoritative. As discussed in the text, all are necessarily subjective. To avoid excessive length, individual case profiles in 4.3 do not identify all evidence that might be used to illustrate each indicator.

Caveat: - Interpretations are subjective.

-Notes do not represent all evidence that might be used to illustrate each indicator.

-Focus is on issues related to protecting Indigenous rights, not Canadian administrative concerns.

THE FULL TEXT OF ALL CASES IS AVAILABLE FROM THE CANADIAN LEGAL INFORMATION INSTITUTE AT <http://www.canlii.org>

A4.1 Summary

A4.1.1 Summary for Non-Indigenous Parties :

	Case	Judge	Year	Colonia l	Postcolo nial
1	10. <i>Lac Minerals</i>	Sopinka	1989	1.5	10
2		La Forest		.5	10
3	11. <i>N.S.(A.G.) v. N.S. (Marshall)</i>	La Forest	1989	3	9.5
4	18. <i>Oldman River Society</i>	La Forest	1991	4	10
5		Stevenson		4	7.5
6	30. <i>Smokehouse</i>	Lamer	1996	7	7
7		L'Heureux-Dubé		3	7
8		McLachlin		3	9
9	39. <i>Secession Reference (Canada)</i>	COURT	1998	5	10
10	(Quebec)	COURT		10	8
11	44. <i>Marshall II (Fishermen)</i>	COURT	1999	7	7
12	45. <i>Firearms Reference (Alberta)</i>	COURT	2000	6	6.5
13	48. <i>Musqueam v. Glass (renters)</i>	McLachlin		2	10
14		Gonthier		0	10
15		Bastarache		0	10
16	49. <i>Deane (Deane)</i>	McLachlin	2001	6	10
	Average :			3.9	8.7

A4.1.2 Summary for Indigenous Parties

	Case	Judge	Year	Colonia 1	Postcolo nial
1	1. <i>Nowegijick v. The Queen</i>	Dickson	1983	9	5
2	2. <i>Guerin v. The Queen</i>	Wilson	1984	7.5	6.8
3		Dickson		8	6.3
4		Estey		9.5	6.8
5	3. <i>Jack and Charlie</i>	Beetz	1985	10	3.5
6	4. <i>Dick v. The Queen</i>	Beetz		8	3
7	5. <i>Simon</i>	Dickson		8	7.5
8	6. <i>Horse</i>	Estey	1988	9	1.3
9	7. <i>Francis</i>	La Forest		9	2
10	8. <i>Canadian Pacific v. Paul</i>	COURT		9	5.5
11	9. <i>Roberts</i>	Wilson	1989	4	10
12	11. <i>N.S.(A.G.) v. N.S. (Marshall)</i>	La Forest		6	6
13	12. <i>Horseman</i>	Wilson	1990	7	6.5
14		Cory		9	4
15	13. <i>Sioui</i>	Lamer		6.5	7.5
16	14. <i>Sparrow</i>	Dickson and La Forest		9	5
17	15. <i>Mitchell v. Peguis Indian Band</i>	Dickson		8	6.5
18		Wilson		8.5	5.5
19		La Forest		8.5	5.5
20	16. <i>Bear Island Foundation</i>	COURT	1991	10	2.3
21	17. <i>Jones</i>	Stevenson		9	2
22	18. <i>Oldman River Society Piegan</i>	La Forest		10	3
23		Stevenson		10	3

24	19. <i>Williams v. Canada</i>	Gonthier	1992	5	6.5
25	20. <i>Quebec v. Canada (N.E.B.)</i>	Iacobucci	1994	7	5.5
26	21. <i>Howard</i>	Gonthier		9	4
27	22. <i>Native Women's Association</i>	Sopinka		8	6.5
28		L'Heureux-Dubé		8	8
29		McLachlin		9	6.5
30	23. <i>C.P. v. Matsqui Indian Band</i>	Lamer	1995	8	4
31		La Forest		9	3.4
32		Major		8	4
33		Sopinka		5.5	6.5
34	24. <i>Blueberry River Indian Band</i>	Gonthier		7.5	6
35		McLachlin		5.5	6.5
36	25. <i>Badger</i>	Sopinka	1996	10	3.25
37		Cory		10	3.5
38	26. <i>Nikal</i>	Cory/		10	3.5
39		McLachlin		10	3.5
40	27. <i>Lewis</i>	Iacobucci		10	3
41	28. <i>Van der Peet</i>	Lamer		10	2.5
42		L'Heureux-Dubé		9	5
43		McLachlin		6.5	6
44	29. <i>Gladstone</i>	Lamer		9	4
45		La Forest		9	3
46		L'Heureux-Dubé		8.5	5
47		McLachlin		9	4.5
48	30. <i>Smokehouse</i>	Lamer	1996	10	3

49		L'Heureux-Dubé		7	4
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Summary for Indigenous Parties cont.

	Case	Judge	Year	Colonial	Postcolonial
50		McLachlin		7	4
51	31. <i>Pamajewon</i>	Lamer		10	2
52		L'Heureux-Dubé		10	2
53	32. <i>Adams</i>	Lamer		10	4
54		L'Heureux-Dubé		10	4
55	33. <i>Côté</i>	Lamer		10	2.5
56	34. <i>Goodswimmer (F.C.A.)</i>	Stone J.A.	1997	3	10
57	35. <i>Opetchesaht</i>	Major		9	4
58		McLachlin		6.5	6.5
59	36. <i>St. Mary's Indian Band</i>	Lamer		10	3
60	37. <i>Delgamuukw</i>	Lamer		9	3
61		La Forest		9	3
62	38. <i>Williams</i>	McLachlin	1998	6	7
63	39. <i>Secession Reference</i>	COURT		9	2
64	40. <i>Sundown</i>	Cory	1999	8	4
65	41. <i>Gladue</i>	Cory and Iacobucci		7	7
66	42. <i>Corbiere</i>	McLachlin and Bastarache		10	5.5
67		L'Heureux-Dubé		10	5.5
68	43. <i>Marshall</i>	Binnie		9	6
69		McLachlin		9	3.5
70	44. <i>Marshall II</i>	COURT		9	4.3

71	45. <i>Firearms Reference</i>	COURT		10	1
72	46. <i>Catcheway</i>	Iacobucci	2000	4	7
73	47. <i>Lovelace</i>	Iacobucci		9	6
74	48. <i>Musqueam v. Glass</i>	McLachlin		4	9
75		Gonthier		4	9
76		Bastarache		4	9
77	49. <i>Deane (ON.C.A.) (George)</i>	McLachlin	2001	9	4
78	50. <i>Mitchell v. M.N.R.</i>	Mc Lachlin		10	3
79		Binnie		10	4.5
80	51. <i>Osoyoos</i>	Iacobucci		8	6
81		Gonthier		9	4.5
82	52. <i>Kitkatla</i>	LeBel	2002	9	3
83	53. <i>Ross River Dena</i>	Bastarache		10	3.3
84		LeBel		10	3.3
85	54. <i>Wewaykum</i>	Binnie		7	9
86	55. <i>R. v. Powley</i>	COURT	2003	7.3	8
87	56. <i>R. v. Blais</i>	COURT		8	4.5
88	57. <i>Wewaykum II</i>	ALL 8		10	2.5
89	58. <i>Paul</i>	Bastarache		7	6
90	59. <i>Haida Nation</i>	McLachlin	2004	6.5	8
91	60. <i>Taku River Tlingit</i>	McLachlin		9	3
92	61. <i>Marshall/Bernard</i>	McLachlin	2005	9	2.75
93		LeBel		9	3.75
94	62. <i>Mikisew Cree</i>	Binnie		4	6
	Average :				

				8	4.9

A4.2 Case Profiles

The following profiles summarize the evidence collected in support of the assessments discussed in *Ghost Dancing with Colonialism*. The name of the judge who wrote the judgment is in bold type. The names of supporting judges follow. Numbers in parentheses refer to illustrative (pages). Numbers in square brackets refer to illustrative [paragraphs]. The profiles published with the book italicize characteristics that were underlined in the original research notes.

Caveat: interpretations are subjective. Notes do not represent all evidence that might be used to illustrate each indicator. The focus is on issues related to Indigenous rights rather than on internal Canadian administration. Characteristics described in previous profiles are not always repeated.

1. *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29

Dickson J. (Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer JJ.)

Main points: "Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (36); "income" is personal property; s. 87 of the Indian Act exempts both property and persons on a reserve from taxation.

Judge: no Indigenous input.

Parties: *imposed:* "Mr. Nowegijick is an Indian within the meaning of the Indian Act" (31); "Indians are citizens" (36); presumes inclusion in the Canadian polity.

Venue: language and Indigenous identity not on record.

Issues: tax assessment imposed.

Procedure: public process, many interveners.

Evidence: *assumptions:* e.g., of Canadian citizenship and residence; *proof:* basic facts of case agreed by both parties.

Concept of law: *imposed:* no evidence of consent to the regulatory scheme; no Indigenous participation in the enactment of the laws applied.

Reasoning: *declaratory:* "Indians are citizens" (36); "the overwhelming weight of authority holds" (38); *principled:* "exemptions to tax laws should be clearly expressed" (36); principles from case law.

Values: the sentiment that "Indians are citizens" is egalitarian, but it is declared without proffering any proof to this effect or recognizing the Indigenous right to choose nationality.

Perspective: case confirms respect for Indigenous difference, but the framework of the protection offered is highly ethnocentric. The possibility of equal national respect is not even considered.

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Yes
Total		9.0		5.0

2.1 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

Wilson J. (Ritchie, McIntyre JJ.)

Main Points: The Crown has a fiduciary obligation re Indian reserves rooted in aboriginal title, not in s. 18 of the Indian Act. (348-8) Damages for breach of this duty are based on actual loss. (357).

Note: -strong support for Musqueam right to consent to decisions affecting their well-being.

-“paternalistic attitude” allowed to excuse conduct of Indian Affairs officials]

Parties: imposed identity: as “indians” under the Indian Act, not challenged by Musqueam

-identified in Indian affairs terms as band - own ID (see Musqueam web site) not explained

Self-determined: to the extent that they drafted their own statement of claim

Venue: Foreign: Colonial frame of reference (331-40)

Issues: Imposed: Issues addressed in analysis are products of judge’s constitutional conception.

Mutually negotiated: Action initiated by Musqueam:-Their decision not to question the Indian Act & to phrase issues in colonizers’ terms (340). Initiation of action asserts personhood of “Indians”

Procedure: Egalitarian/participatory: -interveners present; strong censure for Crown use of political trust doctrine which was not pleaded & was withdrawn according to public statements of ministry

when discovery on the issue was requested. (353)

Evidence: Assumed: B.C. had jurisdiction over reserves to pass to Canada in 1938.

(349) Proof:-oral evidence accepted- Musqueam witnesses alive & cross examined; -Musqueam

assertions corroborated by Indian affairs documentation

Concept of law: Imposed: -accepted imposed character of constitution (though this not contested by

Musqueam) -accepted “paternalistic attitude” of Indian Affairs as defence against deceit & tort

damages. Consensual: based fiduciary obligation on Aboriginal title & right to consent. (349)

Reasoning: Declaratory - Crown sovereignty assumed. “I think”; rights based on “historic reality”

(349) -Accepted trial damages despite setting out evidence that reduction in value was ill founded

because “I do not think it is the function of the court to interfere”. Did not acknowledge the denial of

institutional responsibility this represented. Principled: Careful to set our principles relied on at most

points. “This discretionary power must be exercised on proper principles and not in an arbitrary

fashion” (350)

Values: Authoritarian -acceptance of imposed constitutional framework. Egalitarian - "the Crown...does hold the lands subject to a fiduciary obligation to protect and preserve the Band's interest from invasion or destruction" (350)

Perspective: Ethnocentric: Constitutional understanding ignores the fact of colonialism

Respect: Strong support for the requirement for consent & consultation (346-7)

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Little
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Some	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Some	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		7.5		6.8

**2.2 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
Dickson J. (Beetz, Chouinard, Lamer JJ.)**

Main Points” The equitable obligation that founds the Crown’s liability is not a trust, but a fiduciary duty rooted in the fact that Indian title is inalienable except to the Crown.

Note: -Wilson emphasized prior occupation as the core of aboriginal title and consent to disposition. Dickson focused on the colonially imposed inalienability except to the Crown.
-Dickson also made sweeping unsubstantiated statements about English legal history.

Evidence - Assumptions -no proof to support view that “Crown first took” fiduciary responsibility in Royal Proclamation 1763. (Slightly different wording would alleviate the problem)

- no evidence to support claim that “.the Crown’s original purpose in declaring the Indian’s interest to be inalienable otherwise than to the Crown was to facilitate the Crown’s ability to represent the Indian’s dealings with third parties” (383)[34] No proof for “The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery”or “the purpose of the surrender..etc. (380) [35]

Concept of law: Imposed - relied on B.C.’s 1938 transfer of Indian reserves to Canada (380) [33]

Reasoning: -Hybrid re Indian Title - based on prior occupation, but justified with Canadian precedent rather than consensual legality.

Declaratory - reliance on inaccurate/questionable characterizations of *St. Catherine’s Milling & Amodu Tijani* (377-9)
-not based on need for consent by Musqueam for constitutional inclusion. **Principled** - recognized categorization problems characteristic of paradigm change but did not identify cause. Noted problem of applying “inappropriate terminology drawn from general property law” (382)

Perspective: Ethnocentric - accepted colonial analysis by Chief Justice Marshall. Used a cite that clearly explains the impairment created by colonization, but accepted it without question rather than repudiating it. (378). -accepted view that title to Indian reserves was transferred by BC to Canada in 1938.

Respect -upheld prior occupation of land as source of Indian Title as recognized in *Calder*.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Little
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Some	Mutually determined	Some

5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Some	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		8		6.3

**2.3 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
Estey J.**

Main Points: Indians have been constrained by statute to act through the agency of the Crown & the Crown has a duty to act within the mandate assigned to them by the Indians. If the Crown breaches this duty it will be liable for the actual losses caused.

Notes: Well meaning, but unaware of basic facts of Indigenous existence.

- Tried to be egalitarian by applying law of agency to "Indian Agent" as if this official was agent of "Indians" rather than an agent of the colonizing government. The result is logical inconsistency.
-This reasoning was not pleaded so it was not well researched. It is inconsistent with agency law. See James I. Reynolds, "A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples (Saskatoon: Purich Publishing, 2005), 81.

Issues: Imposed Law of Agency not raised by the parties. Mutually negotiated: as other judgments

Procedure: Irregular: Issue of agency introduced though no evidence it was argued by the parties.

Evidence: Assumptions: Same as Wilson and Dickson. No evidence Musqueam voluntarily chose Indian Affairs to seek a lease. Supported by proof: As for Wilson, Dickson & trial judge.

Concept of law: Imposed: Accepted imposed constitution & Indian Act. Consensual: Law of agency is based on consensual principles

Reasoning: Authoritarian: Imposed an analysis not argued by the Musqueam. Assumed validity of Indian Act despite lack of Musqueam participation in Canadian political institutions

Egalitarian: Dealt with fact that "surrender" was not a release in the sense of general law. Attempt to be egalitarian in ascribing same meaning to law of agency.

Reasoning: Declaratory: adopted Trial judges' unprincipled approach to damages. Neither party pleaded agency. Principled: -attempted to find a principled basis for the decision. (394)

Perspective: Ethno-centric - Like the others, presumed validity of the Canadian constitution and Indian Act. -They reflect "a strong sense of awareness of the community interest in protecting the rights of the native population" !!! (392) Relied on "agency as prescribed by Parliament" without noting that Musqueam did not participate voluntarily & had no right to vote at the time the lease was signed.

Respect: Desire to reason in terms of agency shows support for consensual processes.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Little
3. Venue	Foreign	Yes	Own language/culture	

	language/culture			
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased	Some	Public/intervenors/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		9.5		6.8

3. Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332.

Beetz J. (Dickson C.J. Estey, McIntyre, Chouinard JJ.)

Main Point : Provincial regulation of deer hunting does not interfere with Indigenous religious motives.

Parties: "Indians" under Indian Act

Issues: Charged

Procedure -open court, pleadings. Case decided on the basis that there was no evidence to refute an argument that was not raised until the Supreme Court level.

Concept of law: No Indigenous participation in making the laws imposed.

Perspective: Ethnocentric: own world view imposed. Place: Fact that world view was different was acknowledged but not accommodated.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		10		3.5

4. Dick v. The Queen, [1985] 2 S.C.R. 309.

Beetz J. (Dickson C.J., Estey, McIntyre, Chouinard JJ.)

Main Point: A provincial law that does not single out Indians for special treatment or discriminate against them is a law of general application within the meaning of s.88 of the Indian Act and applies even if it regulates an Indian *qua* Indian.[35-6, 45]

Reasoning: Declaratory source of law

Values: Accepts law alien to accused

	Colonial		Postcolonial	
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1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		8		3

5. *Simon v. The Queen*, [1985] 2 S.C.R. 387.

Dickson C.J. (Beetz, Estey, McIntyre, Chouinard, Wilson, LeDain JJ.)

Main Points: "the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself"[31] Under s.88 of the Indian Act provincial legislation cannot restrict native treaty rights.

- "It should be noted that the language used by Patterson J...reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada." [21] "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises." [38]

Parties: Indian Act identity is imposed. Micmac treaty identity is chosen/negotiated

Venue: Micmac agreed disputes should be tried in British courts 1752 treaty s.8 [6]

Issues: RCMP charge

Evidence: Proof: required for argument concerning commercial hunting [30]; treaty termination [34]; hunting on highway[39, 41]. Blood relationship need not be shown - political relationship sufficient [42-5]

Concept of law: Imposed: s.88 governs rights but treaty respected.

"Under s.88 of the *Indian Act*, when the terms of a treaty come into conflict with federal legislation, the latter prevails, subject to whatever may be the effect of s.35 of the *Constitution Act, 1982*".

Reasoning: Principled reliance on precedents

Values: Authority of Canadian laws over "Indians" assumed, but treaty respected. Tendency to rely on case precedent rather than articulated principle. Eg. re treaty [50-51]

Perspective: Authority of Canadian laws over "Indians" assumed, but treaty respected.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes

7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		8		7.5

6. R. v. Horse, [1984] 2 S.C.R. 335.

Estey J. (Beetz, McIntyre, Lamer, Wilson, Le Dain, L'Heureus-Dubé JJ.)

Main Point: Extrinsic evidence is not to be used to interpret a treaty unless there is ambiguity. (12)

Treaty 6 did not give "Indians" a right to hunt on private lands.

Issues: - charge

Evidence: Assumptions: ultimate objective of Treaty (9)

Concept of law: Imposed UK parliament source of legality for Canada (5)

Reasoning: Declaratory reliance on precedents without identifying principle (8, 11)

Perspective: Ethnocentric: unilateral interpretation of Treaty 6; only considered internal Euro

Canadian law; presumes "Indians" have no rights unless requested from the British [47]

NB -Though he cited principles, he did not apply them. Use of evidence was extremely biased.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Little
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect for others	
Total		9		1.3

7. R. v. Francis, [1988] 1 S.C.R. 1025.

La Forest J. (Dickson C.J. Beetz, Estey, McIntyre, Lamer, Wilson, LeDain L'Heureux-Dubé JJ.)

Main Point: Unless the federal government expresses explicit intent to cover a field completely, federal and provincial legislation that does not conflict can exist side by side and apply on a reserve.

"Enclave theory" (not explained) already rejected in *Cardinal v. AG Alberta* [1974] S.C.R. 695. [4]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		9		2

8. Canadian Pacific Limited v. Paul [1988] 2 S.C.R. 654.

(Dickson C.J. Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain)

Main Principle: Railway rights over property must be founded on laws and documents? A railway may be granted a permanent injunction against a property owner over whose land it has a right of way.

Note: By contrast, *Delgamuukw* at [119] says aboriginal title is "more than the right to enjoyment and occupancy"

Evidence: Assumptions: Status of land undetermined but right of way found. Validity of "servitude"

not considered. Only previous case supports claim that inalienability was intended to protect Indians. (17)

Proof: facts related to documentation (30)

Concept of law: Imposed decided based on preference.(23) Ignored lack of Indigenous political rights. Consensual: consideration of legislative law making.

Reasoning: Declaratory found CP had a right of way, though couldn't tell who had title.(para 19)

Did not explain why permanent injunction was appropriate.(41-42)

Principled: Quest for legal rules eg. *Ellensborough Park* (though superficial in this area)

Values: Authoritarian acceptance of orders. Egalitarian attempt to apply principles consistently to both parties.

Perspective: Ethnocentric considered entirely according to Anglo-Canadian paradigm. eg.

Ellensborough Park. Why did the Malecite block the crossing? No consciousness of others

perspective. Respect: Tried to uphold *Guerin* principle of fiduciary respect. (17)

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some

Total		9		5.5
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9. *Roberts v. Canada*, [1989] 1 S.C.R. 322.

Wilson J. (Dickson C.J., Beetz, Lamer, Le Dain JJ.) (Le Dain took no part in the judgment)

Main Point: The law of aboriginal title is Federal common law.

Note: Both parties relied on the Canadian legislative scheme to assert rights to a reserve both claim. This apparent acceptance of the imposed colonial regime alters the character of the assessment significantly.

Judge: judge neutral between parties who accept the system

Parties: parties accept Indian Act regime

Venue: parties appear to have adopted a foreign culture

Issues: issues not externally imposed

Procedure: public process

Evidence: evidence of case law supplied

Concept of law: imposed by act in which parties had virtually no say

Reasoning: principles explained. Relies on statutory grant

Values: relies on statutory dictate

Perspective: not in issue as both adopt Indian Act & Canadian legislative scheme.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total		4		10

10.1 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2. S.C.R. 574.

Sopinka J. (McIntyre J.) dissenting in part

Main Principle : "Not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature". (59) See also *La Forest* (49).

Judge: Peer: member of same culture

Parties: Self-determined through incorporation

Venue: Own Language & Culture

Issues: Mutually Negotiated through the pleadings

Procedure: Public: normal due process

Concept of law: Consensual: based on contract & equity. All agree to use legal system to solve dispute re legal interpretation & test for Breach of confidence (*La Forest* (43))

Values: Egalitarian: dependency or vulnerability as basis of fiduciary obligation [PC] (19) reasonable person test (27)

Perspective: Ethno-centric: relevant parties determined purely on basis of colonial perspective. Ignores Indigenous rights that may be involved. Respect: usages to be established by those familiar with them, not experts [unlike later *Van der Peet* "integral to a distinctive culture test"]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	.5	Respect for others	Yes
Total		1.5		10

10.2 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2. S.C.R. 574.

LaForest J. (Wilson, Lamer JJ.)

Main Principle: Damages can be payable for the misuse of information gained in confidence.

Values: Egalitarian: parties may get a reference if they cannot agree on evaluation of adjustments.

Perspective: Ego centric: Failure to articulate *Lac's* point of view.
Respect: Custom should be defined by parties & experts. Legal significance by courts.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric	Some	Respect for others	Yes
Total		.5		10

11. *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution)*, [1989] 2 S.C.R. 788.

La Forest J. (Lamer, Wilson, L'Heureux-Dubé, Gonthier, Cory, McLachlin JJ.)

Main Principle: The scope of a Commission's powers is defined by the terms of reference in the order by which it was established.

Judge: Alien for Marshall, peer for others.

Parties: For Marshall, imposed Canadian citizenship. For the Commission imposed by order, but self-determined in the sense of being a product of their society.

Venue: Foreign for Marshall. Own for A.G.

Issues: Both contributed.

Procedure: fair.

Evidence: Supported

Concept of law: Imposed: reasoned on the basis of the Commission's authority under the "Order in Council" that set it up, rather than on accountability to the people under democratic procedure. (5)

Reasoning: principled

Values: Authoritarian: The Commission to protect cabinet members from public scrutiny; belief that security is served by secrecy.

Egalitarian: The Commission justified its order on the basis of

public interest; excluded questions re individual views because hearing from all required to set record straight.

Perspective: Ethnocentric reliance on the order, no reference to Marshall's cultural parameters.

Respect : Supports Commission's discretion and allows it to define its own terms.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity	Some	Self-determined	Some
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Cross-cultural respect/recognition	Yes
Total (Commission)		3.5		9.5

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Cross-cultural respect/recognition	
Total (Marshall)		6		6

12. 1 R. v. Horseman, [1990] 1 S.C.R. 901.

Wilson J. (Dickson C.J. & L'Heureux-Dubé JJ.) dissenting

Main Principle: Canadian and provincial legislation should be interpreted in a way that respects the terms of the treaty that was signed.

Issues: Imposed by a charge

Evidence: Assumptions: No proof to support agreement that Canada could regulate; no evidence regulations are necessary for species preservation. Proof: much support for historical findings

Concept of law: Imposed : supports expanded interpretation without suggesting renegotiation of treaty to protect conservation interests. Consensual: strong support for treaty terms

Values: Egalitarian: "it seems to me somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting a reciprocal process in which the contracting parties engage in mutual exchanges of promises." (15)

Perspective: Ethnocentric: allows judicial examination in each case to determine purpose of hunting or fishing. Respect: Authors cited include reports of interviews with elders; liberal construction, as understood by Indians (5)

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		7		6.5

12.2 R. v. Horseman, [1990] 1 S.C.R. 901.

Cory J. (Lamer, La Forest & Gonthier JJ.)

Main Principle: Parliament of the colonizing party can unilaterally extinguish treaty rights.

Note: Heavily influenced by need to conserve Grizzly bears. [Hard cases make bad law. He could see no alternative paradigm for bear protection. Claimed bears relied on man for protection!!!(25) when they would actually do better if there were less humans. Found Horseman "acted in good faith" (26) but upheld conviction because he thought others would take advantage.(25).

Ignored lack of Indigenous political rights. On extinguishment issue, began by setting out 2 legal principles(20) but did not apply them. He looked only at the words of the transfer agreement itself and how they were viewed by Dickson J and previous courts (21-22) giving no evidence to show how it was interpreted by Indigenous people. This case itself suggests that they saw it as having no effect on their rights because they argued that a treaty could not be unilaterally changed.(22)

Evidence: Assumptions: no evidence of discussion with "Indians" re. imposition of government regulation. Proof - reference to Ray's work on existence of treaty - lacking on extinction

Concept of law: Imposed: "Federal government" can unilaterally alter treaty rights (24)

Reasoning: Declaratory: tends to rely on authority of precedents rather than on the principles they contain. Principles: identifies some principles at the beginning re treaty.

Perspective: Ethnocentric: assumes his concepts of "government" and "province" are the only ones applicable. Believes settler legislation protects bears without questioning effect of habitat reduction

Respect: Authors cited include reports of interviews with elders.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10.	Ethno/ego centric	Yes	Respect for others	Some

Perspective				
Total		9		4

13. R. v. Sioui, [1990] 1 S.C.R. 1025

Lamer J. (Dickson C.J., Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin JJ.)

Main point: the capacity of Indigenous nations to enter treaties is recognized. "It is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' right." (25) Treaties should be interpreted according to the common intent of the parties.

Parties: imposed: "Indians" under Canada's Indian Act;

Self-determined: Huron identity acknowledged.

Issues: imposed: charge, framed by Quebec officers; *mutually determined:* through right to defence.

Evidence: assumptions: Indians are better versed in negotiations today (7); jurisdiction is territorially defined; purpose of English and French was to control territory by force (8); past constitutional conceptions conformed to modern ones; *proof:* primary documents used to support many findings.

Concept of law: imposed: "The treaty gives the Hurons the freedom to carry on their customs and their religion" (22; these rights existed precontact). *consensual:* consent needed to extinguish treaty (20).

Reasoning: declaratory: Indians "not on a par with a sovereign state" (9) *principled:* interprets on the basis of historical context and perception of the parties .

Values: egalitarian emphasis on common understanding of the parties; respects "Indian" perspective (7).

Perspective: ethnocentri: use of unicultural texts and authorities ; anachronistic imposition of modern, unilaterally determined legislative framework; accepts derogatory racist characterizations (7, 9); characterises British practice as "exploration & settlement"; examines document as "a treaty under the Indian Act" (anachronistic) (11); only considers Crown's reasons for treaty commitment (11); subordinates Indigenous rights to recreational practices. *respect:* recognizes differing views but doesn't consider capacity of signing "chiefs" (16); states examination must be from different points of view depending on group; considers Indigenous ceremonies as evidence of a treaty.

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes

7. Concept of law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Some	Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Some	Respect for others	Yes
Total		6.5		7.5

14. R. v. Sparrow, [1990] 1 S.C.R. 1075.

Dickson C.J. and La Forest J. (McIntyre, Lamer, Wilson, L'Heureux-Dubé, Sopinka JJ.)

Main principle: s. 35(1) of the *Constitution Act, 1982* is meant to ensure that Aboriginal rights are taken seriously. "Aboriginal and treaty rights may be overridden if the government is able to justify the infringement." (citing *Badger*) [74]

Issues: *mutual*: issues raised by both parties.

Evidence: *assumptions*: no evidence to prove that the regulations function to conserve the resource (1113); "never any doubt that sovereignty," legislative power, and underlying title reside in the Crown (1103); *proof*: use of anthropologist and regulatory history; supports 1973 change in policy with document (1104).

Concept of law: *imposed*: sovereign can extinguish an Aboriginal right with clear and plain intent (1099); *consensual*: Constitution is a statement of the will of the people (1106).

Reasoning: *declaratory*: does not explain why extinguished rights cannot be revived, just lists similar cases (1091); declares conservation uncontroversial (1113) and consistent with Aboriginal practice (1114); guidelines pulled from a hat (1115) *principled*: *Nowegijick etc.* (1107).

Values: *authoritarian*: concept of Canadian "sovereign power" (1109); Ignores imposition of British rule on Musqueam throughout; dictates guidelines (1115) *egalitarian*: reasoned response to both parties.

Perspective: *ethnocentric*: Aboriginal rights are *sui generis* (takes self as standard) (1112); ignores Aboriginal perspective in favour of internal Canadian analyses, such as Slattery (1109-10) *respect*: penal trial not best venue for determining Aboriginal rights (1095); need to be sensitive to *sui generis* nature of Aboriginal rights and perspectives (1112); for the Musqueam, fishery is an integral part of their culture (1099); details of allocation left to those with expertise (1116).

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes

9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno-/egocentric	Yes	Respect for others	Yes
Total		9.0		5.5

15.1 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.
Dickson C.J. (different reasons)

Main Principle: 'Her Majesty' in the Indian Act refers to both the federal and provincial Crowns. The Indian Act prevents money owed to a band by the province from being garnished.

Note: reliance on "social purposes of the Indian Act" rather than representations made at time of treaty.

Parties: "as long as Indians not affected qua Indians..." (18)

Issues: Imposed: garnishment order. Mutually determined: able to raise arguments

Concept of law: Consensual: *Nowegijick* principle primordial.

Imposed: Canada's ability to impose its laws unquestioned.

Reasoning: Principled: eg set out & explained *Nowegijick* (11)

Values: Egalitarian: understands by analogy to treaty

Perspective: Ethnocentric: effect of Crown actions can be overestimated (18)

Respect: may not be easy to see as seen by Indians (11); explained arguments of both parties (12) for different perspectives (13); understanding of *sui generis* (17-8); "Historic occupiers" of North American lands & European Colonizers (18)

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		8		6.5

15.2 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

Wilson J (Lamer, L'Heureux-Dubé JJ.)

Main Principle: Fundamental questions about the relationship between the courts and government should be resolved by the legislature.

Concept of law: Consensual: for legislature to reform law of garnishment

Imposed: unquestioned reliance on Blackstone & old cases. Note Blackstone's definition.

Reasoning: Principled: emphasised need to explain why Garnishment Act did not apply (22)

[evaluation as for La Forest]

15.3 Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85.

La Forest J. (La Forest, Sopinka. Gonthier JJ.) Wilson J.'s reasons concur.

Main Principle: Provincial Garnishment Act should not be interpreted in a way that is inconsistent with the broad social purpose of tax exemption in the Indian Act.

Evidence: Assumptions: no evidence to support claim natives accepted British sovereignty (31); ignores wealth contributed by natives to Canada & only sees the reverse. (31-32); no evidence re motivation for requirement for Minister's consent -assumes protection(38); no evidence to support rejection of Indian perception of Crown as indivisible entity.(40) Proof: Treaty 8 cited (35)

Concept of law: Imposed: ignores non-participation of "Indians" in the development of legislation

Values: Authoritarian: Parliamentary intent for statute prevails over Indigenous understanding (40)

Perspective: Ethnocentric view of history; assumes Indigenous acceptance of sovereignty.

Respect: explanation of *Nowegijick* principle.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Some	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		8.5		5.5

16. Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 579.

THE COURT: Lamer C.J., La Forest, Gonthier, McLachlin, Stevenson JJ.

Main Principles: Aboriginal title was extinguished by the Robinson-Huron Treaty & subsequent arrangements. "An appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts"

Issues: Indigenous attempt to wrestle with the foreign legality that had been imposed.

Procedure: So little explanation of their thought processes that the result has an in camera effect far in excess of declaratory law. The Court refused to subject the issues raised to a public analytical process so the reader cannot tell which "arrangements" subsequent to the Robinson-Huron Treaty constituted surrender of the right in the Court's opinion.

Evidence: Evidence was not used to demonstrate the legal findings

Concept of law: Imposed: presumption that Anglo-Canadian law is the only relevant consideration

Reasoning: Declaratory: no explanation or facts to support their finding that there had

been an aboriginal right to the land or how it was surrendered or extinguished by arrangements subsequent to the Robinson-Huron Treaty. No explanation of the grounds for declaring that Ontario had a better claim to the land than the Temagami. Principled: standard grounds for overturning trial findings of fact mentioned.

Values: Authoritarian: basically declares a state of affairs

Perspective: declaration that the issues were purely factual, though applying their own frames of

Reference; acceptance of small treaty annuities and reserves in return for a huge tract of land.

-patronizing pretense at liberality through rejection of the trial finding that there was no Aboriginal right at the time of the treaty followed by a refusal to define that right because it had been extinguished by unspecified "arrangements". Presumes colonial culture has managerial power. (See Katherine Biber, "Being/Nothing: Native Title and Fantasy Fulfilment" (2004) 3 *Indigenous L.J.* 1).

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes

6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Little
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect for others	
Total		10		2.3

17. R. v. Jones, [1991] 2 S.C.R. 110.

Stevenson J. (La Forest, L'Heureux-Dube, Sopinka, Cory, McLachlin, Iacobucci JJ.)

Main Point: The belief that Canadian law is inoperative on reserves is a mistake of law, not a mistake of fact.

Notes: Accused were in over their heads and did not make strong arguments. The Court missed an opportunity to set out egalitarian principles and relied on institutional force. Post colonial reasoning could have pointed out that the procedures used by the band council did not make it possible for them to demonstrate that they had the support of the majority of the community for what was, in effect, a constitutional change.

Procedure: Unequal: 5 governmental interveners supporting Ontario against a small band.

Evidence: Assumption: No evidence to support the regulatory scheme applied.

Concept of law: Imposed: Ignored evidence showing the Band did not consent to application of Canadian law.

Reasoning: Declaratory: no explanation offered to distinguish mistake of fact from mistake of law.

Contradictory character of Council's actions not commented upon eg. partial renunciation of Canadian authority. Insufficiency of a Band Council Resolution for renouncing jurisdiction not explained. ie method used did not meet International Standards per *Western Sahara*.

Values: Authoritarian: Relied on Canadian state power, rather than explaining the principles that legitimate state power. Egalitarian: Assuming the Band wished to be considered Canadian, they were treated the same?

Perspective: Ethnocentric: Court did not give an articulate response to an obvious bid for self government. Respect : accepted request not to make statements adversely affecting Indian self-government, though this provided the court with an easy escape.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/intervenors/equal	Some
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of	Imposed	Yes	Consensual	

Law				
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total		9		2

18.1 (a) *Friends of the Oldman River Society v. Canada (Minister of Transport)*,

[1992] 1 S.C.R. 3.

La Forest J. (Lamer C.J., L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci JJ.)

Main Point: A private party may compel a government ministry to comply with guidelines put in place by the legislature.

Note: Principle of case is decolonizing. Effect for Piegan was not. Indigenous opinion was completely ignored and we do not even know what they wanted though their rights were affected by the dam.

Parties: Society created its own legal identity.

Issues: Imposed: no evidence that the Piegan were represented either by the environmental plaintiff or the governments concerned.

Procedure: Biased: In a matter that obviously affected the Piegan, there was no provision for their representation. Public, Equal: Indigenous organizations allowed to participate as interveners.

Evidence: Assumptions: perspective on what was relevant determined uniquely by colonial society.

Proof: facts considered proven by documentation.

Concept of law: Imposed: Court imposed its concept of the "correct" interpretation of laws and guidelines without considering Indigenous or public opportunities to express or withhold consent.

Reasoning: Though principles were relied upon, there was obviously a wide range of opinion concerning how they applied

Values: deference to the intention of the legislature, but Piegan opinion was completely ignored.

Perspective: Ethnocentric: Piegan & Indigenous perspectives completely ignored.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes

9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect for others	
Total (Piegan)		10		3

18.1 (b) re the Oldman River Society

Social order voluntarily accepted by members of the majority society.

Concept of law: Imposed: Highest court imposed its interpretation.

Consensual: Citizens have a right to challenge officials & lower courts.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/intervenors/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total re Society		4		10

18.2 *Friends of the Oldman River Society v. Canada (Minister of Transport)*

Stevenson J.

Main Point: The Crown is not bound to follow a law unless expressly required to do so or violation would frustrate the purpose of the act. The trial judge's discretion should be supported and those undertaking litigation should be prepared to accept some responsibility for the costs.

Note: His evaluation re the Piegan would be the same. For the Oldman River Society his broader interpretation of Crown Immunity, his insensitivity to the obstacles faced by any group of citizens that tries to question state action and his objection to the award of solicitor-client costs suggest that his reasoning might be considered more authoritarian and less postcolonial.

	Colonial		Postcolonial	
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1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total	re	4		7.5
Society				

19. Williams v. Canada, [1992] 1 S.C.R. 877.

Gonthier J. (La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson JJ.)

Main Principle: The situs of UI benefits is the same as that of the employment that generated them.
The situs of intangible property is determined on the basis of connecting factors.

Parties: Imposed: No treaty adherence to Anglo-Canadian regime.

Concept of law: Consensual: Band & Williams participated in UI program. Imposed: reasons on the basis of paternalistic protection rather than contractual term for tax exemption.

Values: Egalitarian: looks for consistency & predictability in the law.

Perspective: Respect: Situs must be interpreted in relation to the purposes of the Indian Act & the Income Tax Act, not the conflict of laws rules.(11)

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect for others	Yes
Total		5		6.5

20. Quebec (Attorney General) v. Canada (National Energy Board, [1994] 1 S.C.R. 159.

Iacobucci J. (Lamer C.J. La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Major JJ.)

Main Points: When deciding whether to grant an export licence it is appropriate for the Board to consider the environmental impact and to require further studies when the impact is knowable.

Notes: Case is difficult to rate because the status of James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c.32 is not clear. Does this case suggest that Canadian governments can avoid fiduciary obligations by delegating decisions to boards? Though the decision appears to be very fair regarding the issues before it, the Cree appear to have been completely excluded from the decision making processes concerning developments that profoundly affect them. The project is relying on the power of the state to proceed over their objections.

Judges: No evidence of Cree on Board whose decision was upheld.

Parties: Meaning of James Bay Act is unclear.

Venue: Disagreement between Cree & Canadians over Act.

Issues: Project to export electricity seems to be Canadian initiative protested by Cree.

Concept of law: The Cree obviously do not consent to the project

Reasoning: Principles for founding the decision are explained.

Values: Egalitarian Cree values seem to take a back seat here. Their reasons for objecting to the licence are camouflaged by the process & the shaping of the issues.

Perspective: Ethnocentric: presumption that Canadian procedures are acceptable even though the agreement that founds Canadian authority is being litigated. Respect: Cree arguments seem to be explained. The requirements for environmental & cultural review were reinstated.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Some
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes

10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		7		5.5

21. R. v. Howard, [1994] 2 S.C.R. 299.

Gonthier J. (Lamer C.J., La Forest, Sopinka, Cory, McLachlin, Iacobucci JJ.)

Main Principle: *Bear Island* reliance on trial findings of fact reiterated.

Evidence: Assumptions: relied on 1923 treaty. Presumably this was part of the Court record but, unlike *Sioui*, text was not provided so the reader cannot verify the Court's account of it. (Justice must not only be done, it must be seen to be done!!) Reliance on opinion of a man with no legal training that 2 signers were legally educated. Also "mandate" of commissioners not reproduced though it was the basis for a defence argument.

Concept of law: Imposed: Did not consider whether the people relinquished "all privileges" with informed consent.

Reasoning: Declaratory: Little or no attention to principles like *Nowegijick* "perception" & *Sioui* requirement for express words to extinguish.

Values: Authoritarian: Did not consider whether the members of the band gave their informed consent to giving up their rights.

Perspective: Ethno/ego centric: Prefer's trial judge's understanding of treaty to that of accused. Completely unaware of the tensions between Indigenous traditionalists and assimilationists. If I had been the judge, I would have sent it back for retrial so that missing facts could be supplied. Dismissed Indigneous perceptions of difference.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect for others	

Total		9		4
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22.1 Native Women's Assn. Of Canada v. Canada, [1994] 3 S.C.R. 627. Sopinka J. (Lamer C.J. La Forest, Gonthier. Cory, Iacobucci, Major JJ.)

Main point: There was no evidence to show that the organizations selected by Canada to represent Indigenous peoples were male dominated.

Note: From a postcolonial perspective, the real problem with the funded organizations is that they were selected by Canada, not by the people they were taken to represent. Funding NWAC would not solve this problem. The Catch-22 is that it is unlikely that an unorganized entity could carry an argument against the colonial character of Canadian practice.

Parties: Self-determined: membership in organization.

Issues: Imposed: "Walsh J. framed the issues". Huge state funding.

Mutually determined: Brought action based on own analysis.

Evidence: Assumption: Canadian organizational format is able to represent Indigenous women.

No examination of Indigenous organizational concepts.[fault in pleadings?]

Evidence: Looked at the structure & policies of the organizations involved (though superficially)

Concept of law: Imposed: Sees "government" as holding wide discretion. No consideration of those not represented in organizations.

Values: Authoritarian: Government has no duty to consult anyone, let alone everyone, by

referendum (XLVII) Egalitarian: Government obligation to listen to particular class is same as for

public at large. (LII)

Perspective: Ethnocentric: "the Aboriginal community of Canada" [Said's othering, colonial construction

of a previously non-existent community] Minister of Constitutional Affairs says organizations chosen

represent men & women[external opinion] Only Euro-Canadian organizational concepts considered.

Opinion of minister is relevant to determining how representative the chosen organizations are.

Respect : Considered interveners' positions though counterbalanced by strong support for state prerogative.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	

4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total		8		6.5

22.2 Native Women's Assn. Of Canada v. Canada, [1994] 3 S.C.R. 627. L'Heureux-Dubé J.

Main Point: A government may be held to a positive obligation to provide a platform for expression in some instances.

Note: She supported Sopinka's reasons except for his interpretation of her reasons in *Haig* so the result is the same except she makes a strong place for other points of view which supports a consensual concept of government.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/intervenors/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	Yes
Total		8		8

22.3 Native Women's Assn. Of Canada v. Canada, [1994] 3 S.C.R. 627. McLachlin J.

Main Point: A government may choose and fund its advisors without regard for the Charter.

Note: She supported Sopinka's reasons but found consultations of the kind considered in this case differ from the electoral issue in *Haig*. It was not necessary to consider evidence of Charter violation. The only proof provided to support the legality of this principle in Canada was an American case! This approach is declaratory and deprived of the egalitarian considerations canvassed by Sopinka.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes

5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect for others	some
Total		9		6.5

23.1 Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

Lamer C.J. (Cory J.)

Main Point: A tribunal must be legally structured so its members are reasonably independent of those who appoint them.

Notes: Does not understand the interrelated nature of life in a small community. One gets the feeling that some excuse will be found to invalidate the proceeding.

Parties: Imposed under the Indian Act, self-determined acceptance of a colonial legal regime.

Issues: Imposed: Case decided on argument not in pleadings or made in argument at trial. [111]

Procedure: Bias: Issue of bias raised in oral argument, not in originating notice of motion.

Evidence: Assumption: A reserve where everyone may be related can function like a large

impersonal state. Proof: Textual references, comparison to municipal regimes under provinces but

decided here without a concrete example of how the tribunal would function in practice.

Concept of law: Imposed: presumption that federal or provincial appointment solves the problem of bias for someone external to the culture.

Values: Authoritarian: presumes neutral standard is possible.

Despite appeal to the principles of natural justice, they were violated by relying on an argument that was not properly raised in prior courts denying the bands a proper right to reply.

Perspective: Ethnocentric: based entirely on Canadian law, Parliament's intent, Indian Act etc.; assumes bands have no "governmental experience" unless using Anglo-Canadian institutions[43]; doesn't see

neutrality principle proposed was not followed by Canada when adjudicating Indigenous rights.[95];

assumes that federal appointment to tribunal would solve problem of "independence" & that "security of tenure" may solve problem of influence on a reserve that may be cash strapped with few employment

opportunities. Would there be enough tax assessment cases on a reserve to merit permanent appointments?

Analysis seems out of touch with reality.[101] Does not grasp the interconnectedness of life in a small community.

Respect: Parliament's objective was to facilitate development of Aboriginal self-government[18]

	Colonial		Postcolonial	
1. Judge	Alien	Yes	Peer decision	

	decision-maker			
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		8		4

23.2 Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

La Forest J.

Main Point: Technical legal issues should be determined by a tribunal with the required expertise.

Note: Agrees with Lamer & Major: Dismiss the appeal with costs.

Values: Declaratory/Authoritarian : no explanation of why he thinks the band lacks expertise.

Perspective: Ethnocentric: presumes views of dominant culture are the only ones that count.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		9		3.5

23.3 Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

Major J. (McLachlin J.)

Main Point: "When a fundamental issue of lack of jurisdiction is raised as the only issue, the respondent should not be compelled to proceed needlessly to the appeal tribunal"[140] [150]

Note: No account taken of the major difference between the Indigenous situation & the precedent used.

Evidence: Assumption: Board has no expertise on property law ; composition of tribunal is unknown as is the potential decision.

Concept of law: Imposed: Colonial legality interpreted to deny an Indigenous forum.

Reasoning: Principled: Principles applied carefully set out.

Values: Authoritarian: Parliament's intent to grant jurisdiction

Perspective: Ethnocentric: Assumption Board has no expertise on property law

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		8		5

23.4 Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

Sopinka J. (L'Heureux-Dubé, Gonthier, Iacobucci JJ.)

Main Points: An appellate tribunal can only reverse the Trial judge's exercise of discretion if no weight or insufficient weight was given to relevant considerations. Without knowledge of the operational reality of a tribunal's by-laws a reasonable person cannot be informed about how they function.

Concept of law: Though colonial legality applied, support for the Band tribunal created a forum for their ideas. Consensual: party must have a fair chance to answer, but tribunal independence was not pleaded or argued.

Perspective: Ethnocentric: entirely Anglo-Canadian approach. Respect: self-government policy is relevant to the entire exercise of judicial discretion. [114] Noted decision made on an argument not before the Bands. Application of *Nowegijick* principles. Provisions aimed at maintaining "Indian" rights should be interpreted in a broad manner.[114]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric	Some	Respect for others	Yes
Total		5.5		7.5

24.1 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) [1995] 4 S.C.R. 344.

Gonthier J. (La Forest, L'Heureux-Dubé, Sopinka JJ.)

Main Points: Indian title in reserves is *sui generis* so common law principles of property are not helpful. The intention of the parties should not be frustrated.

Note: application of limitation period; "full & informed consent" standard.

Issues: Imposed legal conceptual framework, but able to file pleadings

Evidence: Assumption: presumed Indigenous intent could be determined from words of the surrender and the record prepared by the Indian Agent.[9, 10] Trial judge did not find the band gave "full, free and informed consent to the surrender of the mineral rights"[85]

Concept of law: Imposed: accepted Indian Act regime. Consensual: "intention-based approach" [7] founded on "full and informed consent" [4]

Reasoning: Principles underlying most reasoning set out but conceptual framework declared.

Values: Authoritarian: imposed a conceptual structure that was not pleaded by either party

Egalitarian: legitimacy based on "full and informed consent" [4]

Perspective: Ethnocentric: Presumed surrender drafted by Indian Affairs showed "Indian" intent.

Respect/place: Focus on "Indian" intent.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Some	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Some	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Some	Respect/place for others	Yes
Total		7.5		6

24.2 Blueberry River Indian Band v. Canada, [1995] 4 S.C.R. 344. McLachlin J. (Cory & Major JJ)

Main Points: -A deliberately executed and statutorily authorized surrender should not be overturned on the basis of no evidence. The surrender provisions of the Indian Act are intended to ensure that the intention of the Indian bands with respect to their interests in their reserves will be honoured.

Note: Her interpretation of the Indian Act as protection to ensure that the Band's intent is honoured is postcolonial in spirit. It is not supported by proof that this was the actual intent when the measures were implemented.

Evidence: Proof: insists on proof of band's intent & on revocation of 1940 surrender [81-5]

Reasoning: Declaratory: no evidence to show that purpose of Indian Act is to honour band intent.

Principled: very

Values: Egalitarian; "full, free and informed consent" standard [85] insistence on compliance with

statutory scheme, objection to unilateral changes by the Crown[88]

Perspective: Ethnocentric: deference to statutory scheme that band did not participate in forming

Respect/place: Indian Act interpreted to protect Band's right to consent to actions taken [83] Distinguished "a legal finding based on his reading of the wording " from evidence of band's intent.[86]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Some	Consensual	Yes
8. Reasoning	Declaratory	Some	Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric	Some	Respect for others	Yes
Total		5.5		6.5

25.1 R. v. Badger, [1996] 1 S.C.R. 771.
Sopinka J. (Lamer C.J.)

Main Point: Treaty 8 was merged in the NRTA. The enactment of new constitutional provisions does not imply the amendment of earlier provisions.

Note: contradiction - says ambiguities should be resolved in favour of the Indians & the integrity of the Crown should be upheld, but does not attempt to see Indigenous points of view.

Procedure: Biased: Crown given new trial to meet analytical scheme. Badger & Kiyawasew were not.

Evidence: Assumption: conservation legislation was passed before the treaty so it was "clearly understood" that rights under the treaty were subject to the legislation. No evidence offered to show actual understanding.[11]

Concept of law: Imposed: belief that treaty can be unilaterally altered by one party's legislation.

Consensual: to the extent that Cory's explanation of a treaty was adopted

Reasoning: Declaratory: eg used *Horseman* to say NRTA extinguished right to hunt on Crown land

[29] Principled: quest for principles in precedents.

Values: Authoritarian: validated the harassment represented by use of penal charges to define treaty rights.

Perspective: Ethnocentric: presumption that legality belongs only to settler society

Place for other: attempt to see NRTA as continuing treaty

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	Little
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some

Total		10		3.25
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25.2 R. v. Badger, [1996] 1 S.C.R. 771.

Cory J. (La Forest, L'Heureux-Dubé, Gonthier, Iacobucci JJ.)

Main Point: The hunting rights confirmed by Treaty No. 8 were modified by para. 12 of the NRTA though the right to hunt for food on unoccupied land continued. Legislation can limit a treaty right if justified according to the test set out in *Sparrow*.

Note: Despite highly colonial profile, he articulated an attempt to see what "the Indians understood".

Procedure: Biased: Crown got new trial to meet analytical scheme. Badger & Kiyawasew were not.

Evidence: Assumption; "as before" limits right to hunt for food. Representations re Treaty 4 & Treaty 6 cited as evidence of promises re Treaty 8 !!! [56] Cree & Dene assumed to know of government regulations in 1899 with no evidence given to this effect[70] Proof: reference to experts & to evidence of promises made and conditions at time.

Concept of law: Imposed: Law by government in which "Indians" had no representation altered treaty. Consensual: cited Judson's explanation of a treaty [Did he understand it?]

Reasoning: Declaratory: Cites himself in *Horseman*, relying on his own authority rather than on principles for the limitations imposed on the treaty. Principled: fine principles stated [41] but not applied. Judson's categorization of "Aboriginal rights" and "treaty rights" unevenly applied.

Values: Authoritarian: Belief that conservation must be imposed [70] Validated use of penal charges to define legal ambiguities. Egalitarian: Mentioned Aboriginal peoples should be consulted or at least informed re conservation

Perspective: Ethnocentric: purpose of treaty to facilitate settlement of West [& for the "Indians"?]

-limitations v. hunting "as before"; -treaty rights may be unilaterally reduced by colonizing state's NRTA. Respect/Place for others: principles of interpretation [52] "To the Indians, it was an essential element[82];-right to hunt for food "as it is understood by the Indians"[93]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of	Imposed	Yes	Consensual	Litt

Law				le
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Little
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total		10		3.5

26.1 R. v. Nikal, [1996] 1 S.C.R. 1013.

Cory J. (Lamer C.J. , La Forest, Sopinka, Gonthier, Iacobucci, Major JJ.)

Main Point: “[T]he federal government may validly require aboriginal people to obtain a fishery licence” under provincial regulation. ...An invalid act or regulation cannot create an offence”. [CXII]

Note: Appellant argued Crown was “given authority to bind the Crown & assign fishing rights” XXXVIII
Appellant’s conviction overturned, but federal right to regulate affirmed & the band’s right denied.
Consideration of “the understanding of the Indians” mysteriously missing though used in *Badger* written by the same judge & released just three weeks earlier. No explanation for this offered.

Issues: -charge

Procedure: Biased: relied on decision of “Law Officers of the Crown” instead of neutral tribunal XLIII

Evidence: Assumptions: representations of personal opinion to prove Crown policy [XXIX-XXX, XXXIV]; claim re English law since the Magna Carta with 1973 cite. [XXXII]; claim right to fish would become meaningless without gvt. regulation [XCVI] control by central authority [CI]

Proof. Government provided no evidence to justify licence [CXI]

Concept of law: Imposed: accepted declaration of government official as law [XXXV]

Reasoning: Declaratory: over-arching assumption that only Canada had law. Principled: many set out & used

Values: Authoritarian: ignored requirements for democratic legality. Egalitarian: some lip-service to idea that consultation required re conservation [CX]

Perspective: Ethnocentric: assumed fishing right can be “granted” by the colonizing culture, XXV, XXXVII. Place: Lectured on balancing & sensitivity to others [XCII] but denied band’s jurisdiction

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	

8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Little
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		10		3.5

26.2 R. v. Nikal, [1996] 1 S.C.R. 1013.

McLachlin J. (L'Heureux-Dubé J.)

Main Point: "[T]he state is entitled to impose a licensing scheme on the aboriginal fishing" [CXXII]

"The unconstitutionality of a condition of a licence does not...absolve the appellant from the need to obtain a licence." [CXXIII]

Authoritarian: "The trial judge, the majority of the Court of Appeal, and this Court unanimously have ruled that the state does have the right to require him to obtain a licence" [CXXV] source of authority not explained. Claims State has right to impose its authority on the basis of its own institutions contrary to *Western Sahara* reasoning.

27 R. v. Lewis [1996] 1 S.C.R. 921.

Iacobucci J. (Lamer C.J. La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Major JJ.)

Main Point: Band by-laws regulating fisheries on a reserve do not extend to an adjacent river.

Note: issues surrounding establishment of colonial jurisdiction ignored. Fine included optional 5 days in prison, but no requirement to prove law beyond a reasonable doubt. The fact that judges at various levels disagreed about what the law was & that the by-law was approved by Indian Affairs surely demonstrates that some doubt was reasonable.

Evidence: Assumption of valid Canadian jurisdiction. No evidence of parties practice during century between establishment of the reserve & the charges.

Concept of law: Imposed: no consideration of importance of band anticipation in fisheries regulation. Consensual: some deference to Parliament, but band representation ignored.

Reasoning: Declaratory: eg. Crown met fiduciary obligation.

Values: Authoritarian: No consideration of the need to enhance democratic processes. No consideration of need to prove beyond a reasonable doubt when incarceration involved. Egalitarian: NOT when asserting equal access to fisheries for original inhabitants & settlers!!!

Perspective: Ethnocentric: only "Parliament's objective" [77] and Canadian views considered.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		10		3

28.1 Van der Peet v. The Queen, [1996] 2 S.C.R. 507.

Lamer C.J. (La Forest, Sopinka, Gonthier, Cory, Iacobucci, Major JJ.)

Main points: the rights protected by s. 35(1) "lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples" that existed prior to contact [48, 60].

Note: Lip-service to Indigenous perspective but not applied; see L'Heureux-Dubé [149]. Van der Peet lost because she did not correctly anticipate the test that she had to meet. No wonder! It was not decided until the case reached the SCC.

Issues: *imposed:* charge plus new issues developed at both appeal and SCC levels.

Procedure: no retrial now that the case to meet is known.

Evidence: *assumptions:* appellant given no chance to seek evidence required by the new test; *proof:* reliance on trial judges' findings of fact.

Concept of law: *imposed:* *Worcester v. Georgia* "power, war, conquest" concept accepted [37]; Lamer made up his own test, then said she did not meet it.

Reasoning: *declaratory:* requirements for test [68, 74], no principle, no source, no example; the "prior to contact" requirement is simply stated based on his own reasoning; McLachlin agreed [247]; *principled:* e.g., use of *Mabo*.

Values: *authoritarian:* presumes the judge can make law with no reference to the community concerned.

Perspective: *ethnocentric:* Indigenous rights to be reconciled with "Crown sovereignty" [31, 62]; Canadian-Aboriginal relations seen as relationship between only two cultures [42]; presumes exchange between kin was not really "trade" [87]; mentions principle of considering "aboriginal perspective" and looking at the particular community but does not apply it [49, 69]; relies entirely on professors and "experts" from own society.

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some

9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	
Total		10.0		2.5

**28.2 Van der Peet v. The Queen, [1996] 2 S.C.R. 507.
L'Heureux-Dubé J.**

Main point: definition of the nature and extent of Aboriginal rights must be addressed in the broader historical context of Aboriginal reality [106]

Note: some genuine consideration of Native perspective but still imposes external analysis [166]; would send back to trial on extinguishment of the right to sell, trade and barter fish, *prima facie* infringement and justification by government ; problem with recently devised judge-made law; none of the parties knows the case to meet.

Procedure: would allow retrial.

Evidence: *assumptions:* no evidence to support historical claims, such as Bering bridge theory [106]; Marshall decisions used to prove history, but these are opinion only. (Marshall C.J. was not a witness to Aboriginal societies at first contact) [107].

Concept of law: *imposed:* "government" must be able to direct rights for Natives and the rest of Canadian society [122].

Reasoning: *declaratory:* e.g., time requirement of twenty to fifty years, based on Slattery, not on consensual democratic process [177].

Values: *authoritarian:* sees law as an exercise in external analysis. *egalitarian:* strong emphasis on support for Aboriginal perspectives.

Perspective: *ethnocentric:* sees colonization as an "opportunity to share in the advances of modern civilization" [188]; *respect:* "significance of these activities to natives" [157]; "taking British sovereignty as the turning point" exaggerates importance for Indigenous peoples [166].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Yes

Total		9.0	5.0
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**28.3 Van der Peet v. The Queen, [1996] 2 S.C.R. 507.
McLachlin J.**

Main points: Aboriginal rights should be defined by "looking at what the law has historically accepted as fundamental aboriginal rights" [227]; British law accepted Aboriginal rights as fundamental [254]; the Crown cannot transfer rights to non-Aboriginal people without Aboriginal consent, without treaty, and without compensation [310].

Evidence: *assumption:* direct sale of land to settlers was prohibited to ensure a fair exchange [270]; Aboriginal people must prove their right to fish for sport, commercial purposes or even a moderate livelihood [279]; *proof:* British common law respected Aboriginal law [267-70].

Concept of law: *imposed:* assumes legitimacy of colonially imposed system and assessment of Native law by judges from another culture [279]; *consensual:* Crown should not be permitted to transfer rights without Aboriginal consent [310]; emphasis on treaty process and negotiation [313].

Reasoning: *principled:* detailed explanations of all points; principles sought.

Values: *authoritarian:* accepts legitimacy of colonially imposed law [264] *egalitarian:* "Aboriginal peoples, like other peoples ... " [251].

Perspective: *ethnocentric:* view of history [232]; treaties sought to provide Aboriginal peoples with a land base [271]; *respect/place:* Walters quotation re need to accommodate both legal cultures [232].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Some	Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Some	Respect/place for others	Yes
Total		6.5		6.0

29 .1 R. v. Gladstone, [1996] 2 S.C.R. 723.

Lamer C.J. (Sopinka, Gonthier, Cory, Iacobucci, Major JJ.)

Main Points: If an Aboriginal right has no internal limit on its exercise, it may be justifiable for the government to impose a limit. (citing McLachlin in *Van der Peet* [259])

In order to do this, there must be evidence concerning how and why resource allocations were made, the nature and extent of any Aboriginal right involved and the extent of consultation with Aboriginal groups concerned.

Note: Though the case supports Aboriginal consultation & concern for HOW decisions were made, it ultimately supports the colonization of a previously uncolonized Indigenous resource.

Evidence: Assumptions: "Since the time of the Magna Carta" [67] jurisdiction [73]

-conservation seen as an important goal based only on *Sparrow's* presumption - no supporting evidence [74] Proof: eg re fishery [49,50]

Concept of law: Imposed: Does not question Canadian capacity to govern Indigenous resource

Reasoning: Declaratory: Does not explain WHY Anglo-Canadian law should be given priority eg. [66, 7] Principled?: reasoning is based more on procedural precedent eg *Sparrow* than principles; analogy to Charter analysis - must look at purposes [71]

Values: Authoritarian: "governments" must make decisions to allocate rights [65]

Egalitarian: Considered consultation, though standard only "cognizant of the views" [84]

Perspective: Ethnocentric: "primitive time & setting" [26] "Since the time of the Magna Carta" [67]

Respect/Place : minimal impairment *Oakes* test. [63]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10.	Ethno/ego centric	Yes	Respect/Place for	Some

Perspective			others	
Total		9		4.

**29.2 R. v. Gladstone, [1996] 2 S.C.R. 723.
La Forest J.**

Main Point: When applying Lamer’s test for Aboriginal rights, a qualitative approach should be taken that accounts for the character of traditional practices.

Note: couldn’t see similarity between traditional trade practices & offer to trade with the Japanese. The Court gave tacit support for racist trade restraints [all judges]; placed great emphasis on the perspective of the Aboriginal people, but did not notice he had no evidence on which to base his decision & applied an external judgment. {p.44} He would equate regulations and an Order in Council (which has little or no democratic control) with a constitutional provision - all be it that the NRTA in *Horseman & Badger* was an act of the British parliament.

Evidence: Assumptions: Says “perspective of the aboriginal people” must be relied on then made a decision without any evidence of that perspective to define the accused’s actions ie Without a Heiltsuk jury

Concept of law: Imposed: OIC or regulation can extinguish Aboriginal right [31, 32]; assumed complete regulatory authority [82]

Reasoning: Declaratory: supports OIC & regulations over parliamentary process

Principled: Understanding of principles is superficial & culturally specific.

Values: Authoritarian: Belief Crown should have power to extinguish Aboriginal rights [25]

Perspective: Ethnocentric: Implicit assumption Aboriginal nations did not have law or commerce.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	
Total		9		

				3
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29.3 R. v. Gladstone, [1996] 2 S.C.R. 723.

L'Heureux-Dubé J.

Main Point: The native perspective must be taken into account when defining an Aboriginal right.

Note: She would follow Lamer's analysis and disposition, but her emphasis on the importance of the "native perspective" and on the accused's definition of the issue makes her approach less colonizing in character, though she is content to maintain an external assessment of the "native perspective".

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Some
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Some	Respect/Place for others	Some
Total		8.5		5

29.4 R. v. Gladstone, [1996] 2 S.C.R. 723.

McLachlin J.

Main Point : When the aboriginal right is to secure the modern equivalent of basic sustenance, evidence must be entered to demonstrate what the sustenance needs are.

Note: No source provided for declaration that the Indigenous right is limited to the modern equivalent of the standard of living at contact. This is an externally imposed issue. No mention made by ANY of the judges of the need to negotiate with the Heiltsuk re management of a resource they evidently controlled prior to contact. Her request for evidence to show the modern equivalent of basic sustenance does help make a place for Indigenous peoples but Canadians are not limited to a subsistence livelihood.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/intervenors/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Yes
Total		9		4.5

30.1 R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672.

Lamer C.J. (La Forest, Sopinka, Gonthier, Cory, Iacobucci, Major JJ.)

Main Point: When the factual findings at trial are not appealed for palpable or overriding error they must be accepted, though the determination is an issue of law & fact.

Note: Case had the effect of penalizing those who conduct business with Indigenous communities.

Parties: Company determined its own identity.

Venue: Foreign for Indigenous, chosen for company.

Issues: instituted by a charge

Procedure: case to meet not known in advance

Evidence: Assumptions: The only way to see things is according to colonial categories

Concept of law: Imposed: no evidence that the Indigenous people participated in forming the law

Reasoning: Declaratory: Required to meet *Van der Peet* test, released simultaneous with SCC

Judgment.

Values: Authoritarian: No chance for bands' company to participate in making conservation regulations

Perspective: Cross-cultural respect. Ethnocentric: assumption that aboriginal rights must be defined by customs of the colonial culture .

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total: (Indigenous)		10		3

Assessment for the non-Aboriginal appellant:

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total: (Smokehouse)		7		7

**30.2 R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672.
L'Heureux-Dubé J.**

Main Point: Aboriginal rights must be construed on the basis of evidence concerning the history, culture and perspective of the particular native society concerned.

Note: The Indigenous people affected were not represented though the case concerned their rights .

****This is the first judgment to look seriously at the way the Indigenous culture concerned was structured and to note that the system of social classification was significantly different. But it still accepts imposed legality.**

Judge: member of Smokehouse Ltd's culture

Parties: Smokehouse incorporated

Issues: Charge - the bands involved were not even interveners

Concept of law: Imposed: rights may be extinguished through a series of legislative acts[76]

Values: willing to consider other culture on equal basis

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total: (Indigenous)		7		4

Assessment for the non-Aboriginal appellant:

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes

6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total: (Smokehouse)		3		9

**30.3 R. v. Smokehouse Ltd., [1996] 2 S.C.R. 672.
McLachlin J.**

Main Point: It is not necessary to prove that the way an aboriginal right was exercised in the past was identical to the way it is exercised today.

Note: Similar chart to L'Heureux-Dube by a more tersely worded method.

31.1 R. v. Pamajewon, [1996] 2 S.C.R. 821.

.Lamer C.J. (La Forest, Sopinka. Gonthier, Cory, McLachlin, Iacobucci, Major JJ.)

Main Point: The rights protected by s.35(1) must be looked at in the light of the specific circumstances of each case, including the history and culture of the Aboriginal group claiming the right. They do not include "a broad right to the use of their reserve land".

Note: Stated the right to self-government was not considered, yet it was obviously avoided. (colonizing!)

What happened to "generous, broad liberal" interpretation and the "perspective of the Aboriginal people themselves"? Supposedly incorporated by reference to *Van der Peet* - but is this enough? Also: reliance on unilaterally designed legal instruments eg Royal Proclamation; refusal to answer the defence raised: That the bands had "a broad right to manage the use of their reserve lands".

Procedure: Biased: Decision in February, but reasons rely on *Van derPeet* released Aug. 21st.

Evidence: Assumptions: No evidence to support the assertion of governmental authority over bands

Proof: Reference to expert's evidence

Reasoning: Declaratory: Indigenous perception of rights is "at a level of excessive generality".

Perspective: Ethnocentric: (Ditto "Reasoning")

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		10		2

31.2 R. v. Pamajewon, [1996] 2 S.C.R. 821.

L'Heureux-Dubé J.

Main Points: The proper inquiry focuses broadly upon the activity itself and on the purpose for which it was undertaken, not on the specific manner in which it has been manifested. The Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of Aboriginal people.

Note: Same profile as the majority judgment. Would she really accept an American inquiry into the purpose for which Canadians exercised jurisdiction?

32.1 R. v. Adams, [1996] 3 S.C.R. 101.

Lamer C. J. (La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major JJ.)

Main Points: Aboriginal rights are not dependant on Aboriginal title. "Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance" [54]

Procedure: Bias: Case argued before *Van der Peet* which structured the decision.

Evidence: Assumption: minimizing the effect of contact on a culture [46]; assumes academic experts know the culture better than the people it belongs to.

Proof: reliance on trial evidence of experts & Chief.

Concept of law: Imposed: - no reference to need for Indigenous consent to regulation

Reasoning: Declaratory: Reliance on the Court's constricted view of rights in *Van der Peet*. [34] [47]

Perspective: Respect: rejected argument that only rights recognized by the French regime were protected [33]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		10		4

32.2 R. v. Adams, [1996] 3 S.C.R. 101.

L'Heureux-Dubé J.

Main point: Aboriginal rights are protected by s.35(1) if they have been "an integral part of the distinctive aboriginal culture for a substantial continuous period of time." [66]

33.1 R. v. Côté [1996] 3 S.C.R. 139.

Lamer C.J. (Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major JJ.)

Main Point: Aboriginal rights can exist independently of Aboriginal title.

Recognition by French colonial law is not required to prove the existence of an Aboriginal right.

Note: perspective of the "Indians" not mentioned. Serious claim to exclusive title in this case as no evidence that French went there & some evidence that they recognized Algonquins as allies, not subjects. Looks generous because he was acquitted of the fishing charge, but it was actually a serious loss. How could the European claim be greater than the Algonquin claim if time of contact is the point of assessment?

Procedure: Bias: case to meet not known. Case argued at all levels on the theory that proof of title was necessary.

Evidence: Assumptions: boundaries & limits of New France never defined but jurisdiction assumed.

Canada has legal jurisdiction.

Proof: reliance on experts

Concept of law: Imposed: means of identifying rights decided by the Court itself; "clear & plain intent" accepted to extinguish [52]; boundaries of s.88 Indian Act topic of future court discussion[87]

Values: declared law of *Van der Peet*, *Sparrow* accepted

Perspective: Ethnocentric: "Outaouais region of Quebec"[2] Lack of consciousness of how own conceptual frameworks imposed, especially in its view that the procedure did not prejudice the appellants.

Place: Conscious of different frameworks & dealt well with historical difficulties [40-49]

Emphasis on Algonquin practice

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled	Some

			explanation	
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		10		2.5

33.2 R. v. Côté [1996] 3 S.C.R. 139.

La Forest agreed, subject to his comparison of the right to a "servitude".

33.3 R. v. Côté [1996] 3 S.C.R. 139.

L'Heureux-Dubé agreed subject to her reasons in *Adams*.

34. *Goodswimmer v. Canada*, [1997] 1 S.C.R. 309.

Lamer C.J. (La Forest, L'Heurux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major JJ.)

Note: case not heard as appellant withdrew on grounds it was moot. (The non-band member who had been elected Chief no longer held office) Assessment based on the reasoning of the Federal Court of Appeal implicitly adopted. Both parties are Indigenous and both have been "absorbed into the body politic" of Canada through their acceptance of the Indian Act regime & Canadian institutions.

STONE J.A. (Strayer, McDonald JJ.A)
***Goodswimmer v. Canada*, [1995] 2 F.C. 389.**

Main Point: The fact that a legislative provision gives rise to absurd results is not sufficient to declare it ambiguous and then embark on a broad-ranging interpretative analysis.[19]

Judge: Though not a peer, is a fellow member of the polity whose laws are used to determine the parties rights. Position is neutral in relation to both parties.

Parties: Both appear to accept Indian Act identity.

Venue: Though the language & culture is foreign, both appear to have adopted it.

Issues: Mutually determined issue re statute interpretation

Evidence: relied on contents of statutes & legislative history

Concept of law: Consensual: Chief elected according to a system that both parties

agree to. Imposed: as legislated by parliament & interpreted by Court, majority rule.

Reasoning: Principles from case law explained, though source is in declaration of British law.

Values: Egalitarian vote, authoritarian process, analysis

Perspective: Ethnocentricity does not arise as a problem as both parties are functioning within the same legislative culture. Dispute resolved by appeal to mutually agreed authority (the court) rather than by use of force.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of	Imposed	Yes	Consensual	Yes

Law				
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total		3		10

35.1 Opetchesaht Indian Band v. Canada, [1997] 2 S.C.R. 119.

Major J. (Lamer C.J. La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Iacobucci JJ.)

Main point: Limited, indeterminable rights in reserve land may be granted under s.28(2) of the Indian Act.

Note: Cultural foundation is similar to that of McLachlin's dissent. It favours postcolonial values by relying on the capacity of the Opetchesaht to consent. However, McLachlin's analysis demonstrates its weakness and accords much more strongly with egalitarian Indigenous values that emphasize the rights of future generations.

Evidence: [N.B. this is 18A application] Assumption: Canadian approval to alienate land meant to protect native land base [52]; BCR represented opinion of the people Proof: eg. record confirms protracted negotiations. [56] unproven factual assertions to be dealt with at trial[58]

Concept of law: Imposed: reliance on an imposed regulatory scheme [56] Consensual: reliance on Band council consent, no claim for unfairness or uneven bargaining power [56]

Reasoning: did not dig as deeply as McLachlin

Values: Authoritarian: accepted authority of Council with limited temporal mandate to make perpetual alienation. Refused to lift the institutional veil

Perspective: Ethnocentric: Paid no heed to the argument of the Indigenous intervener

Respect: Accepted BCR but took it at face value & left future generations subject to colonial intrusion

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		9		4

**35.2 *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119.
McLachlin J. (Cory J.)**

Main points: Consent of the entire band membership is required to dispose of interests in land for many generations. The "Plain" meaning of words in a statute must be understood in the context of the legislative purpose. S28(2) of the Indian Act only applies to commitments shorter than 2 year Band council mandate.[92]

Note: Values applied correspond to international postcolonial norms.

Issues: Indigenous arguments used

Evidence: Assumptions: 1) Indigenous land could be legally alienated & 2) proclamation of 1763 "created" a process for doing it [though more likely it replicated practice with commons in England.]

Proof: assertions well illustrated by examples

Concept of law: Imposed: discussed in terms of Canadian parliament's or Crown's intent rather than people's. Consensual: importance of consent for long-term commitments.

Reasoning: Declaratory: founds "Indian" rights on colonial declaration (proclamation) [82]

Principled: good at finding principle that binds enactment [eg. Pt. IV]

Values: Authoritarian: founds rights on declaratory elements of Canadian law rather than egalitarian principle. Egalitarian: concern for band & future generations' right to manage their land

Perspective: Respect: strong support for people's capacity to consent to long-term alienations; sets out Union of B.C. Indian Chiefs' argument.[96]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Some	Principled explanation	Yes
9. Values	Authoritarian	Some	Egalitarian	Yes
10.	Ethno/ego centric		Respect/place for	Yes

Perspective			others	
Total		6.5		6.5

36. *St. Mary's Indian Band. v. Cranbrook (City)* [1997] 2 S.C.R. 678. Lamer C.J. (La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major J.J.)

Main Point: Interpretation of the agreement should be based on the true purpose of the dealings & the intention of the parties [15]

Note: What happened to the *Nowegijick* principles? Since the trial judge decided for the band and the appeal court against, there were obviously ambiguities. Why didn't McLachlin & Cory reconcile with *Opetchesaht*? Serious problem here as the case began with a question of law and was resolved on an interpretation of fact. Yet the surrounding facts were not investigated. It would have been better to send back for re-trial. I doubt that the band was looking to sell its land. It is more likely that Cranbrook wanted an airport and since it is in the mountains there weren't many options.

Issues: The Court refused to consider unnamed issues raised by the parties.[29]

Procedure: Case instituted to determine a legal question: Do the words "cease to be used for public purposes" make the surrender "otherwise than absolute"? Decision claimed to be determined on the basis of the intention of the parties which is a question of fact. [surely it should have been sent to re-trial]

Evidence: Assumptions: no evidence offered to support statements of fact in [18] No evidence to tell us whether the airport was an indigenous initiative or an external idea brought for their approval or how "fair market value" was determined.

Concept of law: Imposed: Question of the consent of present or future members of the band raised by McLachlin in dissent in *Opetchesaht* not considered.

Consensual: Claims to rely on the intention of the parties but ignored the need to investigate the intent of the band members beyond the wording of documents from the colonizing society

Reasoning: Declaratory: "Absolute" and "conditional" are not mutually exclusive terms -either conceptually or under the scheme of the Indian Act. [19]; The "other issues raised by the parties" are dismissed without even being set out.[29]

Values: Authoritarian: as under above points, affirms the "Indian Act reality"[38]

Perspective: Ethnocentric: presumption that documents, presumably drawn up by Indian Affairs, represent the intent of the band. The claim to respect others [15] is contradicted by the obvious disagreement of the band that brought the action.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign	Yes	Own language/culture	

	language/culture			
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/intervenors/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	?
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		10		3

**37.1. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010
Lamer C.J. (Cory, Major JJ.)**

Main points: oral histories should be accepted on an equal footing with historical documents [87]; Aboriginal title "must be understood by reference to both common law and aboriginal perspectives" [113]; Aboriginal title is a right in land that "confers the right to use the land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies." [111]; the land must be surrendered for a use that Aboriginal title does not permit (e.g., strip mining) [131]; s. 35(1) provides a constitutional basis for negotiation: "We are all here to stay" [186].

Note: weakness of trial: all that evidence and only one judge to assess it; confused assessment; detailed accounts of prior reasoning but not of pleadings of parties or interveners.

Evidence: *assumption:* colonial era provided solid foundation for modern legality, for example use of *St. Catherine's* [175]; federal government functioned to protect Aboriginal rights and land [176].

Concept of law: *imposed:* reliance on Crown's assertion of sovereignty; does not mention *Nowegijick*; believes he can dictate: "I laid down in *Gladstone*" [167].

Reasoning: *declaratory:* many "principles" based on own previous reasoning [140, 141, 148, 165].

Values: *authoritarian:* mere assertion of sovereignty founds legality [145]; *egalitarian:* desire to apply the same common law standard to Indigenous people (though the essence of that common law standard is ignored); title to be founded on both cultures' perspectives [113].

Perspective: *ethnocentric:* insists that Aboriginal land rights are *sui generis* [112-13]; defines the right in terms of the Indian Act and Canadian decisions [120-21]; relies on academic opinion in his culture [145]; takes common law as source of Aboriginal title [147]; applies Canadian constitutional principles although Indigenous peoples did not participate in forming the Constitution [177-78]; *respect:* recognizes and supports the importance of oral histories; Aboriginal perspective, including Aboriginal law, to be considered as source of title [147, 149]; supports negotiations and inclusion of all people affected [186].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	

5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	Some
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Some
Total		9.0		3.0

**37.2. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
La Forest J. (L'Heureux-Dubé, McLachlin JJ.)**

Main points: if Aboriginal people continue to occupy and use land, then it is necessarily of central significance to them "in developing vast tracts of land, [and] the government is expected to consider the economic well being of all Canadians. But aboriginal peoples must not be forgotten in this equation." [204]

**37.3. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
McLachlin J. agreed with both Lamer's and La Forest's judgments.**

38. R. v. Williams, [1998] 1 S.C.R. 1128.

McLachlin J. (Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major, Bastarache, Binnie JJ.)

Main Point: The expectation that jurors will behave in accordance with their oaths does not obviate the need for challenges when it is established that the community suffers from widespread prejudice against people of the accused's race.[25]

Parties: Accused is "aboriginal"

Issues: Though charged, issue was raised by accused.

Evidence: Reference to studies to support findings

Concept of law: Imposed; legitimacy of use of Criminal Code & Canadian legality taken for granted

Consensual: reliance on Parliamentary intent

Reasoning: principles enunciated

Values: aim to equalize position before the law

Perspective: Ethnocentric: belief that judicial & juror impartiality can be achieved. Respect: low threshold for allowing questioning of jurors

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		6		7

39(a). Reference re Secession of Quebec, [1998] 2 S.C.R. 217

The Court: Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Main Point: "The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table" [88]; If not negotiated in accord with constitutional principles, secession would not have the legitimacy needed for recognition by the international community [103];

Note for Canada: strong postcolonial initiative muddled by perpetuation of colonial historical perspectives and methods.

Judge: *peer:* judges members of culture of birth or choice.

Parties: *self-determined:* birth identity or chosen by immigration.

Venue: *own:* imposed by conquest or chosen by immigration.

Issues: set by elected representative.

Evidence: *assumptions:* status of Indigenous peoples is irrelevant to formation of the Canadian state; all Canadians supported what the dominant actors did (almost no primary sources cited); *proof:* references to events and procedures [33-46].

Concept of law: *imposed:* accepts British proclamatory authority [39]; *consensual:* charts

participation of colonies; Confederation to "work together" [43]; requirement for negotiation under the Constitution to effect legitimate secession [104].

Reasoning: *declaratory:* declares principles on the basis of subjective analysis; *principled:* identifies principles and applies them; Rejects principle of "effectivity" [106].

Values: *authoritarian:* Constitution established by imperial Parliament (not Canada's); *egalitarian:* Canada established so that different races can work together [43]; consent of the governed is basic to understanding of free and democratic society [67].

Perspective: *ethnocentric:* Constitution established to ensure "continuity, stability and legal order" [33]; democracy emerged in the colonial era [63]; *respect:* federalism to reconcile diversity with unity [43].

	Colonial		Postcolonial	
1. Judge	Alien decision maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of	Imposed	Yes	Consensual	Yes

law				
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Yes
Total: Canada		5.0		10.0

39(b). Reference re Secession of Quebec, [1998] 2 S.C.R. 217

The Court: Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Note for Quebec: the fact that the Canadian Constitution was imposed by conquest is not considered.

Judge: Chief Justice and two judges from Quebec [135] but with allegiance to Canada.

Parties: Quebec is a province of Canada by conquest

Venue: *foreign:* legal system imposed by conquest; *own:* Quebec formally participated in formulation of the Constitution, and French is an official language.

Issues: *imposed:* Quebec did not agree to participate; *amicus curiae* appointed and supported case against secession [135], but the procedure was public, with some interveners from Quebec.

Procedure: *bias:* *amicus curiae* supports case against secession [135]; *open:* many interveners.

Evidence: *assumptions:* judicial notice of an Anglo-Canadian version of history; *proof:* data concerning Quebec's participation in Canada.

Concept of law: *imposed:* Quebec bound by a Constitution that it did not consent to [47]; *consensual:* negotiation required if a clear majority votes on a clear question.

Reasoning: *declaratory:* source of principles (based on judicial opinion concerning a tautologically selective account of history).

Values: *authoritarian:* the legitimacy of the imperial foundation of the state is assumed; *egalitarian:* supports minority rights and popular voice through vote.

Perspective: *ethnocentric:* ignores conquest of Quebec; *respect:* French official language, participation in Confederation.

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	Yes
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Yes
Total: Quebec		10.0		8.0

39(c). Reference re Secession of Quebec, [1998] 2 S.C.R. 217

The Court: Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Note for Indigenous peoples: Aboriginal interests were specifically represented by four of the thirteen interveners. The Court referred to "aboriginal peoples" to defend its claim that Canada has a "long tradition of respect for minorities" and to cast doubt on the undecided question of whether or not Quebec represents a "people" [82, 138-39]. Yet its version of history and its account of the effect of international law completely ignores the ambiguity raised when Indigenous experiences are considered, and it declines consideration of "the concerns of the aboriginal peoples" [125, 139].

Judge: no Indigenous judges.

Parties: generic "aboriginal peoples" seen as minorities [96].

Venue: *foreign:* imposed system, foreign languages.

Issues: set by representatives of colonial governments.

Procedure: Indigenous interveners.

Evidence: *assumptions:* no evidence to support claim of protection for Aboriginal rights [46].

Concept of law: ignores need for Indigenous consent [139].

Reasoning: *declaratory:* principles founded on subjective analysis.

Values: *authoritarian:* despite the presence of many Indigenous interveners, presumes the the colonial assumption of sovereignty was legitimate.

Perspective: *ethnocentric:* included "races" do not include Indigenous peoples [43], ignores Indigenous languages ; no mention of subjection of Métis who were represented by Riel [45]; ignores treaties with Indigenous nations ; declares right of colonial peoples to self-determination "irrelevant to this Reference" [132]; *respect:* considers constitutional protection for Aboriginal peoples "important" but it would only be "taken into account" in constitutional negotiations between Canada and Quebec (assumes equal Indigenous representation is not required) [82, 139].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/intervenors/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of	Imposed	Yes	Consensual	Some

law				
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Some
Total: Indigenous		9.0		2.0

40. R. v. Sundown, [1999] 1 S.C.R.393.

Cory J. (Lamer C.J., L'Heureux-Dubé, McLachlin, Iacobucci, Bastarache, Binnie JJ.)

Main Point : The accused's acquittal was confirmed in circumstances similar to *Sioui*, but with "properly drafted regulations", the Crown could reasonably limit the hunting rights of Treaty No. 6 adherents.[46]

Notes: poor communication. Fact someone else cut the trees not dealt with until third court hearing.[19]; treaty seen as "sacred". Consensual nature of "agreement" not commented upon.[24] *Nowegijigk* translated into *Badger* & repeated like a mantra, lacking nuanced insight. *Secession Reference* duty to negotiate not mentioned. No awareness of the way the procedures used interfere with recognizing a "sphere of autonomy". Cory claimed that it was not necessary to decide whether the regulations applied to Sundown because "the appeal was resolved without reference to the *Constitution Act, 1982* but, by his own account, the acquittal he affirmed was based on the "constitutionally protected right to hunt".

Evidence: Assumptions: "virgin Forest" pre-colonization.[43]

Concept of law: Imposed: honour of Crown understood as unilateral treaty interpretation [24]

Crown could legislate to limit hunting rights [46]

Reasoning: *Badger* principles applied

Values: Advocated curtailing treaty right through regulation [45] Relied on precedential authority without considering consensual spirit of treaty procedure

Perspective: Ethno centric concept of legality. Respect: expeditionary hunting

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		8		4

41. R. v. Gladue, {1999} 1 S.C.R. 688.

Cory & Iacobucci JJ. (Lamer C.J., L'Heureux-Dubé, Bastarache, Binnie JJ.)

Main Point : Whether or not an aboriginal offender lives on a reserve, sentencing should take account of their particular situation, including the systemic disadvantages experienced by Aboriginal people.

Note: "sad and pressing social problem" [64] represented by the "tragic overrepresentation of aboriginal people in prisons[87] discussed without acknowledging role of colonialism or residential schools. Example of how a problem can be characterized in a way that avoids confronting its source. Charges related to political incidents such as Riel "uprising" or more recently Oka, Gustaffsen Lake, Burnt Church, Ipperwash & Kanesatake policing not mentioned in broad discussion of the context.

Parties: Imposed concept of "aboriginal" but accused self-identified as "Cree".

Evidence: Articles, RCAP considered.

Concept of law: Imposed: Colonial legal framework not questioned.

Consensual: Indigenous concepts from RCAP accommodated

Values: Authoritarian: Judge declares sentence. Egalitarian(?) restorative justice -goal of restitution & reintegration in community

Perspective: Ethnocentric: failure to consider colonialism & residential schools as root cause of pervasive problems. Canadian culture called "traditional"[77] Failure to recognize political objection or jurisdictional disputes in list of causes of convictions (per Oka, Kanesatake etc. or treaty interpretation cases) [80] Respect: recognition of importance of restorative justice [70]; recognition that aboriginal opinions vary [72]; rejection of assumptions [78]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes

10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		7		7

42.1 Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.

McLachlin & Bastarache JJ. (Lamer C.J., Cory, Major JJ.)

Main Points: -"Aboriginality-residence" is an analogous ground under s.15 because it is an immutable "personal characteristic essential to an Aboriginal band member's personal identity" [14]; "it is not the ground that varies from case to case, but the determination of whether a distinction...is discriminatory"[9] "conflation of the second and third stages of the Law framework is to be avoided." [12]

Note: Same profile as majority decision. They believe that "this case can be solved on simpler grounds" than those offered by L'Heureux-Dubé, then launch into a discussion of analogous and enumerated grounds that is incomprehensible to anyone not versed in the esoteric lore of Supreme Court of Canada reasoning.

Issues: Imposed: "Batchewana Band took no part in the trial"[32]

Evidence: Assumptions: said RCAP stressed "fundamental importance of retaining and enhancing their cultural identity while living in urban areas" but there was no evidence showing distance voting was part of the cultural heritage ...or that voting in band council elections facilitates access to community and elders.[17]

Concept of law: Imposed: Lesser Slave Lake submissions re consultative process ignored, like majority.

Consensual: absolute denial of political rights decried [19]

Values: Egalitarian: purpose of s.15 [5]

Perspective: Ego/ethnocentric: claim that Aboriginal residence decisions not comparable to those of other Canadians. Failure to acknowledge rootedness of some Canadians; fact that some reserves are not Indigenous homelands & that some places of off-reserve residence are. eg.. Batchewana - much off-reserve residence was on initial reserve allocation.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes

10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		10		5.5

42.2 Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.

L'Heureux-Dubé J. (Gonthier, Iacobucci, Binnie JJ.)

Main Points: "though it would be legitimate for Parliament to create different voting rights for reserve residents and people living off-reserve, ...it is not legitimate for Parliament to completely exclude [non-residents] from voting rights." [114]

Note: The finding is postcolonial in recognizing the political rights of non-residents but colonizing in its view that the solution can be dictated by a Parliament in which those concerned have no effective voice. It completely ignores the well documented goal of assimilation that prevailed at the time the basic form of the Indian Act was set. The remedy with only 18 month suspension completely ignores the complexity of consultation required making expertise very thin on the ground & making everyone prioritize their issue.

Procedure: Case directly affected the rights of on-reserve 'Indians' but there was no representation of any at trial, not even of the Batchewana band. [32] The absence of evidence concerning their situation was a factor in the reasoning [69].

Evidence: Assumptions: broadening issue & notifying only provincial AG's is notice to all "those who have a stake in the outcome" [49] No evidence to support findings re factors determining who lived on or off reserve [62] Intention of the legislature in limiting voting to on-reserve "Indians" not considered. No evidence to support finding re "Parliament's objective" for the legislation [99] Proof: some evidence re situation of Batchewana band, though it was ignored in the reasoning. Evidence supporting material assumptions was weak.

Reasoning: Declaratory: legality based on own prior reasoning. [97] dictatorial remedy ignored band realities [118] Principled: common-law methodology used [110]

Values: Authoritarian: ignored fact the Batchewana Band did not participate in formulation of the Indian Act. Egalitarian: listed arguments made by all present at trial [106-109] democracy respects minorities [116]

Perspective: Ethnocentric: Off-reserve band members described as "a discrete and insular minority" [62] though over 62% of Batchewana band lived off reserve. [27] [Canadian rather than Batchewana perspective applied] Context is "Canadian society" [63] Failed to see concerns raised by C-31 influx though mentioned by intervener. [109]

Respect: "reasonable person" defined in perfect accord with post-colonial requirements [65].

In remedies, listed proposals of parties & most interveners. [106-109] respect for minorities [117]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	

2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	some
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		10		5.5

43.1 R. v. Marshall [1999] 3 S.C.R. 456.

Binnie J. (Lamer C.J. L'Heureux-Dubé, Cory, Iacobucci, Binnie JJ.)

Main Point : Extrinsic evidence concerning the historical and social context in which a treaty was negotiated can be taken into account when interpreting the common intent of the parties. The trial judge's findings of fact must be respected, but failure to give adequate weight to the concerns and perspectives of one of the parties is an error of law.

Evidence: Assumption: "In my view, the treaty rights are limited to securing "necessaries".[7]

(note unsubstantiated acceptance by expert & Binnie that treaty rights are "subject to regulation") [38]

Proof: careful consideration of the documentary sources. Reference to Dr. Patterson's evidence[37]

Concept of law: Imposed: dependent on British recognition of Mi'kmaq rights [19]

Unilaterally imposed regulations can be enforced without violating treaty rights [62]

Consensual: no limitation on treaty right unless included in the treaty [65]

Reasoning: Declaratory: reliance on precedent [9-14] Principled: many explained

Values: Authoritarian: Imposed own category and threatened Marshall for violation.[8]

Egalitarian: "A deal is a deal. The same rules of interpretations should apply." [21]

Perspective: Ethnocentric: legality founded on British recognition [19] Treaty interpreted as unilateral granting of rights rather than inter-cultural or international agreement[54]

-Respect: trial judge erred by failing to give adequate weight to the concerns of the Mi'kmaq. [19]

"there can be no limitation on the method, timing and extent of Indian hunting under Treaty, apart, I would add, from a treaty limitation to that effect".[65]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled	Yes

			explanation	
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		9		6

43.2 R. v. Marshall [1999] 3 S.C.R. 456.
McLachlin J. (Gonthier J.)

Main Points: A general treaty right to trade cannot be founded on an expired exclusive trade covenant.

"A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects, expressly or by inference, the activities in question."
 [110] A treaty right must be defined so that the government can know how far it may justifiably trench on the right in the collective interest of Canadians.[112]

Note: "generous" interpretative principles stated [110] but not applied.

Parties: assumed Mi'kmaq were British subjects

Evidence: Assumptions: -Mi'kmaq were British subjects & acknowledged British jurisdiction over

N.S [86] Proof: used to support finding of mutual understanding[89]

Concept of law: Imposed: presumption that British law applied to Mi'kmaq as to British though the treaty only included agreement that inter-cultural conflict would be solved by British law.

Values: Authoritarian: precedents, not reasons found principle of interpreting in historical/cultural Context.[81] Assumed British had the right to dictate who could and could not trade.[86]

Perspective: Ethnocentric: Assumption that there is no right unless it is "granted" by treaty.[108]

Respect: each treaty to be interpreted in its historical and cultural context. [81]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		9		3.5

44 (a) R. v. Marshall [1999] 3 S.C.R. 533.

The Court: (Lamer C.J. L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Binnie JJ.)

Main Point: The majority judgment in *R. v. Marshall* was misunderstood.[2] "The Court did not hold that the Mi'Kmaq treaty right cannot be regulated". [2] "It is up to the Crown to decide whether or not it wishes to support the applicability of government regulations"[2]. "...the merits of the government's justification [for regulation] may vary from resource to resource, species to species, community to community and time to time." [22]

Note: effect of the judgment was to place very narrow limits on the right that seemed to be affirmed in the majority reasons in the initial judgment.

Evidence: Assumption: Britain had a right to impose its laws on Indigenous people in "Nova Scotia".

Proof: Careful documentation of its explanation of its own past pronouncements.

Concept of law: Imposed: implicit requirement that Mi'kmaq get approval from Canada to do anything with resources.[20] Crown can decide whether or not to impose regulations and whether or not to enforce them.[2] Consensual: support for negotiated solutions [22] though firm support for "Government" discretion.

Reasoning: Declaratory: "The exercise of treaty rights may be regulated"[35] (no ref to international law) Principled: Some principles better enunciated here than in *Marshall I*.

Values: Authoritarian: "the government's regulatory power is clearly affirmed" [25] presumption that only Canada has a right to impose regulation of resource use.[20-21] Government may define treaty right "in terms that can be...understood by the Mi'kmaq community"[37]

Egalitarian: entitled to immediate acquittal like any other accused found not-guilty.[8] right to know the case to meet.[15] Intention of both parties to a treaty to be considered.[19] "equitable sharing"[38]

Perspective: Ethnocentric: Presumption that one party's conception of the import of the treaties prevails and that no legal solution is possible other than that generated by Canadian legal culture. Indigenous conceptions are invisible eg. "Gaspegewich = "the end of the land".

Respect: (Less) Agreements negotiated with Britain varied from community to community.[17]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	

3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	?
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Less
Total: (Mi'kmaq)		9		4.3

44 (b) R. v. Marshall [1999] 3 S.C.R. 533.

The Court (Lamer C.J. L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Binnie JJ.)

Main Point: The majority judgment in *R. v. Marshall* was misunderstood.[2] "The Court did not hold that the Mi'kmaq treaty right cannot be regulated". [2] "It is up to the Crown to decide whether or not it wishes to support the applicability of government regulations"[2]. "...the merits of the government's justification [for regulation] may vary from resource to resource, species to species, community to community and time to time." [22]

Note: Obvious social & cultural differences between the members of the Court and the fishermen's coalition suggest that the case had a colonizing effect on them as well.

Judge: social experience & culture radically different from fishermen

Parties: Imposed: the people of Nova Scotia did not consent to join Confederation. *Secession*

Reference [48] Self-determined: Represented through 2 separate provinces, members of Parliament & municipalities

Venue: Canadian institutional venue

Issues: The motion considered was filed by the Coalition.

Procedure: public, interveners, arguments reviewed

Evidence: as for Mi'kmaq

Concept of law: Imposed by Court interpretation. Enforcement of regulations is at the unfettered discretion of "the Government".[2]

Reasoning :as for Mi'kmaq

Values: as for Mi'kmaq -high level of government regulatory discretion equally applied to all

Perspective: blind to the fishermen's fears & expertise

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10.	Ethno/ego centric	Yes	Respect/place for	

Perspective			others	
Total: (Settler)		7		6

45 (a) *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.

The Court: (McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.)

Main Point for Alberta: The Act's purpose is to protect public safety. Parliament may control indirectly[40]

Judge: Are judges peers to farmers & hunters?

Evidence: Assumption: relied on study saying deaths "may" increase in jurisdictions with fewest restriction without evidence re actual effect.[21] Comparison of guns to cars based purely on subjective experience.[43] Proof: citing Hansard [20]

Concept of law: Imposed: Parliament's purpose conflated with bureaucratic interpretation [20] Consultation not needed.[56]

Reasoning: Declaratory: Rand J. in *Margarine Reference* cited without explanation re. ends served by criminal law [32] "prohibitions and penalties are not regulatory in nature"[38]

Perspective: Ethnocentric: Concept of guns, cars [43-45] What did interveners argue? Analysis of the perspectives of farmers & hunters conspicuously absent.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	?
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total: (Alberta)		6		6.5

45. (b) *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.
The Court: (McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.)

Main Point for Indigenous people: Consultation with "rural aboriginal Canadians" has no bearing on division of powers analysis.[56] ie Issues may be characterized to completely exclude Indigenous concerns.

Procedure: Most Indigenous peoples not represented

Evidence: Assumption: People who would have trouble accessing the registration scheme would be able to argue their case in court.[56]

Concept of law: Consultation not required to ensure legality..[56]

Reasoning: principles externally applied.

Values: no Indigenous inclusion in formation of regulatory scheme

Perspective: Ethnocentric: "Firearms are often used as weapons in violent crime"[43] "Guns cannot be divided into two categories"[45] Indigenous concerns are irrelevant to questions related to division of powers.[56] "Gun control is directed at a moral evil".[54]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total: (Indigenous)		10		1

46. R. v. Catcheway, [2000] 1 S.C.R. 838.

Iacobucci J. (McLachlin C.J. L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie, Arbour, LeBel JJ.)

Main Point: When there has been a reasonable apprehension of bias a new trial is warranted

Note: Court of Appeal had dismissed without giving reasons.

Issues: charge but defence raised the issue at hand.

Concept of law: Crown agreed - evidence showed bias.

Reasoning: prior involvement raises reasonable apprehension of bias.

Values: standard rules of procedural fairness applied.

Perspective: New trial ordered giving chance to present case in a neutral tribunal.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total		4		7

47. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

Iacobucci J. (L’Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Arbour, JJ.)

Main Points: The equality guarantee in s.15 of the Charter are not violated by a scheme designed to benefit a disadvantaged group to the exclusion of an equally disadvantaged group. The casino program did not affect the core of federal jurisdiction under the *Constitution Act, 1867* s.91(24).

Note: At this point, s.15(2) appears to serve as an aid to interpreting the rights protected by s.15(1).

The reasoning in the case seems bizarre & twisted. Argument turned on Indian Act status leaving the issues totally colonized. The context is fundamentally troubling. Should the right to self-government for anyone depend on a casino operation? Should a government promote and exploit addictions on the pretence that this will make it possible to realize an inherent right?

Parties: Imposed: Identity of all parties defined in relation to Canada’s Indian Act. [79]

Issues: Imposed: Parties status defined by the Indian Act. Mutually Determined: Parties defined the issues brought to court.

Evidence: Assumption: a casino operation can be used to promote equality. Proof: re. the background and development of the scheme.

Concept of law: Imposed: judicial precedent used to dictate the interpretation of the Charter [93,108]

Constitution Act, 1867 used to define jurisdiction. [109-111]

Consensual -reliance on the partnership quality of the casino venture. [82]

Reasoning: Declaratory: approach relies heavily on the subjective interpretation of the judiciary

Principled: Serious search for guiding principles though contact with reality lost in legalisms.

Values: Authoritarian: presumption Canada has government which may persist in withholding self

Government.[78] Egalitarian: arguments of all parties seem to be explained with unusual care.

Perspective: Ethnocentric: “reasonable person, in the circumstances of the claimant”[55] applied to find, in essence, that the claimants were unreasonable to raise their concern.[90]

Respect: each community has its own history & relations with government.[10] s.15(1) concerned with personal autonomy and self-determination - “human dignity” definition.[54]“reasonable perspective of the claimant”.[55]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	

2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		9		6

**48. (a) *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633
Bastarache J.**

Main Point: Land evaluation must respect legal restrictions, including reserve status.

Note: There was no conflict with the Crown in this case. The Musqueam chose to lease their land and did so by invoking Canadian legal paradigms.

Parties: Chose to lease under Canadian law

Venue: Chose to lease under Canadian law

Issues: Imposed by the renters but according to lease terms

Evidence: *Except McLachlin omission re Salish Park[13.26]

Concept of law: concern with intent of the parties

Reasoning: *Declaratory: (McLachlin only) Evidence regarding Salish Park was ignored without explanation

Values: Applied same rules to all regardless of status.

Perspective: Respected the Musqueam cultural choice re the leasing.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total (Musqueam)		4		9

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes

5. Procedure	In camera/biased	1*	Public/interveners/equal	Yes
6. Evidence	Assumptions	1*	Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total (Renters)	* McLachlin decision only	2*		10

48. (b) Gonthier J. (Major, Binnie, LeBel JJ.)

Main Points: The actual state of the land, including the fact that it is part of the reserve, should be used to calculate "current land value".

48. (c) McLachlin C.J. (L'Heureux-Dubé, Iacobucci, Arbour JJ.)
dissent

Main Points: "Current land value" means the actual value of similar land held in fee simple and it should not be reduced by 50% because it is situated on a reserve. The Band could sell so "The reserve character of the land...is not a legal restriction" [14] "Except where the parties expressly provide for a different method of valuation, it is plain meaning and common practice that should provide the default." [18]

49. R. v. Deane, [2001] 1 S.C.R. 279

McLachlin C. J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.)

R. v. Deane, (2000), 143 C.C.C. (3d) 84, 129 O.A.C. 335.

Main Point : Procedural error does not merit a retrial unless it could produce a different outcome.

Note: Fundamental issues concerning relations between Canada and the Indigenous nations were avoided. The policeman with his finger on the trigger was found guilty of criminal negligence, not the federal bureaucracy that created the problem or the provincial officials who sent him there with a gun in his hands.

Judge: same basic socialization for Deane/ foreign for George

Parties: Canadian citizen/alien designation as "aboriginal"

Venue: -own culture/colonially imposed culture

Issues: protocols & legal code Deane professionally supported

Procedure: -public

Evidence: Assumption: deceptive basis for the police action against the protesters ignored

Proof: evidence concerning Deane's actions closely considered

Concept of law: Imposed command model: Deane consented through parliament to the standards of

his culture/ not George

Reasoning: Declaratory as the explanation had to be deduced from the *Criminal Code*

Principled for Deane's concerns principles used in the analysis were set out/George's unaddressed

Values: Authoritarian command model of legality implemented & supported .Egalitarian equality before and under the law imposed

Perspective: Ethnocentric: No insight into the conceptual trap created for Deane inducing him to

Lie or imagine rifle flash; George's perspective assumed to be irrelevant to the issues

Respect: Firm assertion that unarmed "Indians" can no longer be shot.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker		Peer decision	Yes
2. Parties	Imposed identity		Self-determined	Yes
3. Venue	Foreign language/culture		Own language/culture	Yes
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of	Imposed	Yes	Consensual	Yes

Law				
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total re. Deane		6		10

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total re. George		9		4

50. 1 Mitchell v. M.N.R., [2001] 1 S.C.R. 911

McLachlin C.J. (Gonthier, Iacobucci, Arbour, LeBel JJ.)

Main point: "Claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities" [51]

Note: Technique used is to redefine the issues, then claim that the new definition is not met. According to Binnie, there was much debate on sovereignty at trial and at the Supreme Court [69], but McLachlin avoids this issue, which is central to the case [64], at least from the perspectives of both Mitchell and the Crown.

Procedure: *biased*: defines case to meet in territorial terms then uses territorial identity to exclude on the basis that even "Chief Mitchell did not discuss Mohawk trading activity north of the St. Lawrence River" [25, 48, 55].

Evidence: *assumptions*: characterizations of Adams and Gladstone ignore acknowledged

evidentiary limits [52]; little evidence to show that Mohawks did not carry goods north of river; ignores role of Mohawks in modern state formation ; evidence: much close analysis, though she misreads Richter.

Concept of law: *imposed*: the Court asserts the right to characterize based on *Van der Peet* [15].

Reasoning: *declaratory*: conceptual requirements of time and space [55]; assertion of the doctrine of continuity not founded on "prior informed consent" or anything else [62].

Values: *authoritarian*: ignores Mohawk cultural conceptions ; Does not consider the need for equal access to law-making function .

Perspective: *ethnocentric*: ignores symbolic nature of Mitchell's action, though evidence was before the court [85-89]; imposes own definition of the issues [25].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	
Total		10.0		3.0

50. 2 Mitchell v. M.N.R., [2001] 1 S.C.R. 911
Binnie J. (Major J.)

Main points: control over the mobility of persons and goods in the country is a fundamental attribute of sovereignty [160]; Aboriginal people are themselves part of Canadian sovereignty [164]; Indigenous mobility rights across the Canada-US boundary are incompatible with European (now Canadian) sovereignty and never came into existence [172-73].

Note: Adopts McLachlin's reasons, so most of the same indicia apply.

Issues: sets out Mitchell's arguments but answers own conception of the issues.

Evidence: *assumptions:* Canada's international obligations depend on instruments that Canada has not ratified [81-83]; advantage from intercultural (cross-border) role is not Indigenous [92] [v. Richter]; the People of the Longhouse go back 10,000 years [131].

Concept of law: *imposed:* audacious reinterpretation of the *Two Row Wampum* ignores the need for consent to agreements [130]; ignores the need for consent to found a "confederal relationship" [150].

Reasoning: *declaratory:* claims that Canada tried to minimize the disruption caused by the border [84]; RCAP sees Aboriginals as full participants in a shared Canadian sovereignty, so they are part of it [135]; accepts that sovereignty could simply be declared by the 1783 *Treaty of Paris* [157]; uncritically accepts Vattel's declaratory concept of legality [163]; asserts a right to impose an external assessment of what defines Mohawk culture [164].

Values: *egalitarian:* Mohawks and Canada have their "own framework of legal rights and responsibilities" [131]; yet so blind to the meaning of the *Two Row Wampum* and the need to share social space that his interpretation contradicts the concept of shared sovereignty.

Perspective: *ethnocentric:* accepts uncritically 1906 Privy Council concepts [108]; "[t]he Constitution was patriated and all aspects of our sovereignty became firmly located within our borders" [129]; sees longhouse as "spiritual" rather than governmental practice [117]; *respect:* describes Mohawk problems and wish to reunite a community divided by imposed boundary [77, 90]; recognizes that "[f]rom the respondent's point of view, the aboriginal right flows from Mohawk sovereignty" [117].

	Colonial		Postcolonial	
1. Judge	Alien decision maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes

6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	some
10. Perspective	Ethno-/egocentric	Yes	Respect/place for others	Yes
Total		10.0		4.5

51.1 Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746. Iacobucci J. (McLachlin C..J., Binnie, Arbour, LeBel JJ.)

Main Points: -“this Court is not required to give legal effect to an unauthorized act of the state” [69]
 The band’s exercise of regulatory powers is limited and must be consistent with other regulations [77]
 When ambiguity makes two interpretations possible, the one favourable to Indian interests prevails [68]

Note: The authority under which the canal was taken was not explained.[39] Case is a product of colonial modes of operation which were not directly repudiated by the Court. Drawing on Lambert’s reasoning in the BCCA, the Court, none the less, endorsed a decolonizing approach.

Issues: laws imposed but band decided to tax.
Evidence: Noted the problem of insufficient evidence on significant aspects of the case [38-40]
Concept of law: Imposed: Crown may remove land from reserve if intent is clear and plain.[47]
 Governor in Council is the grantor of the interest.[80] need for consent not considered.
 Indigenous rights emphatically subordinated to Crown sovereignty [166-7]
Reasoning: many principles based on own reasoning.
Values: Authoritarian: non-consultative expropriation process validated [57]
Egalitarian: rejection of idea that “Indians” suffer from “incapacity”. [44]; instead of trumping Indian interest, public interest must be reconciled with it. [57]; limits both Governor in Council [69] and band [77]
Perspective: Ethnocentric: Crown wanted to ensure “Indians are not dispossessed of their entitlements” [46] Respect: acknowledgement that expropriation of reserve land is different because of the “*sui generis*” nature of the aboriginal interest”. [45]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/e qual	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	

8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		8		6

51.2 Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746. Gonthier J. (L'Heureux-Dubé, Gonthier, Major, Bastarache, JJ.)

Main Points: "Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament ..." [and] must be read "with a view to elucidating what it was that Parliament wished to effect." [124] "a bare interest in reserve land which is not also the object of aboriginal title, treaty rights or such other aboriginal rights cannot be considered to be an "aboriginal right" that is protected under s.35 of the *Constitution Act, 1982*". [169]

Note: The case did not attack the expropriation of the land, the amount of land taken or the adequacy of the compensation. [156] "Once it is ascertained that s.35 of the Indian Act allows the expropriation of a fee, the possibility of the removal of land from a reserve by expropriation can only be impeached by attacking the constitutionality of s.35 of the Indian Act, or suggesting that somehow a particular instance of government consent, or indeed all consent to the expropriation of full ownership, is a breach of the Crown's fiduciary obligation." [157]

Issues: Band decided to tax canal lands in context of imposed laws
Evidence: Assumed the appropriation of the land the canal was on was valid.

Concept of law: Imposed: distinction between consensual sale and non-consensual expropriation irrelevant [138]

Reasoning: Declaratory: reliance on the court's own past findings [138] law of expropriation [149]

Principled: Those relied on are explained

Values: Authoritarian: understanding of Indians irrelevant to expropriation of their land [124]

Governor in Council may impose terms as he sees fit. [131]

Perspective: Ethnocentric: Reliance on debate in a parliament where "Indians" had no vote or representation [151] Place: Interpret statute broadly to maintain rights & narrowly to limit rights [125] Open to constitutional challenge re validity of s.35 of the Indian Act? [142]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of	Imposed	Yes	Consensual	

Law				
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		9		4.5

52. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.

LeBel J. (McLachlin C.J. Gonthier, Iacobucci, Major, Binnie, Arbour, LeBel JJ.)

Main Points: "the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity".[72] The British Columbia Heritage Conservation Act considers First Nations' culture as part of the heritage of all residents of British Columbia [44]. Though the "overwhelming prevalence" of objects that the act applies to are Aboriginal, its pith and substance is property, so it is *intra vires* the province. The "need to exploit the province's natural resources...in order to maintain a viable economy that can sustain the province's population" must be balanced with "the need to preserve all types of cultural and heritage objects".[76]

Note: If decolonization had been in issue, the fact that permits to cut culturally modified trees (CMT's) required the Minister's consent, not the Indigenous people's consent, would have been determinative. This is a case that cannot see the Forest for the trees!! Court did not consider that the Forest itself might be part of Kitkatla cultural heritage.

Venue: equated with all people in B.C. [69]

Issues: Need to prove Aboriginal right, not established that "the essential and distinctive core values of Indianness" were affected.[76]

Evidence: Assumption: no evidence to prove that logging the area including the CMT's was a "goal deemed by society to be of greater value" & not just a profit-making venture for the logging companies.[62]

No evidence to show respect for Indigenous rights would prohibit a viable economy[76] assumed the province's population needs to be maintained when in-migration is actually encouraged. Proof: related to ss. of act, past case law.

Concept of law: Considered exclusively according to Canadian constitutional parameters

Reasoning: as per usual case law analysis

Values: Minister's consent required, not the peoples'.s.13(4)

Perspective: Ethno-centric: Purpose of legislation narrowly defined- extrinsic evidence is only

seen as being "Hansard or the minutes of parliamentary committees"[53] Concept of shared

sovereignty includes no Indigenous sphere (contrary to Binnie's supplemental reflections in

Mitchell). No consciousness of the way "exploitation of natural resources today" rather than

preservation of the environment for future generations is a culturally specific purpose.[65]

Respect: sets out positions of the parties [31-41] "Native concerns must be weighed at most steps of the administrative process"[44]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		9		3

53.1 Ross River Dena Council Band v. Canada, [2002] 2 S.C.R. 816. Bastarache J. (McLachlin C..J. L'Heureux-Dubé JJ.) (minority reasons)

Main Points: : "the Crown is still free to deal with its land in any other manner it wishes"[7] S.18(d) of the *Territorial Lands Act* only concerned use of vacant land for agriculture and did not limit the Crown's prerogative re reserve creation.[8] A reserve may be created by many formal procedures, provided the Crown intends to create a reserve.[10]

Note: Score as per LeBel's majority reasons

Evidence: Assumption: The land where the Dena live belongs to the Crown [7]

Proof: disagreement between officials in contact with Indigenous people and Ottawa [72-75]

Concept of law: If the Dena are part of Canada, no consideration of the terms of their joining.

Reasoning: Declaratory: requirements for reserve creation set out, but source not explained [1, 6]

Values: Authoritarian: "the Crown is still free to deal with its land in any other manner it wishes"[7]

Perspective: Ethno-centric: No sense that the concept of "royal prerogative" may have changed over time or that it is alien to Dena culture. No consideration of the principle that ambiguities should be decided in favour of the Indigenous nation.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Little
Total		10		3.3

53.2 Ross River Dena Council Band v. Canada, [2002] 2 S.C.R. 816.
LeBel J. (Gonthier, Iacobucci, Major, Binnie, Arbour JJ.)

Main Points: To create a reserve the Crown agent must "have represented [the Crown] in very important authoritative functions"[66] and must have intended to create a reserve.

Procedure: In camera: Case to meet not known in advance - decided on the basis of *Sioui* test and the implicit claim that the Dena could not reasonably have perceived the Canadian officials as being sufficiently authoritative to bind the Crown. [As in *Bear Island* effect goes beyond declaratory reasoning]

Evidence: Assumption: Ross River Dena would perceive differences in interests recorded in the Yukon Land Registry & perceive that registry of their land was not important enough to be a reserve[66]

Concept of law: Imposed: issue of Indigenous consent to arrangements with Canada not considered

Consensual: end comment supporting the negotiation process for the Umbrella Agreement, but the Dena who had not participated, were left in the air.[19]

Reasoning: "reasonably seen by the First Nation" test identified [64,69] but not really applied.

Values: Authoritarian: without a treaty "the Governor-in-Council is free to designate any Crown land the Crown chooses as a reserve for a particular band".[62] General presumption is that Canada determines what the law is without Indigenous participation.

Perspective: Ethnocentric: Without a treaty, Governor in Council is under no obligation to set aside land for a band [62] Presumption that Ross River Dena perceive importance of Crown agents in the same sense they do[66] Respect - detailed account of all parties pleadings; "Indians' point of view" from *Sioui* [64]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Little
Total		10		

				3.3
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54. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.

Binnie J. (McLachlin C..J.L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.)

Main Points: Both bands had agreed to the existing use of the reserves so no substantive wrong was done. Discretionary control is "a basic ingredient in a fiduciary relationship".[80] "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.[81] Outside the *Constitution Act, 1982* s.35, the S.C.C. has only recognized fiduciary duty in relation to land [81]

Note: reliance of bands on authoritarian "black letter law" to create "legislative entitlement" through ditto mark error [52] used to claim equitable remedy. Consider why fiduciary duty on the part of the Crown is considered *sui generis* in the colonial context.

Parties: Indian Act incorporated chosen designation

Venue: Kwakwala language [9] Foreign: Trial judge held "Cape Mudge Indians " could understand

English directly or with interpreter in 1907. Own:The venue was chosen by the Indigenous parties

Issues: Decided own issues

Procedure: ? per *Wewaykum II*

Bias:? Binnie, the judge who wrote the reasons, was Crown counsel in early stages (*Wewaykum II*)

Evidence: Proof: detailed bureaucratic paper trail [10]

Concept of law: Imposed: OIC procedure "transferred administration and control" of reserve land to

federal Crown[51] Consensual: "wishes of the Indians" sought & respected.[6, 24, 37] The Court should not "allow the true intention of the parties to be frustrated by "technical" rules embodied in the common law.[43]; negotiated ditto marks distinguished from these[54]

Reasoning: Declaratory assertion of the political trust doctrine [73]

Values: Authoritarian reliance on Anglo-Canadian legality.

Egalitarian: Crown conceived as neutral arbiter in accord with the character of the application[96]

Perspective: Ethnocentric: assertion of the Anglo-Canadian legal canon [73-75] assertion of British

sovereignty seen as a "necessity".[79] Assumed, no Aboriginal obligations[95] Respect: sets out

positions of the parties [31-41]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes

3. Venue	Foreign language/culture	Yes	Own language/culture	Yes
4. Issues	Imposed		Mutually determined	Yes
5. Procedure	In camera/biased	?	Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes*	Principled explanation	Yes
9. Values	Authoritarian	Yes*	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes*	Respect/place for others	Yes
Total		7		9

*Most colonial indicia occur in the discussion of "*sui generis* fiduciary duty" that is not essential [after 72] Case assessed without consideration of issues raised by *Wewaycum II*.

55. R. v. Powley, [2003] 2 S.C.R. 207.

The Court: (McLachlin C.J. Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.)

Main Points: Aboriginal rights are communal rights [24] Métis identity can be determined on the basis of self-identification, ancestral connection and community acceptance.[30] [though remaining under the control of Canadian courts] The *Van der Peet* test can be applied to determine Métis rights that were distinctive and integral to the pre-control Métis community.[38]

Parties: Imposed minority status, but self-identified

Issues: charge countered by self-determined argument

Procedure: Pre-control test not identified until the SCC level so Powley could not know the case to meet. If convicted a retrial should have been ordered.

Evidence: evidence reviewed

Concept of law: Consensual: self identification - community determines identity [31-3]

Reasoning: eg. purpose of s.35 protection declared[13] *Van der Peet* principles declared applicable

Values: Authoritarian: imposition of European legality equated with control [39] Egalitarian: Personal identity & community opinion crucial for determining Métis identity[31-3] Métis to be treated by analogy as Inuit and Indians[37]

Perspective: Ethnocentric: "Riel rebellions" [26] depersonalized references to "Indian band".[35]

Respect: Community allowed to self-identify members

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Little	Respect/place for others	Yes
Total		7.3		8

56. R. v. Blais, [2003] 2 S.C.R. 236.

The Court: (McLachlin C..J. Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.)

Main Points: Métis are not entitled to benefit from the protection for "Indians" under the NRTA. Métis and 'Indians" were separate and distinguishable groups at the time of the NRTA. A requirement for continuity of language should not be imposed on the constitution as a whole.

Note:Only the Crown's view of the law considered [33] Colonizing effect of case derives from foundation on an imposed legality. Métis arguments (as represented by the Court) did not disturb this.

Issues: -imposed by charge, determined by Blais' pleadings [13] but legal framework (NRTA) is imposed.

Evidence: Agreed facts re basic charge. Noted how evidence supported trial findings [20] MacDonald quote [22] Census data [27]

Concept of law: "rightly or wrongly, this view did not extend to the Métis"[33]

Reasoning: Principles explained, but based on Crown's imposed legality (note some seeming illogical arguments of Métis eg. [36])

Perspective: Ethnocentric: Observation that Métis did not seek Crown protection [20] is strange given public knowledge of military conquest of Riel & Métis. Respect: Crown & Métis perspectives referred to [20] Métis arguments set out & addressed [36-40]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		8		4.5

57. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.

INDIVIDUALLY NAMED COURT

(McLachlin C..J. Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel, Deschamps JJ.)

Main Points: -“no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.”[92]

Note: Given the hierarchical character of the judicial system, it might be impossible to find a trier for this case who is neutral in the sense of not being implicated -short a jury trial or external assessment by an international tribunal.

Issues: Crown filed motion [22], Court invited submissions [24]

Procedure: Except for Deschamps, they judged their own decision.[92] Heavy reliance on Wilson

J.’s article about court procedure. Was it shown to the Indigenous parties?

Evidence: Assumption: no evidence to support the claim that anyone can be impartial

(eg.psychological studies) No opportunity to cross-examine on their assessment of their own

procedure - which was critical to the outcome. Proof: Memos related to Binnie examined in detail & his statement included.

Concept of law: Imposed: both indigenous parties wanted the judgment vacated but it was

upheld.[24,25] The Crown filed a motion [22] after Campbell River sent an information request[15]

The Court asked for submissions from the parties [24] and left them to pay the costs of this [94].

Reasoning: Declaratory: assessment founded on their own conviction.[90] Principled: eg re bias &

need for justice to be seen to be done

Values: The fully informed “reasonable person” test seems egalitarian, but as applied by the Court none of the Indigenous parties or interveners qualified as “reasonable”.

Perspective: Egocentric “alleged reasonable apprehension of bias”[1] use of themselves as the standard for the reasonable person...failure to deal with the short-comings associated with the fact that they were judging their own proceedings

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign	Yes	Own language/culture	

	language/culture			
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased	Yes	Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total		10		2 ½

58. Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585.

Bastarache J. (McLachlin C.J. Gonthier, Iacobucci, Major, Binnie, Arbour, LeBel, Deschamps JJ.)

Main Points: Adjudication is distinct from legislation so a province can enable a commission that may be required to consider defences based on Aboriginal rights.[34] “the procedural right to raise at first instance a defence of aboriginal rights in a superior court, as opposed to before a provincially constituted tribunal” has not been shown to go to the core of Indianness.[33] If an administrative tribunal has the power to interpret questions of law, it may apply valid laws only to the extent that they do not run afoul of s.35 rights.[39]

Issues: charge

Values: Authoritarian: discussion concerns what is “allowed” or “Permissible” (not “agreed”)[25]

Egalitarian: concept of equality before the law implicit in considering effect of right to appeal [22]

Perspective: Ethnocentric: Aboriginal rights have been identified as “collective rights”, but Paul’s nationality is not identified. He is just “a registered Indian”. [1] Totally absorbed in legal arguments so esoteric that the understanding of those with enough legal expertise to sit on the B.C.C.A. was called “fundamentally wrong”. [18] Expertise of specialized tribunals recognized [30], but not the expertise of Indigenous peoples in their own cultures. **Respect:** The judgment has the effect of requiring all tribunals to take account of Aboriginal rights, making them more accessible to those without the means to pursue their rights to higher courts.

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes*	Mutually determined	Yes*
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Yes

10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		7		6

* The very technical procedural arguments addressed in this case did not arise from the charge. However, they may not have been raised by Paul either. They may have been the initiative of the lawyer required because of the charge. If so, the burden of this case, whose cost surely exceeded the price of the deck Paul wanted to build, is even more onerous.

59. Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511
McLachlin C.J. (Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish. JJ.)

Main Points: "Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate." [37] - "the duty to consult and accommodate...flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group." [53] - "The honour of the Crown cannot be delegated" to third parties. [53]

Note: In this case the Court is caught at the crossroads between colonial and postcolonial legality. In keeping with the colonial establishment of British Columbia, the province assumed it had legal title to Haida Gwaii and issued Weyerhaeuser a licence to cut trees there. However, under postcolonial rules "aboriginal title" must be recognized so the Court was faced with two claims whose validity depended on which legality prevailed.

Parties: Haida identity accepted - but only as Aboriginal and in Canada

Issues: Imposed by incursion of logging but Haida determined issues for court

Concept of law: Imposed: Crown assumption of "discretionary control" accepted. [18]

Consensual: Haida may choose what remedy to seek. [13]

Values: Authoritarian: decision-making remains in "the government" despite "deep

consultation" [44] Egalitarian: emphasis on consultation as "talking together for mutual

understanding" [43]

Perspective: Ethnocentric: presumption that only Canada has the capacity to recognize legality [1]

"The government holds legal title to the land" [6] Haida must prove rights to Canada but Canada not required to prove rights to Haida. [18, 36] "the duty to consult and accommodate...flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group." [53] Respect: Begins by setting out the problem from a Haida perspective. [1] Haida allowed to seek the remedy they wanted [13]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Yes
5. Procedure	In camera/biased		Public/interveners/e	Yes

			qual	
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Some	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		6.5		8

60. Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550.

McLachlin C.J. (Major, Bastarache, Binnie, LeBel, Deschamps, Fish. JJ.)

Main point: If an Aboriginal nation with a *prima facie* claim is consulted during the certification of a project in their claim area and if their concerns are accommodated in the view of the Minister, the project may proceed over the nation's objections.[45]

Note the contrast between the nuanced description of Haida Gwaii in *Haida Nation* and the depersonalizing use of "TRTFN" here, especially when the mine in question is described by its full culturally appropriating name of "Tulsequah Chief Mine", as if the foreign mine had more Indigenous identity than the people themselves.

Parties: *Imposed* very! "TRTFN"[1]

Venue: *Foreign:* "the TRTFN...wished to have its concerns addressed on a broader scale than that which is provided for under the Act".[36]

Evidence: *Assumptions:* Staples' addendum was able to adequately express Taku River concerns[13] Content of the Tlingit concerns in the supplementary report not reviewed.

Proof: supports finding B.C. had knowledge of Taku River's title & rights claim[26]

Concept of law: *Imposed:* Tlingit concept of requirements rejected in favour of those in provincial legislation.[43-4] Consent clearly not required here.

Reasoning: *Declaratory:* Tlingit concerns declared accommodated with no specification of what they were & only hazy general reference to them.[44] *Principled:* *Haida Nation* principles referred to but not fully applied.

Values: *Authoritarian:* preference for Project Director's assessment over Taku River's - duty is only to consult, not to obtain consent and Indigenous opinion is ultimately irrelevant as an external assessment of their opinion is relied upon. [41]

Perspective: *Ethno/ego centric:* Trial judges directions for reconsideration of the Project Approval Certificate not set out & Appeal court's reasons not detailed so reader cannot assess the reasonableness of other judicial approaches [19, 20] Blind to the province's role as a party to the colonization of the Tlingit.[42]

Respect: Inclusion of the Tlingit in on-going consultations expected.[46]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	

4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total		9		3

61.1 R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220.
McLachlin C.J. (Major, Bastarache, Abella, Charron. JJ.)

Main points: "what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern context".[26] "To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained." [59]

Note: Trial *Bernard*: "according to the evidence of Chief Augustine, the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which in my opinion, is fatal to the claim for Aboriginal title".[81] British authority to grant Mi'kmaq land never questioned or explained. Repeated assertion that "aboriginal perspectives...must be considered" but this principle was not applied and an externally determined analytical framework was applied. Presumed nothing "dishonourable" about taking over the whole of someone else's environment.

Parties: -presumed to be under British rule

Evidence: Assumption: the right to a catch & sell fish depends on treaties with the British.[13]

"commercial logging" as conducted by the accused was "a European activity" [34][where?]

Common law right to title has always meant exclusionary control.[77]
[no evidence to support]

Proof: discussion of Royal Proclamation & Belcher's Proclamation

Concept of law: Imposed: treaty interpretation is a unilateral process[13] title= exclusionary control[77] Imperial authority of "his Majesty" presumed to define legality [97-105]

Reasoning: Declaratory: Source of authority is own previous reasoning [13]

"Thus the truck house clause was concerned with traditionally traded products".[19] though no evidence that this superimposed limitation was in the contemplation of the parties in 1760-61.

Values: Authoritarian: Reliance on the Court's own previous interpretation of 1760-61 treaties in *Marshall*, which found they "conferred" a right to fish and presumption that the Court rather than the signatories of the treaty had authority to define the scope of the agreement.[13]

Egalitarian: both aboriginal & European perspectives must be considered [46] BUT presumes to have the expertise to assess what fits the Aboriginal perspective without reciprocating.

Perspective: Ethno/Ego centric: Conclusion that "commercial logging" was a "logical evolution of traditional Mi'kmaq trading activity." [35] Applied only Anglo-Canadian law despite claiming Aboriginal perspectives had to be considered. Insisted that the "group's relationship to the land is paramount" but failed to look at the British relationship with the land in 1760.[136] Respect: "both aboriginal and European common law perspectives must be

considered" [45]_ "The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim." [136]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	?
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Little
Total		9		2.75

**61.2 R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220.
LeBel J. (Fish J.)**

Main Points: "The treaty protects both a right to trade and a right of access to resources" [113] "The right of trade and the right of access to resources for trade must bear some relation to the traditional use of resources in the lifestyle and economy of the Mi'kmaq people in 1760." [125] "The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title." A final determination of aboriginal title should only be made when there is adequate evidence.

Note: rambling discussion of the importance of "the aboriginal perspective" with virtually no evidence of what it was or is. The only Aboriginal perspectives cited at any point were Chief Augustine's mention of the environmental problems caused by British logging [122] and John Borrow's advocacy for reconciliation of Aboriginal & Canadian law [128, 130] Comparison between British & Mi'kmaq occupation in 1760 conspicuously absent in both sets of reasons.

Evidence: Assumption: Mi'kmaq could not cut large logs because they lacked the necessary tools.[121] (Indigenous people felled trees using fire. William Cronon, *Changes in the Land :Indians, Colonists, and the Ecology of New England* (New York : Hill and Wang, 1983), 48).

Values: Accepted authority of Anglo-Canadian court in face of egalitarian assertions of the need to take account of "the aboriginal perspective".eg.[139].

Perspective: Ethnocentric: Law based only on Anglo-Canadian opinion & culture. 1760 measure re resource access applied only to Mi'kmaq, not to other Canadians. [125] Respect: Attempt to find a place for Aboriginal perspective. Critique of the use of summary conviction procedure.[142-4]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Some

9. Values	Authoritarian	Yes	Egalitarian	?
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		9		3.75

62. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388.

Binnie J. (McLachlin C.J. Major, Bastarache, LeBel, Fish, Deschamps, Abella, Charron. JJ.)

Main Points: The 1899 negotiations for Treaty 8 “were the first step in a long journey that is unlikely to end any time soon.”[56]. “Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899.” [63] “The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that [representations of Aboriginal peoples]...are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action”.[64]

Issues: no evidence they asked to join Canada , lack of interest in reserve.[3] Road was an external initiative.

Evidence: Proof: shows roads change wildlife patterns [44]

Concept of law: imposed legality rejected. Requirement for consultation does not go so far as to require consent, but the requirement to accommodate comes close - perhaps as far as reasonable for postcolonial law.

Reasoning: Principled: based on honour of the Crown

Values: Egalitarian: principle of looking at both perspectives actually applied throughout the reasoning.

Perspective: Respect: Information re Mikisew & Treaty 8; opinion of Chief Poitras [9], of Mikisew [15] Mikisew submissions [35]. Sensitivity to geographic ecological variation[45] & to “significance and practicalities” for First Nations[47]. Meaningful right to hunt based on traditional territory [48].

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed		Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes

Total		4		6
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63.1 R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686.

Bastarache J. (McLachlin C.J. LeBel, Deschamps, Fish, Abella, Charron, Rothstein)

Main Principle: Defense of aboriginal right to harvest wood for domestic purposes made out.

Parties: Canadian Citizens but Indigenous

Issues: Defined by charge under Crown Lands Act, though could raise defence

Evidence: Proof: evidence of historian to found finding re use of wood [28]

N.B. there was evidence of trade though it was excluded see [30] treaty history [64]

Assumptions: Mi'kmaq & Maliseet "migratory"

Concept of law: Imposed; *Van der Peet test* [22] primacy to Court's recognition [23] [31], [38]

Reasoning: Principled; use of *Van der Peet test*, *Adams*

Values: Authoritarian: Court to define scope of s.35 [22] citing *Van der Peet* - primacy to Court's recognition [23] [31], [38]. Crown right to extinguish affirmed pre s. 35 [58]

Perspective: Ethnocentric: quest for "distinctiveness";

"harvesting wood" for "personal uses" too

General. [24]; definition of Maliseet & Mi'kmaq as "migratory people" [24][46] insistence on

"distinctiveness" [34], emphasis on contact as a time frame [34]

Respect: to protect traditional means

of survival [38] different ideas re distinctiveness [43] differences in different languages[44] avoid

racialized stereotypes [46] Allowed to use resource in traditional territory [53] Crown bears burden

of proving extinguishment [57]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Some	Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	Some
10.	Ethno/ego centric	Yes	Respect/place for	Yes

Perspective			others	
Total		7.5		6

63.2 R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686.

Binnie J.

Main Point Barter should be permitted on the reserve, but not outside.

Note: Respected right of Indigenous people to barter among themselves but ethnocentric belief Court has authority to impose restrictions on their relations with others.[74]

64.1 McDiarmid Lumber Ltd. v. Gods Lake First Nation [2006] 2 S.C.R. 846.

McLachlin C.J. (Bastarache, LeBel, Deschamps, Charron, Rothstein JJ.)

Main Principle: Funds from a Comprehensive Funding Arrangement held in an off-reserve bank are not protected from garnishment by the Indian Act.

Note: . uncritical reference to assimilation policy of 1938[52]

Evidence: Assumptions: no evidence to support claim of Canadian policy change in 1930's & 40's
 [51] Lack of information about the history of Indigenous relations with "government" leads to distortion suggesting the Indigenous "aspiration" to self-determination and self-government was a 20th century development though there is plenty of historical evidence to suggest they believed they always had these rights. Naive belief that 1938 revision marked change in attitude despite referring to the "need to develop a spirit of self-reliance and independence in our Indian wards"[52]
 Speculation re Parliament's intent [61]
 Claims her interpretation fosters self-reliance, self-government & economic development with no supporting study
Concept of law: Imposed: laws of colonizing society imposed (Indian Act, Trust & Loan Companies Act, case law, Parliament's wish [20]
Values: Authoritarian: Should not disturb Parliament's distinction
Perspective: Ethnocentric: application of Parliament's wish [20]
 Adoption of assimilationist view re making Indians citizens[53] & adoption of new Indian Act[55]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	Some
7. Concept of Law	Imposed	Yes	Consensual	
8. Reasoning	Declaratory	Yes	Principled explanation	Yes
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	

Total		9		3.5
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64.2 *McDiarmid Lumber Ltd. v. Gods Lake First Nation*[2006] 2 S.C.R. 846.

Binnie J. (Fish, Abella JJ.)

Main Principle: CFA should be treated like a treaty and exempted from garnishment under s.90(1)(b) of the Indian Act.

Concept of law: Imposed: Indian Act standard. Consensual: reliance on treaty ideal; need for change anticipated [144]

Reasoning: Principled -reliance on equitable rules of interpretation [121]

Values: Authoritarian: interpretation of Canadian statutes made without Indigenous input [127]

Egalitarian: treat all bands equally [121] predictability [146] avoid national embarrassment [149]

Perspective:-recognition of colonial dispossession [106] [124]; recognition of language problem[125]

"survival as liveable communities" [134]; *Nowegijick* principles [144]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	Yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	Yes
6. Evidence	Assumptions		Supported by proof	Yes
7. Concept of Law	Imposed	Yes	Consensual	Yes
8. Reasoning	Declaratory		Principled explanation	Yes
9. Values	Authoritarian		Egalitarian	Yes
10. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total		5		7

65.1 *R. v. Morris*, [2006] 2 S.C.R. 915
 Deschamps & Abella JJ. (Binnie, Charron JJ.)

Main Points : *Sparrow & Badger* justifications only apply when government is acting within its constitutionally mandated powers [55]

Issues: Imposed: charge, acceptance of non-consensual regulation
Evidence: Assumption: "they agreed to relinquish control over their lands on Vancouver Island" [no evidence offered][25] Proof -re hunting rights - Douglas letter etc[22] night hunting [28] no evidence of accident from night hunting[59]
Concept of law: Imposed: division of powers analysis_[42]; "insignificant" infringements of treaty rights OK [50] *Sparrow* definition of infringement [51] Consensual: treaty respected
Reasoning: declaratory (reliance on McLachlin) use of principles [29]; "insignificant" infringements of treaty rights OK [50]
Values: Authoritarian: "insignificant" infringements of treaty rights OK 50]
Perspective: Ethnocentric: Division of powers analysis [29]
Respect: interpretation [29], protection for "Indianness" - right to hunt [44]

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	Yes	Peer decision	
2. Parties	Imposed identity	Yes	Self-determined	yes
3. Venue	Foreign language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	yes
6. Evidence	Assumptions	yes	Supported by proof	yes
7. Concept of Law	Imposed	yes	Consensual	yes
8. Reasoning	Declaratory	yes	Principled explanation	yes
9. Values	Authoritarian	yes	Egalitarian	
10. Perspective	Ethno/ego centric	yes	Respect/place for others	yes
Total		9		6

65.2 *R. v. Morris*, [2006] 2 S.C.R. 915.
 McLachlin C.J. & Fish J. (Bastarache J)

Main Point: treaty right to hunt is subject to an internal limitation that excludes dangerous hunting [64]
 "treaties must be interpreted in a manner that contemplates their exercise in modern society"[115]

Issues: Imposed: charge, reasoning relies on past jurisprudence in the colonial culture [85]

Evidence: Assumption: accused are Canadians [85] hunting at night is dangerous [108]

Concept of law: Imposed: analysis begins with 91(24); "province" or "government" has right to Define [123,124]

Reasoning: Declaratory: reliance on Court's own reasoning [123]

Values: Authoritarian: assumes right to legislate for Indians; "preference for *Singh's* interpretation "We prefer" [106]

Perspective: Ethnocentric: opinions canvassed are those of judges in colonizing society [105] [127]

Indigenous opinion is invisible. View that treaty "conferred" right to hunt [135]

Respect: concern for public safety

	Colonial		Postcolonial	
1. Judge	Alien decision-maker	yes	Peer decision	
2. Parties	Imposed identity	yes	Self-determined	yes
3. Venue	Foreign language/culture	yes	Own language/culture	
4. Issues	Imposed	yes	Mutually determined	
5. Procedure	In camera/biased		Public/interveners/equal	yes
6. Evidence	Assumptions	yes	Supported by proof	
7. Concept of Law	Imposed	yes	Consensual	
8. Reasoning	Declaratory	yes	Principled explanation	yes
9. Values	Authoritarian	yes	Egalitarian	
10. Perspective	Ethno/ego centric	yes	Respect/place for others	some
Total		9		3.5

Appendix 5
Use of the Canadian Judicial Institution

5.1: Form of Participation

INITIATION OF THE CASE	Indigenou s defendant	Settler defendan t	Total
a. Crown penal charge/assessment	30	2	32
b. Crown court suit	2		2
c. Crown inquiry/reference	1	2	3
d. Private suit	3	2	5
e. Indigenous suit		18	18
f. Crown alliance with Indigenous interest	6		6
g. Crown support for private property interest	27		27
h. Indigenous/settler alliance		7	7
i. No Crown-Indigenous adversity			6
PROVOCATION			
By the Crown:			40
j. Charge re resource use (hunting, fishing, logging)	22		22
k. Tax/customs assessment	4		4
l. Grants/permits/leases given to settlers	14		14
By an Indigenous party:			9
m. Legal initiative		2	2
n. Claim/tax assessment		3	3
o. Blockade		2	2
p. Public refusal to comply with settler regulations		2	2
INTERVENERS			
q. Federal Crown			22
r. Provincial Crowns			37
s. Indigenous			40
t. Private			22
u. No intervener			10

5.2: Penalization of Indigenous Parties

	Number charged	Acquitted	More trial	Convicted
<i>Nowegijick</i> , tax	1	1		
<i>Jack and Charlie</i> , hunting, ceremonial, BC	2			2
<i>Dick</i> , hunting, closed season, BC	1			1
<i>Simon</i> , hunting, treaty, Mi'kmaq	1	1		
<i>Horse</i> , hunting, Treaty 6, NRTA	8			8
<i>Francis</i> , traffic regs on reserve, NB	1			1
<i>Horseman</i> , hunting, bear attack, Treaty 8	1			1
<i>Sioui</i> , hunting, in park, treaty	4	4		
<i>Sparrow</i> , fishing, BC	1	1		
<i>Jones</i> , bingo, ON	2			2
<i>Williams</i> , tax	1	1		
<i>Howard</i> , fishing, closed season, ON	1			1
<i>Badger</i> , hunting, Treaty 8, NRTA	3		1	2
<i>Nikal</i> , fishing on reserve, BC	1	1		
<i>Lewis</i> , fishing, by reserve, BC	3			3
<i>Van der Peet</i> , fish sold, BC	1			1
<i>Gladstone</i> , herring spawn on kelp, BC	2		2	
<i>Pamajewon</i> , gambling, ON	5			5
<i>Adams</i> , fishing, Mohawk, QC	1	1		
<i>Côté</i> , fishing, traditional, QC	5	1*		5
<i>Williams</i> , robbed pizza parlour	1		1	
<i>Sundown</i> , hunting cabin, Treaty 6	1	1		
<i>Gladue</i> , manslaughter	1			**
<i>Marshall</i> , fishing eels, Mi'kmaq	1			1
<i>Catcheway</i> , roadblock	10		10	
<i>Mitchell</i> , customs, Mohawk	1			1
<i>Powley</i> , hunting, Métis, ON	2	2		
<i>Blais</i> , hunting, Métis, NRTA	1			1
<i>Paul</i> , cut logs, BC	1		1	
<i>Marshall/Bernard</i> , logging, Mi'kmaq, NS	35			35
Totals	99	14	15	70
* Acquitted on one charge, convicted on another				
** Re jury selection, served sentence unchanged				

