Université de Montréal

LA DANSE DES FANTÔMES À LA COUR SUPRÊME DU CANADA:

Les droits autochtones pendant le premier quart de siècle de l'article 35 de la Loi constitutionnelle, 1982

Tome 1

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Thèse présenté à la Faculté des études supérieures en vue de l'obtention du grade de

LL.D. Droit

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GHOST DANCING
AT THE SUPREME COURT OF CANADA:

Indigenous Rights during the First Quarter Century of s.35.of Canada's *Constitution Act, 1982.*

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Ce these intitulé.:

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Indigenous Rights during the First Quarter Century of

s.35.of Canada's *Constitution Act, 1982.*

présenté par

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RÉSUMÉ

Certains supposent que la *Loi constitutionnelle de 1982,* donc la section 35(1) reconnait les droits existants des peuples autochtones, a complété la décolonisation du Canada. Par contre, malgré le passage d'un quart de siècle, plusieurs Autochtones estiment que la Cour suprême continue à nier l'existence de leurs droits. Cette étude examine cette problématique en formulant des définitions juridiques du « colonialisme » et du « post colonialisme ». Vu le remplacement de l'idéal de «la loi » comme « commande », promu par le juriste anglais John Austin au dernier siècle, par l'idéal du consensus populaire et démocratique, nous avons vécu une changement important dans le droit euro-canadien. Mais, selon la théorie des paradigmes de Thomas Kuhn, la continuation des anciennes habitudes est une partie normale du processus de changement, qui n'est jamais complété sans l'émergence de nouveaux modèles et procédures.

Pour déterminer la situation de la Cour suprême du Canada par rapport au processus de décolonisation, la Partie I de cet étude examine le fonctionnement paradigmatique autant que le phénomène coloniale, la décolonisation en droit international et le postcolonialisme pour identifier les indicateurs du paradigme colonial autant que le paradigme postcolonial. La Partie II adapte ce cadre analytique aux raisonnements de la Cour suprême du Canada concernant les droits autochtones protégés par la article 35(1) de la *Loi constitutionnelle de 1982.*

Cette double analyse coloniale/postcoloniale démontre la persistance des anciennes habitudes malgré la reconnaissance des idéaux postcoloniaux par la Cour. Les juges sont conscients des limites institutionnelles qui restreignent leur capacité

de protéger les droits autochtones, mais plusieurs concepts qui structurent leur raisonnement perpétuent la dynamique coloniale. Une réflexion approfondie des juges, des praticiens et des peuples autochtones sur les problèmes qui découlent des changements paradigmatiques doit faciliter la tolérance mutuelle qui est un préalable aux ententes qui sont nécessaires selon les idéaux égalitaires qui sont partagés par tous.

MOTS CLÉ

AUTODÉTERMINATION, CATEGORIZATION, DECOLONIZATION, HAUDENOSAUNEE, HISTOIRE, IMPÉRIALISME, METAPHOR, PARADIGME, POSTCOLONIAL, SOUVERAINNETÉ

ENGLISH RÉSUMÉ

Many people believe that Canada became fully decolonized in 1982 with the "patriation" instituted by the *Constitution Act, 1982,* whose s.35(1) explicitly recognized and affirmed "existing Aboriginal and treaty rights". Yet, a quarter century later, Indigenous critics continue to complain that their rights are being denied by the Supreme Court of Canada. This study has approached such questions by drawing on international law to establish legal definitions for "colonialism" and "postcolonialism". In this optic, it becomes clear that there has been a significant change in Euro-Canadian norms during the past century. Colonial concepts, like the English jurist John Austin's definition of "law" as "command" have been superseded by the ideal of informed, popular consent, yet modes of conduct that are consistent with the colonial paradigm persist. According to Kuhn's theory of scientific revolutions this is predictable because changes from one paradigm to another are normally characterized by intensified assertions of the impugned orthodoxy and no change is complete until new models and procedures have emerged to replace established habits.

In order to determine where the Supreme Court of Canada actually stands in relation to the decolonization process, Part I of this study examines the nature of paradigmatic function, including the metaphoric construction of language. It then reviews the colonial phenomenon, the emergence of decolonization in international law and postcolonialism to define the colonial and postcolonial paradigms in terms of specific indicia that can be used to classify institutional performance. Part II

adapts this analytical framework to the specific circumstances of judicial decision making and applies it to the reasoning of over 60 Supreme Court of Canada cases concerned with section 35(1) of the *Constitution Act, 1982.*

This dual colonial/postcolonial analysis makes it possible to identify some of the ways in which colonial metaphors and modes of thought have persisted during the past quarter century despite the Court's firm commitment to postcolonial ideals. Though the judges themselves are aware of some of the institutional limitations that constrict their ability to validate Indigenous rights, many of the concepts that structure their reasoning induce them to perpetuate the colonial paradigm. Further reflection on the structure of our rational processes and on the problems predictably associated with paradigm change might make it easier for judges, practitioners and Indigenous peoples to develop the agreements that are necessary to implement the egalitarian ideals ascribed to by all.

KEY WORDS:

CATEGORIZATION, DECOLONIZATION, HAUDENOSAUNEE, HISTORY, IMPERALISM, METAPHOR, PARADIGM, POSTCOLONIAL, SELF-DETERMINATION, SOVEREIGNTY

DEDICATION

TO THE INDIGENOUS PEOPLES and ANCESTORS
without whose sacrifice and forbearance we would not be here.

TO MY PERSONAL RELATIONS
family, friends, colleagues and advisers, living and gone,
without whose practical and moral support, I could not have done this work.

TO THE JUDGES AND PARTIES OF THE COURT
whose Herculian labours sit buffeted on the electric edge of social change.

THANKS

This work is the result of the coming together of many minds. It was probably born in the days of my fleeting criminal and family legal-aid practice in the busy court at 222 Main Street in Vancouver. Morris Bates of the Vancouver Police Native Liaison Society sat me down and started talking to me - he and Freida Ens, Michelle Robinson and Marilyn. When I left to do a Masters in International Law at the Université du Québec à Montréal, Wanda John pleaded: "Do something for us". I was bewildered, wondering just what I could possibly contribute, but when I stopped to visit someone on the Blood Reserve at Standoff I stumbled on Horn Society ceremonies where I had my face painted and they too encouraged me to "try". The children were all so bright and beautiful. How could I deny their shining promise?

UQÀM provided a venue where my knowledge and ideas could develop. The late Katia Boustany set me on track immediately by drawing on her Palestinian heritage and telling me I should read about "exclusion". Peter Leuprecht insisted quietly on the new international legality. William Schabas suggested a masters topic that proved much more revealing than I expected and Georges LeBel's supervision provided the acute insights and encouragement needed to complete

Canada v. The Haudenosaunee (Iroquois) Confederacy at the League of Nations: Two Quests for Independence.

When I began my research on that specific topic, Kenneth Deer, the editor of the *Eastern Door* newspaper at Kahnawake and an advocate for Indigenous rights at the United Nations advised me to talk to people. I had no idea how rich his advice would be. Over the years I have benefited from the passing insights and friendship of so many people: Kanatakta, Alexis Shackleton, Martin Loft, Brian Deer, Donna Goodleaf, Marie Jacobs, Claudine Van Evry Albert, Brian Maracle, Harvey Longboat, Paul Williams, Mike Doxtater, Audra Simpson, Johnny Cree, Ellen Gabriel, Keith Myiow, Taiaiake Alfred, Bev. Jacobs, Steve Ford, Jolene Rickard, Robert Porter, gkisedtanamoogk and family, Clifford Larry and family, Billy Tayac and family, Dacajawiah and family, Steve George, Greg Brass, Arihwakehte, Pearl Bonspille, John Harding, Darren Bonaparte and family, Kakwirakeron, Verna and family, Neddie, Katenies and family, Debra Ram, Rae Mitten, Sharon Venne, Treena Knight, Elisapee Karatek, Sharon McIvor, Blake Wright, Gloria Lee, Ted Whitecalf, Grace McKay-Jolly and so many others. If you met me and think you had an influence, you probably did.

The Haudenosaunee and their relations have an amazingly active intellectual life. I owe a special thanks to Kahntinetha Horn, to her daughters, Ojistoh, Kahente, Waneek and Kanietiio and her grandchildren, for showing me how all this is tied to the worries and joys of children and everyday life. Kahente pointed me in the direction of many significant scholarly works including Steven Winter's *Clearing in the Forest*, which seems to draw inadvertently on Iroquoian symbolism. But I have also benefitted from other schools of Indigenous thought. Marama Muru-Lanning and her family made Maori hospitality happen in Montreal. My scattered Saulteaux family, the Tataquasons of Saskatoon, Winnipeg and Fishing Lake, Saskatchewan showed me other sides to academic questions. The influence of the Program of Legal Studies for Native People at the University of Saskatchewan will be obvious to those familiar with the fine work done there. I owe particular thanks to Sakej Henderson, Ruth Thompson, Diane Kotshorek, Marg. Brown, to my students and to my colleagues as well as to Wes Fine Day, his mother, his sister and Walter who

gave me a glimpse of what prairie Cree culture may really be about though I may never fully understand their ceremonies.

I am indebted to the Université de Montréal for providing me with a venue where I could explore some of the questions raised by my masters research. Andrée Lajoie identified the impact of values early in the game. Remi Savard and Guy Rocher brought my attention to historical perspectives I might otherwise have missed and Jean Leclair raised many intriguing questions. This work would not have been possible without the help, support and critical advice of my thesis supervisors, Pierre Noreau and Michel Morin. Kahntinetha Horn's review of the longest version of my whole text to ensure consistency with her culture's perspectives on law was invaluable. I am particularly grateful for the supportive comments and advice of Sakej Henderson, Wanda McCaslin, Marilyn Poitras, DeLloyd Guth and Jim Reynolds who reviewed preliminary versions of some parts of this work. Finally, I am indebted to the Honourable Chief Justice Beverley McLachlin for her gracious encouragement to ask the questions that need to be asked, which arrived at a particularly critical moment.

I would also like to thank the authors in my bibliography and list of references. Without all of their long hours of research and reflection, this work would not have been possible. The selection of opinions, theories and interpretations relied upon are my own. So too are any errors, omissions or misinterpretations. Though my approach may be considered controversial, my intention is only to encourage the continuing discussion required to maintain peaceful relations and create productve meetings of minds.

Loi constitutionnelle de 1982

PARTIE II
DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochtones	**35(1)** Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
Définition de « Peuples autochtones du Canada »	**(2)** Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.
Accords sur des revendications territoriales	**(3)** Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
Égalité de garantie des droits pour les deux sexes	. **(4)** Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The Constitution Act, 1982

PART II
RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights 35	**35(1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
Definition of "aboriginal peoples of Canada"	**(2)** In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
Land claims agreements	**(3)** For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
Aboriginal and treaty rights are guaranteed equally to both sexes	**(4)** Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

OVERVIEW

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INTRODUCTION

"In light of the evolution of our law following the passage of the charters and given the growing recognition that there are many different perspectives - the aboriginal perspective, for example - I believe that the era of concealed underlying premises is now over.

In my view, those premises must be brought to the surface in order to promote consistency in our law and the integrity of our judicial system."

L'Heureux-Dubé J.
2747-3174 Québec Inc. v. Québec, 1996.[1]

[1] *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919 at [158].

1.

GHOST DANCING and s.35

> "In every instance, the Indian position is fragile because it ultimately depends on the capacity and willingness of the majority society to explore unfamiliar intellectual terrain."[2]
>
> Charles F. Wilkinson
> *Wisconsin Law Review*, 1991.

This study must begin with a *caveat*. The process of decolonization is complex. Some of the underlying premises examined in this work are deeply enmeshed in our habits of thought and action. This is not an easy afternoon read. It was written slowly and invites a slow, section by section, approach for reasons that will become apparent as paradigmatic function is examined in more detail. The perspective presented here is postcolonial in that it remains highly conscious of the looming persistence of the ideology that shaped the colonial era. Despite the current trendiness of "decolonization" and the concept of human equality, the emergence and success of new models for social behaviour that actually implement these ideals is by no means assured. This should become clear when the concepts associated with colonial modes of behaviour and postcolonial ideals are explored in more detail.

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[2] Charles F. Wilkinson, "To feel Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa," 1991 *Wis. L. Rev.* 375 at 378-9 as cited by Robert A.Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (New York : Routledge, 1999) at 134.

In the field of "law" there has, to date, been substantial reform in the concept of what constitutes "legal" activity; however, consensus has yet to be reached concerning the exact parameters of this "new" legality. Colonial mores have been the norm in many parts of the world since the beginning of written records and by the end of the 19th century, colonialism had become an all-pervasive influence. It was the source of Canada's very existence as a state and, as Michael Asch among others has pointed out, Canada continues to rely on "legal doctrines and political tenets that follow from colonialist conceptions".[3] That is to say, habits of thought and action that were accepted as part of the natural order of things during the colonial era persist in all kinds of cultural venues making intercultural violence an on-going concern, even in this relatively peaceful part of the world. As this study will demonstrate, postcolonialism remains very much an "ideal to be achieved".

Though the difficulties involved in decolonization are almost universal, the focus in this work is on the ways in which colonial and postcolonial modes of thought shape a very narrow part of Canadian legal function: judicial reasoning about Indigenous rights at the Supreme Court of Canada. The inclusion of protection for "existing aboriginal and treaty rights" in s.35 of Canada's *Constitution Act, 1982*[4] is examined here as part of the global decolonization movement that is inviting us all to re-examine established habits of thought and traditional ways of doing things. This movement is raising many questions. What do we want to keep? What do we want to avoid?

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[3] Michael Asch," From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17.2 *Can. J. Law & Soc.* 23.

[4] *Constitution Act, 1982* enacted by the *Canada Act, 1982* (U.K.) 1982 c.11, Sched. B.

Canada's Supreme Court is both a conscious and a conscientious participant in the process of change that is altering Canadian relations with the Indigenous nations whose existence has been so profoundly compromised by colonial processes. As Chief Justice Dickson and LaForest J. stated in *R. v. Sparrow*, s.35(1) "renounces the old rules of the game" for:

> "The new constitutional status of that right enshrined in s.35(1) suggests that a different approach must be taken"[5]

The *Royal Commission on Aboriginal Peoples* has also recognized s.35 as a "watershed" that separates current understanding from past policies and practices.[6] Yet, as indicated by Madam Justice L'Heureux-Dubé in the quote at the beginning of this section, "underlying premises" continue to exert immense social power. As the paradigm theory applied in this study suggests, they often remain concealed, raising questions concerning how we can be certain that we have really left the past behind to become what might be described as "postcolonial".

According to the Chinese Classics (ca. 500 B.C.), change is a constant[7] and this is certainly not the first time that people have believed, for better or for worse, that they were living at the threshold of a new age. Just over a century ago, when all but a few last bands of "Indians" had been confined to reservations, the Ghost

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[5] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1105 citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95.

[6] René Dussault and Georges Erasmus co-chairs: *Royal Commission on Aboriginal Peoples* (RCAP, 1993), *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa:Minister of Supply and Services. 1993) at 29.

[7] Z.D. Sung ed. *The Text of the Yi King (and its appendices) Chinese Original with English Translation* (Shanghai: 1935 reprinted Taiwan: Chung Hwa publications, 1976).

Dance swept through the shattered remains of the Indigenous world.[8] Paiute and Christian beliefs blended in the prophesies of Tavibo and Wovoka who predicted that the "white people" and their culture would soon be destroyed by a series of cataclysms. They envisioned the land restored to its former state. A new layer of earth would be laid down so the trees and grasses would grow strong as they had before. Dead ancestors and relatives would return to live among them. The sick would be made well and once again there would be an abundance of pine nuts, fish and game.

Their vision was popular. Though it made no inroads among the Navaho, who found the very idea of ghosts offensive[9], it spread rapidly to other nations. The Indigenous peoples were grieving. Many were starving. According to current scholarship, colonization did indeed change the land itself.[10] The process, which included the introduction of new diseases, is estimated to have cost the original inhabitants well over 90% of their population.[11] In the Sioux version of Ghost Dance lore, the renewed land that they longed for would be covered with immense herds of buffalo and fine ponies. They defied orders to remain on the reservations that had been assigned to them by the colonial American regime and tried to speed

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[8] Canadian Indian agents were warned to watch for signs of the Ghost Dance but nothing came to their attention. E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver : U.B.C. Press, 1986) at 165.

[9] Anthony F.C. Wallace, "Introduction" to James Mooney, *The Ghost-Dance Religion and the Sioux Outbreak of 1890* (University of Chicago Press, 1965 reprint of the *Fourteenth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution*, Part II (Washington: Government Printing Office, 1896) at viii.

[10] William Cronon, *Changes in the Land, Indians, Colonists, and the Ecology of New England* (New York : Hill and Wang, 1983).

[11] Olive Patricia Dickason, *Canada's First Nations: A History of the Founding Peoples from Earliest Times* 2nd ed.(Toronto: Oxford University Press, 1997) at 8; Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: W.W. Norton and Co. 1999 © 1997) at 211;

the renewal process by joining hands to dance in circles for hours and days on end, not missing a step when some of their members collapsed from exhaustion into visions of a better world, the old world their ancestors had known. The dancers wore "ghost shirts" decorated with sacred symbols said to make them impenetrable to bullets.[12]

Beliefs of this kind were not unique. The 1890's also hosted invulnerability rituals among the "Boxers" in China who burned churches, destroyed foreign schools, dug up railway tracks and imagined they had become immune to Western guns and bayonets.[13] Similar responses have been noted on other frontiers of colonialism and cultural collision, leading to the identification of parallels between the Ghost Dance and such diverse movements as the Maji Maji Rebellion in Africa, the Melanesian cargo cult and even Spanish Carlists.[14]

Not everyone who participated in or supported invulnerability rites believed in the literal sense.[15] On the material plane, the historical record provides plenty of evidence to demonstrate the effectiveness of bullets against Ghost Dancers and

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Charles C.Mann, "1491" *The Atlantic Monthly* (March 2002) http:/www.theatlantic.com/2002/03/mann.htm.

[12] See account of George Sword in Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 42.

[13] Dun J. Li, *The Ageless Chinese* (New York: Scribners, 1972) at 428-30; Joseph W. Esherick, *The Origins of the Boxer Uprising* (University of California Pres, 1987) at 54-59.

[14] "Ghost Dance", http://en.wikipedia.org/wiki/Ghost_dance (3/17/06).

[15] A teacher on the Pine Ridge reservation said one 1890 dancer described his vision as "A big lie". Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 181.

[15] Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 8 at n. 1.

[15] He was considered the leader of a reserve that opposed "authority". The legal grounds for his arrest were not mentioned. Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 93.

[15] Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York : Cambridge University Press, 1994) at 180.

[15] Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 119.

[15] *Ibid.* at 120.

Boxers alike. On December 29th, 1890, some 200 dancers were mowed down within minutes by machine guns at Wounded Knee, giving this place an enduring symbolic significance. For the settlers it marked the end of an era.[16] But was it? On the conceptual level, the Ghost Dancers' vision rings true. Guns may be able to make people obey, but they cannot change their minds and this may be the real meaning of the invulnerability rites. Eighty five years later, when the descendants of the first Ghost Dancers were once again under siege, surrounded by armies, with helicopters flying over-head, the Ghost Dance was revived in response to another set of events that were catastrophic for those who found themselves targeted.[17]

If hysteria characterizes such encounters, it is certainly not confined to one side of the cultural divide. At the original Wounded Knee, the violence broke loose while members of the U.S. 7th Cavalry were searching tents for weapons and moving among seated Sioux who had surrendered the previous day. The medicine man Yellow Bird mingled with the crowd, blowing on an eagle-bone whistle. Tensions were high and it is not certain what happened next. Perhaps a soldier tried to look under a young warrior's blanket. Some thought Yellow Bird gave a signal. A shot rang out, but whose was it? The soldiers opened fire. They had four Hotchkiss machine guns. Their first volley left about 200 "Indians" and 60 soldiers lying on the ground, dead or wounded and the killing did not end there. The cavalry pursued fleeing women and children whose bodies, were found up to two miles from the scene. The final death toll is uncertain; but, it is estimated that 300 people

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[16] *Ibid,* "Anthony F.C. Wallace, "Introduction" in Mooney, *The Ghost Dance Religion and the Sioux Outbreak of 1890* at vii.

lost their lives. All of the 50 or so U.S. casualties are believed to have been victims of "friendly fire". There were many women, children and old people among the dead "Indians" who were buried in a mass grave. Yet, according to James Mooney, who reviewed the official records and survivor's reports when he investigated for the Bureau of American Ethnology in the 1890's, "when the sun rose on Wounded Knee on the fatal morning of December 29th, 1890, no trouble was anticipated or premeditated by either Indians or troops".[18]

So what happened? Why did those soldiers chase and kill women who were fleeing with infants in their arms? And why was an army called to suppress the dancing to begin with? Mooney saw the Ghost Dance as an adaptive response to poverty and oppression.[19] According to his investigation, it had begun as a peaceful movement. Even though the U.S. government was reneging on promises to provide adequate food rations in return for lost territory, Wovoka advised his followers to co-operate with the settlers until the day of salvation came. But the refusal of the dancers to return to their reservations made inexperienced Indian Agents nervous and Eastern newspapers were "teeming with rumours of uprisings and massacres".[20] That is why the troops were sent. The agents at the "central point of the disturbance" had not felt threatened. They were aware of the dancing, but ignored it.[21] The fear and craziness that erupted at Wounded Knee was fuelled by the

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[17] Mary Crow Dog and Richard Erdoes, *Lakota Woman* (New York : Harper Perennial, 1991) at 148 ; Leonard Crow Dog and Richard Erdoes, *Crow Dog : Four Generations of Sioux Medicine Men* (New York : HarperPerennial, 1996) at 126 ;

[18] Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at 119.

[19] *Ibid.*, Anthony F.C. Wallace, "Introduction" to Mooney, *The Ghost-Dance Religion and the Sioux Outbreak of 1890* at ix.

[20] *Ibid. at* n. 1.

[21] *Ibid.*

illusions and fantasies of strangers and, perhaps, by a sense of guilt. What would you do if someone was taking your land? That's why young men were sent west to find glory fighting "Indian wars".[22] The Sioux had a more realistic understanding of their situation. They had already surrendered before they were massacred. They were sitting under a white flag.

Wounded Knee neither pioneered nor concluded the use of machine guns against Indigenous peoples and this phenomenon was not confined to colonization as practiced south of the current Canada/U.S. border. Gatling guns had already been fired in 1885 against the Métis at Batoche in what is now Canada.[23] Nor did the massacre eliminate the inter-cultural differences mourned by the Ghost Dancers on the conceptual level. In Sakej Henderson's view, Eurocentric writers have misunderstood the Ghost Dance which was really a vision about how to resist colonialism. It emphasized the importance of ecology and was designed to release the spirits contained in the old rites and ceremonies and restore traditional consciousness. European thought is the shadowy twin of the trickster, appearing in many guises to justify oppression and domination with ever changing creativity.[24]

However the inter-cultural relationship is envisioned, it is obvious that Indigenous peoples have continued to see things from their own perspectives while the settler states have continued to use force of one kind or another against them in a

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[22] There have been many reflections on settler conceptualizations of Indigenous peoples. See eg. Olive Patricia. Dickason, *Le Mythe du Sauvage* trans. Jude Des Chenes [*The Myth of the Savage* (University of Alberta Press, 1984)] (Sillery, Québec Septentrion, 1993); Sarah Carter, *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West* (Montreal: McGill-Queen's University Press, 1997)..

[23] See eg. Dickason, *Canada's First Nations* at 284.

[24] James (Sakej) Youngblood Henderson, "Postcolonial Ghost Dancing: Diagnosing European Colonialism" in Marie Battiste ed. *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000) 57 at 58-9.

deadly dance. Notwithstanding the declaration of protection for "aboriginal and treaty rights" contained in s.35 of Canada's *Constitution Act, 1982*, the 100th anniversary of Wounded Knee was marked by the Oka Crisis of 1990. It is not at all reassuring to know that this time there was only one direct casualty - Corporal Marcel Lemay of the Sureté du Québec who, true to form, may well have been killed by a stray bullet fired by his fellow officers.[25] "Indians" were targeted in a full-fledged military operation and elements of the genocidal pursuit at Wounded Knee were replicated. The gun battle that took Lemay's life began when police fired tear gas and concussion grenades at women and young children.[26] Bullets rained down around a two year-old on a tricycle.[27] Later that summer, the police allowed an angry, stone-throwing mob to attack a cavalcade organized to take babies, children and disabled elderly Kahnawake residents out of their village that was literally being held under siege by the army.[28] At the end of the stand-off, fourteen year-old Waneek Horn Miller was stabbed an inch from her heart by a Canadian soldier using an army bayonet at a time when she was leading her four year-old sister and other children away from the barricades in the Pines of Kanesatake.[29] She was not the only person to be physically assaulted by uniformed

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[25] The .223 calibre steel-tipped "full metal jacket" bullet that slipped behind his protective vest may have ricocheted off a tree. The police used the same calibre, but did "not normally" use that type. The gun that fired it was never identified. Geoffrey York, Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka*, (Toronto: Little, Brown and Co., 1991) at 40.

[26] *Ibid. at* 34.

[27] Craig Maclaine, Michael Baxendale, *This Land is Our Land: The Mohawk Revolt at Oka* (Montreal: Optimum Publishing International, 1990) at 19.

[28] "Oka Crisis – Repercussions" http://en.wikipedia.org/wiki/Oka_Crisis (2/7/06); Alanis Obomsawin, *Rocks at Whiskey Trench* (National Film Board of Canada, 2000)

[29] Personal communications Kahntinetha Horn and Waneek Horn-Miller. See also York, Pindera, *People of the Pines* at 399; Donna Goodleaf, *Entering the Warzone: A Mohawk Perspective on Resisting Invasions* (Penticton, B.C.: Theytus Books, 1996) at 109; "Canada's Team, water polo:

representatives of the colonial state. Long after the "crisis" was over, police in the area continued to pursue "Indians", stopping them for trivialities and subjecting them to brutal and illegal treatment.[30]

Did the inconvenience caused by the Indigenous blockade of the Mercier Bridge merit such life-threatening behaviour? The bridge itself was built on land removed from the Kahnawake reserve through questionable legal practices which have yet to be redressed.[31] Why wasn't the original dispute concerning the expropriation of a Kanesatake cemetery for a golf course resolved, or at least presented for judicial consideration, before the situation degenerated in this way? The parallels between Oka and Wounded Knee are disturbing and there have been several similar crises since then. The formal recognition and affirmation of "existing aboriginal and treaty rights" in s.35 of the *Constitution Act, 1982* has been in place for almost a quarter century and there have been radical changes in official policy. Yet confrontations with Indigenous peoples continue to erupt following a familiar choreography with displays of gun-wielding state forces moving in on unarmed Indigenous protesters who very often include women with young children. Even when the legal issues underlying these scenes do get to court, Indigenous people have little confidence that justice will prevail. As stated by Kenneth Deer, the editor of Kahnawake's *Eastern Door* newspaper whose diplomatic skill is reflected in his selection as chair of the Indigenous Forum at the United Nations, "Natives have lost

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Their Goal is Gold" *Time*, Canadian edition, (11 Sept. 2000) 60 at 61; Dave Stubbs, "Sweet dreams are made of this" *The [Montreal] Gazette* (9 September 2000) T3.

[30] See eg. Maclaine, Baxendale, *This Land is Our Land* at 62; Obomsawin, *Rocks at Whiskey Trench.*

far more cases than they have won, and some of these losses reek of bias, racism and discrimination".[32]

The persistence of this pattern of behaviour stems in part from the depth of the cultural chasm involved. Both sides seek "law and order" but the law they invoke and the order they aspire to is as radically different today as it was at first contact. According to the traditions of those belonging to the *Haudenosaunee* or "Iroquois Confederacy" that began with the union of five nations including the "Mohawks" of the Oka Crisis, this difference was identified by their ancestors when European settlers began to move into their area. As recounted by Dayhawtgawgawdoes (Chief Irving Powless Jr.), they made an agreement with the Dutch in 1613 to live together peacefully like brothers, respecting each other's autonomy.[33] The same principles of inter-cultural co-existence were negotiated with their successors and, during the first centuries following contact when Indigenous alliances were important to Europeans in their quest to further their commercial and military ambitions, they were symbolized by the *Covenant Chain* which was extended into the Great Lakes region and renewed periodically by the British until 1858.[34]

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[31] Kahnawake has been launching formal complaints about the misappropriation of their land since at least 1750. *Mohawk Council of Kahnawake*, "Seigneury of Sault St. Louis" 2nd ed.(Seigneury of Sault St. Louis Office), www.kahnawake.com, 2004/2005).

[32] Kenneth Deer, "Caledonia's Mohawks have plenty of reasons to mistrust the law" *The [Montreal] Gazette* (25 April, 2006) A 23; Cheryl Cornacchia, "Mohawk Leader slams Ottawa's about-face", *The [Montreal]Gazette* (6 July, 2006) A7.

[33] Chief Irving Powless Jr. "Treaty Making" in G. Peter Jemison & Anna M. Schein eds. *Treaty of Canandaigua 1794: 200 Years of Treaty Relations between the Iroquois Confederacy and the United States* (Santa Fe, New Mexico: Clear Light Publishers, 2000) 15 at 21 *et seq*. See also René Dussault and Georges Erasmus co-chairs: *Royal Commission on Aboriginal Peoples*, v.1 *Looking forward, looking back* (Ottawa: Minister of Supply and Services. 1996) at 123.

[34] Mark D. Walters "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 *McGill L. J.* 711.

The need to reaffirm or "polish" the *Covenant Chain* so as to avoid intercultural misunderstandings is well documented. Sir William Johnson, who was Britain's Superintendant of Indian Affairs for the region that came to include Canada following the conquest of Quebec, found that the treaties he negotiated with Britain's "Indian" allies were often misunderstood by his countrymen. They tended to presume the Indigenous peoples had become British subjects though, as Johnson pointed out: "no Nation of Indians have any word which can express, or convey the Idea of Subjection."[35]

During the 19th century, as their numbers increased and as their need for Indigenous alliances declined, members of the in-migrating culture became so bedazzled by the myths that justified their colonial expansion that they generally overlooked the independent status of Indigenous peoples.[36] To emphasize the autonomy that is implicit in the *Covenant Chain* relationship, the Haudenosaunee increasingly emphasized their political independence using a wampum belt known as the "*Two Row Wampum*".[37]

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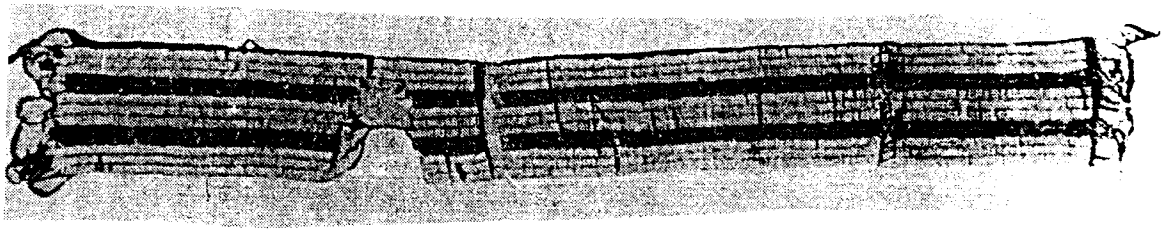
[35] Ibid. citing Johnson to Gage (31 October 1764) in J. Sullivan ed. *The Papers of Sir William Johnson* vol. 11 (Albany: State University of New York, 1921 – 1965) at 923-27.

[36] See eg. P.G. McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" [2002] *U.T.L.J.* 69; Bruce G. Trigger, "The Historian's Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present" (1986) 67.3 *Can. Hist. Rev.* 315; Bruce G., Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal: McGill-Queen's University Press, 1985).

[37] See Powless, "Treaty Making" 15 at 22; Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24.2 *Dal. L. J.* 75 at n. 19; Erasmus, Dussault, (RCAP, 1996) *Looking forward, Looking back* at 123. It is sometimes called "Guswentah" or "kaswentah" but the word may be a general word for "wampum belt". Darren Bonaparte "The Two Row Wampum Belt: An Akwesasne Tradition of the Vessel and Canoe" *The Wampum Chronicles,* http://www.wampumchronicles.com (4/22.2007). According to Walters, there is a possibility that a Two Row belt was given in 1664. Walters, "Brightening the Covenant Chain" at 81 citing E.B.O'Callaghan, ed. *Documents Relative to the Colonial History of the State of New York* (Albany: Weed, Parsons & Co., 1865-1861)

Fig. 1 Two Row Wampum[38]



It shows two parallel rows of purple shell beads on a ground of white. According to Elizabeth Tooker, a belt of this description was given to the Commission settling the Canada-U.S. Boundary in 1789 to show that, following the American separation from Britain, the "Indians" had "two roads offered to them".[39] However, since the last half of the nineteenth century the belt has been used to symbolize Indigenous independence from colonial jurisdiction. According to an 1890 petition sent to the Governor General of Canada by "Chief Isaac Hill" and signed by more than 50 "Chiefs" and "Warriors", it was the British who supplied the metaphor of two vessels – the British ship and the birch bark canoe - travelling on separate paths on the same river without interfering with each other.[40] Levi General Deskaheh took a

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[38] Elisabeth Tooker, "A Note on the Return of Eleven Wampum Belts to the Six Nations Iroquois Confederacy on Grand River, Canada" (1998) 45.2 *Ethnohistory* 219 at 231.

[39] Tooker "A Note on the Return of Eleven Wampum Belts" at 230.

[40] Dingman to Superintendent General of Indian Affairs (19 May, 1890) PAC RG10 v.2284 transcribed from Sally M. Weaver, *Iroquois Politics, 1847-1940* (Canada Council and The National Museum of Man, Ottawa, 1975) [unpublished, Doris Lewis Rare Book Room, University of Waterloo, Ontario] at 278.

The vessel symbolism was referred to in relation to a different wampum belt by royaner John Smoke Johnson in 1870. Kathryn V. Muller, "The Two "Mystery" Belts of Grand River: A Bibliography of the Two Row Wampum and the Friendship Belt" (2007) 31.1 *Am. Indian Quarterly,* 129 at 139 ; Kathryn V. Muller "Évolution et renouvellement du wampum à deux voies" in Alain Beaulieu et Maxime Gohier eds. *La recherche relative aux Autochtones: Perspectives historiques et contemporaines* (Montreal, Chaire de Recherche du Canada sur la question territoriale autochtone, 2005) 159.

Some Western scholars seem to think that sketchy documentary evidence suggesting that this interpretation of the two row imagery may be only a century old affects the validity of the rights represented. See Muller, "The Two "Mystery" Belts of Grand River"; Muller "Évolution et renouvellement du wampum à deux voies" 159 or commentary of Bonaparte "The Two Row

copy of the *Two Row Wampum* with him to Europe when the Six Nations applied for membership in the League of Nations[41] and the symbolism was referred to again in representations made to the Royal Commission on Aboriginal Peoples.[42]

This perception of separate cultural paths is generally shared by specialists in Indigenous relations during the colonial era who have found they must struggle with a variety of intercultural misunderstandings in their attempts to interpret historical evidence and communicate their findings to non-specialist audiences. The Haudenosaunee, for example, used the metaphor of "brothers" to structure their relationship with the Dutch and English, while the Governor of New France insisted on referring to Indigenous peoples as his "children", assuming a right to subordinate them to his will in keeping with absolutist Catholic dogma.[43] Gilles Havard has pointed out that acceptance of the colonizer's choice of terminology in a few instances by some Indigenous peoples cannot be taken as a sign of political submission because fathers in their cultures did not exercise authority over their sons.[44] Moreover, as Michel Morin has noted, the idea of an ally's submission and

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Wampum Belt". However, the principle is implicit to the treaty-making process that characterized early relations. It is also well established in international law. See eg. Patrick Dallier and Alain Pellet, *Nguyen Quoc Dinh Droit International Public,* 6e ed. (Paris: L.D.G.J. 1999) at para 279.

[41] See photo in "The Rights of the Six Nations: Canadian Indian Chief's Mission to the King" p.227, probably of a magazine called *Canada.* PAC RG10 v.2285. File 57 169-1B Pt.3.

[42] Erasmus, Dussault, (RCAP, 1996) *Looking forward, Looking back* at 123.

[43] See also Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650 – 1850* (Cambridge University Press, 1991) at 84.

[44] Gilles Havard, Phyllis Aronoff and Howard Scott trans., *The Great Peace of Montreal: French-Native Diplomacy in the Seventeenth Century* (Montreal : McGill-Queen, 2001) at 29-30. See also eg. Eleanor Burke Leacock, *Myths of Male Dominance: Collected Articles on Women Cross-Culturally* (New York: Monthly Review Press, 1981). See also Alain Beaulieu, "Les guaranties d'un traité disparu: le traité d'Oswagatchie, 20 août 1760" (2000) 34 *R.J.T.* 329.

obedience to a monarch was perfectly compatible with continued independence at the international level according to the European thinking of that era.[45]

Yet the political separation that can be accounted for by these diverse approaches to the inter-cultural encounters of that era could not be maintained at the ecological level. As William Cronon has shown, the importation of European behavioral patterns changed the very ecology of New England in scientifically verifiable ways[46], validating the Ghost Dancers' perception that the land they once knew had been "spoiled". Indigenous concepts of government, of human relations with the environment, as well as with each other and with other people were, and may still remain, radically different from those of the settlers both then and now. As a consequence, early treaties did not necessarily represent a meeting of minds for, as Cronn noted: "Indians, at least in the beginning, thought they were selling one thing and the English thought they were buying another."[47]

A similar dynamic has been identified in relation to the numbered treaties in the Canadian West.[48] Rupert Ross, who worked in the justice system of northern Ontario, drew on Ghost Dance imagery to describe "the immense gulf that separates Native from other Canadian cultures".[49] As he noted, the belief found in many hunter-gatherer societies that there is a spiritual plane lying parallel to and

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[45] Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglais de l'Amérique du Nord* (Montréal, Boréal, 1997) at 67.

[46] Cronon, *Changes in the Land.*

[47] Cronon, *Changes in the Land* at 70.

[48] See eg. Walter Hildebrandt, Dorothy First Rider, Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996); SharonVenne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, B.C.: Theytus Books, 1998).

[49] Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ontario: Octopus Publishing Group, Butterworths, 1992), back cover.

interacting with the physical one is difficult to reconcile with the assumptions underlying his professional training as a lawyer.[50] In the course of his work, he learned that traditional Ojibway have a prohibition against emotional indulgence that prevents them from talking or even *thinking* about personal confusion and turmoil.[51] Our very use of a judicial system to deal with social conflict is a culturally determined response. Instead of focusing on what was done in the past, the Ojibway concentrate on healing the personal or interpersonal dysfunctions that caused the problem to begin with.[52] Because of this, and because of the emphasis they place on consensual decision-making, many aspects of Canada's adversarial justice system appear inappropriate in their eyes.[53]

This cultural incompatibility is not always recognized or understood by members of the dominant culture, though it is well known among Indigenous peoples and Ross reported seeing the following sentence written on a blackboard in the band hall of the Weagamow Lake Reserve, 380 air miles north of Thunder Bay Ontario:

> "I believe you understand what you think I said, but I'm not sure you realize that what you heard is not what I meant."[54]

This statement encapsulates a communication problem that can be found within as well as between cultures.[55] Human experience changes, and with it our capacity to

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[50] *Ibid.* at xxvii.

[51] *Ibid.* at 32.

[52] *Ibid.* at 46.

[53] *Ibid.* at 8.

[54] *Ibid.* at 5.

[55] See eg. Deborah Tannen ed. *Framing in Discourse* (New York: Oxford University Press. 1993); Deborah Tannen, *That's Not What I Meant! How Conversational Style Makes or Breaks Your Relations with Others* (New York: Ballantine, 1986).

know and understand so there are intergenerational as well as inter-cultural misunderstandings.

When the 1991 *Royal Commission on Aboriginal Peoples* examined the relationship between Canada and the Indigenous nations, it divided the past into four different historical eras. During the first, people lived in "Separate Worlds". Following contact, cultural and political differences were respected so relations in the second phase were characterized by "Co-operation" on matters of mutual concern. By the end of the 1700's, immigrants began to outnumber the surviving Indigenous peoples and the focus of the colonial economy shifted from fur trading to farming. This led to a third period characterized by "Displacement and Assimilation" effected through state interventions in Indigenous affairs including forced relocations, removal of children to residential schools and the outlawing of Indigenous cultural practices. Faced with the "manifest failure" of this policy, and encouraged both by sympathetic public opinion and by developments in international law, the *Royal Commission* posited that we have now entered a fourth era of "Negotiation and Renewal", characterized by dialogue and consultation.[56]

The *Royal Commission's* perspective on the changing character of inter-cultural relations is consistent with the earlier work of the historian Bruce Trigger, who found that the Indigenous presence was simply ignored once the in-migrating settler population became a majority. Events were recorded and policies developed as if the First Nations no longer existed.[57] As part of the Canadian government's

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[56] *Erasmus, Dussault* (RCAP, 1996), *Looking Forward, Looking Back* at 37-40.

[57] Bruce G. Trigger, "The Historian's Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present" (1986) 67.3 Canadian Historical Review 315; *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal: McGill-Queen's University Press, 1985).

response to the Oka Crisis, both the mandate and the composition of the *Royal Commission* itself seemed to support the view that a new stage had begun. In that case at least, some Indigenous people were invited to sit at the table on conditions of parity and a precedent was set by appointing joint chairs and a balanced panel representing both Indigenous and settler society.[58]

As will become evident in the discussion that follows, the renewed sense of partnership announced by the *Royal Commission* has been embraced by the Supreme Court of Canada. Yet, a wide gulf remains between Indigenous experience and the perceptions of the Court, which may be attributable in part to the lack of Indigenous representation on the panel. Beverley McLachlin, the Court's Chief Justice, has, for example, stated that this is "a successful pluralistic country" that "has no colonial past ...and is not a threat to anyone".[59] For those who have recently found themselves targeted by guns because of their beliefs or as a result of jurisdictional disagreements, statements of this kind may seem as bewildering and strange as the Ghost Dance must seem to Canadian judges. The conventional reliance on evidence and proof that the Chief Justice has staunchly defended in other circumstances seems to have vanished into thin air, recalling both the nineteenth century habit of ignoring Indigenous peoples and the emotional prohibitions of the Ojibway.

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[58] The commissioners were René Dussault, Georges Erasmus, Paul L.A.H. Chartrand, J. Peter Meekison, Viola Marie Robinson, Mary Sillet and Bertha Wilson.

[59] Beverley McLachlin P.C., "Globalization, Identity and Citizenship", (Ottawa, Ontario: ADM Forum, 26 Oct. 2004) http://www.scc-csc.gc.ca/aboutcourt/judges/speeches (6/11/2006).

There is certainly plenty of evidence to suggest that Indigenous people continue to feel threatened[60] and perhaps it is no coincidence that challenges to the Canadian state often involve Mohawks who evidently do not share Ojibway sensibilities. During her 2004 campaign for leadership of the Assembly of First Nations, Roberta Jamieson declared that Canada was founded on colonial practices, stating that "Racism is part of Canada's historical heritage".[61] Taiaiake Alfred has likewise insisted that "Indigenous people are seeking to transcend the history of pain and loss that began with the coming of Europeans into our world".[62] The tragic effects of this history are everywhere apparent. The *Royal Commission* itself found the suicide rate among Indigenous youth so high that it issued a preliminary report on the topic before publishing its main findings.[63] Indigenous people are starkly over represented in Canadian jails[64] and even basic nutrition is a problem despite the high standard of living enjoyed by Canadians in general. As acknowledged in 2006 by out-going Prime Minister Paul Martin, "The gaps in health care and education, in housing, in drinking water between aboriginal Canadians and the rest of Canadians

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[60] See for example *Mohawk Nation News*, http://www.mohawknationnews.com.

[61] See eg. *The [Montreal] Gazette* (22 March, 2004). The quote was not reported and comes from my own notes of the 2004 *Indigenous Bar Association Conference* in Montreal.

[62] Taiaiake Alfred, *Peace, Power and Righteousness: an indigenous manifesto* (Don Mills, Ontario: Oxford University Press, 1999) at xi.

[63] The overall Aboriginal suicide rate was two to three times higher than Canada's average, five to six times higher among youth and rising. Erasmus, Dussault, (RCAP, 1994), *Choosing Life: special report on suicide among Aboriginal people (Choisir la vie)*.

[64] At about 2% of the population, Natives make up 10% in federal prisons for men and 13% for women. In Saskatchewan and Manitoba, where they are 6 – 7% of the population, they provide 46-60% of prison admissions. Erasmus, Dussault (RCAP), *Bridging the Cultural Divide: Report on Aboriginal People and Criminal Justice in Canada.*

is simply unacceptable".[65] Drinking water! In this land of lakes, even that is no longer assured for those of Indigenous ancestry.

In 1996, as the *Royal Commission* completed its work, confrontations were taking place between state forces and Indigenous people at Ipperwash, Ontario and Gustafson Lake, British Columbia.[66] At Ipperwash, which concerned a well founded land claim, Dudley George, an unarmed Anishinabe protester, was shot and killed by a police officer[67]. Despite innumerable positive initiatives now underway, the decade since then has been marked by several more conflicts. Armed force was used against the people of Burnt Church in a fishing dispute that erupted following the Supreme Court decision in *R. v. Marshall.*[68] There was scandal in Saskatchewan when the public discovered the police had been dumping Indigenous youths outside the city of Saskatoon in winter without adequate clothing, leading to their deaths from exposure.[69] Canada came to *Amnesty International*'s attention because of its failure to investigate the disappearance of over 500 Indigenous women despite strong evidence that many had fallen victim to foul play.[70] The *Royal Commission* found that the over-representation of Aboriginal people in the criminal justice system was so alarming that it issued a preliminary report on this situation as well.[71]

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[65] Elizabeth Thompson, "'Let the government hear from Canadians'" *The [Montreal] Gazette*, (2 June, 2006) A10.

[66] Erasmus, Dussault, (RCAP,1996), *Looking forward, looking back* at 2.

[67] See *R. v.Deane,* [2001] 1 S.C.R. 279.

[68] *R. v. Marshall* [1999] 3 S.C.R. 456. (*Marshall I)*

[69] See eg. Justice D.H. Wright, Commissioner, *Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild*, http://www.stonechildinquiry.ca (7/18/05)

[70] "Canada: Stolen sisters – A human rights response to discrimination and violence against Indigenous women in Canada" AMR 20/03/2004. See http://www.amnesty.ca. (5/5/05)

[71] Erasmus, Dussault, (RCAP), *Bridging the Cultural Divide: Report on Aboriginal People and Criminal Justice in Canada* (Canada: Minister of Supply and Services, 1995).

Yet the percentage of Indigenous people in federal prisons is reported to have increased 22% between 1996 and 2004.[72]

It is apparent that old patterns of interaction persist in direct contradiction to the innovation represented by the *Royal Commission.* The cynicism felt by many indigenous peoples can be seen in Patricia Monture-Angus' allegation that "Every oppression that has been foisted on Aboriginal people in the history of Canada has been implemented through law".[73] From their perspective, things do not seem to be changing. During the first half of 2006, as the Ipperwash Inquiry into the killing of Dudley George continued, Kanesatake residents were convicted for protesting the replacement of their police force by a heavily armed militia financed by Canada.[74] A few weeks later, Ontario police at Caledonia attempted to use force to evict members of the Six Nations who had reclaimed a tract of land from a housing developer on the grounds that it had been illegally taken.[75] The Six Nations had been attempting for two *centuries* to negotiate restitution for the misappropriation of this land and recent, much publicized, land claims initiatives had resulted, once again, in nothing. In May 2007, people at Tyendanega blocked the rail line that passes through their land between Montreal and Toronto to publicize on-going

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[72] Janice Tibbetts, "Watchdog slams prison system", *The [Montreal]Gazette* (17 Oct., 2006) A12; Rémi Savard, "Les peuples américains et le système judicaire canadien : Spéléologie d'un trou de mémoire" (2002) *Can. J. L. & Soc.* 123

[73] Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 67.

[74] See eg. Jeff Heinrich, "Judge throws book at Mohawk rioters", *The [Montreal]Gazette* (21 Jan., 2006) A 9; André Beauvais, "La police la mieux équipée du Québec" *Le Journal de Montréal* (31 Jan. 2006).

[75] See eg. Canwest News Service/Canadian Press "Police Raid pours fire on protest" *The[Montreal] Gazette* (21 Apr., 2006) A1. For on-going Indigenous commentary see eg. *Mohawk Nation News*, http://www.mohawknationnews.com.

abuse of their rights and a national day of protest is planned for June 29th.[76] As Taiaiake Alfred has pointed out, "post-colonial promises" are not enough. Indigenous people are not convinced that there has been a real change for they are faced with an ever-present risk of "redefining without reforming".[77]

This divergence of opinion raises the questions examined in this work:

1) How can we tell that the goal of inter-cultural reconciliation has been reached?

In other words:

2) Is Canada "postcolonial"?
   i) If so, how can we prove it?
   ii) If not, what reforms are needed?

As far as the Supreme Court of Canada is concerned:

3) What is its role in relation to this issue?
   i) Has the Court contributed to the reconciliation process?

Or

   ii) Is the Court creating a new form of colonization of the kind that critics like Taiaiake Alfred fear?

As L'Heureux-Dubé J. has pointed out, it is no longer possible to assume that anything said or written has a "plain meaning". The "integrity of our judicial system" can only be upheld if communications are considered in context so they can be given an "informed interpretation".[78] What follows is accordingly a contextualization. It applies paradigmatic theory in an attempt to cast some light on the legal reorientation represented by the recognition of "aboriginal and treaty rights" in s.35 of the *Constitution Act, 1982*. Colonial and postcolonial modes of

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[76] After taking over a quarry on disputed land, the people of Tyendanega found it was being used for illegal dumping of toxic waste. The presence of the railroad is also in dispute. The railroad responded with a lawsuit for disruption of its business. "Indigenous People Block Mega Yard Sale: Railroad Companies Fuel Hysteria" *Mohawk Nation News* (17 May, 2007).

[77] Alfred, *Peace, Power and Righteousness* at xiii.

thought are investigated along with internationally agreed upon legal standards for assessing decolonization in order to define the old colonial paradigm that we are attempting to leave behind and clarify the legal and social vision represented by the postcolonial ideal. The application of these templates to Supreme Court of Canada cases decided following the enactment of s.35 makes it possible to see that the problems we face resemble those commonly associated with changes in conceptual frames of reference.

The task of negotiating this ideological change in a way that bridges the cultural divide between Indigenous peoples and Canadian administrative practices is complex and fraught with ambiguities. This work is accordingly presented in stages. The introductory section continues with an overview of the shift in perspectives created by the emerging international emphasis on egalitarian values. It identifies some of the changes that crystallized during the twentieth century to inspire the questions that now engage our interest. The basic terms and conventions used in this analysis and some of the ambiguities that surround them are also outlined.

Part I sets out the analytical framework applied in Part II. Chapter 2 reviews Kuhn's theory of paradigmatic change as understood for the purposes of this study. It also introduces recent findings concerning human cognitive function that confirm Kuhn's concept of the structure of human knowledge, providing new insights into the way paradigms are reflected in the categorical definitions that govern judicial texts. Chapter 3 summarizes prominent opinions on colonialism and postcolonialism as informed by the emergence of the international decolonization movement. This

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[78] *2747-3174 Québec Inc.* at [152 - 9].

has been used to create a profile of the two major paradigms applied in this study. The resulting analytical framework is broadly defined and could be applied in many other contexts.

Part II has adapted this conceptual model to present a case study of judicial reasoning concerning Indigenous rights at the Supreme Court of Canada following the constitutional entrenchment of "aboriginal and treaty rights" in the *Constitution Act, 1982.* Using the paradigmatic theory described in Part I, it was possible to demonstrate the deeply rooted character of some aspects of the colonial paradigm. The intense deconstruction produced when colonial and postcolonial indicia are considered simultaneously has made it possible to identify the persistence of cultural habits of thought that are founded on discarded norms as well as areas in which postcolonial modes of thought are gaining a foothold. The study concludes with some observations concerning the new role that the Court is defining for itself.

According to the linguistic evidence reviewed in Part I, Madam Justice L'Heureux-Dubé's belief that "the era of concealed underlying premises is now over"[79] is an impossible dream. However, her call for an examination of such premises captures the spirit of the legal reform that is beginning to emerge. In keeping with this modern mandate, the aim of this work is to stimulate reflection, identify trends and gain a better understanding of the Court's challenges and accomplishments related to the complex task presented by the decolonization process.

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[79] *Ibid.*

1.1 The Twentieth Century Shift to Egalitarian Values

> "The effective expansion of democracy...presupposes a critical self-examination,..."
>
> Vàclav Havel, President of the Czech Republic,
> Stanford University,
> September 29, 1994.[80]

As a study of Indigenous rights in relation to Canada, this work joins hundreds of others which present so many conflicting points of view that it is difficult to phrase the discussion in a way that is acceptable for all of the audiences concerned. The assumptions that people make concerning what is "right" and how this should be determined can differ dramatically. Most judges are familiar with this phenomenon for they are confronted with it on a daily basis. According to the paradigmatic theory that will be examined in the next section, the goal of reconciling discordant points of view is simply unattainable in some instances. The mis-matched frames of reference that fuel legal disputes are typically products of divergent experiences, assumptions and aspirations. This problem is particularly acute when dealing with Indigenous rights. Inter-cultural misconceptions add an element of confusion to governmental duties and court-ordered solutions skate precariously over complex questions that might never be definitively resolved: What is "Canada"? How was it constituted? Who and what is "Indigenous"? Or "aboriginal"? Or "Indian"? What kinds of rights do these social categories entail?

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[80] Vàclav Havel, "Democracy's Forgotten Dimension" (1995) 31:1 *Stanford J. Int'l L.* 1 at 12. As president of Czechoslovakia, Mr. Havel presided over the consensual division of the country into the Czech and Slovak republics.

Who should decide? And how? What is the proper relationship between Canada and the members of these controversial classes of people?

The incendiary nature of such questions is fueled, in part, by a major shift in the legal and moral paradigms that motivate "reasonable" men and women. Because of this transformation, concepts whose meaning seems deceptively self-evident to some may appear hopelessly confused to others. The origins of this ill defined movement are multifaceted and deeply rooted. Driven by the collective consequences of individual thoughts and perceptions, they have been traced to the demise of feudalism[81] and entwine with the emergence of modern notions of nationhood and democracy.[82]

There are many ways to understand what has been happening and the result, for many, has been a re-orientation in the concept of "law" itself. That is to say, consciously or unconsciously, many of us are engaged in the process of rethinking, not only the rules that are generally considered to be binding, but also our sense of community and of the means by which community "custom" and "consensus" are identified. As seen in the L'Heureux-Dubé quote at the beginning of this chapter, recognition that points of view may legitimately vary is growing. This is an important element in the transformation we are experiencing, for it is no longer acceptable to assume that there is only one "correct" opinion.

As the recurring confrontations between modern states and Indigenous societies referred to at the beginning of this work suggest, colonial habits remain

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[81] See eg. Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

deeply embedded in cultural practice. Yet, the social activity that constitutes "legal" function has already undergone dramatic reform. At the 19th century height of colonialism, the concepts of legitimacy and social stability asserted by the dominant state actors were founded, consciously and without apology, on the use of force. In 1832, the English jurist John Austin defined "laws" as "commands" and his characterization was broadly accepted – at least by those engaged in the colonial enterprise.[83] Even communism was to call for a "*dictatorship* of the proletariat".[84]

Today, by contrast, human equality is considered primordial. The command model *per se* has not been explicitly rejected. Despite the rising populatity of alternate methods of dispute resolution, court *orders* and other institutions consistent with its tenets continue in use. However, the rationale for using such procedures has shifted. The equality of all men and women is now so firmly rooted in both domestic and international discourse that it has grown into a generally accepted moral imperative. As majestically articulated in 1948 by the *Universal Declaration of Human Rights*, international organizations now aim at achieving effective protection for "the inherent dignity and the equal and inalienable rights of all members of the human family".[85] In other words, the notions of liberty, equality and fraternity popularized by the slogans of the American, French and Communist revolutions have become so firmly rooted that they have called previously accepted

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[82] Re. the emergence of "British" nationality see Linda Colley, *Britons: Forging the Nation 1707-1837* (London: Random House, 1992); *Captives: Britain, Empire and the World, 1600 – 1850* (New York : Anchor Books, 2002).

[83] John Austin, *The Province of Jurisprudence Determined etc* (London: Weidenfeld and Nicolson, 1955 reprint of 1832) at 1.

[84] This much discussed term was coined by Karl Marx to describe the transition to communist society he envisioned. http://en.wikipedia.org (08/07/2006).

[85] *Universal Declaration of Human Rights* A.G. Res. 217 A(III), U.N. Doc. A/810 (1948).

social practices into question. Equality raises questions concerning how and when command may be considered legitimate. It suggests that it is inherently incorrect for one person to force their will upon another and, at both personal and national levels, actions once accepted as part of the natural order of things are now seen as atrocities. In effect, egalitarian values have come to eclipse the capacity to enforce as the conceptual focus for "law" and social order so, in the legal scheme of things, might – or the capacity to invade and conquer - no longer makes right.[86]

This shift in moral orientation is leading scholars everywhere to re-examine institutional history and the ways in which modern states were legally and socially constituted. Now that armies are no longer deemed essential to secure a state's survival, military prowess and the capacity to dominate fail to provide a sufficient explanation for the process of social genesis. Egalitarian mores are encouraging researchers to challenge culturally defined assumptions and some are beginning to realize that, as Linda Colley has pointed out, an "almost entirely male establishment of imperial historians" expunged many significant events from conventional and current narratives of empire.[87]

More nuanced perspectives on the past are now being constructed by examining what happened to those who lost in battle or became socially marginalized through other means. As new analytical paradigms are applied, the experiences, opinions and responses of the poor, of indentured servants, of natives, slaves, women and others whose interests were previously ignored have come to be

[86] This generalization is not meant to forclose analysis of current American militarism or of the sophisticated rationales employed by regimes like Imperial China and the British monarchy that became stable and endured after initial conquests.

considered relevant.[88] The "imperialism" that was once glorified by Britain and other aggressive cultures has lost its luster. Britain itself has abandoned its "Empire", turning its attention to co-operation with its neighbours in the European Union. Many of the colonized have moved to Britain and become integrated in English society, changing the audience for social commentary and the character of public discourse. Some British historians now refer to their former imperial success as an "intrusion" on other parts of the world.[89] Old stereotypes are being rejected leading a generation educated to believe that England was the "home of democracy" to produce works like the *Democratic Audit of the United Kingdom* which demonstrates serious deficiencies in English practice when measured against internationally recognized standards.[90] The present study might be seen as part of this trend that asks us all to question our heritage and rethink what we are doing.

1.1.1 Changing Canadian Concepts of Legality and Identity

The process of social re-evaluation that has been taking place has been accompanied by a change in the conception of "law" among Western legal philosophers. The progression of works from Kelsen to Dworkin reflects the transition from a model founded on constraint to one that is conceived as a process

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[87] See eg. Colley, *Captives* at 33 n.68 though other cultures have long been concerned with historical bias. See eg. China.

[88] This is reflected in the bibliography to this work which might otherwise seem ecclectic.

[89] See eg. Colley, *Captives*

[90] Stuart Weir, David Beetham, *Political Power and Democratic Control in Britain: The Democratic Audit of the United Kingdom* (London: Routledge, 1999), 23. See also Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Oxford: Hart Publishing, 2006).

involving the constant revision of social consensus.[91] Because of this philosophical reorientation, popular movements for emancipation are no longer seen as "insubordination". In some circles at least, they are now understood as natural responses to oppression. Instead of being confronted by armies with guns, their leaders or spokespersons are increasingly invited to international negotiating tables where internationally determined norms apply. Judges have never been more important. The battles that were once declared by cavalry charge and cannon shot are now announced by the filing of court documents. As we struggle to free ourselves from the grasp of hegemonic determinism, new modes of thought are gaining momentum, past policies are being repudiated, voices that were once ignored are being listened to and new states are consolidating their position in a globalized economy.

Canada's situation in this emerging context remains somewhat ambiguous. Unlike many countries struggling to escape their colonial heritage, Canada does not have an independence day. It has never formally severed its ties to a past whose practices now make people profoundly uncomfortable. Indeed, in the 1998 *Reference re Succession of Quebec*, the Supreme Court declared that Canada's constitution was founded on "an historical lineage stretching back through the ages".[92] This may reflect what William R. Lederman has described as a constitutional habit of relying on "new rules developed by custom, usage and

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[91] See eg. Pierre Noreau, "Comment la législation est-elle possible? Objectivation et subjectivation du lien social" (2001) 47 *McGill L. J.* 195 at 211.

[92] *Reference re Succession of Quebec*, S.C.C. [1998] 2 S.C.R.217 at [49].

convention as sources of law".[93] The application of this backwards looking methodology is often interpreted as a source of social stability. Yet the concept of "new...custom" is confusing. It induces both the judiciary and governmental institutions to seek legitimacy in precedents established during the colonial era. In some eyes at least, this suggests ambivalence with regard to the social reordering now taking place. Even such well intended initiatives as the settlement of Indigenous land claims are seen, by some, as an extension, rather than a revocation, of the colonial ethos and commentators like Taiaiake Alfred have gone so far as to claim that the process is forcing the original inhabitants of the land to "justify their existence to a crude hoard of refugees from another continent".[94]

The conceptual rift created by Canada's reluctance to repudiate the imperial past may be easier to identify when we consider the social and philosophical evolution that has taken place since the "Dominion" was first constituted by Britain's parliament in 1867.[95] In practice, the protocols that order governmental function in Canada are products of the the19th century – a time whose social assumptions appear shocking by current standards. When Canada was formally accorded "dominion" status by the British in 1867, the dominant European powers saw success at colonizing others as a virtue. Indigenous rights were routinely ignored. In 1885, the Treaty of Berlin unabashedly proclaimed rules for taking possession of Africa, formulated at a conference where there had been no

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[93] William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 *Am. J. Comp. L.* 339 at 341 citing Kelsen, *General Theory of Law and State* 117 (1949) at 340.

[94] Alfred, *Peace, Power and Righteousness* at 58.

[95] *British North America Act, 1867*, 30-31 Vict.c.3 (U.K.) (renamed the *Constitution Act, 1867* by the *Constitution Act, 1982*): *Constitution Act, 1867* (U.K.) R.S.C. 1985 Appendix II, No.5.

representation what so ever of the African peoples.[96] By the turn of the last century, foreign administrations claimed authority over most of Africa, America and Asia, including India and all of China's major ports.[97] When World War I erupted, war was considered part of the natural order of things. "Britannia ruled the waves"[98] and, from the British perspective at least, "The sun never set on the British Empire".[99]

The concept of "Canada" was radically different at that time. In legal terms, Britain defined what it called the "Dominion of Canada" as a "colony".[100] Indeed, Britain's "Dominions" functioned as colonies in the biological sense of the word for emigration to Canada, Australia, New Zealand or South Africa was regarded as a solution to Britain's unemployment problems.[101] The majority of the population that migrated to Canada at this time accepted their role as active supporters of and participants in British over-lordship. They worked for companies with names like *Dominion* Bridge and *Imperial* Tobacco. Some of the defeated French were also induced to participate in this vision of an imperial world and in 1909 Prime Minister Wilfrid Laurier, declared:

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[96] Participants were Germany, Austria-Hungary, Belgium, Denmark, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and the United States. See http://www.wikipedia.org/wiki/Berlin_conference.

[97] China itself was an empire, colonized in the 1600's by the invading Manchus who established the Qing dynasty. Li, *Ageless Chinese*. Most Latin American states gained independence from Europe during the 1800's, however control remained predominantly in the hands of European colonizers.

[98] The poem "Rule Britannia" by James Thomson (1700-48) was put to music by Thomase Augustine Arne (ca. 1740) and became an unofficial national anthem. "Rule Britannia!" http://www.britannia.com.(4/24/2007) Germany's Navy Law of 1900 and its construction of 13 battle ships by 1914 threw Britain into a panic. Oscar Douglas Skelton, *The Life and Letters of Sir Wilfrid Laurier* vol. 2 (London, Oxford University Press, 1922) at 317.

[99] See eg. reproduction of 1913 school text in Colley, *Captive* at 372.

[100] A "colony" was "any part of his Majesty's dominions exclusive of the British Islands and of British India". Lord Hailsham of St. Marylebone, *Halsbury's Laws of England* (4th ed.) vol.10 (London: Butterworths, 1996) at para 856. Note also the *B.N.A. Act* s. 132.

> "We are British subjects; Canada is one of the daughter nations of the Empire, and we realize to the full the rights and obligations which are involved in that proud title..."[102]

These rights were not egalitarian in the modern sense of the word. Despite Laurier's use of female imagery, Canadian government in his day was conducted exclusively by property-owning males.[103] Queen Victoria, to whom these men had sworn allegiance for sixty years, had been only a titular head of state. Women in the colonizing society were routinely excluded from public life, denied even the right to vote – along with "Indians", Chinese and men without significant material assets. It was not until after World War I that Britain extended "universal suffrage" to men over 21 and women over 30, eventually equalizing gendered voting rights in 1928.[104] In Canada, on-going doubts concerning women's capacity to exercise full legal personality were finally resolved the following year when the Privy Council in England declared in *Edwards v. A.G. Canada*[105] that the constitution was a "living tree" that could grow as circumstances required. It was accordingly determined that women were "persons" capable of sitting in Canada's Senate.[106]

However, this celebrated affirmation of women's personhood had little, if any, effect on the status of the people defined, under Canadian law, as "Indians".

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[101] See eg. *Canadian Annual Review, 1920* at 244-245.

[102] Skelton, *The Life and Letters of Sir Wilfrid Laurier* at 321. By contrast, Henri Bourassa.(1868-1992) opposed political dependence on Britain or the United States, founding the Nationalist League and the newspaper *Le Devoir* to promote autonomy within the British Empire. http://en.wikipedia.org (12/18/2007)

[103] Re women's status in Canada in the 1920's see eg. Constance Backhouse, "Attentat à la dignité du Parlement" Viol dans l'enceinte de la Chambre des commmmunes, Ottawa 1929" (2001-2) 33 *R.D. Ottawa* 95 at 98.

[104] Weir, Beetham, *Political Power and Democratic Control in Britain* at 24.

[105] *Edwards v. A.G. Canada* [1930] A.C. 124 [1929]; 3 W.W.R. 479 [1930]; 1 D.L.R. 98 (P.C.).

were assigned four seats of their own in New Zealand's parliament in 1868[107], "Indians" have never been accorded separate representation in the parliaments of Canada or any of its provinces. Though the British routinely founded their claims to sovereignty over Indigenous land on treaty processes, the "Indians" did not participate in the decision to found the Canadian federation. The position of the Indigenous peoples in the "Dominion of Canada" was determined exclusively by British colonists who relied on their own interpretations of both the treaties and the unilateral declaration in s.91(24) of the *British North America Act* that "Indians and lands belonging to the Indians" fell under the "exclusive Legislative Authority of the Parliament of Canada".[108]

Having been schooled in a command model of legality, the settlers read the wording of the *B.N.A. Act* as a right to legislate *for* Indians. Though a full discussion of the colonial evolution of the concept of "sovereignty" is beyond the scope of this work, it might be noted that Canadian interpretations of the *B.N.A. Act* were consistent with the changes in British concepts of their jurisdictional authority that accompanied their imperial expansion. As early as 1803, an imperial statute authorized the courts of Upper and Lower Canada to judge crimes committed

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[106] British women previously exercised several sorts of political rights according to the cases cited in *Edwards.* See Li Xiu Woo, "The Cracked Mirror: How 'Judicial Notice' Beat Historic Evidence in the 19th Century Decline in Women's Constitutional Rights" (1994) 52.3 *The Advocate* 347.

[107] www.nzhistory.net.nz/Gallery/parl-hist/tereo.html (14 June 2005). This was granted following Maori military attacks that posed a "serious threat to European dominance". James Belich, *The Victorian Interpretation of Racial Conflict: The Maori. The British, and the New Zealand Wars* (Montreal: McGill Queens University Press, 1989 reprint of *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*(Auckland University Press, 1986) at 253.

[108] Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (University of Saskatchewan, Native Law Centre, 1989) at 63.

outside their recognized territories.[109] The presumption that Indigenous opinion was irrelevant to the formation of legality intensified over time and by 1876 the first consolidated "*Indian Act*" specifically defined a "person" as "an individual other than an Indian".[110]

Significantly enough, this British North American legislation was neither discussed nor explained during the negotiations for the numbered treaties that paved the way for the west-ward expansion of the Canadian state. Like other nations, the Indigenous peoples assumed that British law applied only to British subjects. The *Indian Act* was entirely a product of foreign institutions and the "Indians" had not participated in its formulation. When they learned of its existence, they registered many protests, but their attempts to prevent Indian Agents and other Canadian officials from encroaching on what they considered to be their traditional jurisdictions generally failed. As a consequence of this political exclusion, their assets were appropriated, their traditional governments were deposed, their customs were outlawed, their children were taken from them for education in residential schools run by the colonial government and they were even prohibited from leaving their reserves without an Indian Agent's permission.[111]

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[109] Morin, *L'Usurpation de la souveraineté autochtone,* citing *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and Offenses within certain Parts of North America adjoining to the Provinces*, 1803 (U.K.), 43 Geo. III c.128. The reasons for this enactment merit further investigation, taking account of the British desire to regain jurisdiction over rebel Americans who were former subjects.

[110] *Indian Act, 1876,* S.C. 1876, c.18 (39 Vict.) s.12.

[111] Re effects of these measures see Jean Goodwill, Norma Sluman, *John Tootoosis* (Pemmican Publications, 1984). See also Li Xiu Woo (Grace Emma Slykhuis) *Canada v. The Haudenosaunee (Iroquois) Confederacy at the League of Nations: Two Quests for Independence* (LLM 2000, Université du Québec à Montréal)[unpublished]

It was not until 1951 – two decades after the affirmation of women's personhood - that the exclusion of "Indians" from the definition of a "person" was removed from Canada's *Indian Act*.[112] It is, perhaps, no coincidence that this coincided with the passage at the United Nations of the *Convention on the Prevention and Punishment of the Crime of Genocide*.[113] Yet, it was not until 1960 that some semblance of Indigenous personhood was resurrected through the establishment of the right of "Indians" to vote in Canadian federal elections.[114] These reforms are not as magnanimous as they might initially seem because they simply presumed Indigenous inclusion in Canada and they were put into effect without obtaining the consent of the peoples concerned. As explained in s.3.2 below, this violated current standards in international law and, unlike the *Edwards* decision, the reforms are not generally celebrated by the intended beneficiaries.

As the cases concerning Indigenous rights that are examined in Part II demonstrate, this ambiguous legacy still rankles among Indigenous people. They have objected vociferously to externally imposed legislation generation after generation after generation, yet Canada continues to rely on the *Indian Act* to regulate its relationship with the people it defines as "Indians". The contradictions involved in conducting negotiations through band councils instituted under legislation whose legitimacy has been rejected by many of those to whom it is

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[112] This was not because of Indiginous ignorance of the Act. See eg. John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Governments" (1992) 30:2 *Osgoode Hall L. J.* 291 at 339.

[113] *Convention on the Prevention and Punishment of the Crime of* Genocide, U.N.T.S. No. 1021, vol.78 (1951).

[114] S.C. 1960, c.39. There had been voting rights for some at the time of John A. MacDonald, but some see voting as acceptance of colonization so the implications of this "liberalization" remain highly controversial.

applied has thus far been ignored. The ambiguity of this situation is exacerbated by the constitutional importance still placed on the colonially inspired *British North America Act*, which was simply renamed in 1982 to become the "*Constitution Act, 1867*" in a process that, once again, involved no formal participation by any Indigenous representatives.[115] It was, significantly enough, not until *after* the new constitutional regime was implemented that some "Aboriginal leaders" were invited to sit at the table as equals to provincial "first ministers".[116]

Though anachronistic elements of this kind continue to trouble Canadian relations with the Indigenous nations, the conceptual re-ordering that has taken place since the initial constitution of the Dominion of Canada has been dramatic. In Indigenous contexts, analysts often overlook the fact that even the British men who owned enough property to run for parliament lacked full legal autonomy until well into the 20th century. The colonies that united to make Canada were initially ruled by imperial governors. The concept of "responsible government"[117] through elected legislatures was only instituted a few short years before Canadian confederation which, in itself, did nothing to alter the country's function as an arm of the British Empire. Except for relations with the Indigenous nations, Canada's foreign affairs, including relations with the United States, remained in Britain's full control. It was not until 1923 that Canada signed its first treaty – the Halibut Treaty

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[115] Goodwill, Sluman, *John Tootoosis* at 228-233.

[116] Erasmus, Dussault, (RCAP,1996), *Looking forward, looking back* at 208.

[117] "Responsible government", which makes the executive responsible to an elected assembly, was achieved by the united province of Canada (Ontario and Quebec), Nova Scotia and New Brunswick in 1848, P.E.I. in 1851, Newfoundland in 1855, British Columbia in 1872 and Manitoba, Alberta and Saskatchewan at the time of their creations. Peter W. Hogg, *Constitutional Law of Canada* 2nd ed. (Toronto: Carswell, 1985) at 191. It was suspended in Newfoundland from 1933 until it joined Canada.

- all be it with Britain's help.[118] The preamble to the *Constitution Act, 1867* still calls on Canada to "promote the Interests of the British Empire" and s.132 still defines "Treaty Obligations" in terms of this country's status as "Part of the British Empire"[119] even though the British themselves seem almost to have forgotten their imperial past.[120]

As far as the anglophone majority in Canada was concerned, subservience to Britain was acceptable - even desirable.[121] Most were born British subjects. Canada's British identity was commonly considered a protection from the American brand of liberty with its tendency to degenerate into gun-slinging shoot-outs. Inclusion in the British Empire provided access to a system of justice that was seen as a bulwark against the aggressive ambitions of the colonial rebels south of the border who assumed they would eventually control most of North America.[122] Though Canadians had no vote in Britain's parliament, they *were* British subjects, backed and protected by Britain's imperial might. As we have seen, even prominent francophones, like Prime Minister, Sir Wilfrid Laurier, identified with "the Empire" and this British orientation shaped the character of public debate. The ideal of republican independence seemed so traitorously American that it was rarely discussed. "Colonialists" supported subordination to Britain in return for protection

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[118] Walter A. Riddell, *Documents on Canadian Foreign Policy 1917-1939* (Toronto: Oxford University Press, 1962).

[119] Thanks to gkizitanamogk for pointing this out.

[120] Current accounts of British constitutional history may entirely omit any reference to colonial involvement. See eg. Wicks, *The Evolution of a Constitution.*

[121] See eg. William Renwick Riddell, *The Constitution of Canada in its History and Practical Working* (New Haven : Yale University Press, 1917); Sara Jeanette Duncan, *The Imperialist* (Toronto, Copp Clark, 1904 reprinted McClelland and Stewart, 1971) ; Christine Mander, *Emily Murphy : Rebel* (Toronto: Simon and Pierre, 1985).

without military obligation. "Imperialists" sought a more active role for Canada in Britain's colonial ventures and the "Canadian Nationalist League" founded in 1903, focused - not on independent statehood - but rather on promoting French civilization in America to counter "Imperialist" exaltation of the "Anglo-Saxon race".[123]

The "Rule Britannia" mentality they confronted, which was not so far removed from American jingoism, was firmly entrenched as can be seen in an 1849 editorial in the Montreal *Gazette* which declared:

> "One race or the other must assert its supremacy. Which shall it be?...The Anglo-Saxon which, like the roll of a mighty ocean, is sweeping over the continent? Is it that energetic powerful and sleepless race that is to pale before the rushlight of an insignificant French nationality in a corner of Canada?"[124]

The Indigenous peoples had become invisible in such conceptualizations. Yet, as the discussion concerning concepts of social order in section 5.1 below indicates, assumptions of this kind concerning the "need" for supremacy conflicted profoundly with many Indigenous beliefs concerning what is required to establish social order.

In this context, anyone with ideas approximating late 20th century notions of independent Canadian nationalism was left in the shadows. Most Canadians did not want full autonomy of the kind Indigenous peoples assumed they already had. Laurier, like most of his contemporaries, thought in terms of empire. Though he was to struggle with the issue of Canadian identity throughout his prime ministerial

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[122] See eg. Benjamin Franklin, "The Rattle Snake as a Symbol of America" (*The Pennsylvania Journal* (27 Dec. 1775) in J.A. Léo Lemay ed. *Writings* (New York: Library of America, 1987) at 746.

[123] Skelton, *The Life and Letters of Sir Wilfrid Laurier* at 309-313. See also Duncan, *The Imperialist.*

[124] "Exhibition area will feature former Parliament's foundations", *The [Montreal]Gazette* (27 June, 2006). See also Thompson, "Rule Britannia"; Duncan, "The Imperialist" at 195, 216, 227 or the literary works of Duncan Campbell Scott.

career, his declaration that "Canada is a nation...and freedom is its nationality" was not a proclamation of full state autonomy in the modern sense of the word for it concluded with the prediction that "in a few years the earth will be encircled by a series of independent nations, recognizing the suzerainty of England".[125] In 1909, he even went so far as to declare:

> "I have no hesitation in saying that the supremacy of the British Empire is absolutely essential, not only to the maintenance of the Empire but to the civilization of the world."[126]

Less than a hundred years later, Laurier's prediction seems absurdly and extravagantly misdirected. Time has definitively proven that he was wrong. Even in Britain, the British Empire has all but been forgotten along with many elements of the imperial paradigm that structured its existence.[127] Dozens of independent states in Asia, Africa and Latin America have emerged through the process of decolonization to take seats on a parity with others in organizations like the United Nations. International air travel has broadened the Euro-American concept of "civilization", war has become technically illegal and, even though combat of one kind or another continues to erupt, military conduct is critically scrutinized by a wary public. New expectations concerning proper governmental function have taken root and ritual declarations of human equality routinely preface international covenants and conventions. In this context, "Britain" herself has changed.[128]

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[125] Skelton, *The Life and Letters of Sir Wilfrid Laurier*, 72; R.S. Jenkins, *Canadian Civics,* Saskatchewan Edition (Toronto: The Copp, Clark Company, Limited, 1919) at 5; Riddell, *Documents on Canadian Foreign Policy 1917-1939* at xxxvi.

[126] Skelton, *The Life and Letters of Sir Wilfrid Laurier* at 322.

[127] See eg. the description of "the Crown" in Hogg, *Constitutional Law of Canada* at 215.

[128] There is no consensus concerning exactly what "proper governmental function" is. As one example of a virtually inexhaustible supply of popular academic literature on this topic see eg.

Scotland, Wales and Ireland have established their own legislatures and "subject" status, whose origins predate William the Conqueror's assertion of Norman sovereignty in 1066, has been legally retired. This became official in Britain as of January 1st, 1983[129] and Canadians barely noticed. They had already become "citizens" in 1947[130] and there was very little public comment on this loss of the status that was so proudly flaunted by Sir. Wilfrid Laurier just a few decades earlier.

In keeping with international trends, Canadians now consider human equality to be a basic regulatory norm. No prime minister today would dream of depicting this country as a dutiful daughter hiding behind Britain's skirts. Most Canadian lawyers are unfamiliar with the law that defined Britain's imperial monarchy and "subject status" is not even mentioned in the leading constitutional texts.[131] Universal adult suffrage is now taken for granted and the *Constitution Act, 1982* has formally abolished distinctions of any kind, including those based on "race, colour, sex, language, religion, political or other opinion, national or religious origin, property, birth or other status".[132] The United States and Britain remain giants, dominating the Anglophone social tradition to which Canada belongs, but many of their own citizens now reject the legitimacy of armed interventions.[133] The

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Steven Yates "Thomas S. Kuhn, the Culture War and the Idea of Secession" http://www.lewrockwell.com/yates/yates2.html (10/12/04) This paper, which lacks knowledge of British and international legal history, uses Kuhn's theory of paradigms to support conservative philosophy associated with the American south.

[129] *British Nationality Act, 1981* (U.K.), 1981, c.61. See also Lord Hailsham of St. Marylebone, *Halsbury's Laws of England* (4th ed.) vol.4(2) (London: Butterworths, 1992) at para.3.

[130] *Canadian Citizenship Act* S.C. 1946 c.15.

[131] See eg. Hogg, *Constitutional Law of Canada.*

[132] *Constitution Act, 1982* s.15; *International Covenant on Civil and Political Rights*, Art. 2.

[133] Eg. Some propose prosecution of Prime Minister Tony Blair and President George Bush concerning the war in Iraq. Similarly, when Israel bombed civilians in Lebanon, Louise Arbour suggested that some Israeli generals might be charged with "personal criminal responsibility". Harvard law professor Alan M. Dershowitz's derisive commentary reveals substantial disagreement

grand colonial project of the past has become an embarrassment. Some of its elements have even been defined as "crimes against humanity".[134]

In keeping with the foregoing considerations, the analysis that follows is based on the following assumptions:

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1st Introductory premise:

The concept of law is in the process of changing from a command model to one founded on human equality.

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2nd Introductory premise:

Canadians once saw themselves as part of the British Empire, but now consider themselves to be an independent state.

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1.1.2 Canada's Stance on Decolonization

In accord with the conceptual evolution that marked the 20th century, Canada no longer promotes itself in colonial terms. As stated by McLachlin C.J., "Respect for the inherent dignity and equality of human beings, tolerance of difference, and democratic freedoms" are considered "part of the social fabric of Canada".[135] This country was among the first to ratify the *Charter of the United Nations* in 1945 with its preliminary declaration of human equality.[136] The idea that Canada's constitution must accommodate Indigenous beliefs and customs as well as those of the immigrant settlers has become official doctrine. Domestic legislation has

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concerning just what, exactly international legality requires. Alan Dershowitz, "Arbour must go: Her absurd comments were harmful to democracies fighting terrorism" *The [Montreal]Gazette* (22 July, 2006) B7.

[134] See eg. the *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N.T.S. No. 1021, vol. 78 (1951) p.277.

[135] McLachlin, "Globalization, Identity and Citizenship".

[136] *Charter of the United Nations* [1945] R.T. Can. 7. William A. Schabas, "Canada and the Adoption of the *Universal Declaration of Human Rights*" 43 Mcgill L.J. 403.

undergone a succession of amendments paralleling developments in international law and it is generally assumed that Canada's treatment of "the aboriginal population" stands in a "distinguished position" compared to other states.[137] In effect, many Canadians share McLachlin C.J.'s view that:

> "among the many pluralistic communities around the world, Canada emerges as the one with the greatest capacity to lead others in recognizing diversity as a blessing, and an opportunity."[138]

However, as the introduction to this work suggests, considerable tension remains between declared Canadian ideals and actual practice. In May 2006, Canada's representative at the United Nations Permanent Forum on Indigenous Issues declared that it was his Government's position that "indigenous peoples should be included in decision - and policy-making that affect them".[139] Yet one month later Canada was the only country other than Russia to vote against the United Nations *Declaration on the Rights of Indigenous Peoples*.[140] This apparent contradiction might be attributed to new instructions from the recently elected Conservative government[141] except inconsistency has been a recurrent characteristic of Canadian "Indian" and international human rights policy.[142]

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[137] Jack Woodward, *Native Law* (Toronto : Carswell, 1989) ch.2, s. C.

[138] McLachlin, "Globalization, Identity and Citizenship".

[139] *United Nations Economic and Social Council* HR/4891 "Role of Governments in Advancing Indigenous Rights Focus as Debate Continues in United Nations Forum" http://www.un.org/News/Press/docs/2006/hr4891.doc.htm

[140] Cheryl Cornacchia, "Mohawk Leader slams Ottawa's about-face", *The [Montreal]Gazette* (6 July, 2006) A7.

[141] Stephen Harper was elected on January 23, 2006.

[142] "The Canadian Government misled both domestic and international public opinion by concealing its substantive opposition to the Declaration behind procedural arguments" Schabas, "Canada and the Adoption of the *Universal Declaration of Human Rights*" at 403.

Indigenous peoples remain so invisible to many Canadian decision makers that the extension of formal equality to all those classed as "Indians" or "aboriginal" seems generally to have arisen as a legislative afterthought. It was not until six years *after* Canada ratified the United Nations *Charter* that the *Indian Act* was revised to delete the sub-human definition of an "Indian" along with some measures explicitly prohibiting Indigenous cultural and religious practices.[143] Though some "Indians" had been allowed to vote for a brief period when John A. MacDonald was Prime Minister, the federal franchise for "Indians" was not reinstated until 1960.[144] Likewise, despite Canada's ratification of the *International Covenant on Civil and Political Rights*[145] in 1976, it was, once again, not until six years later that "aboriginal and treaty rights" were formally entrenched in s.35 of the *Constitution Act, 1982.*[146] And, even though the 1991 *Royal Commission on Aboriginal Peoples* referred to the Indigenous nations as "Partners in Confederation"[147], the institutional reforms required to turn this vision into a practical reality have not been instituted. With the exception of Nunavut where a large proportion of the population remains Indigenous[148], there is no jurisdiction in Canada that allows Indigenous representation on a par with that enjoyed by the successors of the founding

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[143] *Indian Act* S.C. 1951, c. 29. Arts 2 to 84 of the *Indian Act*, R.S.C. 1927, c.98 were abrogated by s.123 (2).

[144] *Canada Elections Act* S.C. 1960, c.39. As far a colonialism is concerned, this was a very ambiguous event. It arguably annexed Indigenous peoples as citizens without their consent as may also be argued re. the temporary voting rights accorded to some Indigenous peoples at the time of John A. MacDonald.

[145] *International Covenant on Civil and Political Rights* [1976] R.T. Can. 47.

[146] *Constitution Act, 1982.*

[147] Erasmsu, Dussault, (RCAP, 1993), *Partners in Confederation.*

[148] http://www.gov.nu.ca.

colonies.[149] Indeed, as far as some Indigenous nations are concerned, such a move would be interpreted as the last nail in the colonial coffin that enshrouds their right to equal treatment as autonomous nations.[150] The difficulties involved in ensuring that domestic laws conform to Canada's international commitments remain complex and fraught with uncertainty.

Other problems created by the move to uphold an egalitarian concept of legality are reflected in the struggle Canadian jurists face when attempting to define the implications of some of these belated changes. Their task has been exacerbated by a general public failure – or refusal – to understand and explicitly reject colonialism *per se*. Outside Indigenous circles, the integrity of existing institutions tends to be taken for granted. Maps, geographic boundaries, and social structures established according to colonial habit and custom remain firmly entrenched. "Decolonization" is not a common topic of discussion as it has been in many third-world countries and there has been no "consciousness raising"[151] comparable to that produced by the women's movement.

By the end of the 20th century the internationally inspired field of "post-colonial studies", which encourages re-examination of the colonial past and its residual effects, had begun to infiltrate some university departments; however, there has been little systematic reassessment of institutional performance against currently

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[149] Manitoba initially represented the Metis, but an influx of settlers from the east soon turned them into a minority. Donatien Fremont, Solange Lavigne trans. *The Secretaries of Louis Riel* (Prince Albert, Sask. La Société Canadienne Française, 1985) ch.8.

[150] For some background on the reasons for this stance among the Kanionkehaka or Mohawk see Woo, *Canada v. The Haudenosaunee* or Grace Li Xiu Woo, "Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations" (2003) 1 *Journal of Law, Social Justice and Global Development* http://elj.warwick.ac.uk/global/isues/2003-1.

agreed upon standards.[152] Indeed, as the persistence of Oka-type confrontations suggests, serious conceptual chasms continue to trouble modern initiatives to reform state relations with Indigenous peoples. Radical inter-cultural differences remain between notions of "sovereignty", of "government", of who "speaks the law" and of how a "legal" course of action is socially constructed.[153] Colonialism sits like the proverbial elephant in the alcoholic's living room.[154] Everybody knows something is there, but even when publicly mentioned by people like Roberta Jamieson, it tends to be ignored.[155] As a result, problems raised by the transition to postcolonial norms are not articulated as such.

This failure to address the fundamental nature of the changes that have been taking place in both public expectation and international norms contributes to the confusion surrounding governmental relations with Indigenous peoples, accentuating the importance of the judicial role in general and of the Supreme Court in particular.

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3rd Introductory premise:

> Canada has not formally recognized the need to decolonize or to reform existing practices in accord with recent changes in the concept of legality.

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[151] The term was coined in the 1950's by American radical feminists seeking to make people aware of systemic gender discrimination. http://en.wikipedia.org (08/07/2006).

[152] By contrast, see Weir, Beetham, *Political Power and Democratic Control in Britain* at 4.

[153] See eg. Cronon, *Changes in the Land,* ch.4; Erasmus, Dussault, (RCAP,1996), *Looking forward, looking back* at 2.

[154] The metaphor evokes an obvious problem that is ignored. http://en.wikipedia.org (08/07/2006).

[155] Despite a half-page report on her speech at the *Indigenous Bar Association* in 2004, Jamieson's comments on colonialism were not mentioned. *The [Montreal]Gazette* (22 March, 2004).

1. 2 Terms and Conventions

Because this analysis must bring together many points of view, it raises questions concerning several common conventions. The debates they reflect, must be kept in mind from the outset, even if some of the underlying ideological concerns they raise cannot be resolved. The variety of meanings associated with key concepts like "law", "history", "sovereignty", "land title" and "government" cannot be fully explored in a single work, though their socially constructed character must be kept in mind in the analysis that follows. The definitions of many words that must be used in this discussion have political connotations, as some readers will already know. The same might even be said for subtleties associated with the choice of punctuation. The following is a preliminary explanation of my choices with regard to some stylistic matters.

1.2.1 Honorific Titles

A major stylistic concern involves the identification of the judges whose decisions are examined in depth in Part II. In this work, they are primarily identified by name, unencumbered by title unless required by the context to distinguish them from other commentators. eg. "McLachlin" rather than "McLachlin C.J." or "The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada". No disrespect is intended by this abbreviated usage. The focus of this analysis is on the integrity of the reasoning considered and on the persistence of paradigms. As discussed in s.2.3 below, the findings of cognitive theorists whose research has provided an explanation for paradigmatic function, indicate that rationality is inescapably embodied and personal. According to the egalitarian norms, whose

implementation is being investigated, social status is less important that the derivation and structural validity of the reasoning presented. Any changes in the persuasive effect of a particular judge's reasoning that may be caused by accession to the status of Chief Justice are thus peripheral to the core question under consideration. For these reasons, it is unnecessary to remind the reader of the status of the judge at the time a statement was made. The omission of cluttering honorific titles is intended to enhance rather than diminish respect for the principles the Court has been attempting to promote and for the judges' specialized expertise in this regard.

1.2.2 Quotations, Citations and Hyphenation

To emphasize the personal and idiosyncratic character of the interpretation of any word, I have used full quotation marks (" ") rather than the single quotation marks (' ') conventionally used when discussing the meaning of a word. Case names are presented in italics in accord with existing convention. The cases studied in Part II are referred to primarily by identifying word or phrase. eg. "*Guerin*" instead "*Guerin v. The Queen*, [1984] 2 S.C.R. 335". Spot cites and full identification of the case concerned are left to the foot notes. This, again, is to avoid clutter and facilitate focus. The cases analyzed for Part II and the version used are listed in Appendix 1.

This study required a great number of spot references to cases that span the recent advent of internet publication of court judgements, which now use numbered paragraphs. I have used conventional page references for the older cases published

in printed form. The courts themselves have switched to using paragraph references and I have identified these with square brackets [45] when the numbering is officially supplied. I have used sculpted brackets {45} to identify the page number when the electronic version identifies neither page nor paragraph numbers. The footnotes have followed the model profided by the *Canadian Guide to Uniform Legal Citation* (4th ed.).

Quotations that are the object of reflection and comment are set apart by indentation even if very short. Though quotation marks are conventionally omitted when a quote is indented, I have used both methods in conjunction because the current convention of omitting quotation marks on indented quotes often makes it difficult or impossible to tell where the cited material ends and the textual commentary resumes, especially in electronic versions of text.

Though there seems to be a debate among those who would distinguish the hyphenated "post-colonial" from "postcolonial"[156] such pedantry seems tied to authoritarian habit and, as Henderson has pointed out, positivistic debates concerning what, precisely, to place in a dictionary are anathema to Indigenous lawyers and scholars who are more concerned with finding effective remedies to relieve suffering.[157] In keeping with this sentiment, there was no particular philosophy governing my preference for the unhyphenated term "**postcolonial**". As the text that follows demonstrates, I use this term in the sense described by Ashcroft, Griffiths and Tiffin, as part of a study of "the effects of colonization on

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[156] Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (London: Routledge, 2000) at 186.

[157] James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous L. J.* 1 at 13.

cultures and societies"[158], assuming a broad definition of "**colonialism**" that is not limited to past European practices.

1.2.3 Indigenous, "Indian", First Nations or Aboriginal?

The original inhabitants of the land, whose rights lie at the core of this study, have been identified by a number of different terms reflecting the complexity of the definitional and jurisdictional questions that surround their status.[159] As might be expected in a time of paradigmatic change (see s.2.1 below), the field is so chaotic that it is even attracting the invention of new terminology. For example, Gerald Vizenor, who is a Minneapolis mix of European and *Anishinaabe* heritage, coined the term "postindian" to emphasize that "we are long past the colonial invention of the *indian*".[160] Meanwhile Patrick Glenn has disproven this theory by drawing on European stereotypes for the word "chthonic" to describe people who "live in close harmony with the earth".[161] Like all definitional categories, every innovation and every perpetuation of outmoded terminology or perspectives has its limitations.[162]

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[158] *Ibid.*

[159] See eg. Paul L. A. H. Chartrand ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing, 2002).

[160] Gerald Vizenor & A. Robert Lee, *Postindian Conversations* (Lincoln: University of Nebraska Press, 1999) at 84.

[161] H. Patrick Glenn, *Legal Traditions of the World:Sustainable Diversity in Law* (Oxford University Press, 2000) at 59-60. See also Gordon Woodman, "The Chthonic Legal Tradition – or Everything that is Not Something Else" (2006) 1:1 *J. Comp. L.* 123.

[162] Vizenor's invented vocabulary is structured on his personal experience and the passing fads of university debate (eg. "postmodernism" etc). Because it does not always draw on the root meanings of words, it lacks general accessibility so his meaning cannot be discerned without reading his work and some of the debates of his specific era. (Note also "survivance for "survival" plus "resistance" in *Postindian Conversations*, 79, 193.)

The term of preference in this work is "**Indigenous**", which literally means "in born"[163], stressing the fact of pre-colonial ties to the land. This word is said to have gained popularity in the 1970's during the rise of the American Indian Movement (AIM) and the Canadian Indian Brotherhood.[164] However a non-governmental organization called the *Commission des Indigènes* was already lobbying in Europe on behalf of Indigenous peoples at the time of the League of Nations.[165] "Indigenous" remains the term of preference at the United Nations in discussions concerning the original inhabitants of geographic regions now confined by modern state boundaries.[166] Many other states share aspects of the Indigenous complexity that confronts Canada and I have chosen to use the term that is applied at the international level because I support the premise that it would be beneficial for everyone to accord Indigenous peoples an equal voice in matters that concern them and a place at international negotiating tables.

The choice of words used to identify Indigenous peoples and their issues imports a number of ambiguous political considerations. Some of the concepts associated with the resulting debates are considered in more detail in s.3.2 below. The people referred to as "Indigenous" in international venues have been classified as "aborigines", "Indians" or "natives" by colonial governments and recently they

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[163] See J.B. Sykes ed. *The Concise Oxford Dictionary of Current English* 7th ed. (Oxford: Clarendon, 1982) *s.v.* "indigenous".

[164] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Dunedin, University of Otago Press, 1999) at 7.

[165] See eg. Woo, *Canada v. The Haudenosaunee.*

[166] See eg. *Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Office, Official Bulletin, vol.72, series A, No. 2 (1989) s. 1(b). However, usage may be changing, in French at least. The "Permanent Forum on Indigenous Issues", called "Foro Permanente para las Cuestiones Indigenas" in Spanish, is also called "L'Instance permanente des nations Unies sur les questions autochtones": http://www.un.org/esa/socdev/unpfii/

have been identified as "**First Nations**" in Canada. Yet they have been, and continue to be, denied the right to represent themselves on a parity with other "**nations**" in international fora or with the two "founding nations" in Canada. This has led some to associate the term "Indigenous" with "the unfinished business of decolonization."[167] The word "Indigenous" is accordingly associated with fundamental questions concerning the meaning of concepts like "**self-determination**" and "**environmental protection**" or even of "**sovereignty**" and "**nationality**". I have capitalized the word in this work to highlight its conceptual similarities with, and differences from, the word "**Europe**" which remains mysteriously undefined in popular dictionaries like Oxford and Larousse.[168] As the examination that follows will attempt to demonstrate, "Indigenous" is a culturally defined concept whose meanings are coloured by the colonial dynamic that created the need to define "Indigenous rights" in the first place.

The word "**Indian**" is legally defined in s. 2 of Canada's *Indian Act*[169] as:

> "...a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian".

Entitlement to be registered as an "Indian" is defined in s.6 of the *Act* and ultimately depends on having "Indian blood". The administrative importance of this word that ignores Indigenous political organization ensures its continued use, despite wide recognition that it refers to an artificially created "other" that would not exist were it not for the colonial phenomenon. I have placed the word "Indian"

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[167] Smith, *Decolonizing Methodologies* at 7 citing "Wilmer, *The Indigenous Voice*" at.5.

[168] See eg. Sykes, *The Concise Oxford Dictionary*.

[169] *Indian Act*, R.S.C., 1985, c.I-5.

in quotation marks to emphasize the fact that it represents an externally imposed identity.[170]

The broader term "**aboriginal** peoples of Canada" is closer to the concept of "Indigenous" and is defined in s. 35(2) of the *Constitution Act, 1982* as including "the Indian, Inuit and Métis peoples of Canada". Many Indigenous people believe "Aboriginal" should be capitalized to signify equal respect with Europeans and it was capitalized by the *Royal Commission on Aboriginal Peoples*. However, the word has not been capitalized in Canadian legislation and capitalization has only been used sporadically by the Supreme Court of Canada.[171] I have used the capitalized versions except in quotes where the original usage is retained. However, as explained above, I have given preference to "Indigenous" in accord with international attempts to develop a more neutral perspective on human rights that respects the conceptual categories used by both Indigneous peoples and multinational states.

1.2.4 "Canada"

As a product of colonialism, "**Canada**" has assumed sovereignty over a great diversity of Indigenous peoples and their ancestral lands. Indeed, Canadian

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[170] For a discussion of why others have done the same see Thomas C. Parkhill, *Weaving Ourselves into the Land: Charles Godfrey Leland, "Indians, and the Study of Native American Religions* (Albany: State University of New York Press, 1997) at 5.

[171] The first judgments in Part II used "Indian" to signify Indigenous peoples switching to "aboriginal" once s.35 became a focus of analysis. Several judges reverted to using "Indian", especially when their reasoning involved status under Canada's *Indian Act.* "Indian" was not always capitalized. See eg. Bastarache in *Paul v. B. C.(Forest Appeals Commission)* at [12]. "Métis" was capitalized in *R. v. Powley*, [2003] 2 S.C.R. 207. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 was the first to capitalize "Aboriginal", though capitalization was not used in *Lovelace v. Ontario* or *Mitchell,* except in a quote of the *Royal Commission* used by Binnie. See *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, [130]. McLachlin capitalized in *Haida Nation v. British Columbia* and *Taku River Tlingit First Nation v. British Columbia* but not in R. v. *Marshall/Bernard.*

identity cannot be asserted without dealing, in one way or another, with the fact of Indigenous existence. The term "Canadian" itself seems to have been coined by Europeans to refer to the Indigenous people they met when they first crossed the ocean and ventured down the river now named "St Lawrence". The etymology of the word "Canada" is surrounded by uncertainty, but the first known written European record of this word is found in Jacques Cartier's journal of his second voyage. One of Donaconna's sons who had been taken to St. Malo announced their approach to "Canada" as they were nearing what is now Quebec City and, though early maps applied the word to inland regions, it is now believed to be derived from the Huron/Iroquoian term "kanata" meaning "village".[172] Thus the first "Canadians" seem to have been Indigenous people.

In time, as divergent experience estranged the children of French settlers from the customs of their European cousins, they too were called "Canadians". Many expected Indigenous people to either die out or assimilate and those who retained Indigenous mores were officially referred to as "sauvages".[173] After the French colonists were conquered by the British and the Americans rebelled to form independent "states", Canadian identity expanded with the extension of British dominion to the Pacific coast and geographic maps were coloured to signify the unity of the British empire. Some semblance of earlier notions persisted in Quebec, as seen in the agenda of the "Canadian Nationalist League" referred to above or in the name of the "Montreal Canadiens" hockey team.

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[172] Communication from the National Archives of Canada. British graphic artists in the 18th c. often depicted American colonists as Indians. Colley, *Captives* at 215 n.68.

[173] French titles for the several *Indian Acts* used variations of "*Acte des sauvages*" or "*Loi des Sauvages*" until the 1927 "Loi des Indiens".

With the rise of Quebec separatism in the latter half of the twentieth century, references to "Canada" have been used increasingly to differentiate the interests of the federal state from those of the provinces. Like the descendents of the original "kana-diens", many Quebecois no longer think of themselves as "Canadians". And so, despite its indigenous roots, Canadian identity has an itinerant quality, recalling the migratory herding practices represented by "la Canada" on the Iberian peninsula – a meaning which may well have migrated to these shores in the colloquial world of the Basque fishermen who arrived before Cartier planted his flag, for they had developed the custom of dropping off sheep carried from Europe to graze and grow fat while they were out fishing.[174]

Today Canada is defined by the territorial boundaries drawn on a map and the jurisdiction of Canadian courts is essentially defined in geographic terms. Etymologically Canada's identity has transformed gradually from an Indigenous origin through French colonization and British capture into an independent transcontinental "state" that continues to depend on the immigration of people from all around the world to settle on and develop vast tracts of land to the north and west displacing whoever was living there. The Indigenous sense of being pushed out continues in the internet rumour that "Canadian" is really a Mohawk word derived from *kanata,* meaning "village" and *satiens* meaning "to sit down" to produce a word meaning "those who sit in our village" or "squatters".[175]

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[174] Animals were still being raised this way in northern Newfoundland in the early 1970's. I have not investigated the possible existence of memoirs left by Portuguese or Basque fishermen. I have been told some exist, though possibly only for New England.

[175]Topic: "KKKanada Day" http://www.wasase.org/forum/viewtopic.php ?t+156 (7/14/05)

1.2.5 Decolonization and Constitutional "Patriation"

"**Decolonization**", as discussed in more detail in s.3.2 below, is a concern of international law and the move to apply international frames of reference to the Canadian situation represents a radical reorientation from the initial "nation building" process that was flagrantly colonial in character. Though the "Dominion of Canada" was once legally defined by Britain as a "**colony**"[176], Canada's membership in the United Nations assures its recognition under current international law as a "**state**". However, no one seems sure when or how the tide of public opinion turned. The confusion surrounding the status of the Indigenous peoples in relation to Canada is complicated by controversies associated with the decolonization of Canada itself.[177] It was not until April 17th, 1982 that Canada assumed authority to amend its own constitution. This was formally effected when Queen Elizabeth II of England declared that an act of the British parliament called the "*Canada Act, 1982*"[178] had come into force. The *Canada Act 1982*[179] formally states that:

> "No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law."[180]

Opinions differ concerning whether or not this "**patriation**" of the constitution instituted constitutional autonomy.[181] For some, the event marked the formal end of British imperial authority over Canada. For others it signified Canada's assumption

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[176] A "colony" was "any part of his Majesty's dominions exclusive of the British Islands and of British India". *Halsbury's Laws of England* (4th) vol 10, 856. Note also the B.N.A. Act s. 132.

[177] See eg. Lederman, "Canadian Constitutional Amending Procedures", 341.

[178] *Canada Act 1982*, U.K., 1982, c.11.

[179] *Ibid.*.

[180] *Ibid.* s. 2.

of full constitutional authority. As Peter W. Hogg has pointed out, this interpretative uncertainty is related to the fact that the word "patriate" is not defined in the Oxford English dictionary.[182] Nor is it listed by Larousse.[183] Its closest English equivalent is "repatriate". However, as Hogg noted, the *British North America Act*, that originally constituted the "Dominion of Canada" was not a Canadian act so the constitution could not be "restored" to Canada.[184]

Since French is one of Canada's official languages, "patriation" may draw its meaning instead from the word "patrie". "Repatriate" and "patrie" share the Latin root *patria* which means "native land". "Patrie" is defined by *Larousse* as:

> "Communauté politique d'individus vivant sur le même sol et liés par un sentiment d'appartenance à une même collectivité".[185]

"Rapatrier" is defined as:

> "Faire revenir des personnes, des biens, des capitaux dans leurs pays d'origine."[186]

Most Canadians would probably agree that they are part of:

> "A political community of individuals who live on the same territory and are bound by a feeling of belonging to the same group."[187]

Nevertheless, their ancestors are not "native" to the territory with which they now identify and their use of this vocabulaty implies a denial of their European origins. Moreover, many Indigneous people over whom Canada claims jurisdiction have

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[181] Hogg, *Constitutional Law of Canada* at 44.

[182] *Ibid.*

[183] Patrice Maubourguet ed., *Le Petit Larousse illustré, 1996* (Paris, Larousse, 1995).

[184] Hogg, *Constitutional Law of Canada* at 44.

[185] Maubourguet, *Le Petit Larousse illustré s.v.* "patrie".

[186] Maubourguet, *Le Petit Larousse illustré s.v.* "rapatrier".

[187] My translation.

never felt that they belonged to the same group as the immigrants. For some, at least,, the event referred to as "patriation" is just another insulting attempt to validate the massive land-grab that displaced their ancestors. Rather than marking the end of the colonial era, this "patriation" that severs the immigrant population's legal tie to Britain looks to them like an attempt to declare the colonization process complete. As such, the *Canada Act, 1982* directly violates the principle represented by the *Two Row Wampum.*[188] Many Indigneous peoples filed legal challenges to prevent "patriation"[189], while others insisted that the very act of arguing their cases in British courts instead of negotiating on a nation to nation basis amounted to colonial submission. The concept of "patriation" is accordingly riddled with controversy from several directions.

1.2.6 Ethnocentrism and "Law"

The patriation controversies are related to controversies both in the legal profession and in the social sciences concerning the definition of "***law***" itself. Though a direct exploration of the impact of decolonization on the perception and definition of "law" is beyond the scope of this study, it should be noted that the use of judicial procedure to interpret Canada's constitution is one element of a very culturally specific conception. As Noreau has pointed out, legal practices may be seen as developing through an interplay between interpretations that take place within the subjective frameworks that are internal to a legal system and those that objectify social relations by examining cultural phenomena, like "law",

[188] For reflections based on this perspective see Taiaiake Alfred or *Mohawk Nation News.*

[189] Erasmsu, Dussault, (RCAP,1996), *Looking forward, looking back* at 206.

externally.[190] From this perspective, the former is the province of "law", while the later is the concern of the social sciences. However, the rising importance of international law has added a dimension that is, to some extent, external to traditional domestic Canadian formulations.

To date, the majority of Canadian legal scholars have continued to write from an internal cultural point of view that either implicitly or explicitly ignores both international and Indigenous perspectives on legality even when "aboriginal law" is the subject of discussion.[191] The focus of this study is on Supreme Court judicial reasoning so an analysis of the work of these authors is beyond its scope; however, the depth of the conceptual differences that must be bridged to create common frames of reference that are intelligible according to the traditions of this audience as well as thoses of Indigenous peoples should not be underestimated. For example, monotheism was incorporated in the preamble to the *Constitution Act,*

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[190] Noreau, "Comment la législation est-elle possible?".

[191] In order to gain accreditation in Western universities, scholars from colonized cultures may feel constrained to adopt the colonizers point of view, writing as if the only significant actors or progenitors of "law" were Europeans and omitting the significant contributions of non Europeans like Levi General Deskaheh and Gandhi. (See s.3.1 below.) See eg. Chidi Oguamanam, "Indigenous Peoples and International Law: The Making of a Regime" (2004) 30 *Queen's L.J.* 348. Whether sympathetic to Indigenous rights or not, prominent works written from an internal Canadian perspective that excludes international law and/or Indigenous conceptions of legality include Alan C.Cairns, Tom Flanagan and Dan Russell, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000); Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 *Queen's L.J.* 143; Tom Flannagan, *First Nations? Second Thoughts* (Montreal: Queen's McGill University Press, 2000); Peter W. Hogg, *Constitutional Law of Canada* 2nd ed.(Toronto: Carswell, 1985); Thomas Isaac, *Aboriginal Title* (University of Saskatchewan, Native Law Centre, 2006); Hans Kelsen, *The Law of the United Nations: A critical analysis of its fundamental problems* (New York: Frederick A. Praeger, 1950); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford, 1998); William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 American Jo. Comp. Law, 339; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); James I Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005). Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as*

1982[192] which depicts "God" as the source of "law" in a way that accords with the Christian story of Moses and the Ten Commandmants,[193] whereas "law" is seen as a product of comprehensive popular discussion in the tradition of the Haudenosaunee or "Iroquois Confederacy".[194]

As the analysis that follows demonstrates, differing assumptions concerning the sources of legality are related to differing assumptions concerning what constitutes social order itself, raising serious problems of commensurability.[195] Not surprisingly, questions concerning how Canadian legality is defined abound in Indigenous circles. Studies seeking to explain Indigenous perspectives on "law" or integrate them with Canadian perspectives have proliferated in the last couple of decades, though they tend to be marginalized in a category labeled "Aboriginal Studies" instead of being integrated into mainstream understanding of historical and legal development.[196]

Affected by the Crown's Acquisition of their Territories. (D. Phil. Thesis, Oxford University, 1979 repr. Saskatoon: University of Saskatchewan Native Law Centre, 1979).

[192] "Whereas Canada is founded on principles that recognize the supremacy of God and the rule of law".

[193] Harold E. Monser ed., *The Cross-Reference Bible*, American Standard Edition of the Revised Bible.(New York: The Cross-Reference Bible Company, 1910), *Exodus* 20.

[194] A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* [originally *New York State Museum Bulletin: 184* (Albany:University of the State of New York, 1916)] (Ohsweken, Ontario: Iroqrafts, 1991) at 98-100; Karoniaktajeh (Louis Hall), Mohawk trans. and Kahn-Tineta Horn, English trans. *Gayanerekowa: The Constitution of the Iroquois Confederacy*, (Kahnawake, Mohawk Territory:Owera International, 1993) owera@cyberglobe.net.

[195] Re difficulties defining or comparing "law" seeeg. Daniel Mockle, "A propos de définitions du droit" (1991) 6 *CJLS/RCDS* 181; Andrew Halpin, "Glenn's *Legal Traditions of the World*: Some Broader Philosophical Issues" (2006) 1:1 *J. Comp. L.* 116 at 119.

[196] Works that have begun to explore various Indigenous legal perspectives in Canada include Howard Adams, *A Tortured People: The Politics of Colonization* (Penticton, B.C. : Theytus Books, 1995); Taiaiake Alfred, *Peace, Power and Righteousness: an indigenous manifesto* (Don Mills, Ontario: Oxford University Press, 1999); Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference"* (Vancouver : UBC Press, 1997); Russel Lawrence Barsh and James (Sakej) Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand" (1997) *McGill L. J.* 993; Richard H. Bartlett, "Citizens Minus: Indians and the Right to Vote" (1979) 44 Sask. L. Rev. 163; Marie Battiste ed.,

"Introduction: Unfolding the Lessons of Colonization" in *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000); Catherine Bell, David Kahane eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: U.B.C. Press, 2004); Lucy Bell, "Kwakwaka'awkw Laws and Perspectives Regarding Property" (2006) 5 *Indigenous L. J.* 119; Darren Bonaparte, *Creation & Confederation: The Living History of the Iroquois* (Ahkwesahsne Mohawk Territory : The Wampum Chronicles, 2006); John Borrows, & Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials &Commentary* (Toronto: Butterworths, 1988); John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference"* (Vancouver : UBC Press, 1997); Paul L. A. H., Chartrand ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing, 2002); Gordon Christie, "Delgamuukw and the protection of Aboriginal Land Interests" (2000-2001) 32 *Ottawa L. Rev.* 85; Gordon Christie, "Citizens Plus: Aboriginal Peoples and the Canadian State by Alan C. Cairn , Book Review" (2002) 40 *Osgoode Hall L.J.* 189; Kenneth Deer, "The Failure of International Law to Assist Aboriginal Peoples" in Andrea P. Morrison ed *Justice for Natives: Searching for Common Ground* (Montreal:Aboriginal Law Association of McGill University, 1994) at 99; Claude Denis, *We are Not You: First Nations and Canadian Modernity* (Peterborough, Ontario: Broadview Press, 1997); Dan Ennis, "Marshall decision validates the traditional form of Indian governance: Sharing our Wabanaki Perspective", http://www.unb.ca (2/17/06); Victoria Freeman, *Distant Relations: How My Ancestors Colonized North America* (Toronto : McClelland and Stewart, 2000); Sydney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press, 1998); HARRIS, Heather, *Remembering 12,000 Years of History: Oral History, Indigenous Knowledge and Ways of Knowing in Northwestern North America* [unpublished PhD thesis, Department of Anthropology, University of Alberta, 2003]; Gilles Havard, Phyllis Aronoff and Howard Scott trans., *The Great Peace of Montreal : French-Native Diplomacy in the Seventeenth Century* (Montreal: McGill-Queen, 2001); James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous L. J.* 1; James (Sakej) Youngblood Henderson, "Postcolonial Ghost Dancing : Diagnosing European Colonialism" in Marie Battiste, *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000), 57; Sakej Henderson,. "Mikmaw Tenure in Atlantic Canada" (1995) *Dal. L.J.* 194; Walter Hildebrandt, Dorothy First Rider, Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal : McGill-Queen's University Press, 1996); Richard Hill, "Continuity of Haudenosaunee Government" in José Barreiro ed. *Indian Roots of American Democracy* (Ithaca, New York: Akwe:kon Press, Cornell University, 1992), 166; Kahntineta Horn, *Traditional Culture and Community Competition : An Analysis of the On-Going Struggle Between the Great Law and the Handsome Lake Code* (MA thesis, Canadian Studies, Carleton University, 1997)[unpublished]; Kahente Horn-Miller, *The Emergence of the Warrior Flag: A symbol of Indigenous unification and impetus to assertion of identity and rights commencing in the Kanienkehaka community of Kahnawake* (M.A. anthropology, Concordia University, 2003) [unpublished]; Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 *Osgoode Hall L.J.* 587; Beverley Jacobs, *International Law/The Great Law of Peace* (LL.M. thesis, College of Law, University of Saskatchewan, 2000) [unpublished]; Mylène Jaccoud, "La Justice pénale et les Autochtones: D'une justice imposé au transfert de pouvoirs" (2000) *Can. J. L. & Soc.* 107; Darlene Johnston, *The Taking of Indian Lands in Canada : Consent or Coercion?* (University of Saskatchewan, Native Law Centre, 1989); Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44.1 *U.T. Fac.L.Rev.*1; Laurence J. Kirmayer, Cécile Rousseau, Myrna Lashley, "The Place of Culture in Forensic Psychiatry" (2007) 35 J *Am Acad. Psychiatry Law*, 98; Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005); P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 61 *Sask.L. Rev.*, 393; Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre,University of Saskatchewan, 2001); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), Michel

From Taiaiake Alfred's perspective, as set out in a paper prepared for the Ipperwash Inquiry, Indigenous communities are divided between "those people who embrace a colonized identity and accept the legitimacy of Canadian authority and those who remain rooted in an authentic indigenous identity and assert the authority of their nation".[197] A study founded on the principle of human equality must take these multiple perspectives into account. I have accordingly attempted to present

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Morin, *L'Usurpation de la souveraineté autochtone : Le cas des peuples de la Nouvelle- France et des colonies anglais de l'Amérique du Nord* (Montréal: Boréal, 1997); Andrea P. Morrison ed., *Justice for Natives: Searching for Common Ground* (Montreal, Quebec: Aboriginal Law Association of McGill University, 1994); Bradford W. Morse, "Permafrost Rights: Aboriginal Government and the Supreme Court of Canada in *R. v. Pamajewon*" (1997) 42 *McGill L. J.* 1011; Val, Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 *Can. J. L. & Soc.* 113; James I Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005) ; Daniel K. Richter, *The Ordeal of the Long-house: The Peoples of the Iroquois League in the Era of European Colonization* (Williamsburg, Virginia: University of North Carolina Press, 1992); Robin Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*" in Frank Cassidy ed. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Press, 1992), 206; Rupert Ross, *Returning to the Teachings : Exploring Aboriginal Justice* (Toronto : Penguin Books, 1996); Leonard Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 *Alta. L. Rev.* 1; Douglas Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in *International Human Rights Law: Theory and Practice*, Irwin Cotler and F. Pearl Eliadis eds.(Montreal: The Canadian Human Rights Foundation, 1992), 485; Julie-Rachel Savard, "L'integration des Autochtones au régime seigneurial canadien : une approche renouvelée en histoire des Amérindiens" in Alain Beaulieu et Maxime Gohier eds. *La recherche relative aux Autochtones : Perspectives historiques et contemporaines* (Montreal, Chaire de Recherche du Canada sur la question territoriale autochtone, 2005), 169 ; Rémi Savard, "Les peuples américains et le système judicaire canadien: Spéléologie d'un trou de mémoire" (2002) 17 :2 *Can. J. L. & Soc.* 123 ; Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada"(1984) 32 *A.J.Comp.L.* 361 ; Jacob Thomas, "The Great Law Takes a Long Time to Understand" in Jose Barreiro *Indian Roots of American Democracy* (Ithaca, N.Y.:Cornell University, Akwe:Kon Press, 1992), 43; Ruth Thompson, ed. *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon: University of Saskatchewan Native Law Centre, 1987); M. E.,Turpel-Lafond, "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 *Sask. L.R.* 293. Robert Vachon, "Au-delà de l'universalisation et de l'interculturalisation des droits de l'homme, du droit et de l'order négocié" (Sept, 2000) Bulletin de Liaison d'Anthropologie Juridique de Paris; Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, B.C.: Theytus Books, 1998) ; James B. Waldram., *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (University of Toronto Press, 2004); Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24.2 *Dal. L. J.* 75; Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* (Cambridge University Press, 1991); William C. Wicken,*Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

[197] Taiaiake Alfred, Lana Lowe, "Warrior Societies in Contemporary Indigenous Communities: A background paper for the Ipperwash Inquiry " May 2005.

this material in a way that remains aware of the complex problems associated with defining who and what is internal or external. For example, is Alfred suggesting that "authentic indigenous identity" can *only* be asserted through the assertion of separate nationhood? How does one define a "***nation***" in this context? And how can one identify what is "authentic" – or "legal"? Because this study is based on paradigmatic theory, it does not attempt to provide a definitive answer to some of the questions such statements raise. It focuses instead on identifying the frames of reference used in specific pieces of legal reasoning and examining how we can distinguish "colonizing" solutions from "postcolonial" approaches.

Since this analysis relies on a capacity to identify culturally based presuppositions, it is worth noting that the ethno-cultural composition of Canada has altered dramatically during the past few decades. The Anglo/French divide that characterized Canadian politics during the 19th and 20th centuries has become blurred with the incorporation of people from other parts of the world in the social fabric however we believe it has been woven. Many come from countries that have struggled ardently against European colonization. Yet decolonization is not a common topic of discussion in Canada. Perhaps immigration turns everyone into a tacit colonizer. Many recent immigrants have been displaced in their lands of origin and perhaps this generates a desperate need to belong somewhere, making them overly concerned with "fitting in". Perhaps both. One of the aims of this study is to increase awareness of the ways in which the paradigms we use shape what we know and see, including our notions of history. What are the historical roots of Indigenous complaints? How do we intend to deal with them? Who are "we" and

what are the implications of what happened to them for us all? The answers to some of these questions are political. Others affect the internal functioning of the legal system. The distinctions are not carved in stone.

1.2.7 Constitutional and Aboriginal Rights

Despite the major obstacle that this interpretative problem presents, most would agree that the "patriation" of the constitution marks a significant turning point in Canadian legal history. The *Constitution Act, 1982*[198] includes two significant features as far as Indigenous status is concerned: The first is the affirmation of "existing aboriginal and treaty rights" in s.35, accompanied by the stipulation in s.25 of the *Charter of Rights and Freedoms* that:

> "The guarantee in this Charter shall not be construed so as to abrogate or derogate from aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada".

The second is the *Charter of Rights and Freedoms* itself, with its declaration in s.15 that: "Every individual is equal before and under the law". Precedents for both of these principles can be found in existing English common law, yet some might consider them to be the very lynch pin of Canadian decolonization. The concept of **equality** and the meaning of "***aboriginal and treaty rights***" have both become the focus of much litigation and intense debate. Their incorporation in the *Constitution Act, 1982* provides a culturally sanctioned framework for discussion. It is, accordingly, on this basis that this study considers what it means, in a legal sense, to become "postcolonial". What is the role of the judiciary in the decolonization process? Do Canadian judges act as the cutting edge of social change, usurping the

role of parliament as critics of judicial activism might claim? Or are they a tool of colonization as others allege? The overall aim of this study is to provide some insight into the challenges faced by the Supreme Court of Canada as a participant in the process of paradigmatic change represented by decolonization.

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[198] *Constitution Act, 1982.*

PART I

THE LAW and ORDER of PARADIGMS

"A paradigm can...insulate the community from those socially important problems that are not reductible to the puzzle form, because they cannot be stated in terms of the conceptual and instrumental tools the paradigm supplies" [199]

Thomas Kuhn
The Structure of Scientific Revolutions

[199] Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd ed.) (London : University of Chicago Press, 1996 © 1962) at 37.

2.

CONCEPTUAL STRUCTURES

"Truth is always relative to a conceptual system." [1]

George Lakoff, Mark Johnson,
Metaphors We Live By, 1980.

The decolonization process that implicitly involves the Supreme Court of Canada is a formidable venture involving all kinds of people and cultural practices on an international scale. It is changing the way we see each other as human beings, leading to the rejection of stereotypes and conceptual habits that prevailed during the colonial age. Todarov, for example, has noted that Columbus assumed the first people he met after crossing the Atlantic Ocean were less than human because they were naked.[2] He thought they were naïve because they were generous and cowardly because they had no weapons and avoided conflict. Yet the troops Columbus left on the island he called Hispaniola had all been killed when he returned a year later.[3]

The misfit between colonial and Indigenous paradigms was evident from the outset; however, there is also a tendency for cultures that come into contact to

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[1] George Lakoff, Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 1980, 2003.) at 185.

[2] Tzvetan Todorov, Richard Howard trans. *The Conquest of America: The question of the other* (New York: Harper and Row, 1982) at 35.

[3] *Ibid.* at 40.

hybridize.[203] As humans, we learn by copying each other and some believe that members of the colonial cultures are slowly being seduced into accepting Indigenous ways. As Paula Gunn Allen has pointed out, layers of clothing have disappeared, social welfare has become a major state concern and disarmament is widely accepted as a modern necessity.[204] In other words, old taboos and patterns of reasoning have been abandoned, leading people to scorn behaviour that was once considered socially acceptable, while new inhibitions and prohibitions are developing to take their place.

The legal and governmental protocols that govern the postcolonial legality that is beginning to emerge have not been defined in detail, yet they are of great concern to those who advocate for others as well as for the judges charged with resolving conflicting points of view. As Gerald P. Lopez has pointed out, successful advocacy, whether in a court room or with the person standing next to you in line at the grocery store depends upon an understanding of prevailing social norms.[205] A lawyer's role is to act as a story teller. As the representative of a party involved with a system of laws and social expectations the advocate attempts to translate the client's desires into an account that will be believed and respected by those who have power over the outcome. Whether acting for a government, a corporation, a plaintiff or an individual accused of a crime - or even when engaged in day to day street-level negotiations - an advocate *re*-presents the client, first to themselves, then to the world. Both the lawyer and the ultimate decision-maker function within a

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[203] *Ibid.* or Homi K. Bhabha, "Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside new Delhi, May 1817" (Autumn, 1985) *Critical Inquiry*, 144 at 156.

[204] Paula Gunn Allen. *The Sacred Hoop: Recovering the Feminine in American Indian Traditions* (Boston: Beacon Press, 1986, 1992).

social meaning-making process, attempting to arrange the chaos of the parties conflicting feelings, thoughts and wishes so they fit a conceptual framework that will be persuasive. And this is no less true for a judge whose reasoning may be appealed to a higher court or annulled by legislative reform after intense public discussion.

Since the foundation of legitimacy has changed, or is in the process of changing, legal actors today face complex questions concerning what kind of story line to use. Decolonization calls for a transition from one conceptual framework to another. Thomas Kuhn's theory of scientific revolutions offers some insight into the challenges presented by changes of this magnitude, offering both an explanation of the function of "paradigms" and a description of the process through which they change. His observations have, as a whole, been confirmed, explained and elaborated upon by findings in other fields which, in turn, are altering both our social expectations and our understanding of human cognition. Before proceeding with the task of defining the models for colonial and postcolonial social ordering that will be applied to the judicial reasoning examined in Part II, the first section of this study will review Kuhn's paradigmatic theory and some of its implications with regard to judicial function.

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[205] Gerald P. Lopez, "Lay Lawyering" (1984) 32:1 *U.C.L.A. L. Rev.* 1 at 3.

2.1 Kuhn's Theory of Paradigmatic Change

> "Failure of existing rules is the prelude to a search for new ones."[206]
>
> Thomas Kuhn
> *The Structure of Scientific Revolutions*, 1962

Despite its all pervasive effect on political life in general, the twentieth century reorientation in the concept of legality described above is rarely identified as such. According to Thomas Kuhn's theory of paradigmatic change, this failure to acknowledge what has been happening is entirely predictable. When we see the world through the lens of a new cognitive model, we do not see revolutions but rather "contributions to knowledge"[207] or, in the case of legal evolution, "progress in human rights" reflecting, as it were, a metaphoric journey towards social enlightenment[208].

Kuhn developed his theory of paradigmatic function while studying the history of scientific thought. Drawing on the observations of researchers in a number of fields, he noticed that scientific knowledge was not the product of a simple

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[206] Kuhn, *The Structure of Scientific Revolutions* at 68.

[207] *Ibid.* at 136.

[208] See eg. Lakoff, Johnson, *Metaphors We Live By*. There is an emerging body of work concerning the effect of metaphors on legal reasoning. See eg. Bernard J. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 *Cardoso L. Rev.* 229; Jonnette Watson Hamilton, "The Use of Metaphor and Narrative To Construct Gendered Hysteria In the Courts" (2002) 1 *J.L.& Equality*, 155; Jennifer Nedelsky, "Embodied diversity and the Challenges to Law" (1997) 42 *McGill L. J.* 91; Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self", (1990) 30 *Representations* 162; Steven L. Winter, *A Clearing in the Forest : Law, Life, and Mind* (University of Chicago Press, 2001); Steven L. Winter "The "Power" Thing" (1996) 82:5 *Virginia L. Rev.* 744; Steven L. Winter, "Death is the Mother of Metaphor" (1992) 105:726 *Harvard L. Rev.* 745; Steven L. Winter, "The Metaphor of Standing and the Problem of Self-Governance" (1988) 40 *Stanford L. R.* 1371.

cumulative process as suggested by standard text books. Discoveries appear, instead, to have an episodic quality. According to Kuhn, knowledge is tacitly embedded in shared examples.[209] Significant insights are made following an accumulation of discrepant information that leads to rejection of old models and acceptance of new cognitive ideals, which he referred to as "paradigms".

Kuhn described the function of paradigms by comparing them to common law precedents or to the use of grammatical exemplars like *amo, amas, amat* to teach the declension of Latin verbs.[210] As he later explained in response to some of his critics, his theory employs the word "paradigm" in two different senses, referring on one hand to "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community", and on the other to "the concrete...models or examples [which] replace explicit rules" to solve the intellectual questions raised in a given field.[211] As will be demonstrated in the analysis of Supreme Court reasoning concerning "aboriginal rights" in Part II of this work, paradigmatic theory and paradigmatic practice do not always coincide.

2.1.1 The Importance of Shared Paradigms

While studying the development of scientific knowledge, Kuhn noted that without a shared paradigm, any area of investigation tends to appear chaotic. Research proceeds on the basis of conflicting parameters and assumptions making it

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[209] Kuhn, *The Structure of Scientific Revolutions* at 175.

[210] *Ibid.*at 23.

[211] *Ibid.* at 175. When applied to legal matters, Dworkin or Kelsen's concepts of "law" might be seen as examples of philosophical paradigms, while British monarchy, American republicanism and the Haudenosaunee Confederacy might be seen as models for practice.

difficult to co-relate findings.[212] An effective scientific paradigm makes it possible to see order in this confusion, even though it need not explain all of the facts that have been established. As Kuhn insisted, paradigms are models, not sets of shared rules. Drawing on Wittgenstein's analysis, he pointed out that in most circumstances we can identify a "chair" or a "leaf" without bothering to define all of the attributes that are necessary and sufficient to constitute their identities.[213] Like Hart's concept of core and penumbral meaning in legal interpretation, paradigms guide and regulate science without establishing absolute rules and boundaries.[214] Indeed, since science consist of "puzzle solving", effective paradigms will not only provide a plausible explanation for phenomena that may previously have appeared anomalous, they will also be open ended enough to indicate problems that require further investigation.[215]

2.1.2. "Normal" Research

Kuhn identified two types of research which he referred to as "normal" and "revolutionary" science. What he described as "normal science" operates within an established paradigm, seeking to increase the match between observations of nature and pre-set norms. Without a paradigm, all facts seem equally relevant. Information gathering is random and diverse, creating a morass of irrelevant detail and omitting significant observations.[216]

Once a paradigm is established, phenomena that do not fit its requirements tend to be ignored, however, commitment to the frame of reference it offers frees

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[212] *Ibid.* at 83.

[213] *Ibid.* at 44.

[214] H.L.A. Hart, *The Concept of Law* 2nd ed.(Oxford: Clarendon Press, 1994 © 1961). For discussion, see also Winter, *A Clearing in the Forest* at 196-7.

[215] Kuhn, *The Structure of Scientific Revolutions* at 36-37 and 10.

scientists from proving fundamental principles that have been accepted by specialists in their field. This allows them to concentrate on solving the particular sorts of problems posed by the new perspective. For example, once Dalton's atomic theory gained general acceptance, alloys were seen as chemical compounds rather than physical mixtures. This led to rapid advancements in the field of chemistry. The application of chemical norms lead in short order to the discovery of several new elements and the development of a better capacity to predict the results of certain interactions.[217]

As Kuhn himself observed, this phenomenon parallels the use of precedent in common law legal practice. The "rule of law" might thus be seen as functioning "normally" through the characterization of events according to pre-determined criteria which may have been codified either by previous judgements or in legislation.

2.1.2.1 The Importance of Anomalies

The type of research that Kuhn called "normal science" tends to ignore questions that may be socially important or central to other fields of inquiry. "Normal science" concentrates only on the facts that are significant in relation to the pre-conceived point of view represented by the governing paradigm. In the field of law an example of this might be seen in the assertion of governing constitutional principles that defend human rights while ignoring the fact that existing laws exclude some people from the definition of a "person".

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[216] *Ibid* at 15-17.

[217] *Ibid,* at 130 and 200.

Most of the anomalies discovered during this process are applied to improving articulation of the relevant theory. However, when unassimilated anomalies accumulate, a state of crisis develops. The fundamental generalizations of the paradigm are called into question, especially if they inhibit practical applications which may be important in other disciplines. As discrepant information collects, the field appears increasingly chaotic until it begins to resemble its pre-paradigm state.

2.1.2.2 Paradigmatic Persistence

Despite the development of chaotic conditions, scientists never denounce the paradigm that led to the crisis unless there is a new paradigm to take its place. To do so would be a rejection of science itself.[218] In terms of Kuhn's theory, "aboriginal law" in Canada may be experiencing a crisis of this nature provoked by the emergence of egalitarian norms during the twentieth century and the implementation of s.35 of the *Constitution Act, 1982*. Old ways of looking at things, such as the exclusion of Indigenous people from the definition of a "person", have been abandoned, yet attempts to organize relations on the basis of the old paradigm persist in the name of maintaining the "rule of law". According to Kuhn, people typically respond to chaotic conditions by asserting the old paradigm with renewed vigour.[219] This may explain why police and other government agents sometimes engage in behaviour that could only be justified under the old paradigm, such as the abandonment of Indigenous youth in freezing weather or the failure to investigate the disappearance of missing women.

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[218] *Ibid.* at 77-9.

[219] *Ibid.* at 86-7. See also Peter Stuber, "Legal Reasoning after Post-Modern Critiques of Reason" (1997) 3 *Legal Writing* 21.

2.1.3 "Revolutionary" Research

As Kuhn noted, when anomalies that cannot be explained by the prevailing paradigm become sufficiently disturbing, the nature of scientific investigation changes. Much like the work of appellate courts, the extraordinary research involved in what he called "revolutionary science" attempts to create a new framework by defining and isolating the discordant information that has accumulated, by pushing the rules of normal science harder and by drawing on philosophical analysis to generate and test speculative new theories.[220]

The differences between Kuhn's concepts of normal and revolutionary science seem to parallel the differences between legal and political questions in some respects. Changes in scientific paradigms, like political revolutions, involve the confrontation of a conservative establishment with one or more alternatives, concluding with the adoption of new regimes and practices. [221] The inventors of new paradigms are often very young, or new to the field so they have little commitment to prior practice and tradition.[222] And, since each group uses its own paradigm to argue in its defence, differences are both necessary and irreconcilable.[223] Paradigm change, whether in science, politics or the court, is frequently characterized by heated argument.

2.1.3.1 The Emergence of a New Paradigm

The emergence of a new paradigm alters the way researchers see the world and the conceptual rifts that found paradigmatic debate arise in part because traditional

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[220] *Ibid.*

[221] *Ibid,* at 9.

[222] *Ibid,* at 90.

and reform camps share much of the same information. The ability to understand in terms of a new paradigm may come into operation instantaneously, like the switch in perception demonstrated by Gestalt images in which identical marks on a piece of paper may appear either as a bird or an antelope.[224]

Yet, as practice based on a new paradigm accumulates, the switch may become irreversible. What a person perceives depends upon previous visual and conceptual experience and once we have been trained to see things in a particular way it is difficult to change. Just as those raised using miles and imperial measures have difficulty understanding distance in kilometres and weight in kilograms, so too those trained in a particular paradigm tend to perceive the world exclusively in terms of that frame of reference. Thus, the cartographer habitually interprets the lines on a map as terrain and the physicist sees the confused and broken markings in a bubble photograph as an image of sub-nuclear events.[225]

2.1.3.2 Misperceptions

The inferences made by those with the relevant education may become so automatic and habitual that they induce misperception. Psychologists have accordingly demonstrated that people tend not to notice a black four of hearts or a red six of spades slipped into an otherwise normal deck of cards.[226] According to Kuhn, psychological phenomena of this kind help explain why the process of paradigm change tends to be slow and muddled. The effect of habit is so strong that

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[223] *Ibid,* at 103.

[224] *Ibid.* at 85.

[225] *Ibid.* at 111.

[226] *Ibid.* at 63 citing Bruner, Postman, "On the Perception of Incongruity".

a new paradigm may not be established until an older generation of practitioners has retired.

For those functioning under a new paradigm, however, former modes of thought may seem incomprehensible. Youth today, for example, have difficulty imagining the impact of Rosa Parks' refusal to move to the back of the bus in Montgomery Alabama on December 1st 1955.[227] However, it took the U.S. Supreme Court to strike down the municipal ordinance under which Mrs. Parks was fined and it has taken the American desegregation movement a good half century to reach a point where the U.S. Senate is preparing to admit that the lynching of blacks, once common in the American south, amounted to a holocaust.[228]

2.1.4 The Resumption of "Normal" Reasoning

Just as legislative and judicial recognition of racial equality or the legal personhood of women changed political fights into legal rights, so too general acceptance of a new paradigm by the specialists in a field allows what Kuhn called "normal" science to resume. Experts in disciplines once held to be of central importance may suddenly find themselves marginalized. Their work may even become completely irrelevant. The emphasis now placed on human equality has, for example, made attempts to define racial difference as obsolete as the slide-rule in the age of pocket calculators.

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[227] " Rosa Parks Biography", http://www.achievement.org/ (6/20/05).

[228] See eg. Sheldon Alberts, "Race-Murder Trial May Lay Ghosts to Rest " *CANWEST News Service*; Avis Thomas-Lester, *Washington Post* "U.S. Senate to say sorry for 'American Holocaust'"*The [Montreal] Gazette* (12 June, 2005) IN1 - IN3.

2.1.4.1 The Re-writing of History

To remain effective as pedagogic tools, textbooks must be re-written in the language of the new theory after each paradigmatic revolution. Explanations based on discarded perspectives are omitted, as are references to facts that are not relevant to current models of thought.[229] Students are not required to master outmoded paradigms and so this backwards re-writing of the past creates the impression that science, law or history develops in a cumulative and linear manner.[230] This may explain why Canada's former identity as part of the British empire tends to be overlooked despite the vestigial signs that remain in the much studied *Constitution Act, 1867.* Current generations educated according to modern international paradigms interpret the past as if Canada's evolution into the form known today is the culmination of an inevitable progression of events.

2.1.4.2 The Persistence of Unicorns

Though new paradigms produce new areas of selective blindness, discredited assumptions may continue to function in limited circumstances. Just as Canadian women found that eligibility for Senate appointment did not ensure equal treatment in all areas of social practice, so too, Newtonian physics that treat mass as a constant continue to be applied in certain contexts despite general acceptance of Einstein's theory that mass may be converted into energy.[231] Similarly, modern architects and builders continue to design houses as if the earth was flat because the adjustments required to accommodate the earth's curvature are just too minimal to be relevant.

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[229] See eg. Wicks, *The Evolution of a Constitution*, which recounts English constitutional history from 1688 until joining the European Community without mention of the British empire.

[230] Kuhn, *The Structure of Scientific Revolutions* at 137-8.

[231] *Ibid.* at 102.

Inconsistent paradigms can, accordingly coexist for centuries, particularly when the practices and habits of thought established according to rejected paradigms are reinforced through continued use.

2.1.5 Summary

Decolonization involves a process of paradigm change. Kuhn's theory is useful for understanding this process because it predicts the kinds of problems that might be expected and suggests an analytical methodology. Because this study applies an unconventional framework in an attempt to explain anomalies that have accumulated according to "normal" legal analysis, it would be classified as "revolutionary research" by Kuhn.

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According to Kuhn's theory, paradigms serve as models:

-They govern which information people focus on.
    -People fail to perceive evidence that disturbs the paradigm's coherence.

-"Normal" practice refines the model that structures current understanding.
-Periods of revolutionary change are characterized by:
-attention to evidence that cannot be explained by the existing paradigm,
-harder assertion of the rules governing established frames of reference,
- philosophical analysis to generate new perspectives, and
- a chaotic proliferation of alternative theories vying for acceptance.

-An old paradigm will continue in use until a new model emerges to replace it.
    -Ability to understand a new paradigm may occur suddenly, like a switch
    -A paradigm has changed when:
        -new modes of thought are generally accepted,
        -text books have been rewritten, and
        -practices have changed.

-Practices based on a rejected paradigm may continue in specific circumstances

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2.2 Paradigms and Cognitive Categories

> "Poets are the unacknowledged rulers of the world."[232]
>
> Percy Bysshe Shelley
> *A Defense of Poetry*

> "... the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages."
>
> Bastarache J. S.C.C.
> *R. v. Sappier; R. v. Gray,* 2006.

Paradigmatic theory may be applied to legal practice and judicial function in several ways. However, there is one significant difference between law and the science Kuhn studied. Law is concerned with how people believe things *should* work, whereas science is dedicated to understanding how things work in practice. The two applications intersect because, as Steven L. Winter has pointed out, law, like poetry and music – or the science Kuhn studied - is a product of human cognition.[233] Like science, it functions only through our mental thought processes and so some of the findings that have been made concerning how these work can improve our understanding of legal reasoning, of the function of law in society and ultimately of what exactly is involved in major legal paradigm changes like the transition from colonialism to post-colonialism or from a command model of legality to one based on human equality.

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[232] Cited by Winter, "Death is the Mother of Metaphor" at 750.

[233] *Ibid.* at 748.

2.2.1 Theories of Cognition

Kuhn based significant elements of his theory on research concerning human cognitive function such as the experiment demonstrating the misperception of black hearts and red spades placed in an ordinary deck of cards. His theory has, in its turn, inspired subsequent work in this and related fields.[234] Some of these developments must be taken into account if legal practice is to maintain a coherent relationship with other disciplines such as medicine, education and social work.

Although understanding of human thought processes is considered to be in its infancy, mechanical models of intelligence that led to theories like the popular 19th century study of phrenology have long been discredited. In effect, it is now known that the brain does not store knowledge in particular cells as if it were a computer chip where information can be encoded in discrete locations.[235] It seems that our thoughts and memories are preserved through complex networks of neurons whose electro-chemical patterns of interaction are strengthened each time they are reproduced.[236] Like paths worn through a field, past actions can direct future movements. The function of this patterning is predominantly instant, automatic and subconscious. In keeping with Kuhn's observation that the proponents of conflicting scientific theories are often unaware of the assumptions that structure their

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[234] See eg. Lakoff, Johnson, *Metaphors We Live By*; George Lakoff, *Women, Fire, and Dangerous Things : What Categories Reveal about the Mind* (University of Chicago Press, 1987); Winter, *A Clearing in the Forest.*

[235] Winter, *A Clearing in the Forest* at 28.

[236] *Ibid.*

reasoning, researchers now attribute 95 percent of our thought processes to the cognitive unconscious.[237]

2.2.1.1 Prototypes and Embodied Metaphors

Some of the implications of Kuhn's theory and related research merit consideration as we attempt to understand judicial reasoning and other manifestations of human thought processes. Laurence Kirmayer has pointed out that language is now believed to be "grounded in bodily experience" that provides common referents for our verbal lexicons.[238] According to the "embodied theory" developed by linguists like Lakoff, we structure our knowledge around "idealized cognitive models" which become biologically encoded in metaphoric reference to memories of an array of physiological sensations including hot and cold, balance, direction, hard and soft, up and down, fear, elation, dejection etc. [239]

A "metaphor", as defined by the Oxford Dictionary, occurs when one thing or state is imagined in terms of another. For example, a "glaring error" is one that stands out and creates discomfort *like* a strong light.[240] The error is compared to a bright light, though it is not a light. It is thus understood by analogy to visual perception. According to embodied theory, comparative explanations of this kind function through the use of multisensory electro-chemical pathways established in the brain by previous experiences and used to both metabolize and shape

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[237] George Lakoff, Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (New York, Basic Books, Perseus Books Group, 1999) at 13.

[238] Laurence J. Kirmayer, "The Body's Insistence on Meaning: Metaphor as Presentation and Representation in Illness Experience" 6:4 *Medical Anthropology Quarterly* 323 at 324.

[239] Lakoff, Johnson, *Metaphors We Live By* at 261. See also Bipin Indurkhya, "Rationality and reasoning with metaphors", (2007) 25 *New Ideas in Psychology* 16.

[240] See Sykes, *The Concise Oxford Dictionary s.v.* "metaphor". Note my complementary use of the spacial metaphor represented by "stand out" in this explanation.

understanding of new concepts or stimuli. Cognitive linguists, like Lakoff, thus describe a metaphor as "the mapping of a target domain on to a source domain".[241]

2.2.1.2 Abstract Ideas and the Sensation of Knowledge

This mapping theory is consistent with the observation that even abstract ideas are understood in terms of primary sensual experience.[242] We may, for example, refer to "knowing" as "seeing" saying things like "I see what you mean"[243] or in terms of tactile and motor skills when we say "I can't grasp your meaning". In effect, the word "imagined" used in the Oxford explanation of a metaphor draws on an analogy to "images" or visual perception, invoking the metaphoric inference that KNOWING IS SEEING. The tactile metaphor, on the other hand, suggests that TO UNDERSTAND IS TO GRASP. Both the visual metaphor and the tactile metaphor rely, in turn, on the representation that IDEAS ARE OBJECTS that can be seen or touched. (Can you *get* what I am saying? Can you go and fetch it as if it were an object?)

Research into linguistic development in children has suggested that comprehension of abstract metaphors of this kind develops out of situations in which meaning is conflated. "I see what's in the box" means "I know what's in the box" and it is only later that a child can differentiate the conceptual domains of

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[241] Lakoff, Johnson, *Philosophy in the Flesh* at 57-8..

[242] Lakoff and Johnson focus in particular on Johnson's "theory of conflation", Grady's "theory of primary metaphor", Narayan's "neural theory of metaphor" and Fauconnier and Turner's "theory of conceptual blending". Lakoff, Johnson, *Philosophy in the Flesh* at 46.

[243] Lakoff, Johnson, *Philosophy in the Flesh* at 48.

seeing and knowing to make sentences like "I can see what you mean", which do not involve literal sight.[244]

Some believe that the choice of sensory focus in the metaphors we use may have implications of which we are only peripherally aware. Bernard J. Hibbitts has suggested that American legal discourse is shifting from the visual metaphors associated with the culturally exclusive character of literacy and represented by phrases like "observing the law", "colour of title" and "black-letter law" to aural concepts related to "voice", "hearing", "silencing" ,"conversation" and "dialogue", which seem to be favoured by women and those who have been culturally marginalized[245]. Gerald Postema, by contrast, has explored similarities between legal reasoning and musical themes.[246] Musings of this kind that dance on the edge of established assumption is fully consistent with the quest for new models that Kuhn has associated with paradigm change.

2.2.1.3 The Metaphoric Definition of Categories

The theory that language consists of metaphors that "embody" sensual experience coincides with Kuhn's observation that scientists reason from prototypes that shape their perception of the world.[247] The words we use both categorize and edit our experience in ways that create areas of blindness even as they facilitate the

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[244] *Ibid.* at 48 and 54-55.

[245] Bernard J. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 *Cardoso L. Rev.*229.

[246] Gerald J. Postema, "Melody and Law's Mindfulness of time" [unpublished revision of "Law's Melody: Time and the Normativity of Law" presented to 21st.IVR World congress, Lund, Sweden.]

[247] Kuhn, *The Structure of Scientific Revolutions* at 111.

construction of knowledge. Lakoff"s theories and those of Kuhn both demand that we pause to consider just how it is that we know what we think we know.

As Lakoff has pointed out, one of the most basic metaphors that we use – in English at least - conceptualizes categories as containers in which ideas, understood as objects, may be placed. We ask, for example, whether tomatoes are *in* the fruit or vegetable category.[248] This is the same pattern of reason that we apply when we when we say that "property is (or is not) a constitutionally protected right". There is a tendency to assume first that everything must be either in the category or outside it[249] – "P or not P"- and secondly that all members of a category share the same characteristics. Yet on the conceptual level we do not actually structure the categories we use in this way.[250] Indeed, as any legal practitioner knows, reality is not at all easy to contain.

2.2.1.4 Actual Definition of Categories

Our perceptions vary and, as a consequence, so do the ways in which we structure the categories we use. As experts in taxonomy have discovered, even when they agree about which classificatory criteria apply, it is impossible to fit everything within the boundaries they establish. Even the zebras and fish that inhabit children's story books prove difficult to define at the scientific level.[251] There are, as it happens, organisms that are so interdependent that the decision to class them as one entity or two, or as parasite or prey, depends entirely upon the part of their life cycle

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[248] Lakoff, Johnson, *Philosophy in the Flesh* at 51.

[249] Winter, *A Clearing in the Forest*; Stuber, "Legal Reasoning after Post-Modern Critiques of Reason".

[250] Lakoff, *Women, Fire, and Dangerous Things* at 161, 166.

[251] *Ibid.* at 119.

chosen and the characteristics used to define the categories imposed.[252] This problem is quite familiar to jurists. H.L.A. Hart's famous discussion concerning whether a prohibition against "vehicles" in a park extends to airplanes and toy cars deals with this exact phenomenon.[253] No matter how carefully a state attempts to codify "the law", glosses, commentaries and discussions inevitably appear.

Paradigm theory has provided an explanation for this phenomenon. In effect, concepts can exist in multiple categories at once and categories do not function like containers.[254] They are shaped, instead, around prototypes, which , as Kuhn pointed out, serve as models through a gestalt type of process that allows the brain to interpret the same bundle of data through differing conceptual frameworks.[255] Thus, even though a typical example of a "chair" may be a seat with four legs, rockers and large bean bags may also be classed as "chairs". Conversely, people do not think of the Pope as a "bachelor" even though he, like James Bond, is an "unmarried man".[256] Other considerations, including the religious doctrine of celibacy, exclude the Pope from a category he might otherwise be expected to fit. An understanding of the ways in which prototypes function can accordingly offer crucial insights into law as a social regulatory mechanism and the importance of categories in the development of legal reasoning.

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[252] In the Bay of Naples, neither the medusa nor the nudibranch can survive without the other. Though both reproduce independently, the jellyfish that appears as a parasite on the sea slug at one stage in their relationship, got there through being canibalized by the slug in its larval state. Lewis Thomas, *The Medusa and the Snail: More Notes of a Biology Watcher* (London: Viking Press, 1979) ch.1. Re taxanomic models see Lakoff, *Women, Fire, and Dangerous Things* at 113.

[253] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv. L. Rev.* 593 at 606-15. See also Winter, *A Clearing in the Forest* at 197.

[254] Lakoff, *Women, Fire, and Dangerous Things* at 161, 166.

[255] Kuhn, *The Structure of Scientific Revolutions* at 85.

[256] Winter, *A Clearing in the Forest* at 70.

2.2.2 Category Formation

Researchers have determined that the most fundamental level of understanding is *not* the most general level. The models that govern our thoughts are generated, instead, on the basis of initial experience. In effect, one cannot imagine a plant, a toy or an animal without thinking of a specific member of the category which serves as a prototype or metaphor for the class as a whole.[257] Thus, both general and specific concepts tend to be known in terms of the original exemplar.

As represented by Lakoff, the relationship between types of categories may be seen as follows:

SUPERORDINATE:	ANIMAL	FURNITURE
BASIC LEVEL:	DOG	CHAIR
SUBORDINATE:	RETREIVER	ROCKER.[258]

When interpreting this table it is important to remember that the mental image governing a category does not necessarily fit all of its members. The prototypical chair may very well be a common kitchen chair, but beanbags and platform rockers are still recognized as "chairs" even though they have no legs. A chair is a seat you may sit on, but where you may sit may be defined in a number of different ways. Unless you are the monarch, you may not sit on the throne, but it is still a chair. Moreover, because of the gestalt orientation used to conceptualize categories, there is, as Kuhn pointed out, no need to define a "chair" in order to identify one.

Super-ordinate categories tend to be particularly fuzzy. Thus, for example, the word "animal" may include whales, hamsters, giraffes and panthers as well as dogs, snakes and centipedes, while "furniture" could incorporate washstands,

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[257] *Ibid.* at 24-7.

[258] Lakoff, *Women, Fire, and Dangerous Thing* at 46.

mirrors, curtains and shrines as well all kinds of chairs from beanbags to church pews.[259] In keeping with the variety of human experience, the concept governing at the basic levels of understanding may differ substantially from one culture to the next. Thus, igloos, log cabins, suburban bungalows and plate-glass high-rises may all be seen as typical "houses" – depending on whose social and cultural context is called upon.

2.2.2.1 Preferred Categorical Models

In keeping with the prototype-focused way in which categories are actually constructed some category members are generally seen as better representatives than others.[260] Thus, robins and sparrows are considered to be typical birds, whereas owls and eagles or penguins are not.[261] This phenomenon is believed to reflect the way we construct knowledge at the neurological level.

Prototypes tend to be based on experience and researchers have discovered that some are widely shared. For example, prototypical colours reflect the performance of colour perceiving neurons. Thus red and blue are usually seen as prototypical colours. Turquoise and lavender are not. Even speakers of different languages with different colour categories and cultural experience tend to choose the same hues as prototypes. The Tarahumara have only one term to cover the shades in the spectrum that English speakers call "blue" and "green"; however, they typically choose focal

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[259] *Ibid.*; Winter, *A Clearing in the Forest* at 92-97.

[260] Lakoff, *Women, Fire, and Dangerous Things*, at 161, 166.

[261] Winter, "The Metaphor of Standing and the Problem of Self-Governance" at 1385; Lakoff, Johnson, *Metaphors We Live By* at 71 ; Lakoff, *Women, Fire, and Dangerous Things* at 40-46 discussing the research of Eleanor Roasch.

blue or focal green rather than turquoise as the best representative of their combined category.[262]

Frequency of encounter may also affect the establishment of some prototypes. Robins and sparrows may have become prototypical "birds" because they are more commonly seen than owls or flamingos. Prototype effects have even been found in the field of mathematics where single digit numbers are consistently rated as better examples of odd numbers than those with two or more figures.[263]

2.2.2.2 Prototypes and Learning

Children learn the category membership of prototypical examples first – or perhaps it would be more accurate to say that the examples children learn first serve as prototypes. In any event, their paradigmatic function seems crucial to learning.[264] When asked to name things that belong to categories, people tend to list culturally accepted prototypes and when asked to judge the truth of a statement like "A chicken is a bird", response time is quicker when a prototype is used.[265] However, prototypes also generate misinformation because there is a tendency to assume that all members of a category share all of the prototype's characteristics.[266]

2.2.2.3 Cultural Variations

The role played by experience in developing prototypical status explains why prototypes vary from culture to culture and from person to person. Thus, as Hart was at pains to point out, a regulation that may seem perfectly plain to most people

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[262] Winter, *A Clearing in the Forest* at 79.

[263] *Ibid.* at 78.

[264] Lakoff, *Women, Fire, and Dangerous Things* at 46.

[265] Winter, *A Clearing in the Forest* at 78.

when considering a car or truck becomes ambiguous when applied to other objects that may also be classed as "vehicles". Qualifying adjectives are accordingly used to indicate when the prototypical ideal that represents a category as understood in a particular culture is not met.[267]

The capacity of language to reinforce culturally defined stereotypes has been widely commented upon in recent works concerning race relations and gender roles. We thus have *step*mothers, *foster* mothers and *biological* mothers, not to mention *Chinese* Canadians, *Black* Americans and *Aboriginal* law – just as we have *pale* blue and *olive* green.

2.2.3 Conceptual Errors

Our reliance on "idealized cognitive models" that are highly variable and culturally specific leads to a variety of common conceptual errors.[268]

2.2.3.1 Conjunction and Conflation

Cognitive researchers have found that causation is often conceived in terms of correlation. When A happens in conjunction with B, we tend to assume that A is the cause of B on the basis of extensive experience of this kind. A glass is tipped, the water spills. You fall, you hurt your knee. Conjunction is conflated with causality because of our initial experience of the world. Conjunction errors can be used for politically manipulative purposes. When Senator Robert Dole pointed out that

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[266] *Ibid.* at 92-97.

[267] Winter, "The Metaphor of Standing" at 1385

[268] The term "idealized cognitive model" is taken from the research of George Lakoff. Winter, *A Clearing in the Forest* at 86-9. For a demonstration of the effect of cognitive models on an ordinary action (catching a cab in New York) see Lopez, "Lay Lawyering".

teenage drug use rose 104% during Clinton's term of office, the implication was that Clinton was at fault even though there was no evidence of a causal connection.[269]

Similar errors arise from the tendency to generalize from prototypes. People assume that all of the characteristics associated with a prototype are likely to be present. Using examples taken from the research of Tversky and Kahneman, Winter has pointed out that the probability that 1000 people in California will be killed in a flood caused by an earthquake is necessarily lower than the likelihood of 1000 deaths in a flood of any kind. Yet California is so strongly associated with earthquakes that research subjects consistently rate the probability of the earthquake related disaster higher than the probability of 1000 deaths in a flood. Similarly, people are able to recognize that the probability that a person is either a bank teller OR a feminist is higher than the probability that they are both. Yet, when the question is asked concerning a woman described as being both a philosophy major and a student activist, even graduate students with special training in logic succumb to culturally coloured ideals and judge it more likely that she is a "feminist bankteller" than simply a bankteller.[270] Conjunction errors which arise from previously established mental prototypes have broad social consequences and they are insidiously difficult to escape.

2.2.3.2 Stereotyping

When these phenomena function at a collective level, their effects can be devastating. One emblematic example of this type of dysfunction was offered by the 1986 experience of three young "black" men who were stranded after their car

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[269]Lakoff, Johnson, *Philosophy in the Flesh* at 218.

stalled in the "white" neighbourhood of Howard Beach, New York. While considering what to do, they went for a pizza, but in an area where the prevailing stereotype saw "black" youth as criminals, their mere presence raised suspicion. The police were called, but there were no grounds for arrest. After the young men left the restaurant, they were chased and beaten by a gang of local teenagers. One of the stranded men was permanently blinded in one eye. Another died after being struck by a car while trying to escape his pursuers. When the victims sued, the general attitude in the community was "We ain't racial...We just don't want to get robbed".[271] The legitimacy of such thinking was taken so much for granted that the apparent problem of gang violence in Howard Beach was overlooked in the media as attorneys for the victims fended off questions from reporters who suggested they were making "too much" of the case.[272]

As the Indigenous experience in Canada has demonstrated, dysfunctional reasoning of this kind is by no means rare. Charles L. Lawrence III has pointed out that the sub-conscious level at which stereotypical points of view function merits close attention, particularly with regard to racial identification.[273] Despite constitutional affirmation of equality rights, and the failure of scientists to identify empirically sound criteria for defining racial categories, racism remains rampant.[274]

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[270] Winter, *A Clearing in the Forest* at 92-97.

[271] Patricia Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism"(1987) 42:93 *U. Miami L. Rev.* 127 at 137 citing *Village Voice*, Jan.6, 1987, at 16, col.1.

[272] *Ibid.* at 138 n.40.

[273] Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39:297 *Stanford L. Rev.* 317 at 337.

[274] See eg. Ritchie Witzig, "The Medicalization of Race: Scientific Legitimation of a Flawed Social construct" (1996) 125 *Annals of Internal Medicine* 675; Michael J.Bamshad, Steve E.Olson. "Does Race Exist?" 289.6 *Scientific American* (Dec. 2003) 78. In biology, species membership is defined

Its manifestations range from medical misdiagnoses[275] and racial profiling by police to the patronizing comments of well-meaning liberals who tell their racially identified friends about how they do not think of them as "Negros", "Indians" or "Jews".[276] This cognitive dysfunction also works in the other direction, causing great angst for people with light colouring born into contexts where dark prototypes prevail.[277] As Patricia Williams has stated with regard to its tragic manifestations in the United States, "there is no blame among the living for the dimensions of this historic crime". Yet the "psychic obliteration" caused by hyphenated identities and the perception that some people do not fit the dominant prototype of humanness "lives on as a factor in shaping relations, not just between blacks and whites, or blacks and blacks, but also between whites and whites".[278]

2.2.4 Alternate Systems of Categorization

Despite the power of first impressions that may become embedded in social habit and neural chemistry, we have a remarkable capacity to learn and to develop alternate paradigms. Kuhn was a professor of linguistics and philosophy at the Massachussetts Institute of Technology and one of his achievements has been to raise awareness of the relativity of knowledge. As he pointed out, people within a discipline learn by analogy through "time-tested and group-licensed ways of seeing

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by the ability to interbreed. Lakoff, *Women, Fire, and Dangerous Thing* at 36. The problem appears related to general misconceptions concerning the nature of categories.

[275] Witzig, "The Medicalization of Race", *ibid.*

[276] For discussion see Lawrence, "Unconscious Racism" at 341.

[277] The issue seemed to crop up in one form or another every year that I taught in the Program of Legal Studies for Native People in Saskatoon, yet light colouring reportedly occurred in some groups prior to known contact. e.g.Mi-cou-chusta-con and Shaw-wish-ti-con, two full blooded Cree brothers with pale skin and red and blond hair respectively, lived on the Saskatchewan River in the mid 1800's. Mary Weekes, *The Last Buffalo Hunter* (Saskatoon, Fifth House Publishers,1994 reprint of 1939) at 53.

things".[279] The fact that we can develop alternate models for interpreting experience and structuring what we know is graphically reflected in the multiplicity of languages that have developed over time and across varying geographies.

Professionals charged with translating concepts from one language to another are well aware of the types of problems that may arise because concepts that seem natural and ubiquitous from the perspective of one social and linguistic paradigm may be absent or differently conceived in another.[280] The previously mentioned Tarahumara placement of blue and green in the same colour category is one striking example that is relatively easy to cope with[281], as are similar conceptual distinctions that get lost in translation like the French attribution of masculine and feminine gender to objects.

Other types of inter-linguistic conceptual mismatch may be more challenging. For example, according to Lakof, Dyirbal has four basic linguistic categories: *Bayi*: human males, *Balan*: human females, *Balam*: edible plants and *Bala*: everything else.[282] Some languages have no adjectives at all. Igbo has only eight and Hausa twelve.[283] According to Sakej Henderson, Mi'qmak makes little use of nouns. [284] The spatial orientation, which makes us think of things as having a front and back is applied in English so the front of a bush is the side facing the speaker. In Hausa, by contrast, the "front" is the side facing away, as if the speaker and the bush were

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[278] Williams, "Spirit-Murdering the Messenger" at 139.

[279] Kuhn, *The Structure of Scientific Revolutions* at 189.

[280] See eg. Li, *Ageless Chinese* at 126.

[281] Winter, *A Clearing in the Forest* at 79.

[282] Lakoff, *Women, Fire, and Dangerous Things* at 99.

[283] These are said to correspond to basic descriptive categories found in other languages: big-small, white- black, young-old, hard-soft etc Lakoff, *Women, Fire, and Dangerous Things* at 290.

[284] *Ibid.* at 110.

looking in the same direction.[285] Mixtec speakers have no words that correspond to the English *on, over, under* etc. Instead, they employ a complex system of conventional metaphors that project body parts on to objects. "He is on top of the mountain" is expressed by the equivalent of "He is located mountain's head". I am sitting on the branch of the tree" becomes "I am sitting tree's arm", and so forth.[286] Other linguistic structural differences are more subtle. Ojibway speakers who are asked how they got to a party are inclined to answer "I started to come" or "I got into a car" emphasizing the embarkation stage of a journey in a way that seems quaint or nonsensical to English speakers who would more likely say "I drove".[287] Inter-Cultural translation problems are further exacerbated by the lack of gender based pronouns (like he, she and it) in many Aboriginal languages.[288]

According to Rupert Ross the differences between Native American and European linguistic perspectives are like opposite sides of Einstein's equation $E = MC^2$. English emphasizes the mass side of the equation, metaphorically representing everything as objects, described as nouns, whereas some Indigenous languages focus on energy and "the great flux, eternal transformation and an interconnected order of time, space and events".[289] This, apparently, makes it easy for speakers of Indigenous languages to discuss theory with physicists and Ross cites Sakej Henderson as saying:

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[285] Lakoff, *Women, Fire, and Dangerous Things* at 310.

[286] *Ibid.* at 313-15.

[287] *Ibid.* at 78.

[288] Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) at 116.

[289] *Ibid.* at 115.

> "...when you're speaking Mi'kmaq. you can go all day long without saying a single noun..."[290]

Others have observed that English, like other European languages and Sanskrit, exhibits a long-term tendency to replace specific verbs with abstract nouns. This seems to occur particularly when dealing with concepts introduced by the Norman conquest and the Renaissance. Both added new vocabularies to the language based respectively on French, classical Greek and Latin. The effect of *nominalization,* or the translation of actions into nouns, is to camouflage who is responsible for what happened. Use of imported nominalized language and other professionally specific linguistic paradigms has thus been associated with the exclusion of particular classes of people from centers of power, prestige and privilege.[291]

Regardless of the reasons for such linguistic differences, constructions perceived as bizarre or lacking in credibility to outsiders, seem natural to native speakers and most people develop only occasional awareness of the principles that order the words they choose.[292] The plays on words that typically occur in poetry are often impossible to translate. Even within cultures, identical words may be interpreted in radically different ways by men and women or by people from differing social backgrounds.[293] In summary, as well as generating misunderstandings, the multiplicity of verbal and cultural paradigmatic systems that

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[290] *Ibid.* at 110.

[291] Joseph M. Williams, *Style: Towards Clairty and Grace* (University of Chicago Press, 1990) at 6, ch. 2.

[292] Lakoff, *Women, Fire, and Dangerous Things* at 100.

[293] See eg. Tannen, *Framing in Discourse*; *That's Not What I Meant!* Interpretive differences across gender has become a recurrent theme in some fields. See eg. Allen, *The Sacred Hoop*. Note that Tannen used Lakoff and Johnson's work in her analysis.

have developed give us many effective ways of both understanding and misunderstanding the world and each other.

2.2.4.1 Linguistic World Views

The potential impact of linguistically embedded paradigms on both judicial reasoning and intercultural relations is underscored by research indicating that they can influence non-linguistic behaviour. It has, for example, been shown that English speakers, who have two separate categories for the blue-green colour range, are better than Tarahumara speakers at assessing variations in "greenness".[294]

Evidence of this kind has led Winter to argue that, because of our tendency to conflate meaning, the metaphors we use to depict concepts affect the way they are legally understood. Examining the word "power" in English usage, he identified a matrix of inter-related representations: POWER IS AN OBJECT as in "He *seized* power", which may be a food when "She has an *appetite* for power" or a weapon when "He *wields* a lot of power and is able to *strike down* this initiative". POWER IS A RESOURCE when we "*conserve* energy" and POWER IS A FORCE when "he used his power to *push* the bill through" or "he had the power *to bend the members to his will* ". It may also be a location when "She is *in* control" or "He decided to *shore up* his power *base*", which might be a mountain as when "She has reached the *pinnacle* of power" reflecting another basic metaphor in Anglo-American culture which says CONTROL IS UP. Thus people *rise to* and *fall from*

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[294] Lakoff, *Women, Fire, and Dangerous Things* at 330-334 on research reported in Paul Kay and Willett Kempton (1984) "What Is the Sapir-Whorf Hyoothesis? 86.1 *American Anthropologist* 65-79.

power which is exercised "over" or "upon" others.[295] On the basis of this analysis, Winter concluded that

> "All of our most basic, intuitive assumptions about power – that it is grounded in violence; that it is an external force that operates on a passive victim; that it is expressed through hierarchy; and that power and agency are synonymous – turn out to be either entailments or reductive understandings of these metaphors.[296]

In his view, the representation of power as a force induces people to conflate power and violence, the depiction of power as an object, which is implicit in the use of nouns, makes temporary abilities appear to be essential traits. Similarly, the assumption that "control is up" fosters the belief that power can only be exercised through a top down hierarchical format.[297]

According to Kuhn, people will continue to use an old paradigm unless there is a viable alternative. As it happens, the English concept of power is by no means the only one possible. In Chinese, for example, "power" is denoted by the character li [力], derived from the ancient pictograph representing sinew.[298] As such, it denotes strength and it is used in relation to effort of any kind.[299] Thus a man, *nan* [男] is one who exerts his strength in the field and *xie* [協], which shows ten [十] times a multitude of people [力力力] joining their strength together means

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[295] Winter, "The "Power" Thing".

[296] *Ibid.* at 754.

[297] *Ibid.*.

[298] A.S. Hornby, E.C. Parnwell eds *Oxford Intermediate Learner's English-Chinese Dictionary, Simplified Character Edition* (Hong Kong : Oxford University Press, 1969 rev. 1987) *s.v.* "Power" .

[299] Dr. L. Wieger, S.J. *Chinese Characters: Their origin, etymology, history, classification and signification* (New York : Dover Publications, 1965 reprint of 1927 2nd ed. Catholic Mission Press) at 143

"agreement, concord or mutual help".[300] It is conceptualized as an internal force rather than an external object and the multiple entailments associating this type of force with effort in Chinese ideographs contradict the subjection and passive victimization inherent to the English metaphorical construction.

In other words, the prototypical foundation of *li* [力] reflects a matrix of associations that differs substantially from that elicited by the English word "power". This makes it evident that, despite conventional translations, neither Chinese nor English has a word that fully communicates the meaning of the other's concept. The same inter-cultural dissonance almost certainly exists between French and English, the official languages of law in Canada, and it must be even more pronounced with regard to Indigneous languages such as Mi'kmaq, which ignore material manifestations to focus on energy transformations.

When the deeply embedded nature of the paradigmatic schema that structure language is taken into account, it becomes apparent that switching languages involves switching conceptual frameworks. As explained by Wilhelm von Humbolt in the 1830's:

> "The variety of languages is not merely a variety of sounds and signs, but in fact a variety of world-views".[301]

The capacity to employ alternative modes of thought tends to enhance both the volume of memory and the ability to think quickly. High functioning multilinguals accordingly perform better than comparable monolinguals on tests

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[300] *Ibid.* at 144; *A Pocket Chinese English Dictionary*, (Hong Kong : 中華書局, 1978) 52.

[301] J.M. Coetzee, "Newton and the Ideal of a Transparent Scientific Language" (1982) 11.1 *J. Literary Semantics*, 3.

measuring over-all "intelligence" as well as creativity, divergent thinking, cognitive flexibility and tolerance.[302] However, the way in which additional languages are taught is crucial. Children achieve high levels of literacy most quickly when the mother tongue is the medium of education and new languages are introduced in an additive fashion once the initial conceptual framework has become firmly established. Despite the success of French immersion programs in some places, attempts to provide primary education in a foreign language that is not spoken in the home environment have been correlated with illiteracy and an incapacity to communicate in either language. This, in turn, has been correlated with low achievement, high dropout rates, high unemployment, high rates of imprisonment and even suicide.[303]

Since it may take as little as one generation of externally imposed schooling to extinguish a language, linguists like Skutnabb-Kangas have described English and other homogenizing tongues act as "killer languages".[304] Globalizing trends have threatened a great number of languages with extinction including many Indigenous languages in Canada.

2.2.4.2 Linguistic Knowledge Reservoirs

As the evidence provided by various areas of cognitive research suggests, the death of a language represents the death of a conceptual system along with the corresponding loss of all of the information that is embedded in its structure.

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[302] Tove Skutnabb-Kangas, "Language Policies and Education: The Role of Education in Destroying or Supporting the World's Linguistic Diversity" (Barcelona: World Congress on Language Policies, 16 – 20 April, 2002 http://linguapax, prg/congres/plenaries/skutnabb.html) s.6.4 at.19.

[303] *Ibid.* at 12.

[304] *Ibid.*

Skutnabb-Kangas, for example, has reported that Finnish biologists were recently surprised to discover that salmon use what appeared to be impossibly small rivulets for spawning. Yet, this information was already known to the Indigenous Saami, whose names for the rivulets often include the Saami word for "salmon spawning bed".[305] Languages thus serve, not only as systems of communications, but also as repositories for cultural knowledge that has accumulated through countless generations. Because of this, linguists and educators concerned with the lives of minorities have linked the right to self-determination with linguistic rights.[306]

2.2. 5 Paradigms and Critical Skills

The importance of the frameworks used to structure our intellectual processes has been emphasized from a different perspective by those charged with teaching critical thinking at the university level. Just as transition from a command model of legality to one based on human equality is core to the decolonization process, so too an ability to shift from one paradigm to another is crucial for advanced scientific research.[307] This need for a critical awareness of the use and availability of multiple paradigms has led science educators like Craig E. Nelson to examine how expert reasoning capacity develops in university students. Research in this field has led to the identification of several stages of development.

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[305] *Ibid.* at 17.

[306] See eg. Margaret J. Maaka, "E Kua te Manuka Tutahi: Decolonization, Self-Determination, and Education" (2004) 37.1 *Educational Perspectives*, 3; K. Laiana Wong, "He Hawa'e Kai Nui a Kau ma Kula" (2004) 37.1 *Educational Perspectives*, 31.

[307] Kuhn, *The Structure of Scientific Revolutions* at 174; Lakoff, *Women, Fire, and Dangerous Things* at 306.

2.2.5.1 The Primary System of Categorization

Primary education tends to emphasize rigid categorization because people use sets of shared categories and metaphors to communicate and develop their thoughts. At the novice level, the answers on spelling and basic math tests are marked correct or incorrect and students are conditioned to reject uncertainty. As a consequence, a substantial majority of Americans enter college with a simple "dualistic" view of knowledge that prevents them from understanding complex moral and intellectual issues.[308] They are good at memorization, but tend to view the world as if everything is either right or wrong. This blinds them to the tentative nature of all knowledge, as well as to the complexity of reality which allows multiple interpretations of the same data. It is an approach that corresponds to "Black letter law".

2.2.5.2 Blind Faith in Authority or "Bullshit"

Once students learn that uncertainty exists, most continue to rely on authority to provide "correct answers". Those who reach beyond simple obedience may understand that various theories may be used to resolve areas of uncertainty; however, they frequently assume that the choice is a matter of taste that may be made on the basis of feeling or intuition rather than reasoned analysis.[309] By the graduate university level, students are expected to be able to apply the analytical criteria that govern their particular discipline. However, many compartmentalize their thought processes, thinking of what they are doing as "bullshit", particularly

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[308] Craig E. Nelson, "On the Persistence of Unicorns: The Trade-off between Content and Critical Thinking Revisited" in B. Pescosolido and R. Aminzade eds. Social Worlds of Higher Education: Handbook for Teaching in a New Century (Thousand Oaks, California: New Forge Press, 1999) 168 at 169.

when they have not found a way to rationally integrate their discipline's models of thought with their own personal belief systems.[310]

2.2.5.3 Reasoned Value-Based Choice

It is only when students have integrated an understanding of their own values with those governing the field they are studying that they are able to take responsibility for the perspectives they develop and deal with the extent to which knowledge is constructed. [311] Judicial reasoning that follows this "expert" model is able to integrate social values with the legal rules that can be found in legislation and precedents..

2.2.5.4 Regression under Stress

People in general attempt to preserve cognitive consistency by resisting change in their basic conceptual frameworks.[312] Students accordingly tend to retreat to earlier modes of reasoning when overwhelmed.[313] Just as learners of a new language slip into translating new words into their mother tongue, so too people challenged with novel information attempt to fit it into their existing mental schema, following the same patterns of thought that govern the practices of "normal science" identified by Kuhn. When this attempt fails, there is a tendency to

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[309] Graduates of four year programs typically reflect this pattern. *ibid* at 171.

[310] Nelson, "On the Persistence of Unicorns" at 177. This is read as interpreted in light of a number of works based on Kuhn's theory including Lakoff, Johnson, *Metaphors We Live By*; Lakoff, *Women, Fire, and Dangerous Things*, Lakoff, Johnson; Winter, *A Clearing in the Forest* and "Death is the Mother of Metaphor".

[311] Nelson, "On the Persistence of Unicorns" at 177.

[312] John B. Mitchell, "Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education", (1989) 39 *J. Legal Ed.* 275 at 287 n.30.

[313] Nelson, "On the Persistence of Unicorns", 177.

compartmentalize incompatible evidence[314], a practice that serves to protect people from the mental chaos involved in changing the fundamental paradigms they use.

2.2.6 The Consequences of Cognitive Idiosyncrasies

The research in all of these related fields confirms that the maze created by our initial cognitive patterning is deceptively difficult to escape. It governs our ability to see and to know with such force that even those subjected to negative stereotyping may adopt it. As put by Patricia Williams, "blacks are conditioned from infancy to see in themselves only what others who despise them see."[315] This may affect task performance. It has thus been demonstrated that the mere mention that a math test has been designed to be "gender neutral" can lower scores for men and raise them for women. Similarly, American males identified as being "white" perform better on basketball skills presented as a test of strategy, while those identified as "Negro" perform better when the same tests are said to measure "natural ability".[316]

Because of the profoundly pervasive effect of socially entrenched conceptual frameworks, those who are not prototypical members of a culture find the task of proving their experience to those who are very daunting indeed. When the *University of Miami Law Review* published William's story of being excluded from a trendy shop on the basis of race, the reality of her experience was questioned by law students, and even by prominent jurists who had not encountered what is, for some people in North America, a relatively common phenomenon. Despite decades

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[314] Mitchell, "Current Theories on Expert and Novice Thinking".

[315] Williams, "Spirit-Murdering the Messenger", 141.

of law reform and desegregation initiatives, bad service, public humiliation and legal harassment remain endemic for American citizens who are identified in negative racial terms. Even celebrities like Oprah Winfrey may find themselves standing outside by their limousines when exclusive shops refuse to allow them entry.[317] Stereotypes - or the prototypes that unconsciously govern the conceptual categories we use - result in poor "reality testing". As Williams described it, they act as a "powerful hallucinogen"[318] for, as Lawrence pointed out, they lead people of normal intelligence to reject what they experience as real.[319] Since this characteristic arises from neurological function itself, it is inescapable and must be taken into account if the ideal of human equality is to be achieved.

2.2.7 Summary

An accumulation of linguistic and behavioral evidence supports Kuhn's theory concerning the importance of cognitive patterning, undermining the belief that any individual can function in a way that is fundamentally neutral. As Lakoff and Johnson have found, "we are not outside reality, we are part of it" and our conceptual schemes shape the way we understand the world.[320] Each of us, no matter what our social position, functions according to our own idiosyncratic set of paradigmatic assumptions and embodied metaphors. Some, like up and down or colour perception, are based on common experience in the physical world. Some, like the linguistic systems we use to express our thoughts or philosophical

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[316] Claude M. Steele, *Thin Ice : "Stereotype Threat" and Black college Students* (*Atlantic Unbound,* August, 1999 http://www.theatlantic.com (accessed 6 June, 2001).

[317] Winter, *A Clearing in the Forest* at 135.

[318] Williams, "Spirit-Murdering the Messenger".

[319] Lawrence, "Unconscious Racism" at 332.

assumptions, are culturally defined. Others, including personal preferences, expectations and responses may be highly idiosyncratic, varying according to individual experience. The shift from a command theory of law to one based on human equality must necessarily engage us, consciously or unconsciously, on all of these levels.

The work of the cognitive theorists is useful to this study because it provides an explanation for the conservative phenomena that Kuhn observed as part of the process of paradigm change. It explains why the words and languages used in judicial reasoning can serve as indicia of colonial and post colonial modes of thought. It also describes both novice and expert patterns of thought and predicts the responses that may be expected in the face of any challenge to an accepted orthodoxy.

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According to the embodied theory of human cognition:

-Human reasoning is inescapably paradigmatic in character.

- Understanding is physiologically embedded in multi-sensory neural circuitry

- We reason using metaphors that function sub-consciously.

-The English language uses a container metaphor to structure knowledge.

-Knowledge is actually metaphorically structured around prototypes that:

-vary from one person, language and culture to the next
-define what we can perceive and
-influence beliefs and expectations.

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[320] Lakoff, *Women, Fire, and Dangerous Things* at 261-263.

3.

COLONIAL and POSTCOLONIAL PARADIGMS

> "After the fact, historians may look back upon a season when a thousand lives, a hundred thousand lives, moved in unison; but in the beginning there are really only individuals, acting in isolation and uncertainty, out of necessity or idealism, unaware that they are living through an epoch." [321]
>
> Melissa Fay Greene
> Praying for Sheetrock

Before it is possible to assess the extent to which Canada's Supreme Court has decolonized its functions, the values and practices associated both with the initial colonial paradigm and with its emerging replacement must be identified. This chapter summarizes some of the academic commentary concerning the colonial phenomenon that is available in Canadian university libraries. It then reviews the concept of "decolonization" that emerged in international law before defining the concept of "postcolonialism". By this means, indicia of the "colonial" and "postcolonial" operational models have been identified, making it possible to assess the character of both individual and collective social practices.

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[321] Melissa Fay Greene, *Praying for Sheetrock* (Reading Mass.: Addison-Welsley Publishing Company, 1991) at ix.

3.1 Colonialism

> "The violence which has ruled over the ordering of the colonial world,...has ceaselessly drummed the rhythm of the destruction of native social forms and broken up without reserve the systems of reference of the economy, the customs of dress and external life..."[322]
>
> Franz Fannon,
> The Wretched of the Earth

Experts on colonialism have described it as a phenomenon of "colossal vagueness"[323] yet, however it is ultimately defined, its pedigree is long and well documented. Colonialism is ultimately a dynamic that seems to emanate from tensions over who should manage and benefit from limited resources. Ania Loomba defined it as "the conquest and control of other people's lands and goods".[324] In this sense, evidence of colonial behaviour can be found in the historical record of cultures in all parts of the world dating to the most ancient times. Some of its elements can be seen in China's *Spring and Autumn Annals* which record events in the State of Lu in the pre-Confucian era[325] or in the biblical story of the Egyptian

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[322] Franz Fanon, Constance Farrington trans. *The Wretched of the Earth,* (New York: Grove Press, 1963) at 40.

[323] W. Reinhard, "History of Colonization and Colonialism" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2001) vol 4. 2240. See also Ronald J. Horvath "A Definition of Colonialiam"(1992) 13.1 *Current Anthropology* 45.

[324] Wanda D. McCaslin, "Introduction: Naming Realities of Life" in *Justice as Healing : Indigenous Ways* (St. Paul, Minnesota : Living Justice Press, 2005) citing John Boersig "Indigenous Youth and the Criminal Justice System", *Justice as Healing* (2003) 8:2, 8, n.8 quoting Ania Loomba, *Colonialism/Postcolonialism* (London: Routledge, 1998 at 2.

[325] For China, see eg. *Spring and Autumn Annals* in James Legge trans. *The Chinese Classics,* (Shanghai: reprinted from the last editions of the Oxford University Press, 1935) ;

pharoh's subjugation of Israeli famine refugees.[326] Robert Yazzie, Chief Justice of the Navaho Nation, has described colonialism as "a triangle of power in which the people at the top claim to have the right to control the people at the bottom".[327] In Europe, colonialism can be traced to the Greek and Roman practice of extending their societies by establishing settlements far from home.[328] England itself was once colonised by Rome, and so colonial practices are entwined with the emergence of literacy in the culture whose customs form the basis of Canada's legal system.

3.1.1 English Colonialism as a Law of Nature

Colonial patterns of thought and behaviour have been so prevalent for so long that many believe they are part of the natural order of things. They have been advocated and eulogized in countless literary works. Geoffrey of Monmouth's *History of the Kings of England*, which appeared about 1136, claimed, for example, that Britain was founded by Brutus, the leader of a party of Trojans who settled on the island of Albion and drove off a race of indigenous giants.[329] The tale is pure fantasy. Even at the time it was written, it was scorned by the Welsh historian Giraldus Cambrensis. Yet it became profoundly influential. Despite the lack of corroborating evidence for its version of "history", Monmouth's glorification of brutality was popularly accepted as "the truth" until the beginning of England's

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[326] Monser, *The Cross-Reference Bible* at *Genesis* 12 :10, 41- 50, *Exodus* 1.

[327] Robert Yazzie, "Indigenous Peoples and Postcolonial Colonialism" in Battiste, *Reclaiming Indigenous Voice and Vision*, 39 at 43.

[328] R. Hodder-Williams, "Colonialism: Political Aspects" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2001) vol 4. 2237 at 2239.

[329] Geoffrey of Monmouth, Lewis Thorpe trans., *The History of the Kings of England* (London: Penguin, 1966) Pt. 1.

drive to establish colonies overseas.[330] It remains widely known to this day because of its inclusion in college courses on European literature.

During the colonial age, the most members of the English ruling class seem to have accepted the morality of Monmouth's characters as readily as the veracity of his apocryphal tale. Colonialism was openly promoted by the influential humanist, Thomas More (1478-1535).[331] His *Utopia* (1515), which was greatly admired by King Henry VIII, proposed that whenever over-population developed in his ideal society, a general emigration should be decreed. The citizens should establish a new settlement on the closest uncultivated land they found, bringing the laws of the mother country with them. If the people who lived there accepted the colonist's imported institutions they would be assimilated. If not, they should be chased away by force of arms.

Thomas More considered such behaviour a right according to the law of nature.[332] The prototypical experience that shaped his thought is apparent in English history for his country had been subjected to successive colonizations. William the Conqueror's invasion of 1066 is frequently considered to be the foundation of England's legal system[333]; but the vocabulary of "colonization" comes from the Romans, who gave the name *colonia* to settlements of retired soldiers.

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[330] Hugh A. MacDougall, *Racial Myth in English History: Trojans, Teutons, and Anglo-Saxons* (Montreal : Harvest House, 1982) ch.1.

[331] Marcelle Bottigelli-Tisserand, "Introduction" in Thomas More, Victor Stouvenel trans. *L'utopie* (Paris: Editions sociales, 1974) at 12.

[332] More, *L'utopie, ibid.* at 131.

[333] See eg. J.H. Baker, *An Introduction to English Legal History*, 2nd ed. (London : Butterworth, 1979) ; Frederick Pollock and Frederic William Maitland, *The History of English Law*,2nd ed. (Cambridge University Press, 1895); Williams, *The American Indian in Western Legal Thought*. By contrast, the Normans might also be seen as part of a series of diverse invasions. See eg. Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 1.

Roman occupation of *Britania*, whose chief city was officially known as the *Colonia Claudia Victricensis,* lasted from 55 B.C. to 410 A.D.[334] Anglo-Saxon invasions followed, and the Norman conquest replaced Anglo-Saxon landlords with yet another foreign aristocracy that imposed its own form of government just as More suggested the Utopians should impose their laws in the colonies they founded. It can hardly be considered a coincidence then, that the same pattern of behaviour was replicated during England's expansion overseas, which began with the colonization of Ireland and led eventually to the dispersion of Anglo-European culture around the globe.[335]

3.1.1.1 Trans-Atlantic Colonization

According to the evidence submitted to the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*[336], England's claim to the land now known as "Canada" began with a quest for wealth and territorial dominion. More's *Utopia* appeared at the dawn of Europe's consciousness of a larger world. On March 5th, 1496, Henry VII had granted the Cabots permission to leave with five ships to explore parts:

> "which have hitherto been unknown to all Christian people.....to possess and occupy all the aforesaid towns, castles, cities, and islands, by them discovered, which by right may be subjugated and occupied, as our vassals, and their governors, lieutenants, and deputies, they obtaining for us the dominion, title, and

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[334] Anthony Thwaite, *Beyond the Inhabited World: Roman Britain* (London: André Deutsch Limited, 1976) at 22.

[335] See eg. Williams, *The American Indian in Western Legal Thought.*

[336] Evidence submitted to the Privy Council in *St. Catherine's Milling and Lumber Co. v. the Queen on Information of the Attorney General of Ontario* H.L. Vol. XVI 46 J.C. (1889) U.B.C. Law Library KG42 P748 1888 No.69.

> jurisdiction of the said towns, castles, cities, and islands and continents so discovered."[337]

His motivation appears to have been commercial for he claimed a fifth of the anticipated gains.

Like More's *Utopia* and subsequent European rationalizations for colonial behaviour, the plunder envisaged was justified on the grounds that the usurpers were culturally superior. This seems to have been an extension of notions of social class that prevailed in England, where land "ownership" was the traditional source of wealth. Humphrey Gilbert and his half-brother Walter Raleigh, like several other participants in colonization, were younger sons of the gentry in a society that generally passed landed estates undivided to eldest sons. Participation in overseas military ventures, be it in Ireland, America or on the continent of Europe, was a means of gaining the resources required to maintain the standard of living they had been raised to expect. Gilbert's oldest brother succeeded to his father's estates in Devon. Raleigh's father had made his money through piracy and privateering, which seem to have been culturally condoned at the time. As well as following in his father's footsteps, Raleigh educated himself at Oxford and received legal training at the Middle Temple. Relying on patents that followed the template of the Cabot Charter, Raleigh and Gilbert sold about twenty million acres of land in America that they had never seen.[338] Thus, according to the laws of England, physical presence was not required to begin the colonial process.

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[337] *Ibid.* at 25 citing Chalmers' *Political Annals*, Bk.I, 7-8.

[338] David Beers Quinn, *Set Fair for Roanoke: Voyages and Colonies, 1584-1606* (Chapel Hill: University of North Carolina Press, 1985) at 1 – 8.

3.1.2 Colonial Ethnocentrism

The ethnocentric perspective underlying colonial behaviour has been widely commented upon by those subjected to foreign control and its characteristics are well known.

3.1.2.1 Differentiation of the Colonized

Franz Fanon and Edward Said both identified the differentiation of the colonized as one of the requirements.[339] As Said pointed out, the classification of "natives" as an exotically inferior "other" was an essential part of the process used to justify cultural domination.[340] In recent years, much research has corroborated this observation, charting the process through which de-humanization and racism became legally institutionalized during the colonial age.[341] The relegation of invaded peoples to a different, sub-human status can already be seen in the Cabot charter's validation of assaults on non-Christian peoples. This process continued through the colonial era through a variety of mechanisms, many of which implicated co-opted Indigenous individuals.[342]

3.1.2.2 Projection of Anglo-European Cultural Norms

Those who co-operated with the colonization process were often represented as "chiefs" whose consent validated colonial encroachment when European concepts of social order were projected onto the society that was being subjugated.

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[339] Fanon, *The Wretched of the Earth* at 37 et seq.

[340] Edward Said, "Orientalism Reconsidered" (1985) 1 *Cultural Critique* 89; *Culture and Imperialism* (New York : Vintage Books, 1993).

[341] See eg. MacDougall, *Racial Myth in English History*; Theodore W. Allen, *The Invention of the White Race v.1 Racial Oppression and Social Control* (London : Verso, 1994).

For example, in 1621 when prospective colonists asked "what right have I to go live in the heathen's country", Robert Cushman, an agent for the Pilgrim Fathers, invoked feudal concepts to claim that "the imperial Governor Massasoit", who had "many other kings" under him, "hath acknowledged the King's Majesty of England to be his master and commander".[343] With no Indigenous witnesses available to challenge the validity of his assumptions or to explain their concepts of social order, Cushman's presentation may well have sounded credible. The rationale used to justify British assertions of sovereignty changed little in the centuries to come, yet discrepancies between what the colonists thought they were purchasing and what Indigenous peoples thought they were selling have remained a recurrent problem.[344]

As Eve Darian-Smith observed, "Law, in a variety of ways, was the formal mechanism and institutional frame through which colonial governments oppressed and controlled indigenous peoples."[345] Yet, in the colonial context "law" was not applied with the rigour ideally required by domestic courts. Differences between British and Anglo-colonial legality remain under-explored and historians are just beginning to examine the mysteries surrounding the impact of contact on both Indigenous and European societies. As the Cushman example suggests, one of the

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[342] Albert Memmi, Howard Greenfield trans., *The colonizer and the colonized* (New York: Orion Press, 1965) *Portrait du Colonisé précédé du Portrait du Colonisateur.*

[343] *St. Catherine's Milling* evidence: Robert Cushman, "Reasons and considerations Touching the Lawfulness of Removing Out of England into the Parts of America – The Rights to Live in the heathen's Country, - 1621" citing Youngs *Chronicles of Plymouth* 239-242.

[344] See eg. Cronon, *Changes in the Land* at 70 *et seq.*; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference"* (Vancouver: U.B.C. Press, 1997), 176; Walter Hildebrandt, Dorothy First Rider, Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal : McGill-Queen's University Press, 1996).

[345] E. Darian-Smith "Postcolonial Law" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2001) vol 17,11844.

features of this difference is that elements usually required to ensure credibility and legal validity were often conspicuously missing. In this instance there was no "*audi alteram partem*" and no verification of the claim that Massasoit actually was the "Imperial Governor" Cushman claimed he was.[346]

3.1.2.3 Presumptions of Entitlement

The massive depopulation of North America by the diseases introduced at first contact made it easy for Europeans to justify taking land that had previously been under Indigenous cultivation.[347] However, once the diseases had run their course, a paradigm that assumed Indigenous peoples were primitive, uncivilized or otherwise less than fully human supported the immigrant perception that the Indigenous land they coveted was essentially *terra nullius*, belonging to no one. It can, for example, hardly be considered a coincidence that the vast appropriations of what was to become western Canada were preceded by the 1876 *Indian Act* with its exclusion of "Indians" from the legal definition of a "person". Harold Cardinal has pointed out that the *Indian Act* was neither mentioned nor explained to the signers of the numbered treaties.[348] These treaties are still relied upon to found Canadian sovereignty. Though they are now recognized as being "*sui generis*"[349], there is increasing discomfort concerning the circumstances of their creation. In academic circles, at least, questions are being raised concerning whether it is legally and

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[346] There is certainly evidence to suggest that Indigenous concepts of government differed substantially from those of the colonists who were accustomed to a command model. For a discussion of how "Chiefs" among the Mi'kmaq were probably consensually chosen representatives of their communities see eg. Willian C. Wicken *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press) at 43.

[347] Cronon, *Changes in the Land* at 90.

[348] Goodwill, Sluman, *John Tootoosis* at 19.

socially acceptable to appropriate the resources used by Indigenous peoples in exchange for a handful of shoddy supplies at a time when they were suffering from extreme duress caused by the major beneficiary of the treaty.[350]

3.1.2.4 Ignoring Indigenous Perspectives

The emergence of such issues reflects the fact that until very recently, Indigenous perspectives on colonial relations were routinely ignored, along with most of the established protocols normally associated with maintaining international respect.[351] Brian Slattery, among others, has pointed out that colonial courts presented Europeans as if they were the only actors, functioning as if the original inhabitants of the land lived in a juridical vacuum during the pre-contact era.[352] His own writing follows this tradition by maintaining an internal Anglo-Canadian perspective that leaves aside both Indigenous and international frames of reference.

Legal analysis on this model replicates the way colonial history was written.[353] Indigenous knowledge was rendered invisible. New names were imposed on places, plants and animals and even when garbled versions of Indigenous names were maintained, their meanings were lost. Most Canadians, for example, do not know the meaning of the names for provinces like "Ontario", "Saskatchewan" and

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

[350] See eg. Dean Neu, Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (London: Zed Books, 2003).

[351] See eg. Venne, *Our Elders Understand Our Rights*; Hildebrandt, First Rider, Carter, *The True Spirit and Original Intent of Treaty 7.*.

[352] Brian Slattery, "The Organic Constitution:Aboriginal Peoples and the Evolution of Canada" (1995) 34.1 *Osgoode Hall L. J.* 101 at 104 and 105.

[353] For an account of changing perspectives in Canadian historical writing with regard to "Indians" see Trigger, *Natives and Newcomers*; "Indian and White History: Two Worlds or One?" c.1 in Michael K. Foster, Jack Campisi, Marianne Mithun eds. *Extending the Rafters: Interdisciplinary Approaches to Iroquoian Studies* (Albany: State University of New York Press, 1984.).

"Manitoba". Though images of Indigenous people were habitually incorporated for decorative effect in paintings and photographs, they were treated like exotic flora and fauna. Their own names and ways of knowing the world were ignored and, because the Indigenous peoples were excluded from most discussions, the colonizers were rarely even conscious of the ways in which they organized information to support their in-migration. This ignorance made the "mask of legality"[354] appear impenetrable from their internal cultural perspective.

3.1.3 The Legality of Command

As Purdy has pointed out, the perception of both colonial and indigenous law differed depending on where one sat in relation to the colonial divide.[355] Colonizers, who frequently deemed native populations to be less than human, claiming they possessed no law at all.[356] Indigenous peoples, by contrast, tended to assume that regulatory schemes imported by foreigners had no validity what so ever when unilaterally applied to them.[357] Yet, the colonizers utimately used force to impose their concept of legality.[358]

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[354] Darian-Smith, "Postcolonial Law"; Smith, *Decolonizing Methodologies* at 86-7 ; Greg Sarris, *Keeping Slug Woman Alive: A Holistic Approach to American Indian Texts* (Berkeley : University of California Press, 1993) at 129.

[355] Jeannine Purdy, "Postcolonialism: The Emperor's New Clothes?" (1996) 5(3) *Social and Legal Studies* 405-6.

[356] Darian-Smith, "Postcolonial Law".

[357] See eg. the Haudenosuanee arguments in Woo, "Canada's Forgotten Founders".

[358] This is an essentialized perspective. There were many individuals who did not follow this pattern and there have been periods of inter-cultural co-operation. See eg. Morin, *L'Usurpation de la souveraineté autochtone* or White, *The Middle Ground.* However, the department of Indian Affairs began as a military endeavour and the British offered rewards for killing Mi'kmaq before the mid-18th century treaties. See *R. v. Marshall* [1999] 3 S.C.R. 456 at [3].

3.1.3.1 Military Force

The colonial age was an age of war which saw great advances in the technology of weaponry as European battles for supremacy spread all around the world. The same ethos governed relations with those who were being colonized. The use of force, as seen in the repression of the Ghost Dancers[359] or in the creation of the "Oka Crisis", reflected entrenched patterns of behaviour. The extension of European colonialism was marked by an endless succession of violent incidents ranging from "Bacon's Rebellion" in 1676 involving the revolt of African and European slaves and indentured servants in Virginia[360], to the opening of Japanese ports at gun point by the United States in the mid 1800's, to the Taiping and Boxer "rebellions" in China and the opium war that erupted when British and American traders objected to China's attempt to stop their illegal importation of narcotics.[361] As Franz Fannon later observed, the use of force by the colonizers to resolve conceptual disagreements was habitual and "Police stations, as sites of legal violence were regarded as crucial to the maintenance of the divided world of the colonial regime."[362]

3.1.3.2 Collaborators

Assertion of the colonial paradigm did not rely exclusively on externally imposed legal regulation and superior weaponry. It was also imposed through rewards and punishments. Whether native or immigrant, participants in the

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[359] Wallace "Introduction" in Mooney, *Ghost Dance Religion and the Sioux Outbreak of 1890* at viii.

[360] Allen, *Invention of the White Race* at 17.

[361] See any standard history of Asia. eg. Li, *Ageless Chinese*; Reinhard, "History of Colonization and Colonialism", 2241. Extensive discussions concerning the violence of colonialism are also included in Fanon, *The Wretched of the Earth.*.

colonizing project benefited from loyalty and obedience.[363] Like the Roman colonization to which it had been subjected, Britain's world-wide colonial enterprise involved participants from all parts of the empire. Though the British made political alliances with Indigenous nations like the Iroquois, they also incorporated Indigenous individuals in their colonizing ventures. There were Muslim soldiers in the Kashmir Infantry[364] and Mohawk and Ojibway oarsmen on the Nile[365] just as the Romans before them had invaded using legions from France, Germany, Hungary, Holland and later Spain, Morocco, Rumania and Syria.[366] Modern historians, like Bailyn and Colley, have accordingly begun to investigate the social pressures that induced the colonizers to leave home.[367]

Soldiers, missionaries and others who adopted social roles that promoted imperial endeavours were granted material rewards and high social status. Those who did not could find their very survival in jeopardy. As a consequence, individuals from both sides of the colonial divide contributed to the ideological re-ordering that accompanied colonization. Constrained to internalize other peoples' ideas about themselves, the colonized struggled to beat the invaders at their own game by adopting self-definitions that fit a foreign vision of the world. In Canada, this phenomenon has been commented upon by Indigenous and Québecois critics

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[362] Purdy, "Postcolonialism", referring in part to Fanon, *The Wretched of the Earth.*.

[363] *Ibid.* at 405-6.

[364] Raleigh Trevelyan, *The Golden Oriole: Childhood, Family and Friends in India* (Oxford University Press, 1988) at 42.

[365] *Veterans Affairs Canada*, "Native Soldiers – Foreign Battlefields" http://www.vac-acc.gc.ca (7/12/2006).

[366] Thwaite, *Beyond the Inhabited World* at 32.

[367] See eg. Bernard Bailyn, *The Peopling of British North America: An Introduction* (New York: Alfred A. Knopf, 1986); Colley, *Captives*.

alike.[368] Indeed, as a representative of a conquered people, Sir Wilfrid Laurier's previously mentioned support for the British imperial project provides a ready illustration of this aspect of the colonial phenomenon.[369]

3.1.4 Ideological Reordering

A key element in the colonization process was the conceptual re-ordering that accompanied the imposition of alien values. Foreign frames of reference restructured social knowledge to fit the immigrants' needs and expectations. Indigenous traditions were ignored as resources were appropriated. Places were renamed and history was rewritten.[370] As described by Margaret J. Maaka:

> "The oppression of our indigenous peoples,...involved the stripping away of the fundamental markers of our identities – sovereignty, ancestral lands, language, and cultural knowledge."[371]

The violent and oppressive nature of inter-cultural encounters under the colonial ethos was disguised or left out of official accounts of history. Indigenous struggles to maintain autonomy were called "rebellions", making the victims, rather than the invaders, appear to be the source of social disruption. Public spokesmen fell into the habit of referring to the world as if the original inhabitants of the land had never existed or become extinct. Though the presence of the Indigenous peoples at the time of "discovery" is often mentioned, the details of their struggles against

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[368] See eg. Pierre Vallières, *Nègres blancs d'Amérique* (Québec: éditions parti pris, 1967) or Howard Adams, *A Tortured People: The Politics of Colonization* (Penticton, B.C. : Theytus Books, 1995) – a key reference used by the *Canadian Commission on Race Relations*, http:// www.crr.com.

[369] Skelton, *The Life and Letters of Sir Wilfrid Laurier* at 321.

[370] See eg. Cronon, *Changes in the Land* at 90.

[371] Maaka, "Decolonization, Self-Determination, and Education" at 3.

colonization are typically ignored in official accounts of history, especially in places where the colonizers became the majority.[372]

3.1.4.1 A Two Edged Sword

This denial of the real experience of the colonized cuts both ways. It prevents the victims of colonization, who have often lost their original languages, from articulating their perceptions. This leads to confusion and low self-esteem. It also inhibits the development of respectful behaviour among the colonizers, breeding ignorance and insensitivity. The oppression endured by Indigenous children who were presumed to be inherently backwards, who were prevented from using the languages of their parents and who were taught not to articulate their thoughts and feelings has erupted in addictions and abusive social relations leading some to suggest that it was the colonized themselves who completed the task the colonizers had begun.[373]

As a consequence of this dynamic, those struggling to survive on the privileged side of the conceptual divide created by colonialism, prove all too ready to blame the colonized for the profound economic, social and emotional problems they have had to contend with. This has led Albert Memmi to describe colonialism as a variety of fascism where "human relationships have arisen from the severest

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[372] Note eg. Hubert Gendron and Gordon Henderson, *Canada, A People's History* (http://history.cbc.ca/histicons/) or see eg. Brian Maddock ed., *History and Citizenship Education* (Beaconsfield, Quebec: 2004) currently in use for Grade 7 students in the English Montreal School Board. For a Mohawk view of some of the same history see David Blanchard, *Seven Generations: A History of the Kanienkehaka* (Centre for Curriculum Development, Kanawake Survival School, Kanawake, 1980). Re. changes in historical perspectives see Trigger, *Natives and Newcomers.*.

[373] Sarris, *Keeping Slug Woman Alive* at 132-6 and 43.

exploitation, founded on inequality and contempt, guaranteed by police authoritarianism."[374]

3.1.4.2 Conceptual Blindness

As demonstrated by the experiment with black hearts and red spades discussed by Kuhn, it is difficult for people to assimilate information that does not fit the idealized cognitive models already established in their minds. Like the participants in that research, participants in colonial ventures often failed to note the cruelty of their own actions or of the state policies they supported, even when evidence was plainly before their eyes. Thus inquiries into Wounded Knee in the 1890's and the Oka Crisis in the 1990's left fundamental issues concerning social order buried in the debris. The focus was on who shot first, leaving the institutional deficit that led to the use of armed force in the first place unnoticed and unexamined.

As many have noted, colonialism presumes the right to define what legitimate knowledge is. In so doing, it edits perception and defines what can be seen. When colonialism has taken root, even the colonized have difficulty understanding the world in any other way for, as the Maori scholar Linda Tuhiwai Smith has pointed out, colonial practices fragmented and alienated the Indigenous cultural heritage, tearing apart and destroying "the material connection between people, their place, their languages, their beliefs and their practices." [375]

The capacity of colonialism to dominate human perception explains why many scholars in respected universities have dismissed the complaints of the

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[374] Memmi, *The colonizer and the colonized* at 62.

colonized without making any serious attempt to understand them. Colonialism has, for example, been described as "a general invective against western policy, especially since the 1955 Bandung conference of recently decolonized Asian countries".[376] Even critics of colonialism tend to think they have found something new. Yet, the archives kept by the colonizing cultures themselves record innumerable instances of much earlier protest suggesting that the colonized have struggled to uphold their own social norms from the time of first contact.[377] Non-European literature, commentary and historical records corroborate the fact that resentment of the colonial enterprise has always run deep.

The catalogue of anti-colonial protests is impossibly long and the ways in which particular incidents have been represented in historical records is highly political. Reflecting the tendency Kuhn noted to re-write history in terms of the prevailing paradigm, the victors generally omit references to the human rights abuses they themselves committed, showing little inclination to conduct critical evaluations of such phenomena as state sanctioned plunder, murder, drug-dealing or genocide. Yet, one party's "rebellion" remains another's attempt to prevent abuse and the legitimacy of any action depends upon whose concept of law is adopted and which evidence is considered. If the people involved had consented to colonial rule, violence would never have erupted in the first place. Indeed, the nature of the violence involved in the colonial process is worth considering for those who have

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[375] Smith, *Decolonizing Methodologies* at 89.

[376] Reinhard, "History of Colonization and Colonialism" at2240. See also Hodder-Williams, "Colonialism" at 2237.

[377] In the American context, see eg. Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: W.W. Norton, 1975); Goodwill, Sluman, *John Tootoosis.*

succeeded at dominating have controlled the characterization of the historical record and they have almost invariably been the most heavily armed. As Smith has noted with regard to Maori subjugation in New Zealand, even the most passive resistance has been classed as "war" or "rebellion" so as to justify military intervention and other oppressive state measures.[378]

3.1.5 Questioning Colonialism

The twentieth century inclusion of non-European states in international fora was not, in any sense, the beginning of anti-colonial sentiment. It merely focused Euro-American attention on a discourse that was already well established among those whose humanity or civilization had been discounted by those who coveted their resources. Once the colonized were included in international discussions, it became difficult to maintain the "othering" process that pretended they were child-like creatures who needed to be spoken for. As described by Edward Said , the nature of what they needed protection from became apparent and the usurpation of their sovereignty and resources no longer seemed justifiable.[379]

3.1.5.1 Colonialism and Imperialism

Reflecting the sentiments of the colonized, Said pointed out that colonialism is a product of imperialism which he defined as:

> "...an act of geographical violence through which virtually every space in the world is explored, charted, and finally brought under control."[380]

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[378] Smith, *Decolonizing Methodologies* at 91.

[379] Edward Said, *Culture and Imperialism* (New York : Vintage Books, 1993) at 226.

[380] *Ibid.* at 9 and 225. Also cited by Jacobs. See also Reinhard, "History of Colonization and Colonialism" at 2240.

Historical writers have similarly described colonialism as being:

> "...the control of one people by another, culturally different one, an unequal relationship which exploits differences of economic, political and ideological development between the two."[381]

On a practical level, the problems presented by colonialism vary according to whether the colony in question is a trade or military base, an expansion of settlement or a type of exploitation where temporarily sojourning profit seekers collaborate with local entrepreneurs to appropriate resources for immediate gain, benefiting only those privileged to participate.[382]

3.1.5.2 The Limits of Decolonization

As initially conceived early in the twentieth century, the process of "decolonization" involved the withdrawal of imperial control over foreign territories. This has been described as involving a dialectical process requiring an independence movement, allies and willingness on the part of colonizers to let go – a process that accelerated as the motives for territorial colonization disappeared and administrative costs rose.[383]

However, territorial decolonization did not produce a break with Western hegemony[384] and hierarchical concepts of social order persisted. As the allocation of wealth began to shift away from agriculture and resource-based economies, the colonial powers retained the advantages they had gained through their industrialization during the colonial age. There was, accordingly, no immediate

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[381] Reinhard, "History of Colonization and Colonialism" at 2240.

[382] *Ibid.*

[383] *Ibid.*

leveling of the economic playing field which had become distorted during the centuries of European exploration and conquest.

New states established during the twentieth century found themselves constrained to use institutions and boundaries inherited from the colonizers who had destroyed pre-colonial economic relations, social order, customs and law. Ironically it seems to some that, as Eve Darian Smith points out:

> "The very moment of self-determination by peoples formerly colonized requires the adoption of European knowledge such as notions of progress and development, concepts of self and personhood, as well as forms of government, state-building, and, perhaps most important of all, law"[385]

Thus the ostensible decolonization of territories whose parameters had been defined according to colonial politics did not, in and of itself, guarantee an escape from the colonial dynamic. It required instead assimilation into the legal culture and social paradigms of the colonizers.

3.1.5.3 Neo-colonialism

This phenomenon has contributed to the emergence of terms representing other categories of colonialism. In the early 1960's, references to "neocolonialism" gained currency as a means of describing a situation that already troubled many people. At the 1955 Bandung Conference of non-aligned states, Indonesia's president Sukarno pointed out that colonialism "has also its modern dress, in the

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[384] J.D. Kelly "Postcoloniality" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2001) vol 17,11844.

[385] Darian-Smith, "Postcolonial Law".

form of economic control, intellectual control...by a small but alien community within a nation".[386]

As several commentators have noted, "independence" with laws and regulatory institutions modeled after those used by the colonial states does not fully repair the damage caused by colonization. W. Richard Jacobs has consequently described the "neo-colony" as being:

> "Independent by name, flying its own flag, promulgating laws from its own Parliament, but dependant in all material and metaphysical ways on the umbilical cord which ties it to the metorpolitan centre. The neo-colonial status, while it might in the short run satisfy the ruling class, is a most debilitating, humiliating and ultimately dehumanizing experience, for it facilitates the sucking of the economic blood of the neo-colony and the reciprocal fattening of the metropole in full view of all..."[387]

"Neocolonialism" is thus seen as economic reliance on former colonial powers resulting from "structural dependency" created by the continuing importance of institutions established during the colonial age.[388]

In this sense, organizations regulating international trade such as the International Monetary Fund have come to be seen as tools of the American dominated corporate imperialism that has typified the post World War II period.[389] Some, like Purdy, have pointed to an externally imposed constitution as one indicia

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[386] Hodder-Williams, "Colonialism".

[387] Purdy, "Postcolonialism", 407 citing W. Richard Jacobs, 'Societies in Crisis : Introduction' in S. Craig ed. *Contemporary Caribbean: A Sociological Reader*,vol.2 (Trinidad and Tobago: S. Craig, 1982).

[388] Reinhard, "History of Colonization and Colonialism" at 2240.

[389] See eg. Purdy, "Postcolonialism" at 406; Anne McClintock, "The Angel of Progress: Pitfalls of the Term "Post-Colonialism" 31/32 *Social Text* (1992) 84.

of colonialism, while identifying economic domination as a fundamental element.[390] Sakej Henderson has pointed out that:

> "Eurocentric education forces Indigenous peoples to live according to imposed Eurocentric scripts".[391]

To this day, as Rosemary J. Coombe has observed, Indigenous people are seldom publicly heard and:

> "Native peoples face a legal system that divides the world up in a fashion both foreign and hostile to their sense of felt need."[392]

This may be one of the reasons why Indigenous peoples have failed to be attracted by egalitarian theorizing concerning their rights as "minorities" in states that were established by colonial processes.[393] In the words of Sharon Venne:

> "The aim of Indigenous Peoples is not to be assimilated into the state that has colonized and dispossessed them".[394]

Korean scholar H. Cho summarized the effect of becoming "colonized" as "coming to require foreign means, methods and tools simply to live and think".[395] Maori theorist Graham H. Smith agrees, characterizing the neo-liberal privitization of the New

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[390] Purdy, "Postcolonialism" at 409.

[391] James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous L. J.* 1 at 16.

[392] Rosemary J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy", (1993) 6:2 *Can. J. L. & Jur.* 249 at 269.

[393] See eg. Richard Spaulding, "Peoples as National Minorities: A Review of Wil Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective", (1997) 47 *U.T.L.J.* 35; Thompson, *The Rights of Indigenous Peoples in International Law*; Turpel, "Aboriginal Peoples and the Canadian Charter"; Catherine Brölmann, René Lefeber, Marjoleine Zieck eds., *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1992); A. Rigo Sureda, *The Evolution of the Right to Self-Determination: A study of United Nations Practice* (Leiden: A.W. Sijthoff, 1973).

[394] Venne, *Our Elders Understand Our Rights* at 137.

[395] Kelly, "Postcoloniality", 11848 citing H. Cho T'alsikminji Chisikin ui Kullikki wa Samilkki, [*Reading Texts, Reading Life:The Point of View of a Post-Colonial Intellectual*] 3 vols. (Seoul: Ttohaniuimunhwa Press, 1992-4).

Zealand economy since the 1980's as a reformation of colonization because it marginalized the concept of collective responsibility that is central to Indigenous values.[396] Recent attempts to patent Indigenous genetics and knowledge of the natural world have similarly been seen as a "new wave of colonialism" or as "bio-colonialism" because it allows business interests to encroach on the right to self-determination turning life itself into a salable commodity.[397]

3.1.5.4 Internal Colonialism

Reflections on the nature of colonialism and on its capacity to appropriate power and privilege[398] have contributed to the emergence of the concept of "internal colonialism" by which "particular groups, through their dominance of political and economic power, ensured that other groups are kept in long term subservience."[399] This process has been identified in Britain's incorporation of the "Celtic fringe" of Scotland, Wales and Ireland [400], in "white" South Africa's subjugation of an indigenous "black" majority[401], in Russian domination of the former Soviet Union,[402] as well as in Anglo-Canadian domination of Quebec.[403] In

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[396] Graham H. Smith, "Mai i te Maramatanga, ki te Putanga Mai o te Tahuritanga: From Conscientization to Transformation" (2004) 37.1 *Educational Perspectives* 46 at 47.

[397] Debra Harry, Le'a Malia Kanehe, "The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples" in Beth Burrows ed. *The Catch: Perspectives on Benefit Sharing* (Edmonds Institute, 2005); Debra Harry, Stephanie Howard, Brett Lee Shelton, "Indigenous Peoples, Genes and Genetics: What Indigenous People Should Know About Biocolonialism, A Primer and Resource Guide", *Indigenous Peoples Council on Biocolonialism,* http://www.ipcb.org/pub/IPGG.html (accessed 25 April, 2005).

[398] Purdy, "Postcolonialism"at 409.

[399] Hodder-Williams, "Colonialism".

[400] Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development 1536-1966* (University of California Press, 1975)

[401] Hodder-Williams, "Colonialism".

[402] Reinhard, "History of Colonization and Colonialism" at 2240.

[403] See eg. Vallières, *Nègres blancs d'Amérique.*

all of these situations, pre-existing polities were turned into minorities in a larger whole, as also happened to the Indigenous peoples over whom both Canada and the United States claim sovereignty. The concept of internal colonization thus involves the *ex post facto* imposition of a dominating culture's perspective. It allows the more powerful party in any dispute to set territorial or legal boundaries that deny the frames of reference of the invaded culture and legitimize both cultural and material appropriation.

The process of differentiation and subordination that justifies colonialism has been identified within cultures as well as between cultures. Courses on feminism almost invariably contain some discussion of women as internally colonized victims of patriarchal social norms[404] Focusing on the ways in which the colonial paradigm has supported relations of dominance and submission, geographers have seen colonialism reflected in the administration of cities through the use of ordinances about matters such as cleanliness, sanitation and town planning.[405] Allegations of "environmental racism" have also been made with regard to decisions concerning toxic-waste disposal.[406] Advocates for bio-diversity have observed a colonial dynamic at work in the promotion of mono-cultures and the prosecution of farmers whose seeds have been cross-bred through natural processes with genetically-modified crops.[407] The neglect of local languages and dialects in favour of education in English and other majority languages has also

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[404] See eg. University of Rhode Island www,uri.edu/artsci/wms/hughes ; University of Victoria : http://web.uvic.ca/calendar2001/CDs/WS/CTs.html.

[405] J.M. Jacobs "Postcolonial Geography" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2001) vol 17. 11838.

[406] See internet sites such as http://www.ishgooda.nativeweb.org and www.brook.edu/gs/EnvJustice/ej_hp.htm.

been equated with mental colonization.[408] In short, colonial critique has inspired many questions concerning the design and application of all kinds of conceptual categories.

3.1.5.5 The State and Colonialism

The modern state, having arisen during the imperial age is generally considered to be an heir to colonialism,[409] so it is not surprising to see colonial values reflected in the definition of a "state" used by some Euro-American scholars. Despite evidence that escalation of legal violence tends to precede rather than resolve the spread of violence in society,[410] the state is presumed to play a socially protective role even when it reinforces existing power imbalances instead of defending those who are socially vulnerable. Colonial mores can accordingly be seen in the analyses of the political scientists who define a "state" in terms of the ability to exert coercive power through a monopoly on the "legitimate" use of internal violence or through monetary, bureaucratic and military control.[411]

Though ideals resembling those of the French revolution's "liberté, egalité, fraternité" are frequently flaunted to justify state practices, studies like Foucault's *Surveiller et punir* have documented the emergence of increasing internal state regulation and surveillance during the 17th to 19th century era that coincides with the

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[407] Harry, Kanehe, "The BS in Access and Benefit Sharing".

[408] Skutnabb-Kangas, "Language Policies and Education" at 21

[409] Reinhard, "History of Colonization and Colonialism" at 2240.

[410] Purdy, "Postcolonialism" at 413.

[411] I.V. Gruhn, "State Formation" in Neil J. Smelser, Paul B. Baltes eds. *International Encyclopedia of the Social and Behavioural Sciences* vol.22 (Amsterdam: Elsevier, 2001), 14970; W. Reinhard "State, History of" *ibid.* at 14972.

apex of European colonial expansion.[412] For Foucault, the proliferation of state rules, records, rankings, surveys, examinations, fines and punishments is symbolized by the architectural figure of Bentham's panopticon.

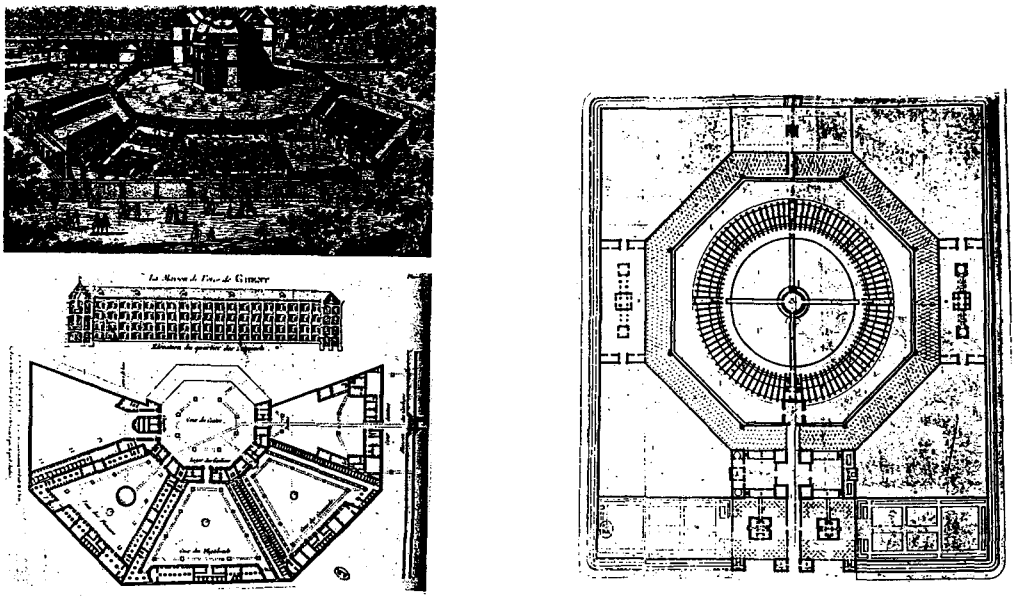

Fig. 2 Panopticon Prison Plan aimed at isolating inmates from each other and maintaining surveillance on all from the centre of the circle.[413]

The panopticon's circular shape looks remarkably similar to Indigenous medicine wheels or the wampum of the Haudenosaunee Confederacy (see Fig. 3 below); however, its function is radically different. Control is exercised exclusively by those stationed in a central tower who can see the inmates without being seen and, rather than uniting and empowering, its peripheral cells are designed to isolate and

[412] Michel Foucault, *Surveiller et punir: Naissance de la prison* (Paris: Gallimard, 1975).
[413] *Ibid.*, fig.16.

incapacitate their occupants.[414] Instead of facilitating equal social relations, its aim is to optimize state power by controlling the thoughts and actions of those imprisoned in this system. As Foucault's observations demonstrate, a state's official intentions do not always correspond to its practice. Critical evaluations of the colonial era accordingly raise concerns about discrepancies or contradictions between the official ideals of modern "democratic" states and records concerning what has actually been done.

3.1.6 Summary

Although there is no widely accepted theory of colonialism, it is generally seen as a form of domination which aims to exterminate or assimilate those belonging to subject cultures.[415] Most of the varied considerations surrounding the inter and infra cultural dynamics associated with this phenomenon have been taken into account in geographer J.M. Jacobs' definition, which sees "colonialism" as based on material self-interest involving the enactment of relations of differentiation and domination to facilitate the exploitation of people and resources. This definition is broad enough to include corporate as well as state practices for, as Jacobs has pointed out, colonial values made "audacious and violent appropriations make perfect sense to those whose interests were being served".[416] In keeping with Kuhn's theory, facts that do not fit with the protective function claimed by colonial regimes tend to be ignored. This has made it easy to overlook the violence of colonialism, despite the proliferation of guns, battles and prisons that accompanied its expansion.

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[414] *Ibid.* at 233-235.

[415] Horvath, "A Definition of Colonialiam" at 45.

Colonial society accordingly functions by appropriating control over property and technology, by denying other perspectives and by failing to provide formal mechanisms to protect individuals or polities in minority positions from those who claim to speak for them.[417] A colonizing culture is typified by an exploitive use of resources for the immediate benefit of a privileged few while the needs of the colonized, as the colonized themselves see them, are denied recognition. The authoritarian nature of colonial society is reflected in a legality founded on unilateral judgements imposed by force and marked by the presence of police stations, armies, prisons and economic confinement or marginalization. Venues that allow the governed to discuss and implement alterations in policy and practice are conspicuous by their absence. Initiatives aimed at defending the colonized or reforming society are frequently characterized as "revolts" or "rebellions". When colonialism is understood in a way that transcends the racist stereotypes once promulgated in its defence, it can be seen as a paradigm that came to be supported by the behaviours of colonizer and colonized alike.

The indicia of colonialism function as an interrelated matrix of behaviours. The very existence of an *imposed* normative system implies the use of force of one kind or another, presupposing unequal power relations and the denial of a political voice for those who are subjugated or imposed upon. Reliance on force to define legality is accordingly the foundation of the colonial legal paradigm.

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[416] Jacobs, "Postcolonial Geography" referred to "metropolitain appropriations".

[417] Most of these indicia are listed by Purdy, "Postcolonialism" or Alan Norrie "From Law to Popular Justice: Beyond Antinomialism" (1996) 5(3) *Social and Legal Studies* 383.

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Colonialism is accordingly characterized by the following indicia:

1) an externally imposed normative system
2) instituted by means of force – be it social, economic or military
3) to uphold an unequal distribution of social, economic and cultural resources favouring people who consider themselves superior such that
4) the society includes classes of people who are denied a political voice and excluded from the process of determining and interpreting laws and social rules.

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3.2 Decolonization in International Law

> "Reducing poverty depends as much on whether poor people have political power as on their opportunities for economic progress."
>
> UN Human Development Reports.[418]

In Kuhnian terms, it might be said that rejection of the colonial paradigm began with recognition of its inadequacies. By the end of World War I, it had become apparent that universal world sovereignty of the kind envisioned for the British by Sir Wilfred Laurier was simply unattainable as a practical matter. Yet, as paradigmatic theory itself predicts, it is taking time for a new model for social order to take shape and gain acceptance. Indeed, as the reflections on neo-colonialism suggest, some would argue that the colonial dynamic is as strong as ever, having simply altered its form of expression.

The slow pace of change reflects the difficulties involved in abandoning colonial practice.[419] This is not just a matter of altering theoretical perspectives as in the case of scientific revolutions. Paradigmatic change at the state level often requires institutional reform as well as the re-education of functionaries and citizens alike. This is no easy task for it requires people to revise expectations and leave aside familiar protocols, behavioural habits and concepts of social order. Decolonization demands an end to coercive practices that have dominated political organization in

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[418] UN Human Development Reports, http://hdr.undbp.org.

[419] For example, many writers retain a Eurocentric perspective that presumes only European people had "law". See eg. Oguamanam, "Indigenous Peoples and International Law.

some parts of the world for well over two thousand years. As the movement gains momentum, its deeply entrenched character is becoming increasingly apparent. Colonial assumptions and modes of thought permeate collective rituals, standard versions of history, literary masterpieces, and verbal idiom.

The magnitude and complexity of the task involved in perfecting this change is often overlooked. Yet it is also easy to forget the progress that has already been made in a relatively short period of time. The word "decolonization" itself did not appear until 1932 when it is said to have been coined by the German scholar Moritz Julius Bonn for his section on "imperialism" in the *Encyclopaedia of the Social Sciences.* Even though the first steps in the direction of decolonization may be identified decades earlier, it was not until the 1950's and 1960's that the concept of decolonization became a topic of general discussion at the international level.[420]

3.2.1 The World War I Turning Point

In the dominant cultures, the tide of opinion against the colonial dynamic seems to have turned with the carnage of World War I. This forced people to realize that there never would be one universal hierarchy of the kind imagined by Laurier and others schooled in the imperial precedents of his time. In keeping with Kuhn's theory, rejection of the old paradigm was announced by someone who stood outside the European core of colonialism's moral authority. Woodrow Wilson, the President of the United States, delivered his "Fourteen Points" address to the U.S. Congress on January 8th, 1918 capturing the imagination of a war-torn world by

[420] M.E. Chamberlain, *Decolonization: The Fall of the European Empires* (Oxford: Basil Blackwell, 1985) at 1.

suggesting the new model for international relations that everyone had been waiting for.[421]

3.2.1.1 Rejection of War

Prior to the *Treaty of Versailles*[422], Europeans tended to take the victor's right to the "spoils of war" for granted. Ordinary people had been allowed little say concerning which imperial contender claimed the right to rule - except through the choice of which army to support. Wilson's influential speech was widely welcomed for its formal rejection of the use of force. Its announcement that "the day of conquest and aggrandizement is gone" was hailed as the beginning of a new era. Recommending the establishment of an association "for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike", Wilson demanded:

> "A free, open-minded and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned shall have equal weight with the equitable claims of the government whose title is to be determined."[423]

As Kuhn's theory would have predicted, this new paradigm for international order was not defined in detail. The concept of self-determination, which was to become primordial as the twentieth century progressed, had yet to be clarified. Though the use of force as a means of determining anyone's rights was now

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[421] F.P. Walters, *A History of the League of Nations* (London: Oxford University Press, 1960); Chamberlain, *ibid.* at 7.

[422] 28 June 1919, 225 Cons. T.S. 195. The treaty was ratified for Canada by Britain: *Treaty of Peace Act, 1919* (U.K.), 9 and 10 Geo. V., c.33.

excluded, a distinction was still seen between "the interests of the population concerned" and those of "government", suggesting that, despite the importance of "self-government" for those following English traditions, the concept of transferring sovereignty to the people was not necessarily contemplated at that point in time.

In the view of U.S. Secretary of State Robert Lansing, Wilson's proposals were the dangerous dream of an idealist. "When the President talks of 'self-determination', what unit has he in mind?" he asked, "Does he mean a race, a territorial area or a community? It will raise hopes which can never be realized. It will, I fear, cost thousands of lives."[424] The significance of Lansing's question is commonly overlooked and to this day consensus has yet to be reached concerning how, exactly, polities such as "nations" or "peoples" should be defined. However, concerns of this kind did not stem the tide of change. News of Wilson's speech flashed around the world. The Germans surrendered much earlier than expected on the understanding that the Fourteen Points would be used as the basis for a peace treaty and representatives from almost every nation gathered in Paris to be present as the future was decided.[425]

3.2.1.2. Persistence of the Old Paradigm

In practice, the negotiations that produced the *Treaty of Versailles* were conducted in a way that contravened the very principles it espoused. Just as Kuhn might have predicted, habits that had become entrenched under the colonial

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[423] For the full text of the address see www.yale.edu/lawweb/avalon/wilson_14. Despite Wilson's seminal influence, the United States never joined the League .

[424] As cited by Richard Holbrooke's introduction to Margaret MacMillan, *Paris 1919* (New York : Random House, 2003) at viii.

[425] *Ibid.* at 461.

paradigm were not so easily caste aside. Negotiations took place in camera, replicating the exclusivity envisioned by the Foucault/Bentham panopticon. Everything was decided by four men: President Wilson himself, Lloyd George representing Britain, France's Georges Clemenceau and sometimes Vittorio Orlando of Italy. The Germans were not included in the discussions at all.[426]

The principle of self-determination was thus externally imposed with little consciousness of the contradiction this involved. Moreover, it was unevenly applied, being called upon only when it suited the purposes of the dominant three. Some territories were treated as just rewards for the victors, while others were placed on the road to independence. Even the Italians, who had access to the exclusive meetings, complained that "they were not being treated as equals by the other Powers; they were attacked and criticized on all sides; they were told what was good for them, but not taken into real discussions" [427] The result was characterized as an "imperialistic peace" and when the terms of the treaty were publicized the Germans felt they had been betrayed. One commentator declared: "We came to Paris confident that the new world order was about to be established: we left it convinced that the new order had merely fouled the old."[428]

3.2.2 Institutional Reform: The League of Nations

Nevertheless, the anomalies that challenged old modes of thought were significant and even though a new paradigm had not been fully articulated or implemented, the momentum driving the process of change continued. The League

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[426] *Ibid.*

[427] "A British diplomat" *ibid.* at 288.

[428] "Nicolson" *ibid.* at 467.

of Nations was established under a covenant whose signing members undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League ".[429] They also agreed to "promote international co-operation" by establishing "the understandings of international law as the actual rule of conduct among Governments".[430] To this end, a "Permanent Court of International Justice" was put in place to settle any question concerning fact, law or treaty interpretation which could not be settled by arbitration.[431]

3.2.2.1 Decolonization at the League

One of the most significant steps taken in support of the philosophical reorientation that had begun occurred when the victors in the war chose not to absorb territories which had formerly been governed by the defeated German, Austro-Hungarian and Turkish Empires. Instead, new states like Czechoslovakia and Yugoslavia were created along with a mandate system under which the colonies and territories of the defeated powers were to be held in trust until they could become self-governing.[432]

Without particularly intending to displace monarchy or disturb prevailing concepts of legality, the new political order that began to emerge rearranged the ways in which both polities and "the law" were conceived at the international level. The United States had already demonstrated to Europeans that a state could exist

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[429] *Covenant of the League of Nations*, Art. 10

[430] *Ibid.*, Preamble.

[431] *Ibid.*, Art. 13, 14.

without a monarch. As attention at the international level focused increasingly on defining territorial boundaries and establishing political representation by popularly elected legislatures, imperial paradigms of allegiance and ties of personal loyalty were increasingly neglected. Yet, as Lansing's reservations indicated, there was no consensus concerning which polities could become League members. Those who participated in forming the League seem simply to have assumed that a distinction could be maintained between inter-state self-determination and internal self-determination for the peoples living within the territories they claimed. Thus, despite the fine principles expressed in the Leagues' *Covenant*, Indigenous rights were sacrificed in a process that allowed some people no political representation what so ever.

3.2.3 Indigenous Exclusion: The Haudenosunee Experience

Curiously enough, the precedent for Indigenous exclusion was set by the Dominion of Canada even though this state – or state in the making - came to develop a reputation as a defender of human rights. [433] Once again, what happened confirms Kuhn's theory that people tend to discard or ignore evidence that does not fit the cognitive ideals that govern their minds.

Despite Canada's fine humanitarian reputation, "Indians", it might be recalled, were legally defined as non-persons under Canadian law until 1951. To this day, half a century later, there remains little official acknowledgement of the

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[432] *Ibid.*, Art. 22 ; Chamberlain, *Decolonization.* Three categories of mandate territories were created according to an assessment of their capacities for self-government. Patrick Daillier, Alain Pellet eds *Nguyen Quoc Dinh Droit International Public* 6th ed. (Paris : L.G.D.J., 1999) at para 319.

[433] For a detailed account of this incident see Woo, *Canada v. The Haudenosaune*; *UN Permanent Forum on Indigenous Issues*: http:/www.un.org.esa/socdev/unpfii/aboutPFII/history_home.htm

fact that Anglo-Canadian officials frequently treated Indigenous peoples in ways that are extremely difficult to reconcile with the belief that British colonialism offered protection. As a consequence, certain events and policies tend to be ignored by standard accounts of Canadian history. One of these concerns the application for membership in the League of Nations made by the people living on the Six Nations reserve near Brantford, Ontario. Most Canadians do not even know the name of the people involved despite their pivotal role, on more than one occasion, in the development of Canada's status as an independent state.

3.2.3.1 Canada v. the Six Nations Confederacy

The League of Nations incident involved a denial of the procedural due process that had been the pride of the British justice system. Around the beginning of World War I, tensions intensified between the Department of Indian Affairs and the Haudenosaunee Confederacy concerning administration of the Six Nations reserve. The Haudenosaunee, who belonged to an egalitarian federation of the Kanionkehaka (Mohawk), Oneida, Onondaga, Cayuga and Seneca, had once been key players in colonial North American politics. Their ideals helped inspire the Constitution of the United States[434] and, during the eighteenth century, their ambassadors had travelled to England where they had been entertained by British monarchs. A century and a half later, when the League of Nations was founded, Canada still functioned as an arm of the British Empire and it had yet to achieve the capacity to appoint ambassadors. It could not even sign treaties independently until 1923. Yet Canada, along with the other British dominions, had become a founding

[434]. U.S. S. Con. Res. 76, 2 Dec. 1987.

member of the League of Nations by virtue of its participation in Britain's Imperial War Cabinet.[435]

The Dominions, which at that point also included Newfoundland, Australia, New Zealand, South Africa and Ireland, were legally colonies. As some saw it, their membership in the League allowed the dominant colonial power to secure multiple representation, circumventing the rule restricting each member to one vote.[436] Yet Canadians, who had sacrificed thousands of lives in the war, saw an increasing need to represent themselves. This sentiment in favour of "home-rule" seems to have been selectively applied in a way that encouraged the Department of Indian Affairs to become more assertive in its efforts to "civilize" the "Indians" by imposing externally determined laws and social policies. Though the Haudenosaunee reminded the department repeatedly that they were "allies, not subjects of Britain", attempts to enforce the *Indian Act* on their territory intensified. However, Wilson's declaration that large nations should not be allowed to oppress the small had struck a chord. Like Canadians, the Haudenosaunee also believed they had a right to self-government. In their view, they always had governed themselves and the imposition of Canadian laws on them and on the territory where Britain had promised to protect them was tantamount to an attempt by Mexico to enforce its laws in the United States.[437]

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[435] Richard Veatch, *Canada and the League of Nations* (University of Toronto Press, 1975).

[436] *Ibid.*

[437] "The Last Speech of Des-ka-heh" [Nov. 1980] 3.11 *Ontario Indian*; Deskaheh, Iroquois Statesman and Patriot (*Akwesasne Notes*, Mohawk Nations via Rooseveltown, N.Y.)

3.1.3.2 Application for League Protection

When the Royal Canadian Mounted Police raided the Six Nations reserve in December 1922, the Haudenosaunee complained that they had been invaded by a foreign military force. Their numerous attempts to use Anglo-Canadian legal procedures to protect their rights all failed. They were never given a chance to present their case, either within the British Empire or internationally, though they had gone to great lengths to obtain supporting archival evidence and to research their legal position. This was their reason for applying for League membership. Being small in numbers, a military defense was out of the question; however there were no laments in this regard. The English translation for the Haudenosaunee law - the *Kaienerekowa* - is "The Great Law of Peace" and the idea of using legal procedures to resolve differences accorded fully with their traditions. They saw their own federal organization as a precedent for the League of Nations. The League's Covenant explicitly required the use of negotiations to resolve differences and their application to use the League's institutions was formally supported at various times by the Netherlands, Persia, Estonia, Panama and the Republic of Ireland.

3.2.3.3 The League's Failure

In the end, however, the habits of thought established under colonial diplomacy prevailed, just as they had in determining the content of the *Treaty of Versailles*. The Haudenosaunee were never given an opportunity to formally present or defend their legal arguments. Falling back on colonial custom, British diplomats manipulated League procedure behind the scenes to claim that even

consideration of the preliminary issues of standing would constitute interference with Canada's right to internal self-government.

Significantly enough, the Canadian public and most of their representatives in the Canadian parliament had no knowledge of what was going on. All matters were ultimately referred to Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs responsible for the contested policies. He did his best to ensure that the incident was buried. As a consequence, allegations that his department had misappropriated substantial portions of the funds it was holding in trust for the Haudenosaunee were not reviewed. Once it became clear that the League would not provide a procedural forum for these Indigenous complaints, Scott deposed the traditional Haudenosaunee council that had survived intact since pre-contact days and replaced it with a council of loyal followers constituted under Canada's *Indian Act*.[438] Thus, in spite of its fine aspirations, the League itself became a tool for affirming the old paradigms that it purported to supersede.

3.2.4 The Definition of a "state".

It was not until 1933 that the question of state identity, which had been used to obstruct the Haudenosaunee, was clarified. At that time, the Montevideo Convention established an internationally accepted legal definition for a "**state**". To qualify, there had to be a defined territory, a permanent population, an effective government and the capacity to enter into relations with other states.[439]

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[438] When the traditional council was deposed by Canada, it was denied access to its trust funds and could no longer finance such mundane matters as road repairs and school construction. Woo, *Canada v. The Haudenosaunee.*.

[439] *InterAmerican Convention on the Rights and Duties of States* (Montevideo, 1933) 165 R.T.S.D.N. 19.

Paradoxically, because it did not have treaty-signing capacity, Canada had not qualified on the last count of this definition when it was granted League membership. The Haudenosaunee arguably did. Thus established European stereotypes that presumed Indigenous peoples needed civilizing and excluded them from the definition of a "person" carried more weight than the objective criteria said to define a "state".

3.2.4.1 The Persistence of Colonizing Methodologies

As an heir to the League , the United Nations has adopted many elements of League procedure and, in keeping with the Haudenosaunee precedent, the refusal of its members to negotiate remains a major obstacle to "state" recognition, obstructing even such prominent and beleaguered peoples as the Palestinians, the Tibetans and the Kurds. Because of this, modern international law remains tied to the concepts of hegemonic legality that it was founded to escape. Armed "rebellion" continues to be used as a political tool and the capacity of certain states to appropriate resources belonging to those that they do not represent still receives international protection. In effect, the escalations of violence predicted by Lansing remain an on-going political concern.

The exclusion of Indigenous peoples from the process of establishing international norms reflects this failure to respect values that are important both to Indigenous ways of life and to many citizens of modern states who have been relegated to the social flotsam and jetsam created by the colonial project. Concepts of custodial obligation to future generations and of umbilical ties to mother earth have been ignored as boundaries continue to be negotiated in foreign capitals by

diplomats and functionaries who have not consulted the people affected by the decisions they make.

3.2.4.2 Structural Reorientation

Despite the shortcomings of the reform process that began with the founding of the League of Nations, the structural reorientation represented by this initiative altered the ways in which human rights were conceived. Instead of appealing to a monarch supported by a militia, people are now expected to invoke written constitutions and codes of conduct. Citizenship based on the place of birth has largely displaced the dynamics of conquest and allegiance and, though the League failed to prevent another war, the monarch's traditional role as protector and source of justice has been increasingly reduced to a symbolic representation of half-forgotten mores.

3.2.5 Equal Rights at the United Nations

The genocidal atrocities committed during the second World War made it evident that the relationship of individuals to their states needed to be reconsidered.[440] The *Charter of the United Nations* accordingly sought to strengthen universal peace by placing human rights front and centre, beginning with an affirmation of "the equal rights of men and women and of nations large and small."[441] The mandate system for formerly colonized territories established at the League continued[442] in a context where the collective right of "peoples" to self-

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[440] See eg. Hodder-Williams, "Colonialism" or D. Scott, "Colonialism, Anthropology of".

[441] 26 June 1945, C.N.O.U.I , vol 15, 365; Can. T.S. 1945 No.7 (entered into force 24 October 1945), Preamble and Art. 1.

[442] *Charter of the United Nations*, Chapters XI, XII and XIII.

determination was now associated with democratic principles and the right of the individual to participate in public affairs.[443]

This strengthening of egalitarian values reaffirmed the concept of negotiated legitimacy that had been asserted by the League's Covenant but ignored in practice. By now, it was becoming increasingly apparent that even though externally applied force could be useful for restraining tyrants, it could not determine legality under the principle of equality. The chaos of war thus helped to crystallize the new paradigm, calling on self-restraint and co-operative understandings rather than appeals to military commanders or an imperial overlord. As this new model for legitimacy gained acceptance, assertions of egalitarian principles were reiterated in the *Universal Declaration of Human Rights*[444] and in countless subsequent international treaties, resolutions and accords. Yet the acrimony that Kuhn identified with paradigmatic change was everywhere apparent. Regional wars continued to erupt as proponents of old models for social order tried desperately to impose discredited notions on a world that was increasingly committed to what remained, for many, an unfamiliar concept of social justice.

3.2.5.1 The Denunciation of Colonialism

Once states representing formerly colonized peoples began to participate in international *fora*, non-European perspectives were accorded more weight. Though the Euro-American tendency to see "others" through the prism of their own beliefs and values continued, the international influence of non-Europeans increased

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[443] Linos-Alexandre Sicilianos, *L'ONU et la démocratisation de l'État: systèmes régionaux et ordre juridique universel* (Paris: Pedone, 2000) at 125.

[444] GA res.217(III), UN GAOR. 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948).

dramatically during the final decades of the twentieth century. Their acceptance as equal participants in multi-lateral treaties according to the United Nations Charter established a venue where Europeans were no longer seen as the only actors. This created an alternative to the imperial models for social order that had dominated the colonial age.

In keeping with the rising importance of egalitarian philosophy, colonialism was overtly denounced in 1961 by the *Declaration on the Granting of Independence to Colonial Peoples,*[445] soon followed by the *International Covenant on Economic Social and Cultural Rights*[446] and the *International Covenant on Civil and Political Rights* which set standards for ensuring "the equal and inalienable rights of all members of the human family".[447] This was accompanied by an *Operational Protocol*[448] making it possible for individuals to seek affirmation of their human rights outside their states of origin by holding signatory governments internationally accountable.

For hierarchically organized societies, this emerging international emphasis on the equality of all human beings contributed to the major realignment in the concept of "law" outlined in the introduction to this study. This was accompanied by the abandonment of many points of view once considered essential to the maintenance of social order. In the League of Nations era French Foreign Minister Aristide Briand had declared that it would be:

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[445] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No.16, UN Doc. A/4684 (1961) 66.

[446] 19 Dec. 1966, 999 U.N.T.S. 171 ; Can. T. S. 1976 No. 46.

[447] Preamble, *International Covenant on Civil and Political Rights*, 19 Dec. 1966 , 999 U.N.T.S. 171, Can. T.S. 1976 No. 47.

> "inadmissible that the League of Nations should become a tribunal before which a subject might plead against his government".[449]

However, complaints of this kind are now institutionally provided for by states that have become signatories to the *Operational Protocol.* Sandra Lovelace used this procedure to challenge the sexually biased provisions in Canada's *Indian Act.*[450] In fact, despite the denial of Court access experienced by the Haudenosaunee in the 1920's, the Anglo-Canadian judicial system has always allowed subjects to challenge governmental power under the "rule of law" principle, as seen in such celebrated cases as *Entick v. Carrington* (1765); *Campbell v. Hall* and *Edwards v. A.G. Canada.*[451] Other institutions are slowly developing to solve access to justice problems by allowing citizens to challenge state power and it is now widely recognized that even when governments are democratically elected, the actions of state officials do not necessarily represent the will of the people. This is leading to considerable reflection concerning the nature of legitimate government, inspiring the innovation of new legal concepts and procedures in support of the quest for egalitarian justice.

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[448] Operational Protocol of the *International Covenant on Civil and Political Rights*, 19 Dec.1996; 999 U.N.T.S. 216; Can. T.S. 1976 No.47.

[449] Veatch, *Canada and the League of Nations*, 112.

[450] *Lovelace v. Canada* (1981) UN Doc. A/37/40,166 ; 2:1-2 HRLJ 158 ; (1981) 1 *Can. Human Rights Y.B.*305. Canada's response ignored Indigenous sovereignty to unilaterally impose revisions to the *Indian Act* via Bill C-31, seriously affecting local government and welfare on many reserves. See Sandra Lovelace, "Award Address" in Andrea P. Morrison ed. *Justice for Natives: Searching for Common Ground* (Montreal: Aboriginal Law Association of McGill University, 1994) 26. For a full account of the struggle leading to the Lovelace case see Janet Silman ed. *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

[451] *Entick v. Carrington* (1765) 19 St.Tr. 1030, 95 E.R. 807; K.B.*Campbell v. Hall* (1774) 1 Cowp. 204, 98 E.R. 1045; *Edwards v. A.G. Canada* [1930] A.C. 124 [1929].

3.2.5.2 The Right to Self-Determination

As far as collective rights are concerned, the assertion of self-determination for "peoples" might be seen as a natural consequence of the combined rejection of the use of force and affirmation of human equality. The right to self-determination is now considered fundamental in international law as recognized in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (G.A. res. 1514 (XV)[452] and the principles for interpreting state obligations in this regard (G.A. res. 1541 (XV).[453] Though implementation has been constrained by the stipulation that the territorial integrity of existing states must be respected, it is now recognized that a peoples' right to determine the form of their government may find expression through various forms including the maintenance of independent status as well as free association with, or integration in, another state. The Union of South Africa's post World War II attempt to annex Namibia, which it had been holding under mandate on behalf of Great Britain, was soundly denounced by the international community.[454] This anti-colonial stance was confirmed by the International Court of Justice in the *Western Sahara* case which confirmed the rights of nomadic peoples and specified that integration with another state must:

> "be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes,

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[452] GA Res. 1514(XV).

[453] *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter,* GA Res. 1541(XV).

[454] Peter Fraenkel, Roger Murray, *The Namibians*, Minority Rights Group Report No. 19 (London: Minority Rights Group, 1985).

> impartially conducted and based on universal adult suffrage...[455] "

The social paradigm that governed the formation of non-Indigenous concepts of the modern Canadian state has thus been formally repudiated at the international level.

3.2.6 The New Legal Paradigm

Taken together, these are the changes that effected the revolution in the international concept of legality referred to in the introduction to this work.[456] The once celebrated ability of the colonial powers to extend their influence through the use of force and to keep their citizens in a state of subjugation has been replaced by a new model for legality. Democratic procedures, fundamental human rights and the rule of law are now considered primordial. The use of arms to expand sovereignty has been discredited; human equality has become a moral and legal imperative and the right to "self-determination", though still hotly debated, has been recognized as fundamental.

3.2.6.1 The Indigenous Paradox

These reforms have left Indigenous peoples in an ambiguous position. Although the United Nations has affirmed the right of self-determination for "peoples" and "nations", its membership consists solely of "states" whose admission has been approved by two thirds of the existing members.[457] The requirement for this level of international support makes it virtually impossible for Indigenous nations to gain membership because the boundaries of many of the

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[455] *Western Sahara*, I.C.J., 16 October, 1975 para 57 at 12.

[456] See also David Kennedy, "International Law and the Nineteenth Century: History of an Illusion" (1996) 65 *Nordic Journal of International Law* 385 at 388.

[457] *Charter of the United Nations*, Arts.3, 4, 18 and 110.

existing members incorporate resource-rich Indigenous territories. The International Labour Organization has attempted to extend some protection through the 1957 *Convention 107 Concerning Indigenous and Tribal Populations* and the 1989 *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*. However, the colonial construction of many state economies has led their governments to believe that survival without Indigenous resources is impossible. Though rarely articulated, there is fear that recognition of Indigenous rights will impoverish existing states.

Pressure from Indigenous peoples for recognition of their rights has continued none the less. Bitterly aware of the overwhelming limitations that afflict them, many adamantly insist that curbs on the exploitation of Indigenous peoples within colonially defined states does not equate with full affirmation of their right to autonomous decision making concerning their lives or the use of their highly coveted resources. Despite their relatively small populations, Indigenous rights remain highly contentious. On July 28th, 2000 the Economic and Social Council of the United Nations established a Permanent Forum on Indigenous Issues to serve as an advisory body.[458] Though this is seen by some as institutionalization of the ultimate exclusion of Indigenous peoples from equal treatment with other nations, it does, at least, provide a venue for recognizing the legitimacy of Indigenous concerns which may, eventually, provide a stepping stone to the realization of postcolonial ideals if its consensus-based decision-making process gains broader acceptance.

3.2.7 The Twentieth Century Re-orientation

To recapitulate - the shift to egalitarian values that accompanied the rejection of territorial colonization involved a substantial reorientation of conventional European legal concepts because military expansion and the legitimacy of using force to resolve differences has been formally rejected. International legality now focuses on ensuring the peaceful right to self-determination. Rejection of the old legality made it necessary to develop new institutions for implementing the new legal and behavioural norms. At the international level, consensual practices have accordingly become the ideal. This, in itself, has contributed to the questioning that is reorienting the concept of legality. Accords such as the 1948 *Universal Declaration of Human Rights* stipulate that advancement towards this new international standard is a work in progress. The French version of this document makes the reorientation even more apparent, stating that it is "l'idéal commun à atteindre" or the common ideal to be achieved. As if to confirm Kuhn's prediction that periods of paradigm change are marked by intensification of old modes of thought and behaviour, violence continues to mark international relations and military force is still being used to establish and maintain governing regimes; however, the new paradigm has gained a foothold and military success no longer guarantees international acceptance of a general's victory or a state's legitimacy.

3.2.7.1 The Revision of Textual References

The abandonment of colonialism, like any paradigmatic change, demands a comprehensive re-examination of many "truths" that previously seemed self-

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[458] *UN Economic and Social Council,* Resolution 2000/22. http://www.un.org/esa/socdev

evident. These include, not just the meaning of "law" but also established views of history. As pointed out by Asbjörn Eide, the United Nations. *Declaration on the Rights of Minorities* now requires states to ensure, not only that minorities have the resources needed to be educated in their own languages and traditions, but also that the majority is educated to understand minority points of view.[459] The United Nations Language has accordingly promoted language revitalization projects in conjunction with other initiatives aimed at ensuring effective political participation by marginalized populations.[460] Meanwhile, technological innovations have made international travel and communications broadly accessible. The cultural barriers on which colonialism relied are breaking down and it is becoming increasingly apparent that it is only through co-operation, respect and mutual understanding that the new legality can take effect.

3.2.7.2. Contradictory Practices

Colonial habits of thought are, however, showing remarkable resilience. Another paradox involved in the decolonization process arises from the fact that the principle of human equality coupled with the right to self-determination raises the expectation that the public will participate in law making and government officers will be accountable. Yet regulatory mechanisms continue to rely on the structures and rationales of the colonial era, functioning through the very government officers that they must hold to account. The public often remains ill informed about just what, exactly is being done "on their behalf" and, as cognitive research has

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[459] Asbjorn Eide "Multicultural and Intercultural Education: Conditions for Constructive Group Accommodation" (1999) 12.1 *R.Q.D.I.* 19 at 23; Grace Li Xiu Woo, "Debate on Intercultural Education and Social Cohesion" 12.1 *R.Q.D.I.* 149 at 152.

demonstrated, everyone tends to be blinded by the limitations of their own conceptual models.

One characteristic of paradigmatic change identified by Kuhn is the innovation and co-existence of conflicting theories and models of conduct. In Canada at the moment government agencies often engage in contradictory practices. For example, one arm of the federal government helped sponsor a widely publicized quilting project that included contributions from members of Indigenous First Nations in parity with contributions from citizens of states that belong to the United Nations.[461] The impression left by this initiative supports the sense that Canada respects the distinctive and valuable perspectives of the First Nations. However, the egalitarian approach to collecting quilt squares serves to camouflage contradictory actions that are much less widely known among the public at large. As a consequence, Indigenous complaints about Canada's refusal to sign the United Nations *Declaration on the Rights of Indigenous Peoples.*[462] appear irrational. Multicultural initiatives like the quilting project serve to confirm Canada's magnanimous image. As a result, few, if any, questions are raised concerning Canadian obstruction of attempts to ensure that Indigenous peoples benefit from the basic human rights set out in international conventions.[463]

The conceptual blindness referred to by Kuhn and other cognitive researchers is also manifest in the debates over the need to protect bio-diversity and Indigenous

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[460] Wong, "He Hawa'e Kai Nui a Kau ma Kula", 31.

[461] *Quilt of Belonging*, www.invitationproject.ca.

[462] Cheryl Cornacchia, "Mohawk Leader slams Ottawa's about-face", *The [Montreal]Gazette* (6 July, 2006) A7.

[463] Harry, Kanehe, "The BS in Access and Benefit Sharing". See also http://www.ipcb.org/pub/IPGG.html

knowledge. These are currently the focus of many international Indigenous initiatives. As Debra Harry and Le'a Malia Kanehe have pointed out, the Indigenous belief that the land and its resources are a gift from previous generations and the birthright of future generations conflicts with Western legal frameworks that see the world in terms of rights that can be commodified and sold, exempting present owners from the communal obligation to share any benefits received.[464]

The United Nations Draft *Declaration on the Rights of Indigenous Peoples* affirmed the principle of self-determination, declaring that "Indigenous peoples have the right to own, develop, control and use the lands and territories...which they have traditionally owned or otherwise occupied or used."[465] However, international regimes concerning access to resources and benefit sharing are being developed through instruments that see "states" as exercising exclusive "sovereignty" over resources. Thus the requirement in Article 15.5 of the *Convention on Biodiversity* for "the prior informed consent of the Contracting Party" for access to genetic resources affords no protection at all to Indigenous peoples for they are not "states" and so cannot be "contracting parties".

Harry and Kanehe have accordingly pointed out that there is a conflict between the egalitarian right to self-determination asserted in international human rights law and recent regulatory developments that continue to follow the colonial patterns of conduct used to impose European belief systems and appropriate Indigenous land. Like other Indigenous activists, they fear that:

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[464] *Ibid.*

[465] *United Nations Draft Declaration on the Rights of Indigenous Peoples,* E/CN.4/Sub.2/1994/2/Add.1 of 20 April, 1994 (Art.26)

> "Nearly every aspect of what we value as Indigenous peoples – our technologies, our knowledge, the seeds that produce our foods, and our medicines – is at risk of appropriation."[466]

3.2.8 Summary

The twentieth century witnessed a substantial change in the concept of legality at the international level. The deficiencies of colonial modes of operation were widely recognized and egalitarian values were accepted as general principles. However, international law and decision making continues to function through "states" that were defined according to colonial customs and usage. Acceptance of the new concept of international legality has created contradictions with many customary practices and operational assumptions. Decolonization requires an understanding that international law is a work in progress and the standards that apply to international conduct have changed in several important ways. However, Kuhn's theory predicts that an old paradigm will not be abandoned unless there is a new one to take its place. It would thus seem that until clearly defined institutional replacements are developed, regression to colonizing practices will remain a recurrent risk.

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The demise of colonialism in international law means that

-Human equality is now a fundamental value.

-The use of force has been formally rejected as a foundation for legitimacy.

-International law aims to protect the peaceful right to self-determination.

-"Prior informed consent" is being promoted as the new basis of legality.

-Reform is understood as a work in progress, requiring the innovation of new institutions and protocols to facilitate the participation of all concerned.

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[466] Harry, Kanehe, "The BS in Access and Benefit Sharing", conclusion.

3.3 Postcolonialism

> "..the emergence of history in European thought is co-terminous with the rise of modern colonialism, which in its radical othering and violent annexation of the non-European world, found in history a prominent, if not *the* prominent, instrument for the control of subject peoples"[467]
>
> *The Post-Colonial Studies Reader*

The word "postcolonial" encapsulates the broadly based social movement whose aspirations have been articulated in egalitarian international legal norms. Like the comprehensive, all pervasive set of social mores that it seeks to replace, postcolonialism incorporates many shades of understanding through its implication in theories of imperialism, modernity, racism, ethnicity, cultural geography, post-modernism and feminism.[468] Postcolonial values overlap those associated with "democracy" which is said to be founded on two basic principles: *popular control* over political decision-making processes and *political equality* in the exercise of that control.[469] Like "democracy" the term invokes different meanings for different people at different times and places. Focusing, as it does, on the rejection of past conduct and beliefs that have lost credibility, "postcolonialism" corresponds to the

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[467] Bill Ashcroft, Gareth Griffiths, Helen Tiffin eds. *The Post-Colonial Studies Reader* (London: Routledge, 1995) at 355. The nineteenth century development of English as an academic subject coincides with colonialism. Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *The Empire Writes Back: Theory and practice in post-colonial literatures* (London: Routledge, 1989) at 3.

[468] Eve Darian-Smith, "Postcolonialism: A Brief Introduction" (1996) 5(3) *Social and Legal Studies* 291; Laura Moss "The Changing Shapes of Postcolonial Theory" (2002) *Canadian Literature* vol.173 reviews www.canlit.ca/reviews/unassigned/444_moss.html. Also, eg. Andy Greenwald "Postcolonial Feminism in Nehanda" , *The Literature and Culture of Zimbabwe*, www.victorianweb.org/post/zimbabwe/vera/greenwald1.html .

[469] Weir, Beetham, *Political Power and Democratic Control in Britain* at 6 - 7.

stage in Kuhn's concept of philosophical revolution during which the inadequacies of the old paradigm become increasingly apparent, inspiring a multiplicity of new theories that compete to provide a new model for understanding and functioning in the world. In this regard, it resembles the "hundred schools" era in Chinese history that produced Confucianism, Taoism, Moism, Legalism and other philosophies.[470]

Postcolonialism represents a commitment to change. Having embraced the ideological shift to egalitarian values, it questions the prototypes that governed in the past and linger in institutional habit. It is not, in itself, a paradigm for social order, but it does provide a venue for reflection and for sorting through the confusion and uncertainty raised by the quest for a new social and legal institutions that are not based on techniques of coercive enforcement. Committed to making the new egalitarian ideology work, postcolonialism struggles to counter the power of old cognitive models that continue to reassert themselves even after formal rejection of the ideology on which they were based.

3.3.1 Origins

Etymologically, the term "postcolonial" is of recent origin. Used frequently to describe the political condition experienced by new states on the granting of independence, this word gained currency with the demise of colonial regimes following World War II.[471] According to Jasbir Jain, scholars in India found "post-independence" failed to adequately describe the situation experienced after 1947 because colonial institutions had taken root and pre-colonial native culture had become

[470] See eg. Li, *Ageless Chinese* at 89-94.

[471] Jacobs, "Postcolonial Geography"; Darian-Smith, "Postcolonial Law".

too remote. The forward-looking optimism of "post-independence" was thus replaced by the backward "post-colonial" gaze in an attempt to break free from habits of subjection which had been institutionalized and become ingrained.[472]

In this context scholars began to realize that "the study of English [as a language] and the growth of Empire proceed from a single ideological climate" whose intent, according to Gauri Viswanathan, was "to control the natives under guise of a liberal education".[473] Despite the official end of empire, knowledge about non-metropolitan regions initially remained classified in India as "subaltern studies"[474] inciting critics like Gayatri Spivak to address the challenges confronting intellectuals in a world that was officially, but not practically, decolonized by demanding "Can the Subaltern Speak?".[475] Some, like Kwame Anthony Appiah, discounted "postcoloniality" as "the condition of what we might ungenerously call a *comprador* intelligensia: a relatively small, Western-style, Western-trained group of writers and thinkers, who mediate the trade in cultural commodities of world capitalism at the periphery".[476] Yet the shift in officially sanctioned values that accompanied the move to decolonize has had profound implications for colonizer and colonized alike and Appiah's critique might also be interpreted as a call for full realization of egalitarian

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[472] Jasbir Jain, *Problems of Postcolonial Literatures and other Essays* (Jaipur: Printwell, 1991) at 3.

[473] Ashcroft, Griffiths, Tiffin, *The Empire Writes Back*, 3 citing Gauri Viswanathan, "The Beginnings of English literary study in British India" (1987) 9.1 and 2 *Oxford Literary Review* at 17. For extract see *The Post-Colonial Studies Reader* at 431. The absence of minority perspectives in Canadian school curricula is seen as a prime source of racism in this country. *Commission on Race Relations.* www.ccr.com.

[474] See eg. Dirlik, "The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism" (1994) 20 *Critical Inquiry* 328.

[475] Gayatri Chakravorty Spivak, "Can the Subaltern Speak ?" (1994) *The Post Colonial Critic* 66 reprinting C. Nelson, L. Grossberg eds. *Marxism and the Interpretation of Culture* (Basingstoke: Macmillan Education, 1988) 271.

values since it incorporates concern for giving a voice to those whose opinions were previously denied consideration.

As the independence of former colonies stabilized, reflections on the paradoxes involved in working within the colonizers' cultural medium have proliferated and the contributions of a "newly diasporic intelligensia"[477] are making it increasingly apparent that even those who co-operated with the Western agenda felt constrained by Euro-American theory which was proving inadequate for dealing with the complexity of their varied experience.[478] The work involved in providing empirical proof of the facts used to discount the concepts of legitimacy that dominated the colonial age is pushing postcolonial analysis into the academic mainstream. Arif Dirlik sees "postcolonial" as a term that came to prominence when "Third World intellectuals arrived in First World academe".[479] That is to say, in keeping with Kuhn's observation that an old paradigm is not rejected unless there is a new one to take its place, postcolonial perspectives are being developed by those who have access to alternate frames of conceptual reference. Its growing academic acceptance is fed by the ability of its critical stance to cast light on a broad range of problems and issues. Thus, Rosemary J. Coombe prefers the term "postcolonial" to "multicultural" because of its capacity to:

> "emphasize rather than obscure the very real histories of colonialism from which all peoples in Canada are still emerging, and the very real relations of power

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[476] Kwame Anthony Appiah, "Is the Post in Post-Modernism the Post in Post-Colonial" 17.2 *Critical Inquiry* (1991) 336 at 349. The same quote is repeated in Kwame Anthony Appiah, "The Postcolonial and the Postmodern" in *The Post-Colonial Studies Reader.*

[477] Jacobs, "Postcolonial Geography".

[478] Ashcroft, Griffiths, Tiffin, *The Empire Writes Back,* 11.

[479] Arif Dirlik, "The Postcolonial Aura".

> and domination inherited from our diverse colonial pasts that continue to shape social relations of difference in this country."[480]

3.3.2 Themes and Debates

Like others who received their primary education in the colonial hinterland, Dirlik has observed that most of the themes popularly called "postcolonial" predate their mid-1980's classification under this rubric, being founded in the "Third World's" knowledge and understanding of its own history.[481] Ella Shohat has similarly suggested that the term emerged to eclipse "Third World" in the late 1980's. In her view, the postcolonial perspective operated as a successful venue for unmasking the racist policies of white settlers, only to become suddenly invisible in academic opposition to the Gulf War.[482] She found that postcolonial doctrine had little currency in the intellectual circles of debt-ridden African, Middle-Eastern and Latin American countries with their intense experience of neocolonialism.[483] Focusing on the military and economic hegemonism of the United States, Anne McClintock has likewise accused postcolonialism of being prematurely celebratory, retaining a Eurocentric focus of inquiry by "inscribing history with a single issue" – the binary opposition between Europe's colonial enterprise and its "postcolonial" rejection.[484]

This sense of entrapment is not shared by all. Like others who are familiar with the long evolution of older civilizations, Kyung-Won Lee sees colonialism as a passing

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[480] Coombe, "The Properties of Culture" at 254, n.32.

[481] *Ibid.* at 329 and 332.

[482] Ella Shohat "Notes on the "Post-Colonial"" 31/32 *Critical Text* (1992) 99.

[483] *Ibid* at 106.

[484] McClintock, "The Angel of Progress" at 85 and 87.

phase in a broader historical context. [485] He has described postcolonialism as an ideological battle, an antidote to colonial domination that works by taking a critical look at texts in the Western canon to identify Eurocentric values previously assumed to be universal and transhistorical.[486] Rejecting discourses such as those of Bakhtin, Foucault and Gramsci for their limited formulation on the basis of specifically Western experiences of class or gender relations, Lee's post-colonialism is a movement initiated by non-Western diasporic intellectuals.[487] Like others, he has pointed out that colonialism did not just silence non-western voices - it presumed that everything had to be measured in terms of European or American ideals. From his perspective, the attempt to incorporate postcolonialism in the "all embracing...and all devouring...post-modernist project of Euro-American self-inquiry" is a manifestation of material dependence on Western capital, publishers and readers. It would be naïve, he warned, to assume that five centuries of European colonialization could be undone by only half a century of counter-discursive practice.[488]

3.3.2 Perspective

Many writers share Lee's sense that rejection of Euro-centric focus that characterized the colonial age is essentially an ideological struggle. It is not a rejection of Europeans *per se*, but rather of the ethos of domination that characterized European colonial expansion. As such, it is equally wary of the excessively imperialistic tactics employed by some of the native rulers who took control when European colonists left,

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[485] Kyung-Won Lee. "Is the Glass Half-Empty or Half-Full? Rethinking the Problems of Postcolonial Revisionism" *Cultural Critique* (1997) 114.

[486] *Ibid.* at 114, 89, 110.

[487] *Ibid,* at 98 and 113.

[488] *Ibid.* at 114.

seeing them as an extension rather than a rejection of the colonial phenomenon.[489] Memmi, among others, has discussed the dynamic through which members of a colonized population become agents for the implementation or perpetuation of colonial modes of operation. Sometimes this happens at a subconscious level. As Kuhn's experiment with the black hearts demonstrated, models of expectation can have a powerful effect on our capacity to perceive and analyze. These may even function through the vocabulary we use, controlling our thoughts and actions in ways that escape conscious awareness. Once socialized in colonial languages, mores and patterns of thought, Indigenous conceptual categories and mechanisms of social control are lost.

Because of this, Graham Smith has pointed out that "just being brown does not make theorizing Indigenous."[490] In practice, some writers with Indigenous ancestry have been fully assimilated into the colonizing culture. They are only accountable to their academic peer group and their research is little more than a performance exercise designed to ensure their own advancement within colonial institutions. Smith has posited that research that is genuinely Indigenous must be generated by the frames of reference offered by a particular Indigenous people. That is to say, it must be centered in their "landscapes, images, languages, themes, metaphors and stories".[491]

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[489] Lingaraja Gandhi, "Literature as a weapon for change" *The Deccan Herald* (23 Jan. 2005) http://www.deccanherald.com.deccanherald/jan232005/artic.asp (accessed 3 May, 2005).

[490] Graham Smith, oral presentation, "Research and the Self-Determination of Indigenous Peoples" Education conference, Montreal, May 2005.

[491] Smith, *Decolonizing Methodologies* at 146.

Observations of this kind have led some Third world critics to view the push for democratization as a reincarnation of colonialism. This allegation may confuse others because some of the reasoning used to reject colonialism resembles the arguments used to promote democratic rights, making the two difficult to distinguish. However, awareness of democracy's ambiguous character can even be found among the colonizers. Internal critics of British governmental practices have pointed out that "democracy" was originally a term of disparagement in their society. Its use changed during the twentieth century when it came to represent demands for reform to ensure systematic processes of public consultation and dialogue, popular consent to legislative initiatives and accountability of public officials.[492] When defined in this way, demands for democratization parallel and overlap postcolonial critique because both idealize populist values.

3.3.2.1 Breaking Boundaries

The problems classed as one form or another of neocolonialism serve as a reminder that the struggle to escape the residual effects of the colonial dynamic transcend racial classifications. They are entwined with phenomena like the imprisonment, without trial, of Ngugi wa Thiong'o who wrote the first African language novel, *Caitaani Mutharabaini* (Devil on the Cross) on toilet paper that was later smuggled out of a Nairobi jail.[493] Ngugi, whose writing in English had already been published, was inspired to use the Indigenous idiom of his childhood by the realization that the people he had been writing about were unable to read his work.

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[492] Weir, Beetham, *Political Power and Democratic Control in Britain* at 9.

Since most African intellectuals have been educated exclusively in European languages, he positioned such initiatives as a means of "Decolonizing the Mind and Moving the Centre", suggesting that history and literature should portray the actual struggles of the people and stand by those involved.

Having grown up in a context where there was effectively no state, the experience Ngugi reported supports Benedict Anderson's assertion that the state is an "imagined community".[494] Emphasising the importance of performance and the procedures through which human society is constantly renewing itself, Ngugi has suggested that if we truly wish to escape colonialism, we must break the borders and boundaries that separate people. His belief in the power of language seems to be supported by the findings some linguists. [495] In Ngugi's words, "linguistic engineering" is a colonizing force, suggesting that we will not be able to "recompose a new world" unless we empower Indigenous languages and engage in a process of inter-cultural borrowing that ensures the transfer of knowledge from the people to the intellectuals and vice versa.[496]

Ngugi's attempt to accomplish this goal by using the novel and other artistic formats that are foreign to African heritage reflects the type of intercultural exchange he advocates and recalls Homi K. Bhabha's reflections on the ways in which

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[493] Gandhi, "Literature as a weapon for change"; Charles Cantalupo, "Ngugi wa Thiong'o Penpoints, Gunpoints, and Dreams" http://www.leftcurve.org/LC23webPaqges/ngugu.html (accessed 3 May, 2005).

[494] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* rev. ed. (London: Verso, 1991). See also Katherine Biber, "Being/Nothing: Native Title and Fantasy Fulfilment" (2004) 3 *Indigenous L.J.* 1.

[495] See eg. Lakoff, Johnson, *Metaphors We Live By* and *Philosophy in the Flesh*; Lakoff, *Women, Fire, and Dangerous Things*; Tannen, *Framing in Discourse*; *That's Not What I Meant!*; Winter, *A Clearing in the Forest.*

[496] As quoted Cantalupo, "Ngugi wa Thiong'o".

colonialism has resulted in hybrid cultures. These have become a conduit that allows the denied knowledge of the colonized to enter the dominant discourse, undermining the basis of the colonizers' former authority.[497] For Ngugi, the concept of the state is problematic because it resists the renewal that is necessary to ensure social vitality. Refusal to work in African languages is, likewise, a type of neocolonialism that binds people to foreign categories and thought processes. Like Lee and Bhabha, Ngugi's work seeks to escape the Manichean duality of the western style of logic that attempts to classify everything as "P or not P", excluding any middle ground.[498] In his view, healthy cultures are always reinventing themselves. Thus, new generations belong neither to the culture of their colonizers, nor to those of their ancestors.

Reflections of this kind are typical of postcolonial debate and they are beginning to have an impact on Euro-American literary and cultural studies. Many have identifed the 1978 publication of Edward Said's *Orientalism*[499] as the point at which "postcolonialism" made its appearance.[500] However this quest for an ultimate authority who can be credited with inventing "postcolonialism" might also be seen as a reassertion of the hierarchical expectations generated by Euro-American patterns of thought. Said himself agreed with Dirlik and Lee in claiming only to have repeated a message previously articulated by many others.[501] Raised in Palestine and Egypt, Said's critique of the way Asian cultures are studied in

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[497] Bhabha, "Signs Taken for Wonders" at 156.

[498] Winter, *A Clearing in the Forest* at 8 and 44. See also eg. Stuber, "Legal Reasoning after Post-Modern Critiques of Reason".

[499] Edward Said, *Orientalism* (London: Routledge, 1978) at 89. He defines "Orientalism" as a Western department of thought and expertise concerning the overlapping domains of the 4000 year-old history of Eurasian relations, the advent in the West in the early 19th century of scientific study of Oriental cultures and the false suppositions about the Orient that dominate modern political relations.

[500] See eg. Ashcroft, Griffith and Tiffin; Bohmer; Krupat, Lee.

European universities argued that the line separating the Occident from the Orient was a product of the human imagination.[502] The West's habitual silencing of "Oriental" voices, raises many questions about how to make the production of knowledge serve communal rather than factional ends.[503] According to Said, the attempt to counter the objectification or "othering" of non-European peoples is part of a larger project that includes the quest of marginalized audiences to identify common ground instead of appealing to a centre of sovereign authority.[504] In his words, the "tyrannical conjuncture of colonial power with scholarly Orientalism" has created a trap that has prevented both Euramericans and those who have been constructed as their excluded "Other" from objectively evaluating such problems as the Palestinian situation or the human rights abuses of the Khomeni regime.[505]

3.3.2.2 Questioning Accepted "Truths"

Said's critique points to a need to re-consider accepted truths. In keeping with this theme, Jacobs has summarized the elastic field embraced by postcolonial inquiry as intent on bringing into view "evident ruptures in the apparent coherence of colonial occupation" and on uncovering "the silences that exist in the colonial record" leading to a "radical rethinking of the forms of knowledge and social identities authorized under colonialism."[506] E. Darien-Smith concurred, calling postcolonialism a "rethinking of a dominant European historiography" that recovers

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[501] Said, "Orientalism Reconsidered" at 91 and 93.

[502] *Ibid.* at 90.

[503] *Ibid.* at 90- 91.

[504] *Ibid.* at 105-6.

[505] *Ibid.* at 103.

[506] Jacobs, "Postcolonial Geography".

"the ongoing significance of colonized peoples, recognizing the interdependence of the oppressors and the oppressed".[507]

3.3.3 Applications

Though used most prolifically at first in the field of literary criticism, the postcolonial perspective has become popular in other disciplines as a venue that allows a wide range of investigation into power relations in various contexts.[508] According to Dirlik, the goal of this field of inquiry is the abolition of all distinctions between centres of power and the periphery to reveal the complex heterogeneity and interdependence of all cultures.[509] He has identified three uses for the term "postcolonial": 1) to describe conditions in formerly colonial societies; 2) as a substitute for "Third World" to describe global conditions after the period of colonialism; and 3) to describe a discourse on the above conditions that is informed by the epistemological and psychic orientations they produced.[510]

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[507] Darian-Smith, "Postcolonial Law".

[508] Brian Wall, "Literary Criticism", Summer 2000, Department of English University of Western Ontario, http://instruct.uwo.ca/english00/index/html. Most references to postcolonialism or decolonization in works by Canadian legal scholars were published after the research presented here began, though Rosemary J. Coombe referred to "postcolonial struggles" in an article published in 1993. Sakej Henderson and Marie Battiste have directly associated some of their work with the postcolonial movement and Richard Pesklevits identified this approach in the title of his masters thesis. (See Bibliography) Many others have taken a critical stance with regard to the colonization of Indigenous peoples or investigated questions that are consistent with the focus of the post colonial movement. Several contemporary Canadian scholars write from a perspective that assumes the validity of British assertions of sovereignty and a few reject the concept of Indigenous self-determination, but none make assertions of racial or cultural superiority of the kind that could be found at the height of the colonial movement. A few even consider the topic of corporate colonialism.

[509] *Ibid.* at 329.

[510] *Ibid.* at 331-2.

3.3.3.1 New Issues

The demise of colonialism has blurred previously defined social and cultural distinctions. Just as the spread of colonization implicated the colonized by inducing them to co-operate, so too the quest to permit the articulation of cultural difference has raised convoluted issues concerning community membership, cultural inclusion and exclusion and the problem of who can speak for whom.[511] The complex of social assumptions we have been left with as a result of colonialism includes a deeply entrenched tendency to invoke hierarchical models of social ordering. Internally the colonial state gave preference to the opinions of a few individuals and classes while denying a political voice to many others. At the collective level, colonialism granted some cultures recognition as "states" while relegating others to minority status, denying them a place at the negotiation tables where international policy is developed and multilateral treaties formulated. The colonial assumption of state authority over formerly self-regulating societies blurred the definitional boundaries that had previously been in effect. Yet decolonization is raising its own set of problems, many of which have legal implications. Parameters of identification, conceptual categories and frameworks for distributing rights vary from one culture to the next. Attempts to treat all conceptual systems equally leave us entangled in issues concerning jurisdictional overlap and the need to respect diverse concepts of legitimacy while maintaining egalitarian rights at both the individual and collective levels.

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[511] Homi K. Bhabha, "Signs Taken for Wonders"; "The Other Question: Stereotype, discrimination and the discourse of colonialism " in *The Location of Culture* (New York: Routledge, 1994); Linda Alcoff, "The Problem of Speaking for Others" (1991) 20 *Cultural Critique* 5; Gail Valaskadis, "Parallel Voices : Indians and Others – Narratives of Cultural Struggle" (1993) 18.3 *Canadian Journal of Communication* 283 ; Paul Seesequasis , "Trick or Treat? What Kind of Indian Are You?" in A. Manguel ed. *Why Are You Telling Me this?* (Banff Centre Press, 1998) at 143.

3.3.3.2 Negotiation and the New Legality

Some, like Eve Darian-Smith, fear there is no obvious solution that will allow us to move beyond "the enduring problem of western domination". As she stated:

> "To really accept the challenges and resistences presented by postcolonial law, be it from within or without the boundaries of the nation-state, requires that legal scholars accept that there is no universal legal code and legal objectivity. This in turn would mean that the relative dominance of one set of legal values over another would be a constant topic of review and analysis."[512]

However, the need for constant re-negotiation and revision of legal rules is not seen as a detriment by all. Some, thinking in line with Ngugi, see the re-negotiation process as the very essence of the new legality. Weir and Beetham, for example, see "systematic processes of consultation and dialogue" as essential to democracy.[513] With the approval of M. Boutros Boutros-Ghali, the former secretary-general of the United Nations, professor Linos-Alexandre Sicilianos has gone so far as to suggest that the right of all peoples to self-determination makes it both absurd and unrealistic to imagine that the *status quo* at any particular moment in history will determine the political status of a people once and for all.[514] In short, postcolonial concepts of democratic practice are beginning to approach Indigenous concepts of legality.[515] The primacy now accorded to the egalitarian imperative and the accumulating research demonstrating the impossibility of accessing a truly objective

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[512] Darian-Smith, "Postcolonial Law".

[513] Weir, Beetham, *Political Power and Democratic Control in Britain* at 9.

[514] Sicilianos, *L'ONU et la démocratisation de l'État* at 125. See also G.L.X. Woo "Linos-Alexandre Sicilianos, *L'ONU et la démocratisation de l'État: systèmes régionaux et ordre juridique universel*, Paris: Pedone, 2000" (2000) 13.1 R.Q.D.I. 367.

reality suggest that the new legality is likely to be founded in process rather than in the dominance of any particular legal interpretation.

As the foregoing discussion suggests, the rejection of the colonial paradigm has led to extensive questioning of concepts whose meanings were once taken for granted. Whether "colonialism" is seen as a phenomenon conducted outside the law as currently defined or "law" is seen as an instrument that was used to implement colonial social relations depends entirely on the way in which "law" itself is defined.[516] Alan Norrie contributed to this aspect of the discussion by accusing Western theorists of hijacking the concept of legality, turning popular justice into the Other that validates its formalism.[517] Drawing on "antinomialism"[518], he defined "legal form" as

> "the imposition of one moral and political narrative about how people ought to behave dressed in a language of formality that has to be constantly safeguarded against alternative moral and political possibilities".[519]

In his view, western law has placed itself on an imperialist pedestal that automatically excludes popular justice. Like Ngugi and others, he has suggested that dialectical methodology may provide a solution, allowing us to examine western law and popular justice as differently formed juridical modes.[520]

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[515] See eg. Battiste ed., *Reclaiming Indigenous Voice and Vision.*

[516] See eg. Purdy "Postcolonialism" at 410.

[517] Norrie "From Law to Popular Justice" at 395.

[518] Defined as "a self-contradiction by accepted ways of reasoning[which] establishes that some tacit and trusted pattern of reasoning must be made explicit and henceforth be avoided or revised" Norrie, drawing on Quine quoted in Honderich, 1995 *Oxford Companion to Philosophy.*

[519] Norrie, "From Law to Popular Justice" 393.

[520] *Ibid.*

3.3.3.3 Procedural Innovation

The postcolonial rejection of Western domination has inspired many attempts to retrieve what was lost by restructuring society and re-examining accepted practices and truths. It acknowledges the fact that a legality based on human equality can only be achieved and maintained by seeking a balance between collective needs and the right of others to live according to their own terms of reference, both individually and collectively. This demands the development of new ways of thinking, new customs and new institutions – or perhaps a revival of some of the customs and practices that were repressed during the colonial era.[521]

Many agree with Maori theorist, Linda Tuhiwai Smith, that decolonization is a process. As she has pointed out, it is not an end in itself. It demands the development of practices and methodologies that will allow healing to take place so people can connect with each other and ease tensions by becoming informed about the blind-spots that developed under the colonial mystique.[522]

The South African Truth and Reconciliation Commission might be seen as one example of an institution devised to facilitate decolonization. Established in 1995 to enable people in that country to come to terms with human rights violations committed during the apartheid regime, it provided a venue for granting amnesty to those who fully disclosed their participation in past abuses, for allowing the victims to recount their perspectives on what happened to them and for facilitating reparations.[523] The establishment of the commission has not, in itself resolved all of

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[521] See eg. Ross, *Returning to the Teachings.*.

[522] Smith, *Decolonizing Methodologies* at 116.

[523] For the *Promotion of National Unity and Reconciliation Act,* No. 34 of 1995 see http://www.doj.gov.za/trc/ (accessed 24 April, 2005)

South Africa's problems; however, its focus on *ubuntu* or "humanity to others" rather than on accusations and victimization has inspired people confronted with a variety of challenges. The Universitat Politècnica de Catalunya, founded by a people whose culture was severely repressed under Franco's regime in Spain, has for example, established a forum for civil society using the concept of ubuntu to promote discussions in Chinese, Russian, Arabic and Swahili as well as Catalan, English, Spanish and French.[524] A multiplicity of inventive initiatives of this kind reflect the spirit of the postcolonial movement, encouraging cross-cultural discussions invigorated by many ideas and points of view.

3.3.4 Summary

Whether seen as a time of liberating emancipation or as a time when western oppression has merely been veiled, the "postcolonial" era has been marked by a transition from an ideal of imperial dominance to an ideal of co-operative effort and self-determination.[525] Though there are many notions of just what, exactly, "self-determination" is, postcolonialism glorifies in this diversity, seeing it as a source of strength rather than a threat to unity. This variety is fed by the existence of many prototypes of independent statehood that shape the thoughts of different writers. Some follow the model of the United States or one of the old colonial powers like France or Britain. Others, including some Indigenous peoples, seek to reinstate pre-colonial institutions. Despite this disparity, insights generated by postcolonial critique generally share the egalitarian moral imperative now enshrined in international law.

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[524] http://ubuntu.upc.es/ (Accessed April 24, 1995)

[525] Darian-Smith, "Postcolonialism".

When colonialism is defined in a way that allows us to address concerns about the kinds of internal othering and oppression at issue in feminism, racism and similar fields, postcolonialism becomes an intellectual movement concerned with the critique of institutionalized power.[526] It raises questions concerning how we can tell whether we have truly escaped the "on-going set of relationships and processes inaugurated by the experience of colonization".[527] Postcolonial reflection thus involves a questioning of the status quo in favour of processes that promote human equality and oppose abusive military or governmental power. It is a demand for the effective implementation of the key democratic principles of popular control and political equality.

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As a repudiation of colonialism, postcolonialism seeks:

-laws that are self-determined by the people to whom they apply;

-consensual processes of implementation arrived at through fully informed discussions among people who are treated equally and able to hold government officials accountable for their actions resulting in

-an egalitarian distribution of power and resources across a society with

-respect for alternate opinions , minority rights and social differences.

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[526] *Ibid.*.

[527] Jacobs, "Postcolonial Geography".

3.4 Identification of Paradigm Change

> "The hinge of the whole matter is, I think, this: Has the central power complete control over the local powers?...If not, anarchy is to be apprehended as the result, sooner or later." [528]
>
> Edward Cardwell,
> Colonial Secretary, 1864.

> "...sacred justice is found when the importance of restoring understanding and balance to relationships has been acknowledged"[529]
>
> Philmer Bluehouse, James Zion
> *Mediation Quarterly,* 1993

Colonial law was established and maintained through the use of armed force. The history of colonialism is a history of dominion – of battles, conquest and usurpation. With the demise of colonial ideology, the ideal of legitimacy has shifted to focus on consensual arrangements and human equality. Legal action now focuses on inclusive social welfare and consensual arrangements like treaties and negotiated settlements. The emerging paradigm is raising an entirely different set of questions.

The change we are experiencing emanates from a shift in social beliefs and values yet it functions through existing habits and social institutions. Because of this, distinguishing colonialism from whatever its postcolonial replacement may be

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[528] John T, Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism* (University of Toronto Press, 2002) 9 citing NAC, Monck Papers, Cardwell to Monck, Private, 18 Nov. 1864.

is not a simple matter. A state's use of enforcement procedures is not, in itself, definitive. If a state were to abdicate completely from all use of force, citizens could be left unprotected. One must accordingly look at *how* and *why* power is used, *whose* interests are served when social or military force is deployed and *whose* opinions are relied upon to make this assessment. The last of these questions may be the most important for, from a postcolonial perspective, one must look for the elements in a governmental system that allow the opinions of all who are concerned to be taken into account.

3.4.1 Characteristics of Colonial and Postcolonial Orientation

Paradigms provide alternate systems for interpreting reality and because they function as models, they are not defined in detail. Each produces its own set of values, priorities and questions. The insights provided by our emerging understanding of the biology of human thought processes make it evident that it is impossible to establish a set of absolute criteria that separate the postcolonial ideal from the colonial model. However, the characteristics that distinguish colonialism from postcolonialism as reviewed above might be summarized according to the following four dimensions:

Table 1. Characteristics of Colonial and Postcolonial Legality

	Colonial	**Postcolonial**
Sources of Laws	Imposed	Self-determined
Social Order	Hierarchical	Egalitarian
Character of Laws	Enforced	Consensual
Social Discourse	Exclusive	Inclusive

[529] Philmer Bluehouse, James Zion, "Hoozhooji Naat'aanii: The Navaho Justice and Harmony Ceremony" (1993) 10.4 *Mediation Quarterly*, 328 as cited in Ross, *Returning to the Teachings,* 27.

These characteristics are interrelated and yet they allow us to focus on four primary characteristics that distinguish the colonial ideal from its egalitarian successor.

3.4.1.1 Sources of Laws

When examining a community's legal system for indicia of colonialism, one of the first things to consider might be the source of its laws. Classical descriptions of colonialism involve the imposition of a foreign social order. In a colonial regime, those who make the laws have invaded or immigrated from elsewhere. They speak a language that is foreign to the Indigenous inhabitants and they typically accord the people whose lives they are encroaching upon no right to refuse the changes that are being imposed. The colonized may not even be allowed to vote on or otherwise participate in decisions concerning what laws apply and how they are to function.

By contrast, the laws of a community that is free from colonial influences will have been agreed to by the people to whom they apply, either directly themselves or by implication through the continuation of an ancestral legal tradition. As stated in Article 1 of the *International Covenant on Civil and Political Rights*, this means that all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development." The laws used may be a heritage from the past or imported from elsewhere, but the decision to use them will be the product of popular decision-making processes conducted by the people concerned, in their own languages, and according to their own cultural criteria. The result is ideally a consensus concerning the courses of action taken and the interpretation of laws and social rules. In short, people are participants in the

decision-making processes that affect them and they consent to the legal regime by which they live.

3.4.1.2 Social Order

The social order produced by colonization is typically conceived in hierarchical form with the colonizers sitting at the top of the social scale. The laws and decisions they make are imposed on others who may respond either by rebelling or by engaging in self-destructive behaviour producing high rates of addiction, mental illness and other social dysfunctions. Those who actively assist in the colonizing project sit high in the hierarchical social order while those who resist are relegated to the bottom. They may even be assigned sub-human status according to the colonizers' law.

Regulation, according to the colonial ideal, functions uni-directionally, top-down. The consequences of decisions are not always felt by those who make them and those who sit lower in the structure have no means of holding decision-makers to account. Government is an instrument used by the colonizers to control the colonized, to exclude them from resources or to force them to do disagreeable or dangerous work. The exclusive character of executive functions produces an elite class focused on promoting its own immediate benefits with little regard for others, both living and unborn. Institutionalized inequities in power produce disparities in wealth which, for those without privilege, may go so far as to affect nutrition and other essential aspects of well-being. Thus, differences between classes may even be found in the length of life enjoyed. With little investment in the past, the colonizer does not think far into the future and when the environment becomes

degraded through the production of toxic waste or mismanagement of other kinds the colonizer expects to be able to move on – to another country – or even to outer space.

Postcolonial society, by contrast, is inclusive, striving for human equality and long-term prosperity for all. As stated in Article 2 of the *International Covenant on Civil and Political Rights*, the aim is to ensure that all individuals within a state's territory enjoy equal rights:

> "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Full achievement of this ideal might be expected to result in unification of government with the governed accompanied by an equalization of wealth and resource distribution, including equal access to nutrition, decent accommodation, education, work, leisure and other sources of social capital. This orientation is confirmed by the *International Covenant on Economic, Social and Cultural Rights.*[530] Social levelling on this order is inconsistent with the exercise of imperative powers considered essential under colonial regimes, but it is not inconsistent with the concept of government itself. Decolonization requires a thorough re-evaluation of established institutions[531] and, though the form or forms that decolonized society may eventually take are not yet apparent, some of its characteristics are.

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[530] *International Covenant on Economic Social and Cultural Rights* 19 Dec. 1966, 999 U.N.T.S. 171; Can. T. S. 1976 No. 46.

[531] Re this process in Britain, note, for example, Weir and Beetham, *Political Power and Democratic Control in Britain*: Wicks, *The Evolution of a Constitution.*

Egalitarian government aims at inclusion. There can, accordingly, be no racially defined laws or subjection of particular classes of people. The well-being of all is sought. Since equality invites diversity and mutual respect, minority rights, as defined and understood by the minorities themselves, must be protected and respected so the tastes of one element of society are not imposed upon by another.

Majority rule is inconsistent with the ideal of human equality. It eternally denies the less numerous the right to live according to their beliefs and the insights that may arise from their particular circumstances. So too is the subjection of the citizenry to mindless and unmoderated regulation by state officials. Hierarchies and the panopticon discussed by Foucault[532] are the antithesis to postcolonialism, which finds expression through circular formations and communication links. When government functions as a tool of the people, it does not seek control. It functions instead as a venue for uniting people so they can participate in consultative decision-making processes that allow citizens as well as public officials to contribute to the definition of social norms. Delegated governmental functions are subject to public scrutiny for their exercise depends ultimately on the consent of the people they serve. They must accordingly be conducted in public to ensure that officials are accountable to those they represent.

Egalitarian inclusion also presupposes that the living do not have a right to expropriate resources from future generations. A postcolonial society moderates the profit motive by taking a custodial approach, aiming to conserve the long-term health of the environment so as to ensure its continued viability. It considers the

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[532] Foucault, *Surveiller et punir* at 205, 290.

needs of the generations to come as well as the welfare of those currently living and does not accept the toxic waste and environmental degradation that typify colonial exploitation.

3.4.1.3 Character of Laws

Colonial law functions by fiat and its characteristics are familiar. Colonial states are represented by "rulers". They command obedience, issuing orders and initiating prosecutions that burden the accused with the task of disproving allegations which may be made according to alien social paradigms. Intercultural conflicts are classed as crimes or rebellions. The issues they raise are interpreted and judged by someone selected by the colonizer, even if the colonizer's government or its agents are parties to the dispute. Decisions are unilaterally made and unilaterally imposed, resulting in convictions and punishments enforced by police or other armed personnel in the form of fines, imprisonment or even execution.

The egalitarian ideal raises radically different expectations. It can be realized in full only if all those affected are able to participate in the processes for making and applying laws. Equality means that the will and desires of any one person will not take precedence over those of another. Instead of "rulers", "commanders" and "leaders" there are "representatives" or "spokespersons" whose actions must be ratified by the people they represent before they attain legal status. The state is unveiled. Its agents are seen as individuals subject to their own personal idiosyncrasies which must be mediated with those of their fellow citizens. Legal decision-making is generated by dialogue, discussions and negotiations culminating

in accords reached through mutual agreement. Those who are affected by the outcome must be able to participate and raise their concerns in ways that result in serious consideration. Though the state may monitor citizens for administrative purposes, the citizens are also able to monitor state agents to ensure that they are not abusing their powers.

This idealized scenario does not correspond to the actual practice of most modern "democratic" states. Yet, as the *Universal Declaration of Human Rights'* stipulates, its measures depict a common ideal that its signatories *aim* to achieve. The postcolonial concept of law tends to be goal and process oriented rather than rule defined. In complex societies with large populations, decision-making must necessarily be distributed and delegated to specialists for it is impossible for one person to fully comprehend all areas of expertise. However, diversity is managed differently in postcolonial society for the egalitarian ideal requires all who act in the public interest to be accountable. Their conduct must be open, transparent and subject to public scrutiny. Consent is the foundation of postcolonial legitimacy and because consent may be withdrawn, courses of action are always subject to re-consideration as new conditions become apparent.

The egalitarian imperative requires a different approach to social problems. Rather than ignoring minority interests, they must be accommodated. Rather than punishing transgressions and violations, the situation that produced the misbehaviour must be investigated. Legal solutions involve restitution and re-calibration of social relations so as to support all members of society and re-establish social balance. When aberrantly dangerous behaviour occurs,

imprisonment or sequestration may still be used for the protection of society in an overpopulated world where exile is not an option. However, except in the most extreme cases, education and mentoring may be expected to replace fines and punishments as prime regulatory mechanisms.

3.4.1.4 Social Discourse

The exclusive nature of colonial institutions is reflected in the authoritarian tenor of their operation. Social order is dictated, changes are initiated by governors and they are decided upon in closed meetings on the basis of undisclosed evidence that may be provided by spies, anthropologists or hired informants. Under colonial rule, the people being governed may send petitions and pleadings to a head of state or other powerful figure, but there is no legal requirement to hear them or to accord them any opportunity to contribute their knowledge, experience or preferences. The history produced by this pattern of relations is accordingly written and taught exclusively from the perspective of the colonizing elite.

Postcolonialism, by contrast, seeks a participatory and inclusive social methodology. It depends upon "expert" reasoning skills and the ability not only to recognize the existence of a variety of frames of reference, but also to make informed choices based on the shared value of human equality. Government by the people presupposes open and transparent public processes so anthropologists study government officials as well as Indigenous peoples and those who are poor or marginalized. Legal status for any course of action is obtained though consent which can only be confirmed if all those affected are fully informed and invited to contribute what they know. Solutions are generated through discussions and those

concerned may reject proposals they do not agree to. When colonialism has been transcended, the multifaceted nature of human understanding is both acknowledged and valued. Minority perspectives on history and social issues become an integral part of social history and so they are respected and included as part of the education of the majority.

3.4. 1. 5 Chart Summary

The indicia of colonialism and post colonialism suggested by the foregoing discussion might be summarized as follows:

Table 2. Indicia of Colonial and Postcolonial Society

	Colonial	Postcolonial
1. Sources of Laws	**Imposed** a. Foreign constitution b. Alien law maker c. Foreign language d. No right to vote/interpret	**Self-determined** a. Own constitution b. Makes own law c. Own language d. Participates/consents
2. Social Order	**Hierarchical** a. A dominant class b Power to decide for others c. Class specific laws d. Disparities of wealth e. Exploitive	**Egalitarian** a. Social equality b. Autonomy c. Equal law d. All provided for e. Custodial
3. Character of Laws	**Enforced** a. Orders, commands b. State initiated processes c. Military/police enforcement d. Punishment	**Consensual** a. Agreed goals b. Interactive processes c.Co-operative conduct d. Mentoring
4. Social Discourse	**Exclusive** a. Dictated b. Alien/specialized language c. In camera processes: d. Dominant perspective	**Inclusive** a. Dialogue b. Popular language c. Public process d. Plural perspectives

3.4.2 The Dynamics of Paradigm Change

The indicia of the colonialism and postcolonialism identified in Part I of this study have guided the analysis presented in Part II. As Kuhn observed, paradigmatic change is a complex process. Established habits and procedures are never abandoned unless there is a viable alternative and transition periods are characterized both by a reassertion of the old paradigm and by a proliferation of new theories proposed to take its place. Those invested in the old paradigm tend to resist change, even when its weaknesses are apparent. The prototypes we use, though constantly invoked, remain largely invisible. As a consequence, we may apply them in ways that escape our conscious volition, particularly when no new paradigm has emerged as a replacement.

3.4.2.1 Idealized Models and Hybrid Function

The colonial and postcolonial models presented here are ideals, distilled from a wide range of academic discussion. As Kuhn explained, paradigms are only models. They facilitate understanding by focusing understanding on particular aspects of reality without attempting to explain everything. The models for social order used by most societies can thus be expected to demonstrate characteristics of both colonialism and postcolonialism especially since each of the indicia identified above has its limits. For example, one of the paradoxes generated by the postcolonial category is its requirement that alternate perspectives must be accorded equal respect. This inherently excludes acceptance of the legality of commands even though they may be the preference of some people in some circumstances.

3.4.2.2 Dual Analysis and Anomalies

Dual analysis of the kind applied by this study accommodates paradoxes of this kind. Thus an imperative legal procedure will score on the colonial side but it may also demonstrate legitimacy according to the postcolonial model if it was instituted through consensual processes. An event may also demonstrate both colonial and postcolonial characteristics. For example, when the negotiations for the Treaty of Versailles at the end of World War I are examined it becomes possible to see that, despite enthusiastic and wide-spread agreement with the principles enunciated in Wilson's Fourteen Points, there was no comprehensive change in diplomatic behaviour. The protocols and codes of conduct that characterized colonial practice continued in use, lulling the whole world into accepting terms that were dictated by the victors.[533] (See s.3.2.1.2 above)

What happened then was fully consistent with Kuhn's observation that established paradigms tend to persist until a new generation schooled in the new paradigm has become established. The fact that the players and the procedures used in the Treaty of Versailles negotiations remained essentially the same as those that had generated the war is highly significant. Indeed, it is widely believed that the terms imposed at that time produced the social conditions that contributed to World War II. The muddled outcome of that early peace initiative and the proliferation of contradictory endeavours that characterized the twentieth century, including many attempts to assert the old legality of dominance and aggression.

Full establishment of a new paradigm is, accordingly, a long-term process. It requires the re-writing of basic texts and the re-education of those who work in the

field as well as fresh generations of practitioners who understand the new theory well enough to be able to rethink standard practices and innovate new methodologies that will test and define its parameters.

3.4.2.3 The Predictable Confusion and Contradictions

Given the nature of the phenomena associated with paradigm change, we now know that we can expect a confusion of responses in our quest for a society that can fulfil the modern ideal of government that is inclusive, egalitarian, and custodial. Despite our best intentions, elements of the imposed normativity generated by the unequal power relations that colonialism fostered remain deeply embedded in established patterns of social interaction and personal expectation. We cannot leave them behind until we develop viable alternatives.

Even when alternatives are found, we may continue to reproduce old paradigms unconsciously with the transmission of culture from one generation to the next for they are enmeshed in the fabric of our thoughts through cultural habit and the metaphors that structure the languages we use. Despite our democratic assertion of human equality, "anarchy" continues to mean "chaos" to those of us raised in hierarchical traditions because we do not have non-hierarchical models for accomplishing complex tasks. In effect, in most fields we have yet to develop egalitarian ways of organizing our mutual dependencies. We rely on established procedures because adequate replacements have not been found and, as Kuhn pointed out, old paradigms may even reassert itself with increased vigour in an attempt to deal with the accumulation of anomalies that trouble their coherence.

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[533] See MacMillan, *Paris 1919*.

Université de Montréal

LA DANSE DES FANTÔMES
À LA COUR SUPRÊME DU CANADA:

Les droits autochtones pendant le premier quart de siècle de l'article 35 de la Loi constitutionnelle, 1982

Tome 2

Grace Li Xiu Woo (née Slykhuis)
Faculté de Droit

Thèse présenté à la Faculté des études supérieures en vue de l'obtention du grade de
LL.D. Droit
2007-07-04

Université de Montréal

GHOST DANCING
AT THE SUPREME COURT OF CANADA:

Indigenous Rights during the First Quarter Century of s.35.of Canada's *Constitution Act, 1982.*

Volume 2

Grace Li Xiu Woo (née Slykhuis)
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Thesis presented to the Faculté des études supérieures for the degree of
LL.D. Droit
2007-07-04

Loi constitutionnelle de 1982

PARTIE II
DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochtones

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Accords sur des revendications territoriales

3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

The Constitution Act, 1982

PART II
RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

PART II : CASE STUDY

Decolonizing Relations with Indigenous Peoples

at the Supreme Court of Canada

" ...what actually stands behind the majestic curtain of Law's rationality and impartiality is nothing other than ourselves and our own, often unruly social practices...."[534]

Steven L. Winter
A Clearing in the Forest, 2001.

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[534] Winter, *A Clearing in the Forest* at xiv.

4.

METHODOLOGY and CONTEXT

> "There is a need to move beyond mere description of problems and issues to making sure that change does in fact occur" [535]
>
> Graham H. Smith, 2004
> re. Kaupapa Maori theory

As the discussion in Part I suggests, the task of assessing whether a state's function is colonial or post-colonial in character is not a simple matter of determining whether the relevant international conventions have been ratified.[536] Paradigmatic change, as described by Kuhn, is a complex process when it affects a single scientific discipline. We can expect it to be all the more convoluted and involved when it comes to a movement like decolonization, which implicates all actors in whole societies, both domestically and internationally. Yet, even though established habits and procedures are resistant to change, patterns of thought do evolve and sometimes transformations are as instantaneous as the mental switch that reveals alternate interpretations of Gestalt images or allows a physicist to read a bubble photograph.[537] This, may explain why churches in Quebec, which once exerted immense authority, suddenly emptied towards the end of the twentieth

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[535] Smith, "From Conscientization to Transformation" at 52.

[536] Organizations like *Amnest International* and *Human Rights Watch* were founded for this reason.

[537] Kuhn, *The Structure of Scientific Revolutions* at 111.

century.[538] Perhaps "law" too will change. At least, that is the dream of many Indigenous peoples.

Kuhn and the cognitive theorists have, on the other hand, also provided a scientific explanation for the popular aphorism, "plus ça change, plus c'est la même chose (the more things change, the more they stay the same). An old paradigm, as Kuhn noted, will reassert itself unless there is a new one to take its place. When social behaviour is considered, there is the added problem of identifying just what, exactly, the functional paradigm was or should be. The decline of the church in Quebec did not, for example, exorcise authoritarian practices from Quebec society. Moreover, it would be a mistake to assume that such a complex and long-standing institution could be reduced to a single dimension excluding other prominent aspects of its functioning such as its provisions for spirituality, art, music, psychological counseling, medical care, education, cultural cohesion and social welfare.

So too with "law". The paradigms we use are construed from overlapping and ill-defined impressions produced by both individual and shared experience that can neither be fully articulated nor fully understood. As Kuhn observed, it is easier to make distinctions concerning this mass of inchoate impressions when there are models for guidance. A model may accommodate many complex concern without needing to explain or articulate them all. It may also be designed to focus attention on one particular aspect of cognition so as to facilitate certain characteristics. This would explain why people using languages that have different words for "blue" and

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[538] See eg. Luc Noppen, Lucie K. Morisset, *Églises du Québec : un patrimoine à réinventer* (Sainte-Foy, Presses de l'Université du Québec, 2005).

"green" find it easier to distinguish these hues on the visual spectrum.[539] So too, we can expect that real social change – or the capacity to engage in alternate modes of collective behaviour - may be facilitated by clarifying our understanding both of the model of legality we are moving from and of the model we aspire to.

With these observations in mind, the case study presented here approaches the subject matter through concentric circles of understanding. First the list of indicia for the "colonial" and "postcolonial" ideals identified in Part I was modified to focus on judicial reasoning. The revised list was applied to Supreme Court of Canada judgments rendered in over sixty cases decided following the formal recognition of "aboriginal and treaty rights" by the *Constitution Act, 1982.* (See Appendix 4) This assessment required identification of underlying premises of the kind signaled by L'Heureux-Dubé J. in the quote at the beginning of Part I .[540] In order to explain the evaluations arrived at, Chapter 5 considers some of the fundamental social ideals and behavioural models that define the role of the judiciary. Chapter 7 provides an overview of the Court's current conception of the rights protected by s.35(1) of the *Constitution Act, 1982.* It begins with a synopsis of the Court's idealized view of the law it applies to "Aboriginal peoples". Then it considers the Court's practice at the end of the first quarter century following the passage of s.35 of the *Constitution Act, 1982* by examining three cases released in December, 2006: *R. v. Sappier/ R. v. Gray*[541]*; R. v. Morris*[542] and *McDiarmid*

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[539] Winter, *A Clearing in the Forest* at 79.

[540] *2747-3174 Québec Inc.*.

[541] *R. v. Sappier; R. v. Gray*, 2006 SCC 54 (CanLII).

[542] *R. v. Morris*.

Lumber Ltd. v. Gods Lake First Nation.[543] Finally, it summarizes the ways in which the individual judgments in the sample reviewed conform to the indicia of colonial and postcolonial legality. Since the ideals expressed by the Court confirm postcolonial legality, the study concludes with a few observations concerning how its role may adapt over time to support the egalitarian norms that have been identified as a common human goal in both domestic and international law.

4.1 Scope of the Inquiry

The focus of this inquiry is exclusively on the content of judgments made by the Supreme Court of Canada during the first quarter century since the *Constitution Act, 1982* came into force. As can be seen in the Bibliography; a wide range of Canadian legal literature was reviewed before the cases considered in this study were analyzed. However, the analytical framework applied here differs substantially from those used in standard legal commentary and even though many references have been made to the opinions of other legal scholars, there has been no systematic attempt to catalogue how many writers agree or disagree with any particular point. That would be a study in itself, raising complex questions concerning whose writing should or should not be referred to, depending on which concept of "law" and which concept of jurisdictional definition is chosen.

Similarly, the analysis has, of necessity, made some references to the philosophies and cultures of some Indigenous peoples whose rights have been affected in order to illustrate colonizing influences and lacunae in the Court's methodology. However, there has been no attempt to present a whole picture of any

[543] *McDiarmid Lumber Ltd. v. Gods Lake First Nation.*

Indigenous social, legal or philosophical system. Nor has there been an examination of the effect of the Court's reasoning on any particular Indigenous nation, on Canadian or provincial governmental practice or on society as a whole. The colonizing impact of educational institutions, the media, government bureaucracies or other aspects of the social matrix are also left aside to focus narrowly on the reasoning of the Supreme Court itself.

4.2 Indicia of Judicial Colonialism and Postcolonialism

For the purposes of this specific study, the indicia of colonialism and postcolonialism identified in Part I were adapted to focus on the following ten aspects of judicial decision-making:

4.2.1 Who made the judgment?

The first factor examined was the identity of the judge or judges. At the high end of the colonial side of the scale, legal decisions will be made by someone who is both appointed by and a member of a social group that is imposing its own mores on excluded others. At the postcolonial end of the scale we might expect judges to disappear entirely because full equality requires parties to solve their differences by mutual agreement. However, judges have specialized training and expertise as neutral arbiters who can illuminate the blind spots created by conflicting frames of reference. Judicial function may accordingly be entirely postcolonial in character when decision-making authority has been delegated to the judges concerned by the interested parties, either directly or by social implication. This, of course,

presupposes membership in or intimate knowledge of the cultures of those concerned.

4.2.2 Who were the parties?

Regardless of his or her identity and conditions of appointment, any individual judge may promote postcolonial mores by remaining focused on egalitarian values and alert to indicia of colonialism that may appear at various stages of court proceedings. This requires an awareness of the **identity of the parties**. If human equality is considered primordial, people should be able to choose their social relationships as Canadians ideally do when we marry or divorce, emigrate, contract, form charitable societies, incorporate business ventures and adopt or renounce citizenship.

When an externally defined identity is in play, as happened when slaves, women and Indigenous people were excluded from decision-making processes through their definition as non-persons, a court that aspires to postcolonial norms must be particularly cautious. The same is true of circumstances in which decisions must be delegated, as when dealing with children, the mentally handicapped or when specialized medical, scientific or other expertise is required. Power imbalances are of special concern, especially when one party is the state. In such circumstances, postcolonial mores suggest that the courts will lift the governmental veil to consider who the effective decision makers were and how personal preferences may have influenced decisions made by state functionaries. If equality is a fundamental value, the interpretations of those who happen to be state employees cannot be favoured over those of other citizens on this basis alone.

4.2.3 Whose cultural venue was used?

Colonial values are manifest when foreign, in-migrating cultural needs are addressed by imposing foreign customs on those who are already there. It is accordingly necessary to consider the court's status as a **cultural venue**. In Canada, the risk of colonization by the court varies according to the social background of those involved. As will be discussed in the following chapter, the legal procedures currently in use are, in themselves, manifestations of a particular cultural heritage. There may be little concern in this regard when all affected by the issues at hand belong to this culture and there are no obstacles presented by differences in wealth, class, education or other sources of social disempowerment. Those involved may find they are able to present their points of view according to their own customs and in their own languages.

The presence of cultural difference does not, in itself, impugn a hearing. Those who have immigrated into a society may be taken to have chosen to live according to its form of social order. However, competent interpretation must be provided when parties use languages that are unfamiliar to the judge. Without the capacity to understand what is being said, a person is effectively excluded from cognitive participation. Canadian jurisprudence has established the right to interpretation so any accused may know the case they have to meet and give full answer and reply.[544] Yet, even with interpretation or even when all speak the same language, experience and fundamental values often do differ, giving rise to honest misunderstandings that

[544] See eg. *Singh v. Minister of Empolyment and Immigration* [1985] 1 S.C.R. 177 re interpretation of the *Canadian Charter of Rights and Freedoms* s.7.

may need to be investigated and resolved, or at least accommodated, to meet postcolonial expectations.

4.2.4 How were the issues formulated?

A judge who is aware of the cognitive traps identified by Kuhn and his successors might want to consider how the legal **issues** before the court were framed and how they arose. Who defined the dispute? How did it come to court? Are the parties seeking a viable resolution to problems they have been unable to negotiate on their own? Or is the court's involvement the culmination of one party's attempt to dominate the other? Indeed, have the issues been defined in a way that respects all relevant perspectives? Or has an issue been devised so as to preclude the substantive content of one party's concerns as happened when women, slaves and Indigenous people were classed as non-persons? Were the laws invoked instituted during the colonial age? Or are they the product of free and democratic processes through which all concerned had a political voice?

4.2.5 Were the procedures biased?

In order to support postcolonial mores, court **procedures** must treat all members of society equally. This principle functions on several levels. To begin with, judges must act with neutrality and they are expected to disqualify themselves if they have a particular connection with any party. Judicial decisions set precedents that may affect the public at large and one of the reasons why hearings must take place in public is to allow people to observe the process used to define the social rules that structure collective life. Those whose rights may be directly implicated

must be allowed to intervene if they see fit. Within the court process itself, rules of procedure must be applied in a way that avoids bias. Other elements that may import inequities include unequal access to legal counsel as well as practical considerations that may affect the impact of court costs and time constraints. For example, child care and employment obligations or distance from court registries and legal libraries may effectively force some people to submit to regulatory interpretations that are imposed on them by others.

4.2.6 Was the reasoning founded on evidence?

As the experiment Kuhn referred to concerning the misperception of black hearts and red spades indicates, one of the most challenging aspects of the judicial role concerns the assessment of **evidence** that is outside the conventional experience of the decision-maker. Today, after decades of consciousness-raising concerning gender issues, the refusal of 19th century judges to uphold women's political rights seems almost incomprehensible. They were, after all, presented evidence showing that the vote had already been exercised by women in Trois Rivières in 1820 and in local circumstances in 18th century England.[545] However, 19th century judges may never have lived in any social context in which gender equality was practiced. This is significant because the tendency to ignore information that does not fit personal experience or prevailing paradigms functions at a visceral level. As Nedelsky observed, "things that seem self-evident, natural and beyond dispute to one group are perceived very differently by people from a different background".[546] Because

[545] See Woo, "The Cracked Mirror".

[546] Jennifer Nedelsky, "Embodied diversity and the Challenges to Law" (1997) 42 *McGill J.* 91 pt.III.

it is impossible to anticipate which elements are fundamental to a paradigm derived from radically different experience, fair-minded judges must pay close attention to the evidence submitted by the parties to ensure that none is overlooked and that they do not rely excessively on personal presumptions under the guise of "judicial notice" – particularly when accepted "truths" are in play.

4.2.7 What concept of law was applied?

The colonial **concept of law** is derived from sources that are foreign to one or more of the parties and applied without considering their preferences. The "objective" standard it applies is founded on egocentric or ethnocentric experience. A postcolonial judgment, by contrast, will ground legality in consensual practices, geared to meeting norms that were agreed to by the parties through mutually inclusive legislative processes. It will accordingly consider whether or not the parties involved had access to the construction or reformulation of the social norms applied. For example, were they excluded from voting at the time the law concerned was enacted? If so, particular problems arise. According to the postcolonial ideal, the solutions to these must involve informed discussion and the consent of all concerned.

4.2.8 What was the character of the reasoning?

Colonial judicial **reasoning** is declaratory in character. A judge need only announce an outcome to make it legal so there is little need for explanation. Judgments founded on a belief in human equality tend, by contrast, to be introspective. They remain conscious of the personal bias inherent in all reasoning,

taking great care to explain the logical process used as is required to persuade and gain the consent of the parties.

The reasoning applied by a judge may either correspond to or contradict the model of legality endorsed at the ideal level. Reasoning confirms postcolonial values when it relates the positions taken in the judgment to principles that were established through egalitarian processes. Short judgments are certainly more accessible because more people have time to read them. Yet, selective blindness is easier to avoid when each party's arguments are re-stated and systematically addressed in written reasons that set out the decision-making process in detail for all members of the society affected by the outcome. The need for full and complete explanations tends to make decolonizing judgments long-winded. However, once a paradigm for a particular area of law is established the need for judicial decisions may diminish and judgments may become shorter because they may rely on established analysis.

4.2.9 What values were applied?

The **values** reflected in a judgment may be either colonial or postcolonial in character. Colonial characteristics are manifest when reasoning is founded on "authority" or the social power to impose a particular state of affairs. Postcolonial reasoning seeks evidence of consultation and consensus, reflecting consciousness of the difficulties involved in defining and protecting equal rights.

4.2.10 What perspectives were considered?

Kuhn's theory and subsequent research suggest that it may ultimately be impossible to escape the ethnocentric or egocentric nature of our cognitive processes. It is, however, possible to acknowledge and respect alternate **perspectives**. Colonialism tends to assume that there is only one correct way of looking at things, but as we move into the postcolonial age we are becoming increasingly conscious of the ways in which the choices we make reflect idiosyncratic values. A postcolonial approach to judicial reasoning can accordingly be expected to note the options presented to the court and examine their implications so as to uphold inter-cultural tolerance and the mentoring and restorative approach to social problems that is replacing the authoritarian, exploitive and punitive practices characteristic of colonialism.

4.3 Modified Analytical Chart

The character of a judicial decision can thus be measured in terms of the following considerations:

Table 3. Indicia of Colonial and Postcolonial Judgments

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

4.4 Selection of Judgments

The model of analysis developed for this study was applied first to the Indigenous Bar Association list of "key cases" concerning "Aboriginal and treaty rights" decided following the enactment of section 35 of the *Constitution Act, 1982*.[547] This list ended in 2002. More recent decisions were identified through a search on the *Canadian Legal Information Institute* (CanLII) web site using the terms "Constitution Act 1982 s.35" and "Aboriginal" then eliminating cases that did not consider the application of s.35 of the *Constitution Act, 1982*.[548] *Saskatchewan Indian Gaming Authority v. CAW-Canada*[549] was dropped from the original list because it deals only with a procedural matter, providing no material for analysis. Some cases were assessed on the basis of the lower court decisions affirmed, in one way or another, by the Supreme Court.[550] Other cases concerning "aboriginal rights" from the 1982 to 2002 period were added to supplement the Indigenous Bar Association list because they were cited by judges who relied on their own previous reasoning.

The resulting list of cases set out in Appendix 1 to this work does not fully represent the Court's involvement with Indigenous rights. The methodology used to supplement the Indigenous Bar Association list excluded several relevant cases. *Mackiegan v. Hickman*[1989] 2. S.C.R. arose from the *Marshall Inquiry* and considered whether a judge of a superior court could be compelled to testify before

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[547] *Indigenous Bar Association*, http://www.indigenousbar.ca/conferences/papers.html (2/17/06).

[548] *Canadian Legal Information Institute*, http://www.canlii.org confirmed (6/22/2006).

[549] *Saskatchewan Indian Gaming Authority v. CAW-Canada* [2001] S.C.R. 644.

[550] *Ontario v. Bear Island Foundation*; *R. v.Deane. Goodswimmer v. Canada* was conceded as being moot.

the Commission. *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 S.C.R. 134 found that a band could not use its taxing authority under the *Indian Act* to levy funds from a provincial utility which had been granted a licence to use of its land by the federal government. A search adding the term "residential school" produced other significant cases. These and others which were not included import complex issues that merit much fuller consideration than can be managed within the confines of this study.[551] The purpose of this research is not to present a complete analysis of the Court's relationship with Indigenous peoples during the past quarter century, but rather to introduce and demonstrate an analytical methodology that may caste some light on the impasses that impair cross-cultural understanding.

4.5 Analytical Process

The cases were read (or re-read) in chronological order using a two tiered analytical approach. As well as looking at the character of the underlying premises used to structure the reasoning, each case was systematically measured against the scale of colonial and postcolonial indicia as revised to assess judicial reasoning. In some instances separate evaluations were made for the effect of the judgment on different social groups. For example, the *Reference re Secession of Quebec* was evaluated with regard to Canada in general, as well as Quebec and Indigenous peoples. (In another context, this judgment would also be amenable to analysis with regard to non-European immigrants such as Chinese, Japanese or East Indians.)

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[551] *Winnipeg Child and Family Services, (Northwest Area) v. G. (D.F.),* [1997] 3 S.C.R., 1997 CanLII 336; *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia,*

Because colonialism and postcolonialism both manifest themselves in comprehensive multifaceted ways, it would be impossible as well as pointless to list and explain every instance of certain indicia in every set of reasons. Points of particular interest are discussed in the text and the charts in the appendices provide useful summaries and brief notes on supportive examples.

The scores produced are not mathematically exact. Since subjectivity is an inherent characteristic of human reasoning, persuasive arguments could be made for higher or lower evaluations on almost every dimension considered. Moreover, ambiguity runs rampant in the complex interplay between culturally diverse assumptions and expectations. Characteristics of colonialism and postcolonialism appear, at times, to be interwoven in the very same sentence, especially when underlying assumptions about concepts like "law", "sovereignty" and "jurisdiction" are taken into account. A point celebrated as a significant break-through by some readers of a judgment could accordingly trigger profound disappointment for others. My own perceptions concerning the relative importance of an argument or comment wavered depending on which other case or which law journal article came to mind. In effect, everyone who applies this system is likely to produce a somewhat different rating based on their own individual insights, inspired by experience as well as inexperience, not to mention the capacity for cognitive blindness that afflicts us all, judges and readers alike. In the course of my reading, I sometimes became aware of my biases or errors. For example, Gonthier's dissenting reasoning in *Osoyoos Indian Band v. Oliver (Town)* included evidence of a decolonizing

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[2005] 3 S.C.R. 45, 2005 SCC 60 (CanLII); *Blackwater v. Plint,* [2005] 3 S.C.R. 3, 2005 SCC 58 (CanLII).

perspective that I had overlooked in my initial analysis of *Canadian Pacific v. Matsqui*. However, there must certainly be many other insights that I have overlooked.

Though the evaluations provided here are all inherently subjective and highly debatable, this variability is of no concern in postcolonial terms. The aim of this exercise is not to produce an authoritative ranking, but rather to raise awareness of assumptions and cognitive structures relied upon both by the Court and by those who read its judgments. Because of the experiential basis of the prototypes that shape our rational processes, ambiguity is a constant. Legal practice, as understood in postcolonial terms, does not aim for a finality that is impossible to achieve. It does, however, attempt to bridge social and cultural divisions such as the lingering misunderstandings that continue to trouble Canadian relations with Indigenous peoples. Postcolonial legal practice hopes to stimulate discussion and foster understanding, both of existing social custom and of areas in need of reform.

4.6 Sources of Subjectivity

A postcolonial approach to law requires a constant awareness of the subjective nature of all knowledge. Because of this, the backgrounds of the judges will be considered in the following chapter. However, my own sources of subjectivity should also be acknowledged. The questions I have raised are, in many regards, the culmination of previous research concerning Chinese legal history[552] and Haudenosaunee political philosophy as revealed by the "Six Nations"

[552] Li Xiu Woo, "Repairing the Dome of Heaven: A Re-examination of the Classical Roots of Women's Legal Status in China" (1994) 24.2 Hong Kong Law Journal 231-275.

application for membership in the League of Nations.[553] Those familiar with the Chinese Classics may recognize their influence in the acknowledgement of change and ambiguity underlying the previous paragraph.[554] As for the Haudenosaunee, their paradigm for social order provided a model that raised issues that might otherwise have passed unnoticed. It is unlikely that this is the only historical prototype for a more egalitarian form of society.[555] As the following chapter indicates, there are precedents for populist rights in England itself. However, since the Haudenosaunee model influenced my reflections and since it is one of the models that the Supreme Court tacitly seeks to accommodate in its determinations concerning "aboriginal and treaty rights", references to it are included at appropriate points in the text.

At a more fundamental level, my own experience as a member of the colonizing culture during the last half of the twentieth century could also be considered relevant. It is the filter through which this study was conducted and so I will provide a brief outline: My ancestry of farmers, tradesmen and school teachers of Welsh, Dutch and Norwegian origin, immigrated to various parts of the land that became Canada between 1760 and 1919. According to family stories, my Dutch ancestors were attracted by the prospect of an egalitarian lifestyle and by the fraudulent or misguided promise that there was "empty" land on the prairies. My grandfather, who came to Canada as an infant, had close friendships from childhood

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[553] Woo, *Canada v. The Haudenosaunee* at n.131.

[554] Note the assumption that change is a constant. See the *I Ching* or *Book of Changes* which was part of the curriculum for those appointed to the judiciary in Imperial China. Woo, "Repairing the Dome of Heaven".

[555] Consider eg. elements of the Hanseatic League or the Jolof Confederation of Senegambia. Boubacar Barry, *Senegambia and the Atlantic Slave Trade* (Cambridge University Press, 1998).

with Waw-see-ja-nas and Bill Standingready of the White Bear Reserve near Carlyle, Saskatchewan.[556] Judging by his accent, he may well have learned English from the "Indians".

Like the prototypical judge on the Supreme Court of Canada, I myself had no childhood contact or friendships with any Indigenous people. I began school oblivious to Indigenous history and interests in Lethbridge, Alberta, probably under the same curriculum as McLachlin C.J., at a school where we tried to practice Scottish Highland dancing during winter lunch breaks. My prototypical understanding of Britain was influenced by my maternal grandfather who emigrated from London when he was nineteen and shaped by a year spent there at the age of nine with parents who took full advantage of the opportunity to visit sites of historical interest. My father was a plant pathologist who worked for the Canadian Department of Agriculture and after he transferred to Ottawa our family hosted visiting scientists from around the world at a time when international awareness in the rest of the country was low. Canadian history in my youth was taught entirely from a 19th century British colonial point of view, as it still seems to be taught today.[557] Despite the international visitors, daily life in an Ottawa suburb isolated me from people of other backgrounds. I knew little about the lives of people who lacked the security provided by civil service tenure or military command and I remained ignorant about other cultures including those of my Dutch, Norwegian and Welsh ancestors.

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[556] For a history of the area see Carlyle and District Historical Society, *Prairie Trails to Blacktop* (Altona, Manitoba : Friesen Printers, 1982).

I am, nevertheless, part of a generation that opened up to the world through the increasing accessibility of education and international travel. I attended Queen's University at Kingston, Ontario and graduated from Memorial University in Newfoundland in 1970 with a degree in sociology and English literature. I spent three years travelling through Europe and Asia learning about where the house guests of my childhood had come from. Adult employment included teaching primary school in a Newfoundland outport and participation in the opening of China trade (1978-86) through a small Vancouver business importing antique porcelain, hand-made carpets and other arts in partnership with my late husband of Québecois origin.[558]

After playing our small role in facilitating Canadian relations with China, I went back to school and received an LLB from the University of British Columbia in 1990. I articled at the Immigration and Refugee Board as a Refugee Hearing Officer cross-examining people who claimed Convention refugee status before practicing at Fan and Co. in Vancouver's Chinatown. The legal aid work I did at that time to supplement work for the core business clientele was mostly for Indigenous people and others suffering from obvious misfortunes such as childhood abandonment, mental retardation and head injuries.

When my husband died, I left Vancouver to do a masters in international law at the Université du Québec à Montréal. I focused on Indigenous issues at the request

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[557] Note eg. Gendron and Henderson, *Canada, A People's History* (http://history.cbc.ca/histicons/) or see eg. Maddock ed., *History and Citizenship Education* as contrasted eg. with Blanchard, *Seven Generations.*

[558] See "Jean-Paul Martino" in François Charron ed. *Imaginaires surréalistes: poésie 1946-1960* (Montreal : Les Herbes rouges, 2001).

of former clients and was eventually qualified to teach for a few sessions in the Programme of Legal Studies for Native People at the University of Saskatchewan. My close personal friends now include people of many Indigenous, colonial and immigrant origins. In short, my social background has left me predisposed to the polyglot populist values represented by the postcolonial perspective.

5.

The Internal Architecture of the Court's Reasoning

> "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."
>
> Binnie J.,
> *Mikisew Cree First Nation v. Canada,* 2005.[559]

The legal objective identified by Binnie for a full and unanimous Court in *Mikisew Cree First Nation v. Canada*[560] is fundamentally postcolonial in spirit. This judgment reasoned from the assumption that the "claims, interests and ambitions" of Indigenous peoples exist on a level of parity with those of "non-aboriginal peoples". It also viewed "law" in terms of common objectives rather than authoritarian command, bringing it close to the postcolonial ideal despite the constraints of the Court's institutional format and the genesis of the issues before it. Yet both judgments in *Marshall/Bernard*[561] decided just a few months earlier and both judgments in *R. v. Morris* decided at the end of 2006 exhibited nine out of ten of the characteristics of colonial legality identified here. Why did this happen?

As discussed in Part I, the rejection of colonialism involves a change in the concept of legality. The capacity to command and control that dominated the colonial age must yield to a quest for human equality and social consensus. This

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[559] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 (CanLII), 1.
[560] *Ibid.*
[561] *R. v. Marshall; R. v. Bernard,* 2005 SCC 43 (CanLII).

shift in both focus and practice has placed Canadian judges in a difficult position. Many of the legal precedents and institutional norms that they are expected to uphold in the name of equality are products of the command model of legality that prevailed during the country's historical construction. Moreover, despite their privileged position, judges are only part of the broad matrix of influence that may push society as a whole to adopt either colonial or postcolonial modes of behaviour. Judges cannot change the written constitution or laws. They can only interpret them and they must do this in the context of the issues that happen to be presented to them. As pointed out by Lamer C.J.:

> "To a large extent, the Court is the prisoner of the case which the parties and interveners have presented to us, and the arguments that have been raised, and the evidence that we have before us..."[562]

Paradoxical as it may seem at first glance, postcolonial norms would be violated if the judiciary were to caste off their medieval robes to institute radical revisions in the procedures and frames of reference that define their function. Such usurpation of the idealized role of the legislature would be inherently colonial in character and do nothing to facilitate the postcolonial transition that concerns us. There are, moreover, no institutional alternatives available to replace many traditional aspects of the judicial role. If postcolonial norms are to be realized in full, some circumstances require the judiciary to wait for the slow percolating process of consensus formation to run its course and culminate in whatever constitutional and legislative revisions the people they serve may find necessary.

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[562] *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.* [1997] 3 S.C.R. 3 at [82].

Within these constraints, the members of the Court can, none the less, exercise considerable influence based not only on their traditional social position, but also on their extensive knowledge concerning the content and structure of Canadian law. Even in the most egalitarian of contexts their specialized expertise and their position as elders in Canadian society would lend weight to their opinions.

Yet, when it comes to implementing postcolonial legality with regard to Indigenous issues their limitations are obvious. As the full Court has already acknowledged in the *Mikisew Cree First Nation* case:

> "The management of these relationships [between "aboriginal" and "non-aboriginal" peoples] takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. ".[563] [text in brackets added]

However, liberal as this formulation may seem, it did not acknowledge the historical fact of colonialism *per se* and, since the Court determined in the *Reference re Secession of Quebec*[564] that Canada is founded on "an historical lineage stretching back through the ages", the need to examine underlying premises to prevent reversion to the colonial paradigm remains an on-going concern.

The present chapter focuses on aspects of what the *Secession Reference* referred to as the "internal architecture"[565] of Canadian legality. These are often taken for granted. Section 5.1 below examines the prototype for social order upheld

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[563] *Mikisew Cree First Nation v. Canada* at [1].

[564] *Reference Re Secession of Quebec* at [49].

[565] *Ibid.*, [50].

by the Court. Section 5.2 considers the social role that judges are expected to play within that order. Section 5.3 looks at the social backgrounds of the judges themselves. Section 5.4 examines the conceptual and metaphoric structure of judicial reasoning, while section 5.5 looks at the frames of reference applied in the judgments. All five areas are potential sources of inter-cultural misunderstanding which raise questions related to the goal of reaching a mutually agreeable reconciliation between Indigenous rights and Canadian custom.

5.1 The Concept of Social Order

> "Two features have at all times since the Norman Conquest characterised the political institutions of England...The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government...The second, which is closely connected with the first, is the rule or supremacy of law."[566]
>
> A. V. Dicey,
> *Introduction to the Study of the Constitution,* 1885.

In the preamble to the *British North America* Act, now known as the *Constitution Act, 1867*, Canada's constitution was described as being "similar in Principle to that of the United Kingdom".[567] As British commentators have noted, the origins of some of the beliefs and practices from which their constitutional model evolved are lost in time[568]. Canada has inherited this British "deficiency". There are, moreover, significant differences between Canada's constitution and that of the colonial motherland that are camouflaged by the unwritten character of the British constitution. This is not, however, a barrier to identifying constitutional norms. It simply requires a more acute awareness of the precedents that have shaped "legal" practice and of their variation through time.

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[566] As cited by Weir, Beetham, *Political Power and Democratic Control in Britain*, 27. Note that Dicey was writing at the height of British colonial power.

[567] See eg. *Remuneration Reference,* [83] *et. seq.*

[568] See eg. Weir, Beetham, *Political Power and Democratic Control in Britain*; Pollock, Maitland, *The History of English Law.*

As Kuhn's theory suggests, we construct our understanding of the world using models based on past experience. Even when not explicitly acknowledged, as for example when a codified system is applied, these underlying mental constructs are reflected in metaphoric inferences that operate at a predominantly subconscious level concealed in the language we use to formulate our thoughts. It is only after these basic prototypes are established that we develop the conscious abstract theoretical models needed to classify and understand our world. Our capacity to comprehend reality tends thus to be shaped and constrained by past experience. So it was with the British constitution. It developed in practice before it was described in words. Thus, as the Court stated in the *Reference Re Secession of Quebec*, Canada is founded on "an historical lineage stretching back through the ages".[569] When this lineage is examined, we find that both colonial and postcolonial models for constitutional behaviour can be found in the historical record.

5.1.1 Anglo-Norman Heritage

Canada's constitution is structured on habits of social practice that were carried through colonization and the conquest of New France from England where, as Dicey has suggested, the Norman conquest of 1066 A.D. is conventionally considered to be the beginning of the country's legal history.[570] When the Normans imposed their brand of legality and political order, they established a foreign elite on

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[569] *Reference Re Secession of Quebec*, [49].

[570] See eg. Baker, *An Introduction to English Legal History* at 11; McNeil, *Common Law Aboriginal Title* at 83. McNeil's conclusions concerning "conquest" by the Normans are based on the *Case of Tanistry* (1608) Davis 28 at 41 rather than the content of the Doomsday survey.

top of a variety of pre-existing arrangements.[571] At conquest, the population of England is estimated to have numbered from one and a quarter to two million and, according to the Doomsday book, 17% of the land was held by the king and his family, 26% by bishops and abbots and 54% by about 190 lay tenants-in-chief. Though several formerly independent Anglo-Saxon and Danish thanes became sub-tenants of Norman lords, the only member of the pre-conquest nobility who retained his estates had collaborated with the invasion.[572] Thus, the majority of Norman land-holders came from the area that is now northern France. In other words, the Doomsday book did not concern itself with the land rights of Indigenous Britons.

As in the subsequent colonization of North American, the only documentary evidence of what life was like in those years was compiled predominantly by the conquerors. Yet despite the displacement of the previous overlords, it is believed that the changes the Normans brought had little effect on the lives of sub-tenants and the peasantry who continued to cultivate the same land as before.[573] Of these, only a few were free men. About 30% of the population were villains who were required to cultivate the lord's land as well as their own. Small holders and cotters, who owed greater services to their lords, sat lower on the social scale and about a tenth of the population were slaves who held no land and were considered to be chattel.[574] Norman society was accordingly imposed on the basis of norms that were

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[571] Knowledge of this era is uncertain. Feudalism as a system of dependent land tenures was not universal in England prior to 1066. McNeil, *Common Law Aboriginal Title* at 80.

[572] Thomas Hinde ed. *The Domesday Book: England's Heritage, Then and Now* (Godalming, Surrey, England:CLB International, 1997) at 14, 17.

[573] Baker, *An Introduction to English Legal History* at 195.

[574] Hinde, *The Domesday Book* at 17.

anything but egalitarian for the majority of the people appear to have been subjugated.

5.1.1.1 Constitutional Reciprocity

Despite the fact that the conquest effected a form of colonization, the English constitution was not conceived in totalitarian terms. There were reasons why the majority of the people co-operated with this militarily imposed regime. William I justified his rule by claiming to be the lawful heir to his predecessor, Edward the Confessor. [575] More importantly, he promised the English they could keep their own laws. The political relations established by this means were understood as reciprocal bonds of loyalty that resembled the status established by marriage.[576] As explained in *Halsbury's Laws of England:*

> "The relationship of subject and monarch was conceived of as a personal one, involving a bargain under which the monarch gave the subject protection and undertook to govern according to the laws of the land, and the subject owed the monarch legally enforceable allegiance".[577]

Thus, even though it was externally and forcefully imposed, Norman legality was conceived in terms of the protection it offered from foreign invasion and other forms of social disorder. There had, after all, been three contenders for the English throne at the time of Edward the Confessor's death.

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[575] The English Earl Godwin and his heir, Earl Harold, objected to the legitimacy of Edward the Confessor's choice. Hinde, *The Domesday Book* at 11.

[576] *Halsbury's Laws of England* (4th), vol.8(2), 26. Elizabeth I wore a ring at her coronation to symbolize her "marriage" to the people of England. Chris Openshaw dir.; David Starkey, nar. *Elizabeth* (B.B.C. – The History Channel, A and E Television, 2002).

[577] *Ibid.*

5.1.1.2 Hierarchical Structure

The bond between subject and monarch mirrored the bond between subject and lord that characterized feudal society.[578] In Norman times, a process called "subinfeudation" created chains of relationships leading from the sovereign to the person who actually worked the land. Under this system, land ownership was separated from occupation and use. In theory, as later described[579], only the monarch had full ownership. The subject's right to use land was protected by his lord in return for swearing an oath of allegiance by which he was expected to follow his lord's commands in everything except treason, theft and murder. A lord forfeited his lordship if he took away the land the tenant used or failed to protect him. According to Pollock and Maitland, the feudal bond may well have been so socially powerful that a man could be obliged to fight on his lord's behalf against the king.[580] William the Conqueror consolidated his hold on England through the innovation of requiring all lords to pay homage and swear an oath of allegiance directly to him.[581] This produced a pyramidal social structure whose basic geometry continues to serve as a model for Canadian concepts of social order despite substantial institutional change and the abandonment of most aspects of feudal practice and belief.

5.1.1.3 Paradigmatic Persistence

The origins of the feudal system are lost in time. It appears to have grown out of lived experience and it was not described in writing until Littleton's *Tenures* was

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[578] See eg. Pollock, Maitland, *The History of English Law.*

[579] Baker, *An Introduction to English Legal History* at 162.

[580] *Ibid* at 298-300.

printed in 1481.[582] By then, it was considered part of an idealized past. There have been significant constitutional reforms since that time; yet many of the beliefs and expectations generated by the Anglo-Norman feudal paradigm remain embedded in the conceptual architecture of its cultural heirs. The American revolution could, for example, be seen as a consequence of the Crown's inability to provide protection in the colonial setting where, for all practical purposes, the colonists were already relying on themselves. The *Royal Proclamation, 1763* and other assertions of Crown "protection" for Indigenous peoples are consistent with this model for social order that saw itself as a protector of locally defined legality.

The persistence of this paradigm can be seen in the fact that, to this day, oaths of allegiance continue to be sworn both in Canada and in the United States reflecting the common belief that citizens have religiously sanctioned duties of loyalty and obedience to the state.[583] This deeply rooted cultural patterning that presumes that social "order" requires obedience to a superior conflicts with the more recent democratic assertion that government is by and for the people. It also conflicts in several regards with at least some Indigenous world views. For example, as seen at Oka and discussed in the course of this work, the Haudenosaunee (Iroquois) insist that government should serve in an exclusively representative capacity.

Another constitutional thread that can be traced to Norman feudal preoccupations is the male preference that has been a bone of contention in the

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[581] *Ibid.*.

[582] Baker, *An Introduction to English Legal History* at 162.

[583] The American *Pledge of Allegiance* appears to be a reversion to the earlier model. It was first published in a children's magazine and adopted for use in schools in 1892. It was not until 1954

recent struggles for gender equality. Feudal society was founded by warriors who distributed wealth and power unequally. Female roles in this society were ignored and women had no formal political function except for the occasional individual who became a monarch. Recruitment to the hereditary elite was based on patrilineal, male-preferred, primogeniture and the persistence of this polarized concept of social order has been documented in modern Canada by works like John Porter's *The Vertical Mosaic.*[584] As set out in the introduction to this work, it was only during the twentieth century that the formal exclusion of women from governmental processes was officially terminated. Yet the basic institutional structure to which women gained admission was designed by and for men and it remains in place. This is another source of conflict and misunderstanding with Indigenous cultures. In the case of the Haudenosaunee, for example, powerful political roles for women are provided for by the constitutional structure of their polity.[585]

5.1.1.4 Personnification

English constitutional history is long and it involved many democratizing reforms. However, the metaphoric representation of the state by the monarch has persisted since Norman times and it continues to permeate the language of law and government. The colonies from which Canada evolved were initially "ruled" by "governors" who represented the monarch. Though successive reforms have rendered

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when President Eisenhower was in office that the words "under God" were added. "Pledge of Allegiance" http://en/wikipedia.org (8/27/2006)

[584] John Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada* (University of Toronto Press, 1965).

their role largely ceremonial, the Queen remains the "*head* of state" today, for Canada as well as Britain. She presides *over* the House of Commons and the Senate and represents the state as the *Crown* in litigation. In 1608, Sir Edward Coke, then Lord Chief Justice of the Common Pleas,described the relationship between subjects and the monarch in *Calvin's Case* saying:

> "Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign....As the ligatures or strings do knit together the joints of all the parts of the body, so doth legiance join together the Sovereign and all of his subjects...But between the Sovereign and the subject there is without comparison a higher and greater conncexion: for as the subject oweth to the King his true and faithful legiance and obedience, so the Sovereign is to govern and protect his subjects,..."[586]

As this metaphorical representation confirms, the English monarchical state tended to be seen as a single human body with control vested entirely in the Monarch.

The corporate unity between subject and monarch is not, however, always maintained. In court cases, legal issues are presented in an oppositional format that separates the individuals concerned from the state to which they presumably belong. Thus cases have names such as *Nowegijick v. The Queen* or *R. v. Horse*. Like Coke's unified metaphor, the representation of the state as an individual whose interests are separate from those of the citizen concerned reinforces the external character of social control, contradicting the democratic theory that government is by the people. It also

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[585] Parker, *The Constitution of the Five Nations,* 98-100; Karoniaktajeh, Horn, English trans. *Gayanerekowa.*

[586] *Calvin's Case* (1608), 7 Co. 1a at 10b, 77 E.R. 377, (K.B. and Exch. Ch.) at 1.(a).

amplifies hierarchical preoccupations because it suggests that decision-making is ultimately the responsibility of one person, the *head* of state, even though this is not actually the case.

5.1.2 Modern Apparitions of the Feudal Paradigm

This phenomenon reflects one of the characteristics of paradigmatic function identified by Kuhn. Until an adequate replacement has become established, people must necessarily rely on the precedents provided by old paradigms to shape their thoughts and order their conduct. Although Anglo-Norman society is part of a dimly understood past, the geometry and metaphoric presumptions that structured feudal social relations are woven into modern practice. They might be seen, for example, in the doctrine of "parliamentary *supremacy*" discussed by Dicey. The judicial system likewise follows a hierarchical model for, as graphically described on the Supreme Court of Canada web site:

> "The Supreme Court of Canada stands at the *apex* of the Canadian judicial system...The Canadian courts may be seen as a *pyramid*, with a broad base formed by the provincial and territorial courts whose judges are appointed by the provincial and territorial governments."[587] (emphasis added)

There are many other manifestations of the pervasive Canadian tendency to assume that social order must necessarily be understood in hierarchical terms. Despite the notional equality of federal and provincial jurisdictions under ss. 91 and 92 of the Constitution Act, 1867, the doctrine of federal *paramouncy* developed to deal with

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[587] "Role of the Court: The Court's Jurisdiction" http://www.scc-csc.gc.ca/aboutcourt/role/index_e.asp (7/1/05).

inconsistencies.[588] Parliament in Ottawa tends to be described as the *top* level of government, sitting *above* provincial and territorial governments, which in turn are depicted as being *above* municipal and local governments.[589] The electorate, if represented at all in diagrammatic representations of the Canadian polity, are conventionally placed at the *bottom* of the social pyramid and they may be referred to metaphorically as a "popular *base*", as "*foot* soldiers", "grass roots" or in other terms that signify a lowly position.[590]

This again conflicts both with the twentieth century notion of human equality and with at least some Indigenous concepts of social order. New Canadians are told that the "Constitution" is "the system of laws and conventions that we Canadians use to govern ourselves".[591] Yet, despite the formulaic assertion that Canada is a "democracy" and that "democracy" represents "government by all the people"[592], common parlance excludes "the people" from "the government", perpetuating the feudal distinction between subject and monarch. This separation is implicit in the chain metaphor invoked to tell prospective citizens that their Member of Parliament is their "*link*" to "the federal government", who can ask questions "about" and help get information "*from*" the federal government.[593] In other words, "government" is

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[588] Federal and provincial law are supposedly equal within the spheres defined by the *Constitution Act, 1867* ss 91 and 92; however, in overlapping areas, the doctrine of federal paramouncy renders provincial laws inoperative to the extent of the inconsistency. See eg. Hogg, *Constitutional Law of Canada* at ch.16.

[589] *A Look at Canada* 2004 ed. (Ottawa: Minister of Public Works and Government Services Canada, 2004) at 29, 30.

[590] The circumstances in which various metaphors are used merits more systematic research.

[591] *A Look at Canada* at 13.

[592] See "democracy" in Sykes, *The Concise Oxford Dictionary.*.

[593] *A Look at Canada* at 33.

spoken of as a separate, personified entity rather than as a process for collective decision-making.

In modern practice, the personification motif represented by the ubiquitous Crown appears to maintain the effective exclusion of the people from governmental decision-making processes. The metaphoric distinction recurs frequently in descriptions of governmental function. For example, according to the Public Information Office of the Library of Parliament:

> "We cannot marry or educate our children, cannot be sick, born or buried without the *hand* of government somewhere intervening".[594] (emphasis added)

One of the consequences of choosing to refer to government as if it was a human body distinct from the citizenry is the assumption that there must be a "head" of state. As everyone knows, the body cannot survive without a head. Political rivals were literally beheaded at some points in British history. Even though there is no significant difference between the mental capacity of either the Queen or the Prime Minister and anyone else, personification of the state enhances the importance of people in such positions and tacitly reinforces the command theory of legality. This happens because the metaphor is frequently conflated with reality. The human body cannot function without a head and so there is a tendency both to ignore the cognitive capacities of ordinary citizens and to presume that all organizations need a "head" in order to function and that without a "head" there is no control.

The language used by the Supreme Court of Canada in its judgements concerning s.35 of the *Constitution Act, 1982* did not break from this metaphoric

schema. Applications of democratic theory to analyses of "aboriginal rights" in relation to those of the in-migrating society were conspicuous by their absence.[595] *Corbiere* altered voting rights for all Band Council elections in Canada using a process in which the majority of the people affected had no representation what so ever.[596] Similarly, the Court applied the *Indian Act* and the *Natural Resources Transfer Agreements* without acknowledging the fact that the Indigenous peoples concerned had not participated in their formulation or demonstrated their informed acceptance of their terms.[597] In this regard, the Court acted consistently as an agent of the Crown to control Indigenous peoples as if they were little more than ligatures or joints.

5.1.2.1 Paradigmatic Conflict

Attempts to solve problems that arise between Canadians and Indigenous peoples often founder on the false presumptions produced by metaphors like the personified representation of the Crown. One prominent example was described by Maclaine and Baxendale in *This Land is Our Land.* Early in the Oka crisis, Sûreté du Québec police approached the people camping by the barricade at the entrance to the Pines where their ancestors were buried and demanded to meet their spokesman:

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[594] Eugene A. Forsey, *How Canadians Govern Themselves* 5th ed. (Ottawa : Canada, Library of Parliament, Public Information Office, 1980, 2003) 1 and back cover.

[595] Aside from the *Secession Reference*, the only discussions of democratic practice occurred in *Goodswimmer v. Canada* and *Corbiere. v. Canada.*

[596] Pleadings at trial concerned only the Batchewana Band, which was not represented. *Corbiere* at [32]. At the Supreme Court there were 5 interveners: Aboriginal Legal Services of Toronto Inc., Congress of Aboriginal Peoples, Lesser Slave Lake Indian Regional Council, Native Women's Association of Canada and United Native Nations Society of British Columbia. These organizations could not, in any sense, provide democratic representation of the people affected by the Corbiere decision, yet the Court accepted the idea that its judgment would affect "most if not all Indian bands in Canada". *Corbiere v. Canada* at [22].

[597] See *R. v. Horse* at [7]; *R. v. Horseman*; *R. v. Blais.*

> "You are talking to our spokesmen," answered one of the women. "You're talking to our women and children. There are children here. Don't point your guns at us".

The police fired tear gas at the people, then repeated their demand.

> "The women asked Johnny Cree to come up and speak to the police. He agreed....
>
> "Are you the leader?" asked the SQ officer.
>
> "No, I'm just a spokesperson," said Cree. "There is no leader. The people lead".[598]

Because of his cultural conditioning, this answer did not satisfy the police officer. The Mohawk's could not produce a "leader" for their people because they do not use this model for social order so there was none. The police, however, presumed both that there had to be a "head" and that the people should "obey". The stand-off escalated and lasted all summer, with traumatic consequences on both sides. The *Commission des droits de la personne du Québec* later found that the long-standing tensions with the people of Kanesatake were founded on a conflict between two legal orders.[599]

Fifteen years later, the fundamental social assumptions that feed such conflicts are still poorly understood and very much in evidence, especially in the hierarchically structured court system. The Mohawks are not the only ones to complain of misunderstanding at this basic level. Rupert Ross has reported that Ojibway women in Northern Ontario see the hierarchical structure imposed by the

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[598] Maclaine, Baxendale, *This Land is Our Land* at 14 – 17.

[599] Monique Rochon, Pierre LePage, *Oka-Kahnehsatke – Été 1990* (Rapport de la Commission des droits de la personne du Québec, Avril 1991) at 54 -56.

Indian Act as the source of physical and sexual abuse in their communities. As one woman stated:

> "..we see the charter as just one more step down the whiteman's road. We don't want to take that step. We want to try a different path instead".[600]

5.1.2.2 Paradigmatic Persistence

The subliminal power of pyramidal geometry should not be underestimated. Even though the *Constitution Act, 1867*, designates concomitant but separate jurisdictions for the federal and provincial legislatures, the courts have determined that when federal and provincial laws conflict, federal law should prevail according to "the doctrine of *paramouncy*"[601] Cabinet function has likewise drifted into a hierarchical format. As Senator Eugene Forsey has pointed out, the Prime Minister was described in the mid-twentieth century as being "the first among equals"; however, it is now considered that all elected representatives must bow to a decision made by the Prime

Minister.[602]

Despite democratic reforms that ostensibly favour government "by the people", the semantic positioning of "law" remains *above* the people in a way that is difficult to reconcile with notions of popular rule and human equality. Canadians are expected not only to abide by the law, but also to *obey* it[603] and, according to s.15 of the *Constitution Act, 1982,* they are only equal "before and *under* the law"

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[600] See eg. Ross, *Returning to the Teachings* at 55.

[601] See Hogg, *Constitutional Law of Canada* at ch.16.

[602] Forsey, *How Canadians Govern Themselves* at 39.

[603] Canada, *A Look at Canada* at 39.

(emphasis added).[604] This vertical schema is consistent with Winter's observation that, according to Anglo-American cultural metaphors, power is "up".[605] It is replicated in the seating arrangement of most court rooms where the judge or judges sit on a raised platform at one end of a room and the seating fans out past the lawyers and court reporters to accommodate the mass of the public who are usually separated from those involved in the proceedings by some sort of railing.[606] Court architects may even accentuate the effect by placing a high skylight over the judge and a low ceiling over the public in inverse relation to the need for air.[607]

Rupert Ross has learned through his association with the Anishinabe or Ojibway that this type of hierarchical social ordering violates the emphasis they place on interconnected relationships. Some judges in northern courts that deal almost exclusively with Indigenous people have accordingly modified seating arrangements to take a more egalitarian circular format.[608] For the Anishinabe, as for Canadians, behaviours like assault are unacceptable. However, instead of focusing on the guilt or innocence of an individual, they seek to heal the whole social matrix within which the dysfunction occurred. This requires the involvement of a broad range of people, creating a pattern of interaction that differs substantially from that found in standard Canadian courtrooms which focus on the guilt of a particular individual. As he described it, those sitting in a sentencing circle are considered equals:

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[604] *Constitution Act, 1982* s.15.

[605] Winter, "The "Power" Thing".

[606] At a trial I attended in France, the seating arrangement was similar but the jury sat behind the bench with the judge.

[607] See eg. the court house in Burnaby B.C.

[608] See eg. Ross, *Returning to the Teachings* at 7.

> "A question is asked, or an issue raised, and then, going around the circle, each person takes turns speaking to it. Everyone is free to speak as long as they wish, or not at all. The choice is theirs, and no one will interrupt or show impatience. No one speaks until it is their turn, and everyone concludes their turn by saying thank you to the circle for their chance to contribute."[609]

Ross cited an article by Philmer Bluehouse and James Zion concerning the Navaho Justice and Harmony Ceremony to explain the differences between Indigenous mediated justice and the adjudicated justice of the colonizing society:

> "Adjudication uses power and authority in a hierarchical system. A powerful figure [the judge] makes decisions for others on the basis of "facts" which are developed through disputed evidence, and by means of rules of "law" which are also contested by the parties...In sum, adjudication is a vertical system of justice which is based on hierarchies of power, and it uses force to implement decisions.
>
> In contrast, mediation is based on an essential equality of the disputants. If parties are not exactly equal or do not have equal bargaining power, mediation attempts to promote equality and balance as part of its process. It is a horizontal system which relies on equality, the preservation of continuing relationships, or the adjustment of disparate bargaining power between the parties."[610]

The use of mediating processes of one kind or another does not necessarily rule out all roles for the institutions of the colonizing society. The judiciary may, for example, have a role to play in ensuring that the cultural space required for egalitarian dispute resolution is provided.

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[609] *Ibid* at 140.

[610] See eg. *ibid* at 56 citing Bluehouse, Zion, "Hoozhooji Naat'aanii".

Mutually accepted methods of inter-cultural reconciliation are not likely to be appealed and none of the cases examined for the purposes of this study made any reference to accommodations of the kind Ross reported. Isolation from this aspect of legal practice leaves the Supreme Court at a disadvantage. Despite its well-meaning intention of reconciling Indigenous and no-indigenous interests, its reasoning demonstrated no awareness of some of the structural problems that bring Canadian institutions into conflict with at least some Indigenous ways of doing things. There was thus no reflection on the difficulties involved in reconciling circular models for social order with the hierarchical structuring represented by the Supreme Court of Canada.

5.1.3 Inter-Cultural Mismatch

As the Oka incident suggests, the subliminally pervasive presence of hierarchical patterning presents a significant challenge to egalitarian reconciliation with Indigenous peoples. The command model of legality that is implicit in hierarchical structure is, for example, completely incompatible with the Haudenosaunee social ideals in play at Oka - both in terms of wealth distribution and relational expectations.[611] Though a full inter-cultural analysis is beyond the

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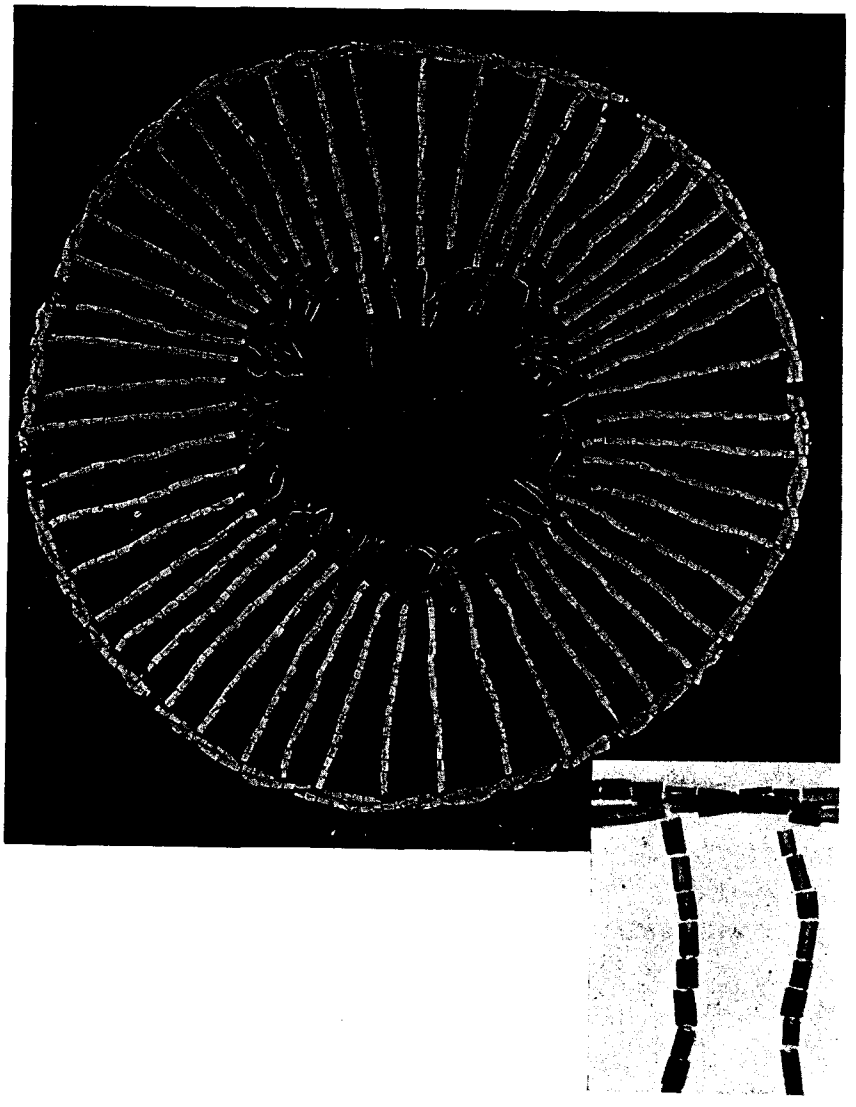
[611] See eg. Cadwallader Colden, *The Five Indian Nations Depending on the Province of New-York in America* (Ithaca: Cornell University Press, 1964 reprint of Pt.1 1727; Pt.2 1747); Alfred, *Peace, Power and Righteousness*; José Barreiro ed. *Indian Roots of American Democracy* (Ithaca, New York: Akwe:kon Press, Cornel University, 1992); Morrison, *Justice for Natives*; Foster, Campisi, Mithun, *Extending the Rafters;* Donna Goodleaf, *Entering the War Zone: A Mohawk Perspective on Resisting Invasions* (Penticton, British Columbia, Canada: Theytus Books,1995). Kahente Horn-Miller, *The Emergence of the Warrior Flag: A symbol of Indigenous unification and impetus to assertion of identity and rights commencing in the Kanionkehaka community of Kahnawake* (M.A. anthropology, Concordia University, 2003) [unpublished]; Beverley Jacobs, *International Law/The Great Law of Peace* (LL.M. thesis, College of Law, University of Saskatchewan, 2000) [unpublished]; Jemison, Schein, *Treaty of Canandaigua 1794*; Karoniaktajeh (Louis Hall) *Warrior's Hand Book* (Kahnawake Mohawk Territory: Rotiskenrakete - Kahnawake Men's Society, 1997 reprint); Kahntinetha Horn, *Traditional Culture and Community conception: An Analysis of the on-*

scope of this study, a brief review of Haudenosqaunee social geometry may help to clarify the dimensions of the problem represented by the Court's attempts to reconcile Indigenous concepts of legality with the assumptions that underlie Anglo-European tradition. How, for example, is the standard Canadian pyramidal model to be reconciled with the wampum of the Haudenosaunee Confederacy?

Fig. 3 Haudenosaunee Confederacy Wampum.[612]



going struggle between the Great Law and the Code of Handsome Lake in Kahnawake (M.A. Department of Law, Carleton University, Ottawa, 1997) [unpublished].

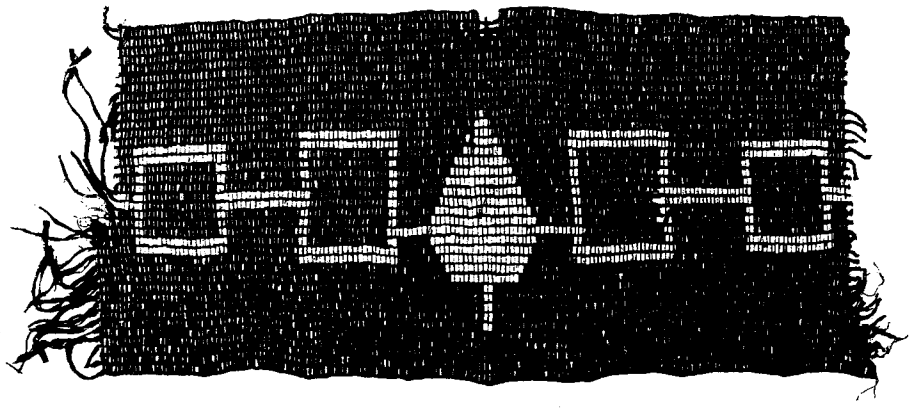
[612] Illustration from Diamond Jenness, *Indians of Canada* 7th ed. (University of Toronto Press reprint of Bulletin 65, Anthropological Series No. 15, National Museum of Canada, 1932) at 136.

5.1.3.1 Haudenosaunee Political Models

The idealized model of social order represented by the Haudenosaunee Confederacy Wampum (Fig. 3) is circular in format with strings of beads symbolizing the people whose opinions, linked together, represent the councilors.[613] Unlike the Foucault/Bentham panopticon (Fig. 2), there is no position of centralized control. The idea of central control is fundamentally incompatible with Haudenosaunee political philosophy, which sees autonomous responsibility as a basic ethical ideal and understands social order in terms of linkage and relationships.[614]

This principle of egalitarian linkage can also be seen in The Hayewahta (Hiawatha) wampum belt, which is popular today as a decorative motif on everything from bumper stickers to baby bonnets[615] It represents the confederation of the Mohawk, Oneida, Onondagua, Cayuga and Seneca nations using a model that excludes both hierarchy and the concept of a single "head of state" or Crown.

Fig. 4 Hiawatha Belt [616]



[613] See eg. Jacobs, *International Law/The Great Law of Peace.* at 9 -11.

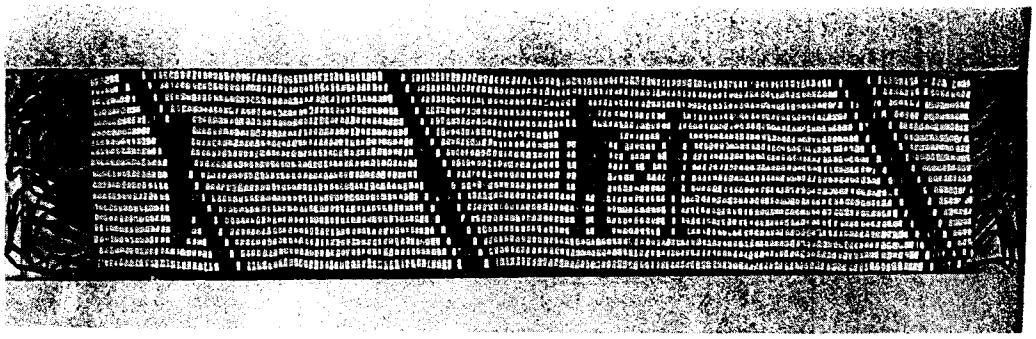
[614] See eg. Williams, *Linking Arms Together* at 64 and 54.

[615] See eg. Darren Bonaparte, *Creation and Confederation: The Living History of the Iroquois* (Ahkwesahsne Mohawk Territory: The Wampum Chronicles, 2006).

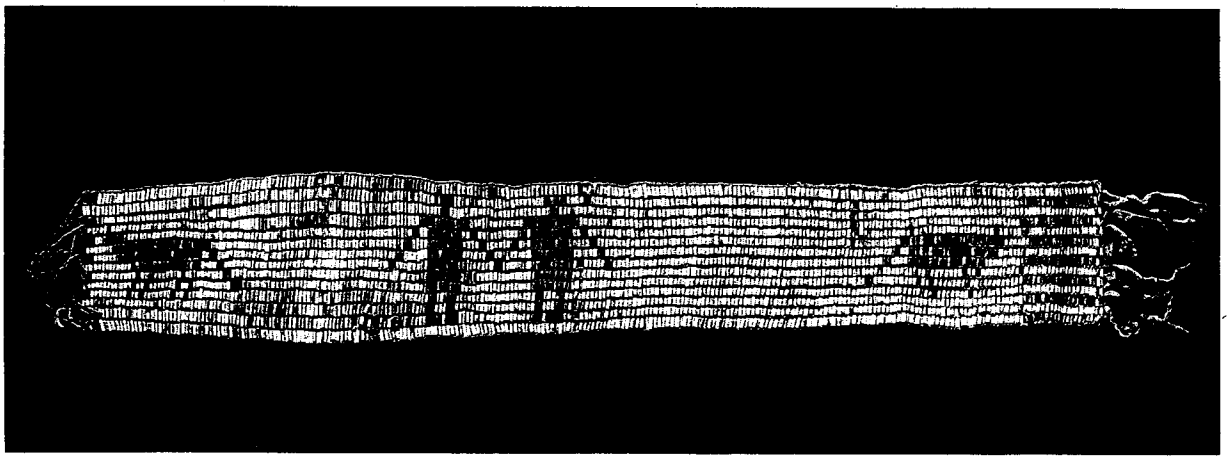
The same principle can be seen in the "Linking-hands" symbolism used in a variety of forms to depict treaties and accords.

Fig. 5 Linking-Hands Symbolism in Haudenosaunee Wampum

A) "Great Treaty Wampum Belt" ca. 1682 associated by Pennsylvania Quaker tradition with a treaty with the Delaware. [617]



B) Wolf belt of the St. Regis Mohawks said to represent a pact of peace and friendship with the French guarded by wolves.[618]

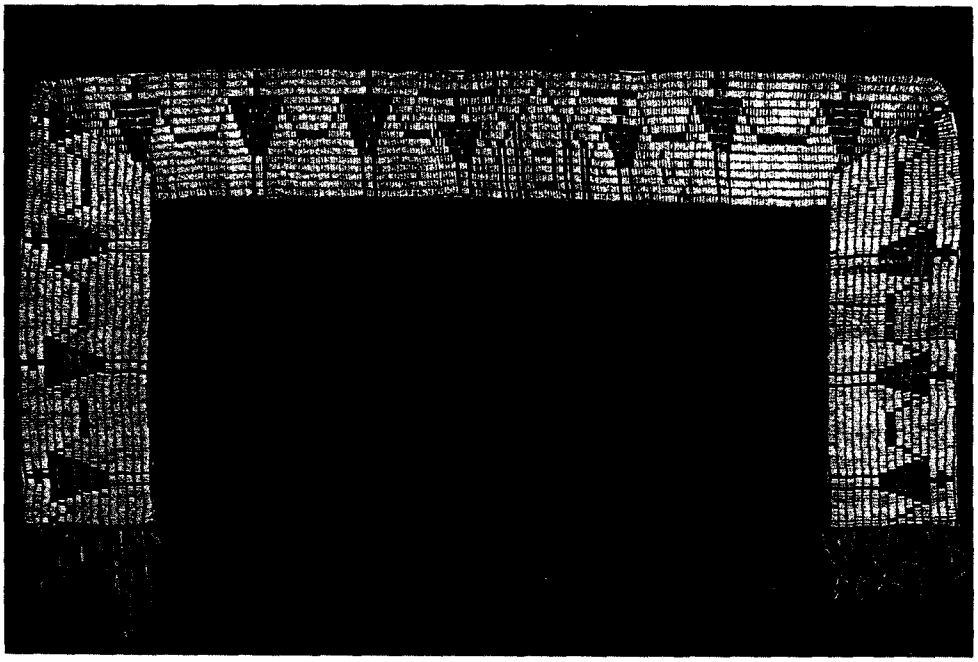


[616] Barbara Graymont, *The Iroquois*, (New York: Chelsea House Publishers, 1988) at 29.

[617] Francis Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton, 1984), 246.

[618] Parker, *The Constitution of the Five Nations* at 162; Graymont, *The Iroquois* at 72.

C) The Washington covenant belt, commissioned by the U.S. Congress for conveyance to affirm peace with the Six Nations in 1779 or 1789. [619]



The antiquity and persistence of the concept of linked autonomy can also be seen in the concept of the *Covenant Chain*. The English expression "chain" seems to have been a translation of this imagery of linked or clasped hands. According to Walters, an "iron chain" treaty had initially been negotiated with the Dutch.[620] Following their displacement by the English, the *Covenant Chain* was confirmed in 1644

[619] William Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman: University of Oklahoma Press, 1998), 237.

[620] This issue merits further research. According to Kanienkehaka oral tradition, the treaty was a hemp chain with the Dutch, an iron chain with the French, a silver chain with the British and a gold chain with the Unitged States. Oral communication, Kahntinetha Horn, 20 Jan. 2007.

through the Haudenosaunee gift of wampum and the reciprocal English gift of a silver chain.[621] During the ceremony, a Kanienkehaka orator reportedly addressed the Governor of New York concerning how the parties were now of "one head (mind)".[622] However, this phrasing is consistent with the metaphors used for the collective decision-making process described in the Haudenosaunee *Great Law of Peace.*[623] It does not in any sense suggest that the Haudenosaunee had been absorbed into the person of the Crown under the authority of a single head of state. This is evident in the way the wampum imagery depicts many heads linked through the intentional, voluntary and egalitarian gesture of holding hands.

By contrast, the metal chain that represented the same relationship for Europeans is an inanimate object used to stop ships from drifting away or even to prevent prisoners from escaping. Like the ligatures in Coke's metaphor, it ignores the mutual will and intelligence required to maintain human connections and negates the autonomy that is essential to Haudenosaunee political concepts. The conceptual shift that occurred in translation reflects a fundamental misunderstanding that can be charted in the historical record.[624] Its on-going influence on current reasoning at the Supreme Court of Canada was explicit in Binnie's minority judgment in *R. v. Mitchell.* In an attempt to accommodate an "updated concept of Crown Sovereignty" based on his reading of the "merged" or "shared" sovereignty

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[621] Walters, "Brightening the Covenant Chain" at 80-81.

[622] *Ibid* at 81. The Walters quote says "of one heart and one head(mind)" The idea of being of one heart is consistent with English imagery that sees the state or Crown as a single corporate body. However, it is reportedly inconsistent with Kanienkehaka understanding of the relationship which can only be "of one mind". Oral communication, Kahntinetha Horn Jan. 20, 2006.

[623] Parker, *The Constitution of the Five Nations*"; Karoniaktajeh, Kahn-Tineta Horn, *Gayanerekowa.*

[624] See eg. Walters, "Brightening the Covenant Chain" at 102 *et seq.* re Johnson's objections to the misinterpretation of agreements he had negotiated.

promoted by the final report of the *Royal Commission on Aboriginal Peoples*[625], Binnie suggested that "aboriginal and non-aboriginal Canadians *together* form a sovereign entity", proposing that:

> "...to return to the nautical metaphor of the "two-row" wampum, "merged" sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel's components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas."[626]

What he does not seem to have noticed is that his interpretation of the *Two Row Wampum* is simply a restatement of the single body metaphor used by Coke in *Calvin's Case*. It represents his own culture's concept of the Crown, imagining a European ship with wood, iron and canvas. Presumably it had only one rudder and one steering wheel. His misappropriation of Indigenous symbolism accordingly reduced Indigenous peoples to mind-less structural elements, fully assimilated under colonial command, ignoring the requirement under international law for prior informed consent when one polity is absorbed by another. [627]

5.1.3.2 Royal Commission on Aboriginal Peoples

The same structural problem troubles the proposals of the *Royal Commission on Aboriginal Peoples*. Like the *Haudenosaunee Confederacy Wampum*, the *Commission's* logo envisages circular, linked relations without any governing head. The *Commission* also used a circular format to conceptualize the principles of a renewed relationship between Canada and Aboriginal peoples:

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[625] *Mitchell v. M.N.R.* at [129].

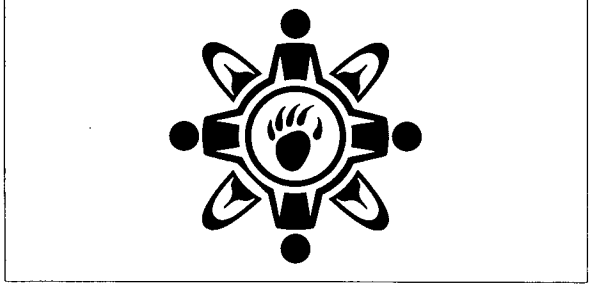
[626] *Mitchell v. M.N.R.* at [130].

[627] *Western Sahara*, I.C.J., 16 October, 1975 at 12, [57]

Commission's logo envisages circular, linked relations without any governing head. The *Commission* also used a circular format to conceptualize the principles of a renewed relationship between Canada and Aboriginal peoples:

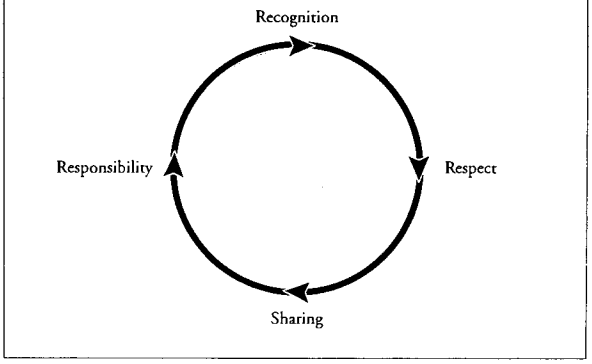
Fig. 6 Circular symbolism at the *Royal Commission on Aboriginal Peoples*[628]

FIGURE 16.1
The Commission's Logo



The logo was designed by Joseph Sagutch, an Ojibwa artist from Toronto, Ontario. It was chosen by the Commission from among 51 entries.

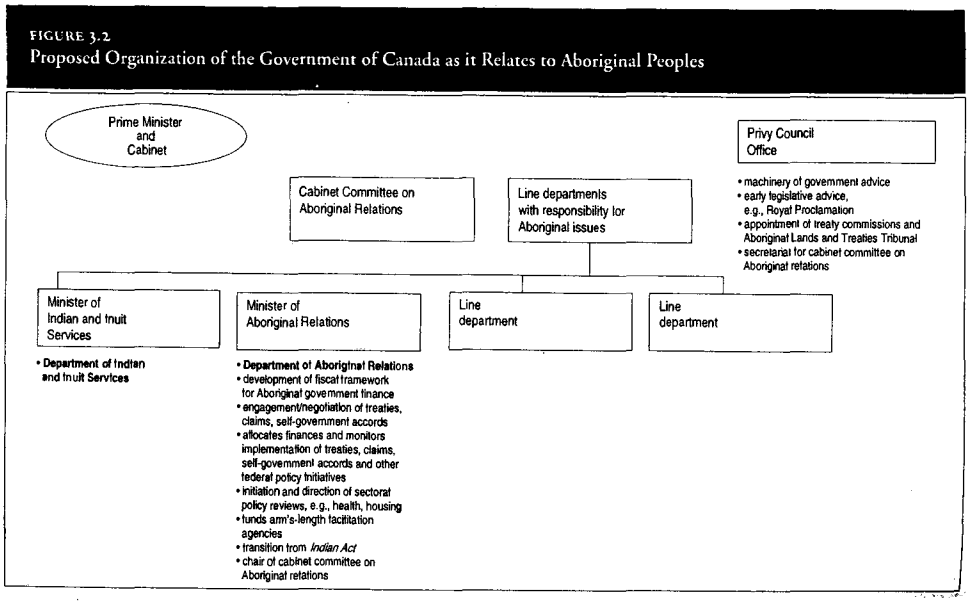
FIGURE 16.2
The Principles of a Renewed Relationship



Yet, when it came to considering organizational relations between Canada and Indigenous peoples, the *Commission* continued to envision a hierarchical model that ignored the distinct nationalities and preferences of the Indigenous peoples concerned.

[628] Erasmus, Dussault, (RCAP, 1996), *Looking forward, looking back* at 676-7.

Fig. 7 "Organization of the Government of Canada"[629]



We are accordingly faced with questions concerning how this culturally entrenched hierarchical model that presumes an organizational head with top-down control can be reconciled with circular Indigenous models that exclude positions of control such as that presented by Haudenosaunee traditionalists who object to the very possibility of this kind of command or "leadership" role.

5.1.3.3 Creative Co-Existence

Despite the structural incompatibility of Canadian concepts of social order and at least some Indigenous models for human society, these cultures have coexisted, and even co-operated, for several centuries. This may have been possible because, as Richard White has pointed out, cultural conventions do not have to be

[629] René Dussault and Georges Erasmus co-chairs, *Royal Commission on Aboriginal Peoples*, v.2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services. 1996) at 362.

"true" to be effective. In effect, as some legal pluralists suggest, different legal norms can be applied to the same factual situation.[630] Thus, people functioning in terms of incompatible ideals can coexist and co-operate in ways that allow each to pursue both shared and different goals.

Notwithstanding the impact of European diseases, it is now believed that European beliefs did not in themselves disrupt Indigenous customs so long as the members of the in-migrating culture remained too few in number to enforce their norms on the original inhabitants of the land.[631] Making an observation that supports this theory, the *Royal Commission on Aboriginal Peoples* situated "the imposition of a colonial relationship" in conjunction with the Indigenous displacement caused by the settler influx that followed the end of the War of 1812.[632] This corresponds with the findings of legal historians who have noted changes in policy with regard to Indigenous peoples during the last quarter of the eighteenth century.[633]

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[630] See eg. Sébastien Grammond, *Les Traités entre l'Etat canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1995) at 8; Sally E. Merry, "Legal Pluralism" (1988) 22 *L. & Soc. Rev.* 869 ; Sally Falk Moore " Law and Social Change : The Semi-Autonomous Social Field as an Appropriate Object of Study" 7 *L. & Soc. Rev.* 719; Andrée Lajoie, Roderick A. MacDonald, Richard Janda, Guy Rocher eds., *Théories et émegence du droit: pluralisme, surdétermination et effectivité* (Montréal: Les Éditions Thémis, 1998).

[631] Note especially French Algonquian relations in the Great Lakes region. White, *The Middle Ground*, ch.2.

[632] Erasmus, Dussault, (RCAP, 1996), *Restructuring the Relationship* at 362.

[633] See eg. Morin, *L'Usurpation de la souveraineté autochtone*; Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24.2 *Dalhousie Law Journal* 75.

5.1.4 British Constitutional Norms

Aside from the practical impossibility of exerting *de facto* control during the first centuries of colonial "plantation", certain English constitutional features may have facilitated early inter-cultural co-existence.

5.1.4.1 Minority Respect and the Rule of Law

The "rule of law", which is the second constitutional characteristic identified by Dicey, is frequently misunderstood. Since justice was seen as a prerogative of the Crown, many people today assume that British royal power was totalitarian. For example, a resource guide prepared by Heritage Canada claims that "In Europe, during the Age of Discovery...kings and queens directly ruled over their countries through royal prerogative, which gave him or her absolute power to rule".[634] In the case of England, as well as at least some other European and non-European states, this representation of monarchy is a misapprehension.[635] Indeed, as philosophers from the time of Mencius (372-289 B.C.) have pointed out, monarchical power depends ultimately on popular support because people will rebel or desert tyrannical regimes if they can find a better option.[636]

The fact that the power of the English monarchy was not customarily considered to be absolute is very well documented. Notwithstanding Cokes' metaphor in *Calvin's* Case, this understanding is reflected in the reciprocal conceptualization of the subject-monarch relationship as well as the myriad detail of historical acts and

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[634] Canadian Heritage/Patrimoine canadien, *Canadians and Their Government* http://canadianheritage.gc.ca/special/gouv-gov/section1 (7/28/05).

[635] Consider Scandinavia or see eg. Louis Assier-Andrieu, *Le peuple et la loi: Anthropologie historique des droits paysans en Catalogne française* (Paris: Librarie générale de droit et de jurisprudence, 1987).

social custom. William I did not rely on conquest to justify his rule. He persuaded people to accept his rule by claiming to be a defender of English law and the lawful heir of Edward the Confessor.[637] The localized conception of the "rule of law" applied at that time is reflected in the limitations placed on his royal successors by instruments like the *Magna Carta* of 1215 and the *Bill of Rights* of 1689.[638] The original British constitutional paradigm favoured an ethos of respect for difference.[639] As described in *Halsbury's Laws of England*, the constitution was customarily conceived in contractual terms.[640] This principle of constitutional reciprocity may well explain the relative longevity of British monarchy. Instead of subjecting the people to alien rules, the colonizers of Britain left a considerable amount of law making in the hands of the people. Despite all of the beheadings, executions for treason and wars that litter that country's history, diversity remained an institutional norm.

The Normans, for example recognized three distinct legal systems: the law of Wessex, the law of Mercia, and the Danelaw and within these juridical norms could vary from one manor to the next.[641] According to the *Magna Carta*, even Welshmen were protected, for their land and liberties could not be removed without legal

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[636] Li, *The Ageless Chinese ;* James Legge trans. *The Works of Mencius* in *The Chinese Classics* 2nd. ed. rev. vol.1 (Shanghai: Oxford University Press, 1935) at 125.

[637] The English Earl Godwin and his heir, Earl Harold, objected to the legitimacy of Edward the Confessor's choice. Hinde, *The Domesday Book* at 11.

[638] Baker, *An Introduction to English Legal History* at 11 and 21.

[639] Re deeply embedded cultural themes see eg. Parkhill, *Weaving Ourselves into the Land.*

[640] *Halsbury's Laws of England* (4th) vol.8(2) at 26.

[641] Baker, *An Introduction to English Legal History* at 12.

judgment of their peers according the laws of Wales.[642] When the colonization of North America began, Englishmen carried their varying laws with them. Kentish legal custom governed the Massachusetts Bay Company's charter, which conferred land: "as of our manor of Eastgreenwich, in the County of Kent, in free and common Socage, and not in Capite, or by knightes service".[643] However, other New England settlements were governed by different sets of laws, depending on the terms of Crown grants and whether or not they were established under royal charter.[644]

As confirmed by the *Covenant Chain* and *Two Row Wampum,* the principle of accommodating differing systems of legality was shared by Indigenous peoples, so in this regard, English and Haudenosaunee systems of law overlapped. The British even extended this principle to conquered territories. Thus the *Quebec Act, 1774*[645] restored French civil law following British conquest in the same year that the Court of King's Bench held in *Campbell v. Hall*[646] that once the king had instituted a legislature for a conquered colony, he could not impose laws or taxes through the use of prerogative power. As recently as 1998, the Supreme Court of Canada confirmed this basic constitutional principle in the *Reference re Secession of*

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[642] Albert Beebe White and Wallace Notestein trans. *Source Problems in English History* (New York: Harper and Brothers, 1915) at *Medieval Sourcebook:* Magna Carta 1215 http://www.fordham.edu/halsall/source/mcarta.html see s.56.

[643] Cronon, *Changes in the Land* at 71. *The Charter of Massachusetts Bay: 1629, The Avalon Project, Yale Law School,* http://www.yale.edu/lawweb/avalon (24/04/2007)

[644] *Ibid.*. This situation contributed to disputes such as that reviewed in *Johnson v. M'Intosh,* (1821) 21 U.S. 543, 8 Wheat 543. See also Norgren, *The Cherokee Cases.*

[645] *Quebec Act,* 1774 (U.K.) R.S.C. 1970, Appendix II, No. 2.

[646] *Campbell v. Hall* (1774).

Quebec with its affirmation of "constitutionalism and the rule of law; and respect for minorities."[647]

5.1.4.2 Conquest and Dominion

If respect for minorities is basic to the Anglo-Canadian constitutional system, some violations of this principle are of equally ancient standing. The use of force to accomplish acts of colonization and conquest is obviously incompatible with the principle of inter-cultural accommodation. Yet the rise and expansion of the British empire and of English culture in general was based on an ethos of dominion that included many contradictory elements. In terms of British constitutional norms, the American revolution could be seen as a reaffirmation of the principle of rule by the people as far as the colonists were concerned. However, when the rebels rejected subject status they also rejected obligations incurred under treaties Britain had made with Indigenous nations. This may be one of the reasons why Indigenous allies often sided with the British rather than the Americans when forced to choose sides at that time.

5.1.4.3 The Norman Paradigm

According to the *Royal Commission on Aboriginal Peoples*, the current Canadian quest for "Negotiation and Renewal" seeks to replace the ethos of "Displacement and Assimilation" that prevailed during the 19th and 20th centuries.[648] However, as Kuhn pointed out, paradigm change is often accompanied by a more

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[647] *Reference Re Secession of Quebec.*

[648] Erasmus, Dussault, (RCAP, 1996), *Looking forward, looking back*, 38.

rigorous application of old rules.[649] We might thus expect the reassertion British historical prototypes during the postcolonial quest to achieve the goal of human equality.

Table 4 Norman monarchy as experienced by Indigenous Britons[650]

	Colonial		**Postcolonial**	
Source of Laws	**Imposed**		**Self-determinedx**	
1	Foreign constitution	Yes	Own constitution	
2	Alien law-maker	Yes	Makes own law	Some
3	Foreign language	Yes	Own language	Some
4	Imposed interpretation	Yes	Participates/consents	Some
Social Order	**Hierarchical**		**Egalitarian**	
5	Dominant class	Yes	Social equality	
6	Decides for others	Yes	Autonomy	Some
7	Class specific laws	Yes	Equal laws	Some
8	Disparities of wealth	Yes	Provision for all	
9	Exploitive	Yes	Custodial	Some
Form of Law	**Enforced**		**Consensual**	
10	Orders/commands	Yes	Agreed Goals	
11	State initiated	Yes	Interactive	Some
12	Armed enforcement	Yes	Co-operative agenda	Some
13	Punishment	Yes	Mentoring/restitution	
Social discourse	**Exclusive**		**Inclusive**	
14	Dictated	Yes	Dialogue	Some
15	Specialized language	Yes	Shared language	Some
16	In camera processes	Yes	Public processes	Some
17	Dominant perspective	Yes	Plural perspectives	Some
Total		17		6?

Without conducting an in-depth study of Norman monarchy, it is apparent that the social model it provided, corresponds to all of the indicia of colonialism identified in Part I. The ordinary peasant was probably not a "free man" and hence not a beneficiary of the protections afforded by the Magna Carta. The Normans

[649] See eg. Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill L. J. 308; Thomas Isaac, "The Concept of the Crown and Aboriginal Self-Government" (1994) 14.2 *Canadian Journal of Native Studies*, 221; Walters, ""The "Golden Thread" of Continuity".

[650] The evaluation would differ for the landed gentry or barons who actually negotiated with monarchs and were able to assert their own constitutional customs, functioning in their own language.

conquered.[651] They installed a new ruling class. They ignored whatever Indigenous identities may have survived previous British colonizations using their own constitution and language to impose their own beliefs and priorities and keeping political power concentrated in the hands of a few land owners. These actions served as a precedent for the colonial process later advocated by Thomas More's *Utopia* and carried into effect in overseas practice. Yet, when the Norman administration is examined for indicia now associated with postcolonialism, respect for a substantial measure of cultural autonomy can still be found.

Then, as now, county assemblies and other regional institutions administered local affairs and the customs these employed varied significantly across the royal domains, which extended at one time from Scotland to Gascony in what is now France.[652] "Sovereignty" was not seen as an absolute power. As demonstrated by the limitations placed on King John by the *Magna Carta*, the "rule of law" ideally curbed the arbitrary exercise of power by subjecting all members of society, including the monarch, to particular social protocols.[653] Though the language of the invading monarchy was not the language of the people and the existence of villeinage attests to social stratification, land could not initially be enclosed for private ownership unless those who had been using it in common agreed. Trials were conducted in public. Juries participated in the interpretation of law and

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[651] The conquest was of the people and cannot be taken as leading to the aquisition of the land. Consider McNeil, *Common Law Aboriginal Title.*

[652] Britain's entry into the European Union is likely to inspire new prespectives on its historical development.

[653] There was no ready remedy for breaches of the law by the monarch so practice could violate the ideal. As a practical matter, strong monarchs like Elizabeth I heeded popular sentiment of those who were near though she also presided over colonial operations in Ireland and overseas that were

evidence, and the eventual development of parliament provided a venue for *regional* representation. It is thus evident that many elements of both colonial and postcolonial practice can be traced to the Norman source of Anglo-Canadian legal tradition.

5.1.5 Conclusions

The Court's attempt to reconcile Canadian and Indigenous concepts of legality faces a major hurdle when it comes to the concept of social order. Anglo-Canadian political geometry assumes a pyramidal shape, while at least some Indigenous concepts of social order are circular. Moreover, Canadian culture presumes that there must be a head of state who can direct the polity as a whole and this concept violates some of the most basic tenets of at least some Indigenous belief systems which place such great store in personal autonomy that their representatives on council are not authorized to make decisions without consulting the people. Despite these differences, many of the characteristics of postcolonial legality are deeply rooted in Anglo-Canadian tradition suggesting that stability may be maintained during the decolonization process through a reassertion or revitalization of some past practices and traditions.

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arguably genocidal in character. See eg. Allen, *The Invention of the White Race*; Williams, *The American Indian in Western Legal Thought*.

5.2 The Judicial Role

> "The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework" [654]
>
> *Reference Re Secession of Quebec*, 1998

According to the web site of the Supreme Court of Canada, the *British North America Act, 1867* "defined the basic elements" of the Canadian judicial system.[655] However, the *Act* itself provides no explanation of what the judicial role was expected to be, confining itself to declaring how judges are to be appointed, selected and paid.[656] In effect, Canada shares what Weir and Beetham consider to be one of Britain's major systemic deficiencies: its failure to define the function of the judiciary in relation to democratic criteria.[657]

The concept of what judges should do, like the concept of social order discussed in the previous section, is derived from the declaration in the act's preamble that defines Canada's constitution as being "similar in principle to that of the United Kingdom". Rand J., cited with approval by Lamer C.J. in the *Reference re Remuneration of Judges,* found that the preamble articulated "the political theory

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[654] *Reference Re Secession of Quebec*, [152].

[655] "Role of the Court: Creation and Beginnings of the Court" http://www.scc-csc.gc.ca/aboutcourt/role/index_e.asp (7/1/05). See the *Constitution Act, 1867* ss.96-101.

[656] *Constitution Act, 1867*, ss.96-101.

[657] Weir, Beetham, *Political Power and Democratic Control in Britain* at 443.

which the Act embodies".[658] But our understanding of this political theory depends, once again, on the "custom usage and convention" identified as a source of constitutional norms by Lederman[659] and implicit in the "historical lineage" relied upon by the Court in the *Reference Re Secession of Quebec*.[660] An understanding of what Canadian judicial function is, must accordingly begin by considering the historical evolution of the judiciary.

5.2.1 The Origin of the Judicial Role

Baker has suggested that the personalization of authority inherent in the judicial role is derived from the constitutional ascendancy of the king.[661] The *folcriht* of Anglo-Saxon custom had no judge. The court's ability to assume a supervisory role by compelling suitors to attend court depended on a capacity to exercise control. The judicial role is thus seen as a derivative of the royal power that made it possible to *enforce* judgments by *order*. This suggests that judicial function depends on the colonial character of the social order from which it was derived because it involves an ability to *impose* particular outcomes or interpretations of the law. However, as discussed in the previous section, judicial function emerged from a context that had the institutional capacity to accept some cultural diversity and some traditional sources of legality in ways that may be considered consistent with postcolonial norms.

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[658] *Remuneration Reference* at [82].

[659] Lederman, "Canadian Constitutional Amending Procedures" at 341.

[660] *Reference Re Secession of Quebec* at [49].

[661] Baker, *An Introduction to English Legal History* at 9.

At the time of Glanvill (justiciar of England, 1180-80), a great variety of local legal custom existed within the English monarch's jurisdictional sphere. The records of that era are not as comprehensive as those of more recent times, but we do know that, juries were employed to assess factual evidence in relation to local mores and, aside from the king's courts, England once had courts of lords as well as courts of the shires, hundreds and boroughs. The decisions of these courts were sometimes appealed to the king's court whose judges initially acted as deputies of the monarch in a society that had recourse to archaic procedures such as trial by ordeal and trial by battle. In company with the broad range of the sovereign's power, English legality also included ecclesiastical courts inspired in part by Roman law and in part by stories from the Christian *Bible* which includes accounts of the judicial practices of King Solomon.[662]

Whether appeals to the king and his court were inspired by the monarch's military capacity or by a populist rule of law principle, they had a unifying effect. By the time trans-Atlantic colonization began, the interpretations of the king's court were developing into "the law of the realm", common to all and known as the "common law".[663] Without conducting a specific study of any of the identifiable influences, it is obvious that judicial practice in England drew inspiration from precedents of many kinds. Some entwined with the Christian belief in a supreme, all powerful, all knowing God who would hold everyone accountable at death on "the Day of Judgement"[664] and some supported the "accommodation of difference" still

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[662] See eg. Baker, *ibid.*, 298; Monser, *The Cross-Reference Bible*, I Kings 3:16.

[663] See eg. Baker, *ibid.* at 9 and 12.

[664] Monser, *The Cross-Reference Bible* at 228.

espoused by the Supreme Court of Canada. Others manifested a lethal intolerance that saw people of one religious persuasion or another hanged, drawn, quartered and disemboweled according to law but on the flimsiest of evidence.[665]

5.2.1.1 Rejection of the Divine Right of Kings

During the 17th century the Stuart monarchs violated what are now seen as the traditional terms of the British constitutional bargain[666] by claiming absolute power under the doctrine of the "divine right of kings". Coke C.J. and a number of other judges were dismissed. Charles I even attempted to govern without parliament. This rejection of established institutions led to Cromwell's rebellion and, according to Baker, when the British monarchy was restored the capacity of the judiciary to act independently to protect the "rule of law" was considered sacrosanct. Following restoration of the monarchy, judges continued to be appointed by the king; however, the personal loyalty they owed under the oath of allegiance was now articulated as a duty to uphold the integrity of the *office* of the Crown and of English common law.[667] The traditional British constitutional bargain of loyalty in return for protection was thus reaffirmed and the judicial role was understood as an obligation to maintain a particular concept of social order that respects the "laws of the land".

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[665] See eg. H.B. Irving, *The Life of Judge Jeffreys* (London: Heinemann, 1898).

[666] See eg. Baker, *An Introduction to English Legal History* at 123-4; McHugh, "Tales of Constitutional Origin" at 69-70.

[667] Baker, *An Introduction to English Legal History* at 114.

5.2.1.2 Colonial Migration

There was, concomitantly, little concern with the laws of the lands that were being colonized. Like Thomas More's Utopians, British colonists carried their laws with them when they emigrated. Many were attracted to foreign shores because they were dissenters of one sort or another or because they were economic migrants seeking a place where they could realize their ideals or at least live decently.[668] Baylin has argued that the colonial movement was simply an extension of migratory patterns that were already well established in Britain.[669] Thus movement from town to town and from country to city rippled into an overseas Diaspora. Whatever motivated their departure, colonists were sometimes required to guarantee their loyalty to the Crown before they set sail. For example, in 1634 the *Mary and John,* destined for the Puritan colony of Massachusetts Bay, was detained at Southhampton until the passengers had sworn an oath of allegiance to the king.[670] Thus each colonist was personally bound to carry the authority of the English Crown abroad.

5.2.1.3 Indigenous Social Influence

Because of the Indigenous depopulation caused both by European diseases and by the genocidal character of some of the initial inter-cultural meetings, the first "New England" colonists often moved into a juridical vacuum. The original

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[668] See eg. George F. Willison, *Saints and Strangers* (New York: Time Reading Program special Edition, 1964 reprint of 1945).

[669] Bernard Baylin, *The Peopling of British North America: An Introduction* (New York: Alfred A. Knopf, 1986).

[670] Victoria Freeman, *Distant Relations: How My Ancestors Colonized North America* (Toronto : McClelland and Stewart, 2000) at 20.

inhabitants had either died or fled from areas of contact.[671] Yet those who met the Indigenous guardians of the continent now known as North America were fascinated by their egalitarian lifestyle. As Cadwallader Colden marveled in his 1727 *History of the Five Indian Nations*:

> "they never execute their Resolutions by Compulsion or Force upon any of their people".[672]

This made their social order fundamentally incompatible with that of the settlers whose institutions, including the judiciary, were frequently compulsory in character.[673]

Many early settlers witnessed Indigenous council meetings including Sir William Johnson (1715-1774), who became the first Superintendent of Indian Affairs for the northern British region in 1755. With the conquest of Quebec in 1760 his responsibilities extended to Canada. The son of Irish gentry, Johnson (1715-1774) formed a partnership with a young Mohawk woman, Konwatsi'tsaienni (1736-1796). Known in English as "Molly Brant", she bore him nine children and exercised considerable influence in Indigenous society.[674] The British continued to seek her support after Johnson's death, particularly in relation to their fear of

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[671] See eg. Jack Leustig, dir. *500 Nations* (U.S.: Warner Brothers, 1994); Willison, *Saints and Strangers.* The disappearence of the large settlement surrounded by cultivated fields visited by Cartier in 1535 by the time of Champlain's visit in 1603 remains controversial. James White ed. *Handbook of Indians of Canada*, (Ottawa :appendix to the Tenth Report of the Geographic Board of Canada, 1913), 200 at http://www2.marianopolic.edu/quebechistory/encyclopedia (8/12/2006); "Hochelega (village)"(sic) http://en.wikipedia.org (8/12/2006); Marcel Trudel ed, *Champlain* (Montreal: Fides, 1956 reprint of Champlain's memoirs of 1618).

[672] Colden, *The Five Indian Nations* at xx.

[673] Many works include reflections on this aspect of Indigenous societies. See eg. Leacock, *Myths of Male Dominance.*

[674] She was a Mohawk. As the older sister of Joseph Brant she probably also enhanced his career. Lois M. Huey and Bonnie Pulis, *Molly Brant: A Legacy of Her Own* (Youngstown, New York: Old Fort Niagara Association, 1997); Earle Thomas, *The Three Faces of Molly Brant* (Kingston, Ont.: Quarry Press, 1996).

further uprisings like Pontiac's "rebellion"[675] and Lady Simcoe, the wife of the British Lieutenant-Governor of Upper Canada (1791-1796), saw their union as an advantageous match.[676]

Though little known to the rest of the world, the philosophy of the Haudenosaunee[677] (also known as the "Iroquois" or "Five Nations") has arguably had a significant impact on modern political thought. Benjamin Franklin published an account of the 1744 Inter-Colonial Council at Lancaster including controversial speeches by Teoniahikarawe (Hendrick) and Canesatego who urged the British colonies to unite in friendship as the Haudenosaunee had done in the pre-contact era.[678] In 1754 Franklin drafted the Albany terms of union at a conference attended by 150 "Iroquois" and 23 representatives of the British colonies.[679] Though the constitution eventually adopted after the American secession differed in format, the United States Senate has formally acknowledged the "Iroquois" contribution to American political development.[680]

This influence, in turn, has had a significant international impact. The rejection of monarchy became a wide-spread movement and the United States Constitution eventually served as a model for the preamble to the *Charter of the*

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[675] Huey, Pulis and Thomas *ibid.*

[676] J. Ross Robertson ed., *The Diary of Mrs. John Graves Simcoe, wife of the first Lieutenant-Governor of the Province of Upper Canada, 1792-6* (Toronto: William Briggs, 1911) at 247.

[677] "Haudenosaunee" literally means "people of the long house" in metaphoric reference to traditional bark houses. The houses could be enlarged and the Haudenosaunee Confederacy contemplated the addition of other nations to the original five members. See eg. Foster, Campisi, Mithun, *Extending the Rafters*. "Haudenosaunee" is the Onondaga form of "Rotino'shon:ni" in Kanionkehaka (Mohawk). Oral communication, Kahntinetha Horn.

[678] Bruce E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Harvard: Harvard Common Press, 1982); Robert W. Venables, "The Founding Fathers: Choosing to be the Romans" in Barreiro, *Indian Roots of American Democracy*.

[679] See eg. letter to James Parker in Lemay ed. *Writings*, at 442.

United Nations.[681] Iroquoian models have also had an impact on the field of anthropology where Henry Lewis Morgan's *League of the Ho-de-no-sau-nee, Iroquois*[682] was the first full ethnography of an "Indian tribe".[683] His later work, *Ancient Society*, was used as a reference by Engels when he wrote *The Origin of the Family, Private Property and Society.*[684] Yet European society, both at home and in its colonies, retained many of its coercive and authoritarian characteristics.

5.2.1.4 Reaffirmation of the Judicial Role

Despite the American rejection of monarchy, Marshall C.J. of the United States Supreme Court, like Coke C.J. before him, asserted a strong, hierarchically structured role for the judiciary in the newly independent state. In 1803 he ruled in *Marbury v. Madison*[685] that the Supreme Court of the United States had jurisdiction to settle disputes concerning the distribution of legislative powers between federal and state governments and that constitutional law would prevail over statute law in case of conflict. Thus, British assumptions concerning both the judicial role and the character of social order were replicated in American constitutional practice. The hierarchical, coercive, adversarial concept of legality was retained, while the

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[680] S. Con. Res. 76, 2 Dec. 1987.

[681] Hans J. Kelsen, *The Law of the United Nations: A critical analysis of its fundamental problems* (New York: Frederick A. Praeger, 1950) at 6.

[682] Henry Lewis Morgan, *League of the Iroquois*, (Secaucus, N.J. 1962 reprint of Rochester: Sage and Brother, 1851).

[683] Leacock, *Myths of Male Dominance*, 90; Dean R. Snow, *The Iroquois* (Oxford: Blackwell, 1994) at 168-76.

[684] Leacock, *Myths of Male Dominance* at 90; Johansen, *Forgotten Founder* at, 122.

[685] *Marbury v. Madison* (1803) 5 U. S. (1 Cranch) 137.

American *Bill of Rights* replicated the protective function once asserted by Britain's theory of monarchy.[686]

5.2.2 Modern Concepts of the Judicial Role

Despite lacking formal constitutional definition, modern members of the Canadian public have no difficulty identifying judicial function. In stereotypical television caricatures, as well as in reality, the judge ritually reinforces hierarchical social notions, presiding over the courtroom from behind a high desk or "bench", often wearing a voluminous robe of medieval European design, and possibly a wig. He (or she) peers down at the plaintiff or their lawyer on one side of the room and the respondent or their lawyer on the other. If it is a criminal trial, there will be the accused in the prisoner's dock and the prosecutor. There may also be a jury to the side. Judges typically wear black robes and they may carry a wooden gavel to pound on the bench and cry out "Order in Court".

At the Supreme Court of Canada, judges have red robes for the most formal occasions and their behaviour is more sedate, though no less ceremonial. Yet the drama and paraphernalia alone do not define judicial function. As Chief Justice, Beverley McLachlin, sees it:

> "Courts offer a venue for the peaceful resolution of disputes, and for the reasoned and dispassionate discussion of our most pressing social issues."

[686] The first ten amendments to the U. S. constitution were passed by Congress Sept. 25. 1789 and ratified by ¾ of the states Dec. 15, 1791.

The judiciary, according to her explanation, guarantee that governments act in accord with the constitution. They give effect to Canadian law and meaning to civic rights and duties, demonstrating Canada's commitment to the key values of:

> "democratic governance, respect for fundamental rights and the rule of law, and accommodation of difference".[687]

According to John D. Richard, the Chief Justice of Canada's Federal Court of Appeal, the presence in Canada of an independent and readily accessible judiciary is a means of ensuring that government decisions are transparent and free from interference.[688]

Despite the profound twentieth-century reorientation in the concept of legality outlined in the introduction to this work, none of the post 1982 cases reviewed included any reflections on the ways this change may be affecting judicial practice. Several judges did, however, make statements alluding to their understanding of the Court's role.

5.2.2.1 Legislative Supervision

The *Firearms Reference*, like McLachlin C.J.'s description on the Supreme Court web site, states that one of the Court's tasks is to supervise legislation to ensure that it does not violate the Constitution.[689] However, the Court's role is passive. Courts do not initiate investigations into the nature and integrity of governmental institutions or their interpretations of the law. They address only the

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[687] Beverley McLachlin, "Welcome", Supreme Court of Canada's Home Page, http://www.scc-csc.gc.ca/Welcome/index_e.asp (7/1/05).

[688] John D. Richard, "Federal Court of Appeal: Welcome" http://www.fca-caf.gc.ca/index_e.shtml (7/29/05)

questions that happen to be raised by citizens, with or without government office, who choose to invoke the judicial system. As Lamer C.J. stated in the *Remuneration Reference*, the judiciary remain very much prisoners of the questions placed before them.[690] The Supreme Court is only called into play when decisions made by previous courts are appealed or when specific questions are referred to it by the Privy Council. Moreover, the questions it addresses are defined narrowly in terms of the aspirations of the parties and the legal issues invoked by the specific factual circumstances at hand.

This limitation was of concern in the second *Marshall* decision. The case had been brought to court because a Mi'kmaq man protested the charge that he had violated Canadian law. The Court's finding that the defendant had a treaty right to acquire enough trade goods to sustain a "moderate livelihood" and that Crown officials had not met the requirements for infringing this right seemed to have broad consequences for fisheries management. Yet, when the West Nova Fishermen's Coalition requested a re-hearing so the scope of Canadian regulatory powers could be considered, the Court refused saying the question was too broad. It insisted that its jurisdiction was:

> "...limited to the issues necessary to dispose of the appellant's guilt or innocence."[691]

It thus refused to become a venue for in depth discussion. This would appear to violate Indigenous legal norms such as those of the Anishinabe described by Rupert

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[689] *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at [35].

[690] *Remuneration Reference* at [82].

[691] *Marshall II* at [11].

Ross.[692] If there had been Mi'kmaq representation in the legislatures concerned with fisheries regulation or if there had been an on-going tradition of international negotiation consistent with the 18th century treaties that served as the Court's source of legality, the *Marshall* decisions might have served as an invitation for further negotiations or legislative discussions. However, because of an institutional or customary deficit in this regard the judgements seem to have opened the door to a contentious episode in Canadian-Mi'kmaq relations that saw Canadian fisheries officers ramming the fishing boats of those Mi'kmaq who did not accept the terms Canadian officials offered.[693]

In the Court's view, which seems to replicate traditional British respect for popular legality, responsibility for negotiating social order remains predominantly with the people. Thus:

> "The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case."[694]

In practice, however, the disputes generated by the *Marshall* decisions never reached the Supreme Court, if they reached any court at all. The material available for this study accordingly provides no means of determining whether or not a mutually satisfactory fisheries management regime was eventually agreed upon. The spectacle provided by Department of Fisheries and Oceans aggression leaves

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[692] Ross, *Return to the Teachings*.

[693] Coates, Ken, *The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000) at 179-80; "Mi'kmaq say DFO rammed boat" CBC News, 19 Aug. 2000 http://www.cbc.ca

[694] *Marshall II* at [43].

reason to doubt, especially given the huge economic imbalance between Canada and the Mi'kmaq.[695]

Even if the Mi'kmaq had the economic means to challenge the Department of Fisheries and Oceans and even if they felt that the Canadian court system was an appropriate venue, it must be remembered that the judges of the Supreme Court only grant leave to about 80 of the 550 to 650 applications for review made each year.[696] The decision to grant leave is made by a panel of three judges based on their assessment of the public importance of the legal issues raised. It would be impossible for the Court to hear 650 cases a year, so time constraints must be a factor. However, the situation allows the members of the Court to act as gate-keepers. It also suggests an institutional deficiency that is leaving many social issues without a venue where they can be resolved or even aired.

Since this study did not examine the cases for which leave was denied, it is impossible to determine whether or not the Court was able to avoid the introduction of bias through this exercise of judicial discretion. The Court considers that its supervisory role only comes into effect when there is a "live controversy"[697] or administrative disagreement. This means there must be an actual dispute with government officials before a citizen can question administrative conduct. In other words, the tenor of debate is oppositional rather than constructive and the Court only uses its expertise to apply a legal analysis to a situation under conditions of

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[695] When I visited Eskinopetij towards the end of the "Burnt Church" fishing dispute, the people had no independent legal advice in negotiations with Canadian officials. Housing was provided by the band council, but the cash income of all those I met was less than $200 per month. Most appeared to be malnourished.

[696] Supreme Court of Canada's web-site http://www/scc-csc.gc.ca (7/1/05).

[697] *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342.

stress, leaving the tenor of day to day conduct to Canadian officials and citizens themselves.

5.2.2.2 Procedural Justice

Despite these limitations on access to a Supreme Court hearing, access to the judicial system itself is considered a right. In *Canadian Pacific Ltd. v. Matsqui Indian Band*, Lamer C.J. explained that:

> "a fundamental rule of the common law relating to administrative procedures...is that everyone has a right to a hearing where matters are involved affecting that person's liberty or property rights. This rule is derived from the principles of natural justice, which are fundamental principles of administrative law that basically ensure (i) a person's right to a hearing and (ii) that the person is heard by an impartial tribunal."[698]

In *Paul v. British Columbia (Forest Appeals Commission)* Bastarache J., for a unanimous Court, identified the difference between an administrative board and a board that performs a judicial function by referring to the procedures used saying:

> "... the marketing board almost always conducted hearings with witnesses, sworn testimony and oral submissions; provided the opportunity for parties to be represented by counsel; and gave reasons for its decisions. The Court of Appeal held that the statutory appeal to the Marketing Board was a full hearing on the merits... The Marketing Board was not a generalist court, but a specialized tribunal expected to use its expertise."[699]

The judicial role has thus been defined in terms of concrete procedures rather than in terms of a theoretical function. Similarly, by focusing on solving actual problems,

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[698] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; 1995 CanLII 145 (S.C.C.) at [74].

[699] *Paul v. British Columbia* at [44]

the Court participated in a process that defined both its function and the law by establishing precedents that serve as prototypes for subsequent court decisions as well as private and administrative actions.

5.2.2.3 Source of Legal Knowledge

The detailed explanations included in the judgments produced by the members of the Supreme Court attest to the store they place in their own acquired expertise concerning Canadian law. The singular nature of day to day judicial experience, reviewing voluminous pleadings, authorities and arguments formulated by people with conflicting perspectives, seems to confirm McLachlin C.J.'s assertion in *Haida Nation* that:

> "The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. [700]

In fulfilling this supportive function, the Court purports to follow established professional norms. As stated by Lord Blackburn over a century ago in reasoning that is still considered valid:

> "... it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the court injudicious..." [701]

In the *Reference Re Secession of Quebec,* which dealt with the question of whether the province of Quebec could legally separate from Canada, the Court was at pains

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[700] *Haida Nation v. British Columbia* at [37] (McLachlin C.J.).

to define its "proper role within the constitutional framework of our democratic form of government" even though it is well known that the inclusion of Quebec in the British empire was not accomplished by democratic means. The Court focused on more recent events, insisting that:

> "The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. ...The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession."[702]

It did not reject, or even address, the history of English invasion and conquest. Despite its claim to rely on history, it turned a blind eye to this aspect of Canada's ambiguous legal heritage, limiting itself to "filling in the gaps in the express terms of the constitutional text". It justified its focus on the constitutional acts passed by Britain specifically for Canada on the grounds that:

> "A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."[703]

Though the Court settled on a requirement for the support of a clear majority on a clear question before secession can be legally effected, it completely ignored the demise of the British imperial paradigm through which Canada was founded, sidestepping questions that might have been asked concerning the implementation of the *Constitution Act, 1982* by Britain's parliament rather than through a vote on a clear question by a majority of the Canadian people.

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[701] *River Wear Commissioners v. Adamson and Others*, [1874-80] All E.R. 1 H.L. at 12 cited in *Goodswimmer v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 1 F.C. 389 {18}, appeal considered moot, *Goodswimmer v. Canada.*

5.2.2.4 Clarification of the Legal Framework

The perception that "gaps" exist is, as Kuhn explained, highly dependent on the paradigm chosen or the frames of reference applied. This is why the concept of social order discussed in the previous section is important. The British belief that there must be a head of state has led to mechanisms like the *Indian Act* that identify "chiefs" and other components that are necessary for "government" according to their set of cultural assumptions. Concomitantly, Weir and Beetham's classification of Britain's failure to provide a democratic definition of the judiciary as a "deficiency" is an anachronism.[704] The perception that something is "missing" could not have come into being until democratic government became the expected norm. It depends entirely on the *ex post facto* adoption of this governmental paradigm and could hardly have been considered a deficiency in the feudal age during which the judicial role was established because modern theories of democratic government were not yet on the horizon.

The *Secession Reference* reasoning likewise invoked conceptual frameworks that were both anachronistic and selectively applied. By phrasing the issue of secession as a matter that was not provided for by the *British North America Act* or the *Constitution Act, 1982*, the Court was able to ignore aspects of Canada's colonial heritage that are troubling by modern standards. These include the fact that these laws were passed by a British parliament that did not represent the Canadian people and that Quebec was incorporated by conquest in direct violation of the principle of democracy espoused by the Court. Nevertheless, as suggested by

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[702] *Reference Re Secession of Quebec* at [26-7].

[703] *Ibid* at [53].

Lamer C.J.'s sense of imprisonment in the *Remuneration Reference*, the Court may have felt pushed into this position both by the character of the questions and pleadings before it and by the weight of behavioural precedent.

It is the requirement to mediate such profound changes in values and social norms that makes the judicial role so complex and challenging.[705] As McLachlin J. suggested in her dissent in *Opetchesat*, the Court generally considers that the intention of Parliament is to be taken from the "plain meaning" of the words of a statute unless there is ambiguity. To this end, she found that the "modern rule" is that:

> "courts must interpret legislation "in its total context, having regard to the purpose of the legislation, the consequences of its proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids".[706]

However, she acknowledged that:

> "When read in the context of the purpose of the Act, what seems at first blush to be a "plain meaning" may be revealed to be not so plain after all. Ambiguities may appear, bringing into play subsidiary rules..." [707]

Given the Court's assertion in the *Secession Reference* that Canada's constitution was founded on "an historical lineage stretching back through the ages"[708], it seems that it has yet to develop a theory concerning the management of paradigm change.

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[704] Weir, Beetham, *Political Power and Democratic Control in Britain* at 443.

[705] See eg. Andrée Lajoie, *Jugements de valeurs : le discours judiciare et le droit*, coll. « Les Voies du Droit » (Paris : Les Presses Universitaires de France, 1997).

[706] *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at [75] citing *Drieger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at 131.

[707] *Ibid.* at [80].

[708] *Reference re Succession of Quebec*, S.C.C. [1998] 2 S.C.R.217 para 49.

5.2.2.5 Expert Reasoning

Nonetheless, one of the ways in which the Court may assist the parties is by providing a model for "expert reasoning" as identified by Craig Nelson and discussed in s.2.2.5 above.[709] For example, the *Secession Reference* drew on social values to inform established professional norms. Though obviously influenced by their own contemporary experience of democratic institutions, the members of the Court sought these values in "unwritten constitutional principles" derived from historical practice.[710] With the contentious issue of Quebec separation before it, their reasoning reiterated that:

> "...it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so."[711]

It thus affirmed a consensual standard even though relying on the history of a regime imposed by conquest.

5.2.2.6 Constitutional Protection

In the *Secession Reference,* the Court attempted to apply the values it identified in a way that accorded with postcolonial deference to popularly defined legality. Again, this vision of judicial function is in conformity with the English ideal asserted by Coke C.J. in his remonstrances with the Stuarts. According to this view, the Court serves as a guardian for a system in which the state protects a legality formulated by the people through a variety of procedures. The *Secession*

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[709] Nelson, "On the Persistence of Unicorns" at 177.

[710] *Reference Re Secession of Quebec* at [48-53].

[711] *Ibid.* at [101].

Reference reasoning thus emphasized the participation of Quebec in Canadian institutions and the constitutional protection provided for Quebec culture, stating:

> "The principle of federalism recognizes the diversity of the component parts of confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction".[712]

And:

> "The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself."[713]

As the cases examined for this study attest, this principle has not been universally applied in Canada. Indigenous peoples do not share the same institutional protection as Quebec. The Canadian Constitution as traditionally interpreted does not recognize any sphere of autonomy in which Indigenous peoples can develop their societies as they see fit. Nevertheless, the Court continued to see itself as a guarantor of a concept of social order that protects a variety of social preferences. As explained by McLachlin C.J. in *Haida Nation*:

> "This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common

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[712] *Ibid.* at [58].

[713] *Ibid.* at [59].

> law, will be called on to fill in the details of the duty to consult and accommodate."[714]

According to Kuhn, people attempt to integrate anomalous information with the prevailing paradigm. This opening to the right of Indigenous Nations to at least be consulted must thus be considered in conjunction with other statements made by the Court concerning legal processes. In *Paul v. British Columbia*, Bastarache J. asserted that:

> "By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law."[715]

Considerable expertise is required for this task because popular legality finds expression through a variety of legislatures importing a wide range of interpretative possibilities that must be coordinated. Thus:

> "...within the unitary court system of Canada, provincially constituted inferior and superior courts apply federal as well as provincial laws."[716]

The cognitive modelling provided by the Supreme Court is important because:

> "...boards must take into account all applicable legal rules, both federal and provincial."[717]

In *Osoyoos Indian Band v. Oliver*, Iacobucci J. explained that when the Court embarks on this process, it assumes that the Crown has acted *intra vires* or within its legal mandate even if left unchallenged by the party affected. Thus:

> "...this Court is not required... to give legal effect to an unauthorized act of the state"[718]

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[714] *Haida Nation* at [11] (McLachlin C.J.). Note the colonial tinge to this statement that effectively presumed the Court's capacity to impose a conceptual framework.

[715] *Paul v. British Columbia* at [22].

[716] *Ibid.* at [21]

[717] *Ibid* at, [23]

Within the context of that particular case that did not question the authority of the Canadian state, this stance would seem to support postcolonial legality through its refusal to ratify dictatorial power. There is, however, considerable ambiguity in the way this statement seems to situate the source of legality in the Court rather than in a representative legislature and in the Court's overall reluctance to recognize any autonomous jurisdictional sphere for any Indigenous nation.

5.2.2.7 Adjudication not Legislation

In keeping with the deference accorded to the role of elected legislatures, the Court is expected to exercise its capacity to "fill in" legal lacunae in a way that does not overstep its adjudicative role. Though the act of judging is inherently colonial, this self-limitation is postcolonial. As seen by Bastarche for the Court in *R. v. Paul*:

> "an adjudicator does not create, amend or extinguish aboriginal rights."[719]

Yet the conflict between the act of judging and the requirement for respect of an externally defined category is so difficult to manage that even a Court of Appeal may be accused of "erring" in this regard.[720] The presumption that the legislative interpretations settled upon by the judges of the Supreme Court are inherently more correct than anyone else's violates postcolonial norms. Since postcolonial legality is in the process of emerging, solutions for possible impasses have yet to be agreed upon. However, postcolonial ideals would seem to be better served if contentious matters were referred to the parties, affording an opportunity to discuss the concerns

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[718] *Osoyoos Indian Band v. Oliver* at [69].

[719] *Paul v. v. British Columbia* at [29]

[720] *Ibid.* at [6]

that remain following judicial clarification so they can reach their own agreement regarding the meaning and application of the rights involved.

5.2.2.8 Legal, not Factual, Authority

Except when considering a reference, the Supreme Court of Canada functions as the final court of appeal on questions of law related to issues that have already been considered by several "lower" courts or tribunals. As explained by McLachlin C.J. in *Mitchell*:

> "Courts render decisions on the basis of evidence."[721]

Most judgments included in this study accordingly began by methodically setting out previous findings of fact and law before explaining the approach that the Court had decided to take concerning whatever issues motivated the appeal.

Several of the judgments alluded to the professional convention that differentiates the fact finding function of the court of first instance from the law finding function of appeal courts. In *Haida Nation,* McLachlin described the relationship between "facts" and "law" as follows:

> "The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However it is typically premised on an assessment of the facts".[722]

As stated in *Mitchell v. M.N.R.*, the process of interpreting and weighing factual evidence

> "is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented."[723]

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[721] *Mitchell v. M.N.R.* at [11].

[722] *Haida Nation v. British Columbia* at [61].

[723] *Mitchell v. M.N.R.* at [36].

As might be expected when the paradigmatic variability identified by Kuhn is taken into account, there are no absolute principles governing the assessment of evidence by the trial judge.[724] Indeed, the determination of which facts are relevant depends on which legal framework is applied. It may also be difficult to distinguish issues of fact from issues of law[725] and because of this, the parameters of the Supreme Court's jurisdiction are sometimes explicitly or implicitly defined in the hazy realm of social context. Thus, in *Gladue*, Cory and Iacobucci JJ. found that determination of a fit sentence required "taking the circumstances of the offence, the offender, the victim and the community" into account.[726]

Additional facts can radically change the assessment of any situation, and in O*soyoos*, Iacobucci J. reflected on the practical constraints that limit a court's fact-finding function saying :

> "...we must determine the rights of the parties as best we can using the evidence at hand."[727]

When confronted with the controversy that frequently surrounds the interpretation of historical events and the way in which their character can alter drastically as new evidence comes to light, Binnie J. protested in *Marshall* that:

> "The reality, of course, is that the courts are handed disputes that require for their resolution findings of certain historical facts. The litigating parties cannot wait for the possibility of a stable academic consensus. The judicial process must do the best it can."[728]

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[724] *Ibid.*

[725] *R. v. Marshall/Bernard* at [28].

[726] *R. v. Gladue*, [1999] 1 S.C.R. 688 at [75].

[727] *Osoyoos Indian Band v.Oliver,* [2001] 3 S.C.R. 746 at [40].

[728] *R. v. Marshall* [1999] 3 S.C.R. 456 (*Marshall I*) at [36-37].

Because paradigmatic change may alter the importance of particular information or even the ability to perceive facts, the value of precedential judgements may change over time. For example, the determination in *Edwards v. A.G. Canada*[729] that women were "persons" has percolated slowly through Canadian legality resulting in a profound reorientation in the legal status of women. This has involved the rejection of many established precedents as attention refocused on facts that were once ignored. One of the functions of the judiciary, particularly at the Supreme Court level, is to navigate the hazy boundaries between "law" and "fact" that changes of this nature entail.

5.2.2.9 Defending Social Values

The most comprehensive discussion of the values that affect Supreme Court of Canada decision making was found in the *Secession Reference*, where the Court stated:

> "In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities."[730]

The members of the Court are thus conscious of the fact that they rely on fundamental social concepts to shape their reasoning. L'Heureux-Dubé J., for example, drew on this methodology in her minority reasons in *Corbiere*, which were supported by Gonthier, Iacobucci and Binnie JJ., when she stated:

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[729] *Edwards v. A.G. Canada.*

[730] *Reference Re Secession of Quebec* at [32].

> "The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion.".

In this context, concerned with voting rights for band members, the judges proffered what sounds like a distinctly postcolonial perspective, L'Heureux-Dubé J., relied on an article by Hogg and Bushell to characterize judicial review as a "dialogue" between courts and legislatures saying:

> "The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation.[731]

They even went so far as to suggest that one of the Court's functions is "to ensure substantive equality is present in Canadian society."[732] because

> "s.15(1) mandates that government decisions must be made in a manner that respects the dignity of all of them, recognizing all as equally capable, deserving, and worthy of recognition."[733]

Yet, as already pointed out in s.5.1.2 above, *Corbiere* altered voting rights for all Band Council elections in Canada using a process in which the majority of the people affected had no representation what so ever.[734] In other words, the effect of the Court's own reasoning contradicted its assertions of egalitarian democratic rights.

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[731] *Corbiere v. Canada* at [116] citing P.W. Hogg and A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75.

[732] *Ibid* at [94].

[733] *Ibid* at [98].

[734] Pleadings at trial concerned only the Batchewana Band, which was not represented. *Corbiere v. Canada* at [32]. At the Supreme Court there were 5 interveners: Aboriginal Legal Services of Toronto Inc., Congress of Aboriginal Peoples, Lesser Slave Lake Indian Regional Council, Native Women's Association of Canada and United Native Nations Society of British Columbia. These organizations could not, in any sense, provide democratic representation of the people affected by the

5.2.2.10 Independent and Impartial Assessment

Despite the Court's conscious reliance on values of one sort or another, it displayed little consciousness of the ways in which its own cultural values might differ from those of Indigenous peoples. Impartiality was accordingly considered "the fundamental qualification of a judge and the core attribute of the judiciary".[735] As understood by the Court in the second *Wewaykum* case:

> "...public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so....The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind."[736]

Though the Chief Justice is ritually distinguished from the other members of the Court, and though the names of the judges are conventionally listed in order of seniority of appointment, each is expected to come to an independent decision concerning the case at hand. In *Wewaykum II*, the Court described its decision making process as follows:

> "The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. ...Each member of the supreme court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the panel before the hearing. After the case is heard, each judge on the panel expresses his or her opinion independently. Discussions take place on who will prepare draft reasons and whether for the majority or the minority. Draft reasons are then

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Corbiere decision, yet the Court accepted the idea that its judgment would affect "most if not all Indian bands in Canada". *Corbiere v. Canada* at [22].

[735] *Wewaykum Indian Band v. Canada* at [59] citing Canadian Judicial Council, *Ethical Principles for Judges* (1998) at 30.

[736] *Ibid.* at [57-8].

> prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that the reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all."[737]

Because of this, the Court found that a "reasonable person" would not conclude that Binnie J.'s minimal involvement as counsel for the Crown in the early stages of the case impugned the judgment he wrote for the initial *Wewaykum* case after it reached the Supreme Court. This raises the question of what seems "reasonable" to the members of the Court and, as Kuhn's theory suggests this will depend on which paradigms have become entrenched through their previous personal experience.

5.2.3 Conclusions

The origins and structure of the judicial role make it inherently colonial in character. It was derived from the prerogative power originally acquired by conquest and, as a social mechanism, it permits a privileged few to impose their interpretations of legality on the rest of Canadian society. However, the Supreme Court views its function in a way that enhances postcolonial elements that may be traced back to Anglo-Norman custom. When asked to define its role, it has relied consistently on formal popular processes as the source of legality. It has also defended the ideal of human equality and left the negotiation of day-to-day social relations squarely in the hands of the people, declining to intervene except when an unresolved dispute was presented for its consideration. The members of the Court have made a conscious attempt to apply an expert model of reasoning,

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[737] *Ibid* at, [92].

acknowledging the existence of differing analytical approaches and drawing on shared social values to make decisions and mediate disagreements concerning the interpretation of popularly defined law. Since an absence of institutional regulation would permit the strong to impose their will on the weak with impunity, the Court's concept of its role seems to be based on postcolonial values even though the effect of its practice may be otherwise.

5.3 The Judges

> "Experience, rather than logic, governs the development of the law"
>
> McEachern C.J. (B.C.C.A.)
> in *A(C) v. Critchley* (1998) [738] re *Guerin*[739]

As Kuhn's theory and subsequent linguistic research suggests, we are conditioned by experience to structure our thoughts using culturally defined categories and paradigms. The backgrounds of the judges who sit on the Court can thus be expected to affect their reasoning. This has been acknowledged to some extent by the *Supreme Court Act* and by the constitutional customs that govern the choice of who sits on the Court. According to the *Act,* the nine judges are appointed by the Governor in Council. The fact that there is some uncertainty concerning the relative roles played in the selection process by the Prime Minister and the Minister of Justice reflects the command model of legality implicit in Canada's colonial evolution. However, the ancient constitutional principle of popular representation has not been forgotten. Each appointee must have been a judge of a superior provincial court or have at least ten years standing at a provincial bar and at least three judges must be appointed from Quebec.[740] In order to maintain regional

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[738] *A(C) v. Critchley* (1998), 166 D.L.R. 4th 475 at [84]. See James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005) ch.10.

[739] *Guerin v. The Queen.*

[740] Hogg, *Constitutional Law of Canada* at 170; *Supreme Court Act,* R.S., c.S-19, ss. 4, 5, 6.

representation, an equal number is customarily appointed from Ontario, while two come from the Western provinces and one from the Atlantic region.[741]

5.3.1 Representative Capacity

At the United Nations, under-representation in the judiciary is considered an indication of bias and cultural exclusion.[742] The *Supreme Court Act*'s concern with regional representation is thus consistent with international standards. Other internationally accepted indicia of bias include inaccessibility of the legal system due to geographical distance, financial cost, language and other cultural barriers.[743] These factors are reflected in the colonial and postcolonial frames of reference established above. Because this study focuses on the texts of the judgments themselves, a full examination of the Court's representative capacity is beyond the scope of this work. However, Indigenous representation among the judiciary is conspicuous by its absence. This lack of representation extends beyond the Supreme Court of Canada itself, to all of the courts of appeal and courts of first instance whose findings of fact were crucial in some of the sixty-odd cases considered. On top of this, none of these cases included Indigenous representation through the use of a jury. There was accordingly no evidence of the peer assessment demanded by the *Magna Carta* despite the relatively large number of cases concerned with "Aboriginal rights".

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[741] Hogg, *ibid.*

[742] Sakiko Fukuda-Parr, director and lead author; Cait Murphy, Bruce Ross-Larson eds.; *Human Development Report, 2004: Cultural Liberty in Today's Diverse World* (United Nations Development Programme, http://hdr.undp.org, 2004) 58.

[743] *Ibid.*

5.3.1.1 Systemic Mis-match

The issue of Indigenous representation on the Supreme Court of Canada is a direct product of the colonizing society's system of cultural categorization from the perspective of at least some Indigenous polities. For example, Haudenosaunee traditionalists contend that the principle of autonomy represented by the *Two Row Wampum* and in the *Covenant Chain* continues in effect so they do not believe they are part of Canada. They claim a right to negotiate with Canada on a nation to nation basis as seen to some extent in the representations made by Mike Mitchell in *Mitchell v. The Minister of National Revenue.*[744] From this perspective, the absence of Indigenous representation on the Supreme Court of Canada is of no more concern than the absence of Canadian representation on the Supreme Courts of the United States and Britain or Brazil.[745] Yet, because the Court's analysis presumes that "Indians" are "Canadians"[746], the complete absence of Indigenous representation casts a colonial pall over the Court's function that is beyond the control of the judges themselves.

5.3.1.2 Geographic Representation

The brief biographical sketches used to introduce the judges to the public on the Supreme Court of Canada web-page provide little insight into their personal experience with Indigenous peoples.[747] (For summary, see Appendix 2.) As far as the principle of popular representation is concerned, the *Supreme Court Act* seems to be a somewhat clumsy instrument. Twelve of the twenty-seven judges who sat

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[744] *Mitchell v. M.N.R.*.

[745] See eg. "The Last Speech of Des-ka-heh" [Nov. 1980] 3.11 *Ontario Indian.*

[746] See eg. *Nowegijick v. The Queen* at 36.

on the cases included in this study were born in Quebec, three in each of Ontario and Saskatchewan, two in each of New Brunswick and Alberta, and one in each of Nova Scotia, Manitoba, British Columbia, Scotland and Germany. A few moved in childhood and Wilson J., who was the first woman to sit on the Court, emigrated to Canada as an adult. Ten were first called to the bar in Quebec, six in Ontario, three in Alberta, two in New Brunswick, Nova Scotia, and Manitoba and one in each of Saskatchewan and British Columbia. Though Sopinka and Binnie JJ. were later called to territorial bars and Charon served as a deputy judge to the court of Nunavut before appointment to the Supreme Court of Canada, this belated experience would necessarily be constrained by prior conditioning. The geographic areas represented by Newfoundland, Prince Edward Island, the Yukon, the Northwest Territories and Nunavut appear to be completely unrepresented at the level of formative experience. For the purposes of this study, it is worth noting that the excluded areas include regions where Indigenous ways of life remain a significant social influence.

5.3.1.3 Educational Representation

Within the context of mainstream Canadian society, the formal education received by the members of the Court appears relatively broad. The twenty-seven judges earned law degrees from twelve different Canadian law schools spread from coast to coast. The fact that subsequent honorary degrees were listed on a par with degrees earned for academic work suggests that social prominence was valued more highly than measurable accomplishment by the compilers of the Supreme Court

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[747] *Supreme Court of Canada*, http://.scc-csc.gc.ca (6/7/2006).

vignettes; however, the actual academic accomplishments of the members of the Court are respectable. All twenty-seven had law degrees. Iacobucci earned a LL.D and seven other judges had masters degrees. Two were Rhodes Scholars and there is a degree each from the universities of Aberdeen, Oxford, Cambridge, Harvard, Yale, Paris, Lyon and Nice. Given the educational function of Supreme Court judgments, both for the legal profession and for the public at large, the fact that all but six taught at a university or the bar before appointment to the Court seems entirely fitting. Several of the judges had also published academic articles and/or text books.

5.3.1.4 Social Experience

The narrowness of the social experience represented is, however, a cause for concern when it comes to considering issues like the Court's concept of what a "reasonable person" would think. Most appear to have moved straight through the education system into legal practice suggesting relative social privilege and comfort with the status quo. All appear to be of European ancestry and none appear to have had much, if any, experience of the world outside the Anglo-French cultural dynamic as experienced in Canada. Though Frank Iacobucci has Italian ancestry and recent appointee Rosalie Abella was profoundly marked by her family experience of holocaust survival[748] they, like all of the others except Wilson, seem to have been raised in middle to upper-class Canada. In other words, all of the members of the Court appear to have been socialized entirely within the cultures that colonized the peoples who are Indigenous to North America.

Even within this culture, their experience is relatively narrow. Their average age when called to the bar was 26. La Forest, LeBel and Deschamps were only 23. Only Michel Bastarache and Frank Iacobucci who were 33 and Bertha Wilson who was 35, were past their twenties so the members of the Court have had little opportunity to experience life as anything but successful members of the legal profession. Most of the judges attended the regional university closest to home. All of their pre-law education was in the arts except for a couple of commerce degrees and Wilson's Scottish education degree. Because most focused early on law, their experience of other disciplines and ways of life can hardly be considered representative of the general Canadian public. Moreover, none had regional attachments that were strong enough to cause them to refuse the move to Ottawa as required by Supreme Court appointment.[749] Some of the first judges in the sample represented a past generation in that Ritchie, Dickson, Estey, McIntyre and LeDain were all veterans of World War II and Cory was an RCAF pilot. However, shared experience with current generations is thin on the ground. Dickson and Bastarache worked with insurance and Sopinka played professional football for the Toronto Argonauts. Fish was a journalist. Most seem to have raised families and Wilson was a minister's wife.

5.3.1.5 Recruitment

There is little in either the personal or professional background of the judges to indicate how they came to be chosen for this prominent office from among all of

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[748] "Remarks of the Honourable Rosalie Silberman Abella", (Ottawa: Swearing-in Ceremony, 4 October, 2004) http://www.scc-csc.gc.ca (6/11/2006).

[749] *Supreme Court Act,* R.S., c.S-19, s. 8.

the members of the legal profession who meet the requirements of the *Supreme Court Act.* Porter's 1965 study, *The Vertical Mosaic*, found that Canadian superior court judges appointed between 1940 and 1960 had strong political connections. He found no pattern of moving up the judicial hierarchy. Appointment as a judge seemed to be "the end of the line for a political career" and ten of the 17 Supreme Court of Canada judges had no previous judicial experience.[750]

Without looking specifically into the political background of the judges on the Court, this pattern appears to have broken down in the 1982 to 2006 period covered by this study. McLachlin C.J. began her judicial career at the British Columbia County Court and Abella J. at the family division of the Ontario Provincial Court. A total of thirteen had experience in courts that may have been charged with making the "findings of fact" relied upon at the appellate level and only Ritchie, Binnie and Sopinka JJ. were appointed directly to the Supreme Court of Canada. None of the Supreme Court of Canada judges in Porter's study or in mine had held elected office. However, the importance of political connections may well continue. The official biographies do not report on prior party affiliations; however, those in the know may be able to read something into the law firms the judges worked for. Political influence may also be inferred from professional experiences that demonstrate competence and expertise, but also suggest political affiliation and bureaucratic sympathy. For example, Chouinard, LaForest, Iacobucci and Binnie all served as federal or provincial deputy ministers of justice before appointment to the Court and several others were appointed after heading prominent government commissions investigating particular issues.

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[750] Porter, *The Vertical Mosaic* at 415-6.

5.3.1.6 Association with Indigenous People

None of the above concerns indicates any judge's initial contact or prototypical experience with Aboriginal peoples. We cannot tell from their biographies whether any of them ever had a classmate at school, a co-worker, student, neighbour or close personal friend who belonged to an Indigenous culture. We can only guess in this regard and the fact that twenty-one of the twenty-seven were born or raised in large cities must certainly affect their assumptions.[751]

5.3.2 The Effect of Prior Experience

The embodied theorists whose research appears to explain some of the phenomena identified by Kuhn have pointed out that the ways in which we structure knowledge and "the gut feelings that are the starting point of decision making"[752] appear to be embedded in the neural circuitry that controls both physical action and emotional reaction. As legal scholars like Winter and Nedelsky put it, "things that seem self-evident, natural and beyond dispute to one group are perceived very differently by people from a different background."[753] Hamilton has likewise cautioned that the power of dominant norms lies in the fact that they are invisible to those whose experience fits their expectations[754] and, John B. Mitchell has observed with regard to teaching critical reasoning to law students that:

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[751] Yorkton, Grand Falls, Pincher Creek, Mattawa, Repentigny and Sturgeon Falls were not counted as cities in this context.

[752] Nedelsky, "Embodied diversity and the Challenges to Law".

[753] *Ibid.*.

[754] Hamilton, "The use of Metaphor and Narrative To Construct Gendered Hysteria In the Courts" at [89].

> "the more alien the world underlying the cases is to one's own, the greater the inclination to hold on to one's previously acquired approach to the world".[755]

The experience, education and culture of the judges on the Court can thus be expected to affect their reasoning in profound and significant ways.

5.3.2.1 *The Firearms Reference*

One example that may illustrate the effect of cultural bias seems clear to me though it may raise vehement protests from some readers. In the *Firearms Reference,* the Court attempted to determine what gun control was about in its "pith and substance".[756] Comparing the "roles of guns and cars in Canadian society" the members of the Court reasoned that:

> "Cars are used mainly for transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons of violent crime, including domestic violence; cars generally are not."[757]

No statistics were cited to support this point of view and the comparison seems curious because the annual carnage caused by cars that are licensed notoriously exceeds that caused by guns that were not. The court's reasoning in this instance seems to draw on their personal urban experience coupled with the same tendency to conflate the characteristics of prototypes that prevents us from thinking of the pope as a bachelor even though he is a man who has never married.[758]

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[755] Mitchell, "Current Theories on Expert and Novice Thinking" at 288.

[756] *Firearms Reference* at [3].

[757] *Ibid.* at [43].

[758] Winter, *A Clearing in the Forest*, at 77; Lakoff, *Women, Fire, and Dangerous Things* at 70.

In keeping with what the cognitive theorists tell us, the judicial perception of cars was probably derived from early childhood memories involving transportation without accidents. Their thoughts, like everyone else's, are shaped by the prototypes created by direct experience. If, like me, they were raised in cities, they probably rode safely in cars with Mom and Dad more times than they can remember, while their prototypical experience of guns probably came from television where guns only make the news if involved in a crime or tragic accident. The experience of my students when I was teaching in northern Newfoundland was completely different. We did not have a road or television, but their fathers almost all had guns and when they took them out there was the hope of something good to eat for dinner. The kids loved the line in Johnny Cash's "Folsom Prison Blues" that said:

> "When I was just a small boy, my mother told me son,
> "Always be a good boy, don't ever play with guns".

They had all heard those exact words at home. No one could afford fancy gun cabinets because the people really did "make their living on the land and on the sea" just as it said in one of the folk songs they sang. But in all the long winter evenings when they sat around the kitchen table telling stories, (because we did not have television), there was not one single account of any accidental injury, crime or domestic violence involving a gun in our community or on the entire northern peninsula of Newfoundland. Guns meant food. We needed meat to survive in that cold climate. That's why wives shoved their husbands out of bed at four o'clock in the morning. People did not have much money so the men did not waste shells. In their experience the danger surrounding guns was much easier to deal with than the

danger surrounding ice or ocean fishing in small boats. It was just as incidental to their use as the danger associated with cars for urban families.

The lawyers arguing against the gun registry legislation tried to communicate this difference and what the judges heard was only this:

> "ordinary guns, like rifles and shotguns, are common property, not dangerous property. Ordinary firearms are different, they argue, from automatic weapons and handguns that Parliament has regulated in the past."[759]

Their pleadings failed and none of us who were raised in large cities were surprised.

5.3.2.2 *R. v. Nikal*

Visceral assumptions of the kind that made the Court assume that guns are somehow more dangerous than cars may also explain why Indigenous people who went hunting for food so often found themselves trapped in a legal maze resulting, more often than not, in convictions.[760] Bewildering layers of assumption similar to that found in the *Firearms Reference* can be seen in *R. v. Nikal* where a Wetèsuwetèen man was charged with violating provincial regulations by fishing without a provincial licence on a river where it passed through his reserve. The charge was laid even though the Gitksan-Wet'suwet'en had their own fishing regulations that had been approved by Canada's Department of Indian Affairs.

In keeping with the "inclination to hold on to one's previously acquired approach to the world"[761] identified by educational theorists, Cory's majority reasons ignored the *Nowegijick* principle of liberal construction in favour of

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[759] *Firearms Reference* at [44].

[760] Acquittals resulted in *Simon v. The Queen* and *R. v.Powley*, but convictions were upheld in *Jack and Charlie v. The Queen*; *Dick v. The Queen*; *R. v. Horse*; *R. v. Horseman* and *R. v. Blais*.

[761] Mitchell, "Current Theories on Expert and Novice Thinking" at 288.

"Indians"[762], commencing with a declaration that the band's right to fish on the river was "very different and distinct" from the right to fish that was protected by s.35 of the *Constitution Act, 1982.* His reasons for coming to this conclusion were not explained, nor did he provide an account of how the river in question came to be considered part of "Her Majesty's Dominions". The analysis provided launched directly into consideration of what the Crown intended to "grant" when the reserve was established in the nineteenth century, as if the land rights of Indigenous peoples had been dependent on Crown grants like those of the settlers. This was accompanied by a complete failure to explain how the geographic and political parameters of their British colonial understanding had been superimposed on a resource over which the Gitksan-Wet'suwet'en had, in all probability, exercised autonomous control before the relatively recent arrival of Europeans.

Nikal was heard on November 30, 1995, one day after *Van der Peet,* but the judgment was released four months earlier and it did not include anything comparable to Lamer's breakthrough acknowledgement in that case that:

> "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries". [underlining in original][763]

As if operating under the kind of spell that prevents people from seeing black hearts and red spades in an apparently ordinary deck of cards, the Court also conflated the presumed intention of the provincial regulations with their actual effect. Without referring to any evidence that there had ever been pressure on the fishing resources

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[762] *Nowegijick v. The Queen* at 36.

[763] *R. v. Van der Peet* at [30].

in question before colonization or that modern Gitksan-Wet'suwet'en practices posed any kind of threat to fish, Cory claimed for the majority of the Court that:

> "If the salmon fishery is to survive, there must be some control exercised by a central authority."

As he saw it,

> "The licence is the essential first step in the preservation and management of this fragile resource".[764]

Thus, like *Sparrow* before it and *Adams* released a few months later, *Nikal* ignored the possibility that the fragility of the resource had been caused by colonization, reflecting the Court's blind faith in the ecologically protective capacity of the colonizing governments. In practice, "central authority" has proven notoriously ineffective at preserving such important resources as the Grand Banks fishery off Newfoundland and by the time the Court recognized a limited Aboriginal right to fish in *Adams*, that part of the St. Lawrence River was so seriously polluted that the only people who ate fish on the Akwesasne reseserve were those who could afford imports from the Maritimes.[765]

Resource conservation is fully consistent with postcolonial norms. However, the real issue here concerned who had a right to make laws for this

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[764] *R. v. Nikal.*

[765] By 1985 it was discovered that children had been playing barefoot in toxic waste. Mothers found that their breast milk was contaminated. The abundant wild life for which the region was once known had disappeared. Turtles and a shrew were discovered containing hundreds of times the contamination required to qualify as hazardous waste. The pollution was caused by industries that had come into the area because of the construction of the St. Lawrence Seaway which had been highly contested by Mohawks both at Kahnawake and Akwesasne. In 1986 pregnant women were advised not to eat fish from the St. Lawrence River and by 1990 New York State extended this warning to everyone with regard to fish caught in certain areas of the reserve. Bruce Johansen, "Don't Drink the Water, Dont Eat the Fish" in "Akwesasne's Toxic Turtles" a chapter from *Ecocide of Native America: Environmental Destruction of Indian Lands and People* (Clear Light publishers) http://www.tuscaroras.com/greydeer/pages/Toxicturtle4.html (12/31/05)

purpose.[766] The Gitksan-Wet'suwet'en by-laws were on record in *Nikal*, but Cory failed to address them and his declaration that they did not apply sits like an afterthought, without explanation among his concluding comments.[767]

We can only speculate about the reasons for this, but the fact that he and his fellow judges were raised in an era when "Indians" were excluded from the legal definition of a "person" in the *Indian Act*[768], accompanied by their experience of Canada's on-going practice of assuming supervisory powers, should not be discounted. Under the circumstances, Cory found that the requirement for a provincial licence was justified because:

> "The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself....The licence by itself, ...is nothing more than a form of identification. Requiring identification so as to assist fisheries officers in distinguishing right holders from non-rights-holders cannot be interference with the preferred means of exercising that right."[769]

Though there was no evidence that licensing had been required in pre-contact society, which certainly did exercise the right to fish, this reasoning was supported by the majority of the Court and, once again, the personal inexperience of the judges seems to have affected the result. McLachlin, with L'Heureux-Dubé concurring, dissented with regard to Nikal's acquittal on the grounds that the licence conditions were unconstitutional, yet all agreed that the federal government could impose its regulatory scheme. Because of this, the case was not really a victory for Nikal. It

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[766] *R. v. Nikal*, [1996] 1 S.C.R. 1013 at [IV].

[767] *R. v. Nikal*, [1996] 1 S.C.R. 1013 at [CXVIII].

[768] The definition introduced in the *Indian Act, 1876,* S.C. 1876, c.18 (39 Vict.) s.12 was removed in the *Indian Act,* S.C. 1951, c. 29 s.123.

[769] *R. v. Nikal*, [1996] 1 S.C.R. 1013 ; 1996 CanLII 245 (S.C.C.) [XCIX, CI]

was an incident of colonial humiliation because his personal acquittal was accompanied by the negation of his people's right to control their own use of a traditional resource.

The lack of judicial familiarity with contemporary Indigenous reality can be seen in other telling assumptions. Conspicuously missing from the judicial analyses was any explanation of why an additional piece of identification should be required when "Indians" already qualify for "status cards". Leaving aside the expeditionary and time consuming problem of contacting a licensing agency from remote locations, the judicial presumption that their requirements were "simple" also suggests that no member of the Court has ever had a close enough friendship with a "status Indian" to drive to three pharmacies trying to get a prescription filled under the *Indian Act* or to wait for twenty minutes while a waitress calls the manager and tries to avoid dealing with the tax-exempt status of the friend's meal.[770] How else could the imposition of this bureaucratic requirement be seen as a "mere inconvenience"?

5.3.3 Decolonizing Developments

The lack of broad social representation on the Court is, of course, partly a function of the exceptionally high level of writing and literacy skills required, as well as the time, expense and culturally specific experience involved in gaining a legal education. As discussed in the introduction to this work, the British social system was structured in a way that favoured a male elite; however, with the social

[770] See eg. John Cuthand, "Beware of con artists posing as spiritual elders" 9.8 *Eagle Feather News*, (Aug. 2006) 6.

changes effected by the twentieth century and the recent Constitutional articulation of egalitarian rights we are moving away from that model.

5.3.3.1 The Inclusion of Women on the Court

Wilson J., the first woman to sit on the Supreme Court of Canada, took office in March 1982 just before the *Constitution Act, 1982* came into effect. Seven of the twenty-seven judges who sat on the cases in this study were women. There was at least one woman judge sitting on all but *Nowegijick*, the first case included in the study (See Appendix 4), and these pioneering women appear to have contributed significantly to the breadth of the Court's vision, even if their opinions were often expressed in minority reasons.

Since many Indigenous societies are matrifocal, the appointment of women to the Supreme Court could be expected to exert a favourable influence as far as understanding and protecting Indigenous rights is concerned. A statistical examination of the core body of cases examined for this study (See Appendix 3) shows that women represented about one quarter of the judicial sittings though they produced about one third of the sets of reasons. (26 of 88 with identified authors). Despite this general indication of hard work, only three of the seven women wrote reasons (Wilson, L'Heureux-Dubé and McLachlin) and only 8 of the 62 majority reasons were written by women. Of these, Wilson wrote one[771] and all of the rest were written or co-authored by McLachlin, only two before she became Chief Justice[772].

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[771] *Roberts v. Canada.*

[772] *R. v. Williams*; *Corbiere v. Canada* (with Bastarache).

This profile suggests that – at least in cases concerning "Aboriginal rights" – the Supreme Court has not escaped the "glass ceiling" that is believed to marginalize women's perspectives in Canadian society at large. However, in such a small sample, the difference might also be attributable to individual character. McLachlin is, after all, the chief justice and both Wilson and L'Heureux-Dubé have been highly influential contributing significant insights into the reasoning of their colleagues through their dissenting opinions. The lack of reasons from the other four women judges, may have been due to the specialized complexity of "Aboriginal law" in the case of Louise Arbour or to the recent appointment to the Court of the other three. On average the women's scores were only slightly lower than the men's on the colonial scale and higher on the postcolonial scale.(7.4/8.2 Colonial/ 5/4.8 Postcolonial). The difference is marginal and the number of women involved is too small to make generalizations or to prove any kind of inherent gender difference as far as colonizing tendencies are concerned. Indeed, some men exceeded some women on at least one scale (e.g. Fish 7.4/5.1 v. Arbour 8/5.2).

5.3.3.2 Collegiality

The over-all similarity in the judges' scores seems to confirm the collegiality of their approach as described in the second *Wewaykum* case.[773] Though this study examined only the texts of the judgments, the round-table discussions and editorial exchanges that reportedly occur before a set of reasons is finalized seems to parallel some of the consultative processes used by the Haudenosaunee.[774] Despite the

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[773] *Wewaykum Indian Band v. Canada II* at [92].

[774] See: A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* [originally *New York State Museum Bulletin: 184* (Albany:University of the State of New York,

application of a majority rule approach and the fact that the judgments were not phrased in the language of consensus formation, the judges report that they function among themselves in a way that supports egalitarian postcolonial norms.

5.3.4 Caveat

Differences between the scores of individual judges are attributable in part to differences in the questions addressed from one case to the next. This effect is particularly pronounced when a judge has participated in a small number of decisions. (eg. Charon 9/2.75 and 4/6) Since all of the points of evaluation are highly subjective, and since the opinions of individual judges may change over time, it is impossible to produce a mathematically reliable measure. The charts in the Appendices are used only to provide an overview and food for thought. The focus of this study remains fixed on the specific characteristics of the reasoning that make it appear to be either colonial or postcolonial in character.

5.3.5 Conclusions

The culturally biased composition of the Court creates a serious handicap when it comes to putting postcolonial norms into effect. No members of the Indigenous societies being judged were included in the decision making process. This meant that the Court's decisions were institutionally designed to impose externally determined cultural norms in accord with the colonial practices that established the modern Canadian state. Moreover, none of the judges appear to have had access to any means of acquiring any depth of understanding of

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1916)] (Ohsweken, Ontario: Iroqrafts, 1991) at 98-100; Karoniaktajeh (Louis Hall), Mohawk trans. and Kahn-Tineta Horn, English trans. *Gayanerekowa: The Constitution of the Iroquois Confederacy*,

Indigenous realities outside of the formal pleadings and whatever may have survived in the lower court judgments presented to them. Though they sincerely attempted to maintain neutrality, the judges had no access to any institution designed to correct misperceptions of the kind that normally occur in intercultural situations.

Despite their narrow cultural origins, the judges did express widely different points of view. They wrote their judgments following round table discussions that attempted to reach consensus while respecting distinctly different perspectives. This suggests that they applied a postcolonial decision-making methodology among themselves. Because of this, and because judicial practice fosters acute awareness of the viability of alternate analytical frames of reference, the judges appear to have an experiential foundation on which to build reasoning that supports postcolonial norms.

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5.4 Categorization and Judicial Technique

> "In general, the true statements we make are based on the way we categorize things and, therefore, on what is highlighted by the natural dimensions of the categories".
>
> George Lakoff
> *Metaphors We Live By,* 1980[775]

As Lackoff and Johnson observed, the "truth" communicated by any sentence is generally dependent on human purposes or, to use Kuhnian terms, it reflects the paradigm applied.[776] "The earth is a sphere" in order to teach elementary astronomy, but not when its orbit must be precisely calculated. Light may be "waves" or "particles" depending on which aspect is being considered and which theory is being tested. So too it is in law. Judges, like the rest of us, structure their analysis on tacitly applied conceptual systems that affect the sense of what constitutes "knowledge" itself. Some of the most basic assumptions that underlie judicial reasoning are woven into the very structure of the thought processes involved.

As Madam Justice L'Heureux-Dubé has pointed out, underlying premises "must be brought to the surface in order to promote consistency in our law and the integrity of our judicial system".[777] Yet these premises can be very difficult to identify. Like the participants in Kuhn's experiment who failed to see the black hearts and red spades in an ordinary deck of cards, Rupert Ross found that even

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[775] Lakoff, Johnson, *Metaphors We Live By* at 163.
[776] *Ibid.* at 164.
[777] *2747-3174 Québec Inc.*.

after he had published a book about differences between Anishinabe (Ojibway) perspectives an his own, he failed to fully comprehend the extent to which different languages can lead to different understandings about what life is and how its challenges should be addressed.[778]

According to Ross, European languages structure thought around material categories represented by nouns; however, some Indigenous languages focus on energy and relationships.[779] With no capacity to speak Anishinabe, Mi'kmaq or any other Indigenous language, most of us cannot fully comprehend the conceptual perspectives they represent. We can, however, consider some of the assumptions implicit in Supreme Court of Canada reasoning by examining the patterns of thought presented there.

5.4.1 Metaphoric Illusions and "Black Letter" Law

In keeping with the Anglo-European tendency to objectify or nominalize experience, several commentators have observed that judicial decisions tend to follow a rigid binary format that excludes any middle ground.[780] The goal is to sort the "true" from the "false". Concepts and categories are defined in opposing terms, identified by properties that are either present or absent, ignoring aspects of commonality. This process, that is used in an attempt to "uphold the law", tends to polarize opinion, affirming conceptual frames of reference that may or may not be explained. It relies heavily on the container metaphor for categorization which, as

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[778] See eg. Ross, *Returning to the Teachings* at 99.

[779] *Ibid. at*115.

[780] Winter, *A Clearing in the Forest* at 8 and 44. See also eg. Stuber, "Legal Reasoning after Post-Modern Critiques of Reason" at 4. The dualism of Western thinking is highly frustrating to Maori.

Lakoff has explained, tends to govern the way we think of words themselves.[781] However, as the cognitive researchers have demonstrated, knowledge is not really compartmentalized in our minds. It is "embodied" and stored in multi-sensory neural circuits that build on previous established prototypes. Our experience with containers shapes our expectations concerning the nature of a "category". It is the model for a concept, just as James Bond may be the model for a "bachelor", a car may be the model for "transportation" and a gun may be a model for either "danger" or "food" depending on one's social background.

Though it seems we actually understand through a gestalt process of metaphoric association, judicial reasoning typically treats situations as if they were objects that may either be inside or outside whatever boundaries have been set in place by the definition of a word, by legislative enactment or by judicial interpretation. Ignoring the way in which knowledge is built on interactive, multi-dimensional analogies, judgments tend to assume that boundaries can be perceived in the same way by everyone. They attempt to class all aspects of experience as being either P or not P. Legal rules either do or do not apply. The scales of justice tip one way or the other. The defendant is declared to be "guilty" or "not guilty" and decisions are made either for or against the plaintiff. This is the ideal of "black letter law." The tendency to conflate metaphor with reality is an ever-present danger.

Wally Penetito, "Research and context for a theory of Maori schooling" (2002) 37:1 *McGill J. Ed.* 89.

[781] See eg. Lakoff, Johnson, *Philosophy in the Flesh* at 51.

5.4.2 The Primacy of the Container Metaphor

Examples of reasoning that follows the model provided by the container metaphor can be found in each and every one of the sixty-two cases considered in this study. My very choice of which cases would be examined and of which aspects of those cases would be noted was also governed by a categorization process. Though the application of a dual scale softens the effect, the over-riding outcome divides aspects of the reasoning into what is or is not either "colonial" or "postcolonial". The selection of cases was largely governed by the question of what was "in" or "out" of the category called "aboriginal and treaty rights" by s.35 of the *Constitution Act, 1982*. As L'Heureux-Dubé stated in her dissent in *Van der Peet* :

> "The issue of the nature and extent of aboriginal rights protected under s.35(1) is fundamentally about characterization."[782]

The reasoning in the cases themselves was concerned with container-like categorization from start to finish. Thus, *Guerin* defined a category called "fiduciary obligation"[783] and *Powley* defined "Métis".[784] *Williams v. Canada* asked whether Unemployment Insurance payments were "a debt to the unemployed contributor".[785] Others cases were concerned with the application of categories established in previous judgments. *Lac Mineral* narrowed the fiduciary obligation established as a category in *Guerin* to exclude some relationships between a fiduciary and a beneficiary[786] and, in *Quebec v. Canada (National Energy Board),* Iacobucci J.

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[782] *R. v. Van der Peet.*

[783] *Guerin v.The Queen.*

[784] *R. v.Powley.*

[785] *Williams v. Canada*, at {9}.

[786] *Lac Minerals Ltd. v. International Corona Resources Ltd.*.

called on these categorical distinctions in the course of determining that the *National Energy Board* had not "exceeded" the scope of its review jurisdiction.[787] Categorization could be seen in the distinctions made between "the facts" and "the law" and it continued within each of these classifications to consider whether "extrinsic"[788] or "oral"[789] evidence is admissible or whether a function is governed by s.91 or s.92 of the *Constitution Act, 1982*.[790]

5.4.2.1 Sub-categorization and Narrowing

Judicial reasoning also uses categorization to aid the examination of different facets of a situation. Thus in *Sioui*, when Lamer set about determining whether or not General Murray's document was a "treaty", he divided the evidence into three sub-categories concerned with 1) the historical context, 2) the signing and 3) subsequent conduct of the parties.[791] A variant use of subcategories can be seen in the second *Marshall* judgment where the Court limited the impact of its first set of reasons by insisting on a narrow interpretation of the category it referred to as "gathering". This led to the explanation that:

> "The Union of New Brunswick Indians suggested a need to "negotiate an integrated approach dealing with all resources coming within the purview of fishing, hunting and gathering which includes harvesting from the sea, forests and the land". This extended interpretation of "gathering" is not dealt with in the September 17. 1999 majority judgment, and negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go

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[787] *Quebec (Attorney General) v. Canada (National Energy Board* at {17 and 27}.

[788] Eg. *R. v. Horse.*

[789] Eg. *Delgamuukw v. British Columbia.*

[790] Eg. *Quebec v. Canada (N. E. B.),* or *Friends of the Old Man River Society v. Canada.*

[791] *R. v. Sioui.*

> beyond the subject matter of this appeal. The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower" [underlining added]

In this passage, the Indigenous proposal for a negotiated solution in keeping with postcolonial norms was held to be incompatible with the adjudicating function of the Court, which was asserted through the imposition of a rigid categorization process that ignored unresolved issues concerning the nature of "sovereignty".[792]

5.4.2.2 Metaphoric Consciousness

Judicial consciousness of their use of categorization techniques was ubiquitous, if not always explicitly stated. The container metaphor was overtly referred to in *Canadian Pacific Ltd. v. Matsqui Indian Band* where Reid's *Administrative Law and Practice* was quoted as saying:

> "... 'tribunals' is a basket word embracing many kinds and sorts."[793] [underline added]

In *Mikisew Cree First Nation v. Canada*, Binnie likewise acknowledged the act of categorization when he stated :

> "both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably."[794][underlining added]

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[792] The concept of "sovereignty" is tied to feudal concepts of social order and merits a more detailed investigation than can be provided here.

[793] *C. P. v. Matsqui,* [82] citing "Reid, *Administrative Law and Practice*, 1971" (full cite not given).

[794] *Mikisew Cree First Nation v. Canada* at [33].

The immense power incorporated in the ability to define categories and govern their application to others may be considered a manifestation of the command model of legality.

5.4.2.3 Metaphoric Mystification

When Binnie himself became an object to be categorized in the second *Wewaykum* case, the application of this metaphorical device began to stretch credulity. His colleagues at the Court were faced with the task of determining whether his judgment in *Wewaykum I* had been impugned by his previous involvement as counsel for the Crown. They approached the situation by dividing his thought processes into two separate compartments as if this was physiologically possible, stating:

> "To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively."[795]

Thus, categorization came to the rescue once again, preserving the integrity of the *status quo* as perceived by the members of the Court. Supreme Court judges serve as prototypical models for juridical integrity and, just as the Pope cannot be a bachelor, so too, it seems, they themselves cannot accept the fact that they may be seen as having violated fundamental norms like the rule that no one should judge their own judgment or serve as judge and party.

In short, basket-like categorization is what modern legal analysis is about and the cascading exercises in classification and re-classification set out in the Supreme Court's reasoning suggests that this process has become so habitual to the

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[795] *Wewaykum Indian Band v. Canada II* at [6].

members of the Court that they sometimes lose touch with reality as it may be seen by ordinary members of the Canadian or Indigenous public.

5.4.3 Whose Categories Were Used?

The heavy reliance placed on the container metaphor in Canadian judicial reasoning excludes whatever conceptual processes may seem more natural to the original peoples whose ancestors lived here before European colonization began. As a consequence, the questions that surround "Aboriginal Rights" tend to be formulated as if Indigenous struggles concern whatever is, or is not, included in a basket. The importance of negotiated co-existence is sidelined and issues are nominalized in a way that disguises the subjective agency involved in the colonization process.

As Kuhn has pointed out, an old paradigm will persist unless there is an alternative to take its place and, once a new paradigm has become established, history is rewritten to exclude references to old theories. This makes it difficult to understand the ways in which people approached problems in the past. Yet discarded paradigms sometimes addressed evidence that is not considered by the current orthodoxy and they may be worth studying if we wish to understand the possibility of paradigmatic alternatives. As far as legal reasoning is concerned, it might be noted that the current emphasis on category definition may be a trait, no

only of a specific conceptual and linguistic culture, but also of a specific European philosophical era.[796]

5.4.3.1 Codification and Cultural Relativism

According to some commentators, the assumptions about reality (or the human capacity to perceive it) generated by modern judicial analysis is a product of the European Enlightenment.[797] One characteristic of this mind set is the move towards legal codification, which emerged in conjunction with modern "scientific" method. This sought to escape the personification of nature to achieve "neutral" descriptions of phenomena. Though the Romans[798], the Chinese[799] and other older civilizations used written legal codes or lists of rules of one kind or another, the word "codification" itself did not become part of the English language until it was introduced by Jeremy Bentham (1748-1832).[800] In other words, the quest for something that approximates the certainty ideally provided by written laws is a

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[796] For a discussion of alternatives, see 2.2 above on Newton's attempt to avoid the metaphysics implicit in Indo-European languages through categories like "thing" and "event" and metaphors like "attraction", See Coetzee, "Newton and the Ideal of a Transparent Scientific Language".

[797] Eg. Winter, *A Clearing in the Forest*, 22.; Coetzee, "Newton and the Ideal of a Transparent Scientific Language".

[798]The Romans compiled lists of laws beginning with the Law of XII Tables, 451-450 B.C. Justinian's *Digest,* sometimes referred to today as a "codification", was not compiled until 530-533 A.D. It should be noted that the function of these lists of rules was not the same as that of the Napoleonic code. Consider: B. O. Foster trans. *Livy* Book III Loeb Classical Library v.1.(London: Wm. Heineman Ltd, 1957) ; C. Pharr trans. *The Theodocian Code* (New York : Greenwood Press, 1952) ; T.Mommsen, P. Kreuger, A. Watson, *The Digest of Justinian* (Philadelphia : University of Pennsylvania Press, 1985) ; Michel Morin, *Introduction historique au droit romain, au droit français et au droit anglais* (Montréal: Les Éditions Thémis, 2004), 18.

[799] About 500 B.C. there was extensive debate, particularly between Legalists and Confucians concerning the use of written legal codes though a combination of codified law and Confucian philosophy was used from the Han Dynasty until the modern era. See Li, *The Ageless Chinese*; Woo, "Repairing the Dome of Heaven"; James Legge, trans., *The Chinese Classics* 2nd. ed. rev. (Shanghai: Oxford University Press, 1935) *Tso Chuan*, Book X, Year VI , 609; J.J.L. Duvendak, *The Book of Lord Shang* (Chicago: University of Chicago Press, 1963); A.F.P. Hulswé, *Remnants of Han Law* (Leiden: E.J. Brill, 1955).

[800] Baker, *An Introduction to English Legal History* at 186-188.

relatively recent addition to British legality, which was once based on local interpretations of local custom.[801] Codification is founded on a belief that law can and should reflect a set of "objective" norms - a belief that seems to have been taken to extremes by Napoleon who reputedly claimed that a single commentary on his famous and highly influential legal code would signify its ruin.[802] In other words, it presumes that there is only one correct way to understand things and that this may be imposed by force.

Napoleon's stance recalls the "dualistic" view of knowledge that, according to Nelson, is characteristic of American college freshmen who retain the primary school belief that everything is either right or wrong.[803] It seems amusingly unrealistic in this age when we celebrate alternative points of view and reject conquest as a legitimate means of state definition. Yet the assumptions underlying the codification movement have become so deeply embedded in Canadian judicial reasoning that they tend to be taken for granted.

5.4.3.2 Belief in a "Correct" Standard

The idea that there can be one correct legal solution can, for example, be seen in *Mikisew Cree Nation v. Canada*, the last case examined in the core study, where Binnie stated:

> "It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before

[801] Re attempts to codify English law in India see Morin, *Introduction historique* at 337 n. 589.

[802] "Un seul commentaire, et mon code est perdu." Norbert Rouland, "Préface" in Michel Morin, *Introduction historique au droit romain, au droit français et au droit anglais* (Montréal: Les Éditions Thémis, 2004) at xi.

[803] Nelson, "On the Persistence of Unicorns" at 177.

> the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties."[804] [underline added]

The suggestion that there is a single "objective" standard that the Courts should uphold is likewise firmly entrenched. It might, for example, be read into McLachlin's assertion in the *Marshall/Bernard* case that:

> "The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and as objectively as it can, into a modern legal right".[805] [underline added]

This suggests that the pre-sovereignty practice is an object that might reasonably be compared and classified along with similarly objectified modern practices. The colonizing impact of this procedure depends, of course, on *whose* analogies prevail in the objectification process. If the classification is imposed by members of an alien culture without the consent of those concerned, it would be colonizing in character. However, if it is agreed to by the people concerned it would accord with postcolonial norms.

Consent was not a factor that was considered with regard to the establishment of most of the analytical norms applied in the cases examined. For example, in the second *Wewaykum* case, the Court described the objective standard as:

> "the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done—that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which

[804] *Mikisew Cree First Nation v. Canada* at [40].

[805] *R. v. Marshall/Bernard* at [48].

> nevertheless create a reasonable apprehension of bias, requiring his or her disqualification".[806] [underline added]

This passage raises questions concerning the Court's concept of "objectivity". How can there be no "doubt" that justice has been done when it is not "seen", or at least perceived by some sense? Did the judges sitting on that case believe in some sort of mystical "justice" that can be "done" independently of perceived norms? Did they think they had a greater capacity to "know" than the members of the public who "see"? Or than the two opposed Indigenous parties who both wanted *Wewaykum I* set aside on the grounds of bias when they learned of Binnie's earlier implication on behalf of the Crown? If the members of the Court were claiming privileged access to some sort of "correct" justice that exists beyond human perception, how can this be reconciled with the democratic ideals discussed in the *Secession Reference*?

5.4.3.3 Shifts in Social Assumptions

Some of the contradictions apparent in the Court's reasoning may be attributable to shifts in basic social values and assumptions. According to Baker, the belief that a rational legal system could be established to define laws in a way that expelled all doubts and uncertainties did not become established in England until the second quarter of the 19th century.[807] There was no judge in the ancient English *folcriht,* it might be recalled. The legal ideal later applied by the monarchy was the "law of the land" which varied from one region to the next.[808] Because of the inherently subjective nature of all knowledge, the belief that there can be one

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[806] *Wewaykum Indian Band v. Canada II* at [67].

[807] Baker, *An Introduction to English Legal History* at 186-188.

[808] *Ibid.* at 9.

"correct" way of looking at things that may legitimately be imposed on others is profoundly colonial in character and so perhaps it is no coincidence that the movement for legal codification emerged at the very apex of the colonial movement.[809] Codification is certainly not the only means of ordering a complex society as can seen in the intense debates that took place between the Confucians and the Legalists in the "Hundred Schools" period in China.(ca. 400 B.C.)[810]

5.4.4 Literacy, Codification and Colonization

Today, written codes are generally considered the epitome of legality. Even though Canada's constitution itself is the product of an unwritten tradition, the *Royal Commission on Aboriginal Peoples* adopted this logic when it concluded that a written constitution should be a prerequisite for aboriginal self-government.[811] Had the Commissioners forgotten that the Indigenous peoples had been governing themselves long before the arrival of literate members of the English and French elite? Literacy has been one of the tools of colonialism. The English imposition of colonial legality in Canada began with Henry VII's charter to the Cabots.[812] The written word made it possible to command at a distance and to sell or grant title to land that had never been visited. Within the colonizing cultures literacy itself spread with the expansion of colonialism. It was only later that the "lower classes" and the colonized took hold of this tool and used it to assert their human equality.

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[809] See eg. Morin, *Introduction historique* at 333 *et seq.*

[810] See Li, *Ageless Chinese,* ch.2: Confucius "had no use for law, as law involved compulsion, and its observation arose from fear. A good government relied on morality to prevent wrong-doing instead of law to punish wrong-doers". The Legalists, who were concerned with maintaining power, instituted codes enforced with draconian insensitivity that continues to impugn the concept of "legality" in China to this day.

[811] Erasmus, Dussault, (RCAP,1993), *Partners in Confederation* at 44.

5.4.4.1 Conflation of Literacy and Legality

The shift over time in the use of literacy may explain why the reasoning in the *Secession Reference*, reflected a similar faith in the written word *per se*, stating:

> "A written constitution promotes legal certainty and predictability..."[813]

None of the cases expressed any consciousness of the extent to which linguistic categories reflect cultural preferences.[814] The sense that everything can and should ultimately be codified in writing can be seen in the view that there are "gaps" in the constitutional text that need to be "filled".[815] The reasoning processes used to this end create mandatory precedents referred to as the "*Sparrow* test", the "*Nowegijick* principles" or the standard of a "reasonable person". The gap metaphor and the proliferation of detail as judgments accumulate encroach on the social space left for Indigenous preferences and autonomous negotiation. In the course of the past quarter century, the Court's own culturally determined thought processes have become like codified obligations. In *Van der Peet*, for example, Lamer explicitly stated that the Court intended to "articulate a test for identifying aboriginal rights".[816] That is to say, the Court presumed the right, not only to interpret, but also to establish the limits of the category called "aboriginal rights" without the negotiated consent of the Indigenous peoples concerned.

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[812] *St. Catherine's Milling* evidence.

[813] *Reference Re Secession of Quebec* at [53].

[814] See eg. Skutnabb-Kangas, "Language Policies and Education"; Penetito, "Research and context for a theory of Maori schooling"; Ross, *Returning to the Teachings.*

[815] *Ibid.*

[816] *R. v. Van der Peet* at [4].

5.4.4.2 Alien Categorization

The quest for a pristine objective standard that can be externally imposed is further troubled by the fact that the categories that make sense in one set of cultural circumstances may not be so easy to apply in another. A relatively simple example of this can be seen in *R. v. Horseman.* All parties agreed that the accused had been legitimately hunting moose for his own use when he shot a grizzly bear in self-defence in the Treaty 8 area. As the trial judge stated, he "did not kill the bear with a view to selling its hide although he was eventually driven to do so a year later in order to feed himself and his family." After the sale, he was charged with "trafficking in wildlife" contrary to the Alberta *Wildlife Act.* The Supreme Court of Canada eventually found itself grappling with expert evidence showing that in the native economy concerned there was no "neat distinction" between commercial and domestic use. What had seemed clear to whoever drafted the law was simply "unrealistic" in a context where people customarily ate the meat and sold the skin.[817]

Such problems could, of course, be alleviated if the Court limited itself to applying laws formulated according to postcolonial norms or defending Indigenous jurisdictions from encroachment by the colonizing culture. In this instance, however, the Court applied laws formulated by legislatures in which the Indigenous polity to which the accused belonged had no representation.

5.4.5 Limitations of the Container Metaphor

Cross-cultural differences in experience are not the only challenge to the assumption that everything can be neatly sorted into container-like categories. The

categories we use to think with facilitate reflection. However, as the cognitive theorists have pointed out, they are a product of our neural functioning rather than a reflection of reality *per se.* Thus categories that function well in one situation may be problematic in another. This is true whether or not the issues involved concern Indigenous peoples.

5.4.5.1 Constitution Act, 1867

One of the most prominent limitations on use of the container metaphor for classification that can be found in Canadian law involves the *Constitution Act, 1867* which lists separate spheres of federal and provincial jurisdiction in ss.91 and 92. The usual basket-like metaphor for classification is difficult to apply in this instance because:

> "no one government is isolated from the other, nor can it usurp the functions of the other".[818]

In effect, Canadian and provincial jurisdictions are customarily defined in territorial terms and the *Constitution Act, 1867* established a situation in which two sets of laws apply on most territory.

At the time of Confederation, which served to unite previously independent colonies, this set up seemed practical. It allowed the laws of the pre-existing provincial jurisdictions to continue as before while areas of mutual concern, once managed by colonial officials in Britain were administered by the federal parliament. The set-up was not a significant departure from the previous state of affairs because the colonists already derived their political rights from their shared

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[817] *R. v.Horseman* at {20}.

[818] *Firearms Reference* at [31].

status as British subjects. Over time, however, difficulties have arisen because many situations arguably involve elements of both federal and provincial jurisdiction. Courts dealing with the separation of federal and provincial powers have found that they cannot "draw sharp lines".[819] As the Supreme Court stated in the *Firearms Reference:*

> "Determination of which head of power a particular law falls under is not an exact science."[820]

The inexactness of that "science" was challenged from the outset in this case (See 5.3.2.1 above) It arose because a federal amendment to the *Criminal Code* requiring gun owners to register and licence their guns was very unpopular in some parts of the country. In response, the province of Alberta argued that it violated provincial jurisdiction over "property and civil rights" under s.92(13). In other words, the case included elements that could be defined as belonging to both federal and provincial jurisdictional categories.

5.4.5.2 Pith and Substance Analysis

The solution to problems created by ss. 91 and 92 has been to digress from container-like categorization to apply a "pith and substance" analysis. The analogy to the pith or growing core of a tree might seem to provide a model for a more diffuse understanding that more closely resembles the prototype-focused way that categories are actually formed in our minds. However, the cases in this study suggest that the altered imagery provided by the pith and substance paradigm has had little impact on the Court's use of the concept of categorization. Most situations

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[819] *Ibid.* at [50].

were still treated as distinct objects that could be sorted into different baskets and the reality of on-going overlapping effects that characterises Indigenous experience was ignored.

An example of the persistence of container-like categorization can be seen in *Kitkatla.* When the province of British Columbia issued a timber license allowing the destruction of culturally modified trees on land claimed by more than one Indigenous group, counsel for the Kitkatla argued that application of the relevant British Columbian legislation to them was *ultra vires* the province because it concerned "Indians" under s.91(24).[821] Writing for a unanimous Court, Lebel seems to have assumed that legal rights cannot be inherent and must be donated by some external source for he stated that:

> "The Constitution of Canada does not include an express grant of power with respect to "culture" as such." [underline added]

He then applied "pith and substance" analysis in a way that charted a course through categories and sub-categories effectively ignoring the overlapping character of the situation.

5.4.5.3 Arbitrariness

The fact that the categories we use are sometimes unrealistically arbitrary recurrently troubles judicial reasoning. The judges on the Supreme Court of Canada are obviously aware of some of the disjuction that exists between the container metaphor and our real experience of the world. The metaphor simply does not work

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[820] *Ibid.* at [25].

[821] *Kitkatla Band v. British Columbia.*

in some circumstances. Thus, in the *Secession Reference* the Court was at pains to explain that:

> "none of the rights or principles under discussion is absolute to the exclusion of the others."[822]

It fully acknowledged the interrelated character of the "fundamental constitutional principles" it was relying upon stating:

> "These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based....These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does one principle trump or exclude the operation of any other."[823] [underlining added].

5.4.6 Alternatives and Innovation

As seen in the *Secession Reference*, judicial awareness of the shortcomings of container-like analysis led to some attempts to use alternate models. In *Corbiere*, L'Heureux-Dubé's minority reasons used a prototype-based methodology by finding that:

> "equality is a comparative concept, the analysis must consider the person relative to whom the claimant is being treated differentially".[824]

Similarly, in *Lovelace* when the Court was asked to consider whether Indigenous communities that were not "bands" under the *Indian Act* could share in the profits generated by reserve-based casinos run by Ontario and the "First Nations" of that province, it referred to "constellations of disadvantage" saying there was not

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[822] *Reference Re Secession of Quebec* at [93].

[823] *Ibid.* at [49].

[824] *Corbiere v. Canada* at [69].

> "...a strict dichotomy of advantaged and disadvantaged groups within which each claimant must be classified."[825].

Because of this it found that:

> "...substantive equality analysis cannot be reduced to simple analytical formulae. For, while it is often true that distinctions may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations."[826]

The Court has recognized that even actuarial accounting can defy absolute definition. Thus, when called upon to evaluate land leased on a reserve in *Musqueam v. Glass,* McLachlin noted that: "appraisal is a notoriously unscientific endeavour".[827] She, in particular, seems to have given some thought to alternate conceptual frameworks. In *Marshall/Bernard*, she may have been influenced by pith and substance reasoning when she stated:

> "The question is whether the practice corresponds to the core concepts of the legal right claimed....To determine the aboriginal entitlement one looks to the aboriginal practices rather than imposing a European template..."[828]

Similarly, in *Haida Nation*, she specifically rejected the container metaphor with regard to the Crown's duty to consult and accommodate Indigenous interests suggesting:

> "the concept of a spectrum may be helpful, not to suggest watertight compartments but rather to indicate what the honour of the Crown may require in

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[825] *Lovelace v. Ontario.*

[826] *Ibid.* at [60].

[827] *Musqueam Indian Band v. Glass* at [16]

[828] *R. v. Marshall/Bernard* at [48-9].

> particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor....At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high....While precise requirements will vary with the circumstances, ...This list is neither exhaustive, not mandatory for every case."[829]

Thus, despite its ubiquitous use of container-like categorization, the members of the Court seem to be aware of some of the limitations of this device.

5.4.7 Judicial Awarness of Cognitive Processes

Because judges are constantly involved with the analysis of both their own and other people's reasoning, it is not surprising to find that they have gained some insight into cognitive functioning.

5.4.7.1 The Problems of Subjectivity

McLachlin acknowledged the inherently subjective nature of our thought proceses in her *Van der Peet* dissent where she criticized Lamer's Integral-Incidental test as being too categorical because:

> "...different people may entertain different ideas of what is distinctive, specific or central."[830]

Her proposal for defining "aboriginal rights" corresponded to what cognitive researchers have found we do in practice:

> ... "we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the

[829] *Haida Nation v. British Columbia* at [43-44].

[830] *R. v. Van der Peet* at [257].

> sort of things which may qualify as aboriginal rights under s.35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?" This is the time-honoured methodology of the common law."[831]

Many other aspects of this passage merit consideration.[832] The problem that concerns us here is that what looks "alike" on the basis of one person's experience will look radically different to someone else so McLachlin's formulation does not escape the shortcomings she identified with Lamer's test. Though she did demonstrate awareness of the fact that there is a problem in this regard, the net result is a colonizing imposition of an externally defined categorisation process.

5.4.7.2 Tolerance of Alternate Perspectives

One of the outstanding characteristics of the judicial reasoning examined in this study is that, despite the relative homogeneity of the judges' culture and experience, they sometimes took radically different approaches to the issues at hand. In *Van der Peet,* McLachlin's dissent joined another by L'Heureux-Dubé. As a result, three different "tests" were proposed. In *Blueberry River,* Gonthier and McLachlin both reached the same conclusion – that the Crown owed compensation to the Band for the loss of the mineral rights from their reserve. However, their reasoning was completely different. McLachlin relied on the *nemo dat quod non*

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[831] *Ibid.* at [261]. See also Peter W. Hutchins, Anjali Choksi, "From *Calder* to *Mitchell*: Should the courts Patrol Cultural Borders?" in *2001 Constitutional Cases: Fifth Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada* (Toronto: Osgoode Hall Law School, Continuing Legal Education, 12 April, 2001) at 25.

[832] For example, the impact of this passage will be postcolonial if the "aboriginal rights" protected by s.35(1) are defined by the Indigenous people themselves in accord with the traditional British concepts of the monarch's protective role, but it may have a colonizing impact if "the law" referred to is defined exclusively by the colonizing society.

habet[833] principle and emphasized a procedural defect within the Canadian system.[834] Gonthier, by contrast, emphasized the intent of the parties in the transaction which he saw as a "variation of a trust in Indian land". Their approaches differed from that of the trial judge and the Crown who thought the mineral rights had been transferred because they were not expressly excluded while Stone J.A. on the Court of Appeal had seen the transaction as a "revocation surrender".

Such disparity of opinion is typical of legal argument. It is one of the reasons why there is often no "right" answer on Canadian law school exams. As observed by La Forest when addressing a less conceptually chaotic situation in *Friends of the Old Man River Society*:

> "A variety of analytical constructs have been developed to grapple with the problem, although no single method will be suitable in every instance".[835]

5.4.8 Conclusions

The uncertainty created by the availability of different analytical options does not mean that categorization processes and "objective" standards can or should be abandoned. Even though it is just an analogy, the container metaphor is useful. Indeed, some elements are inherent to the way we think – in English and French at least. We can, however, take an informed approach. As the applications of paradigmatic theory discussed in section 2 above suggest, science no longer considers "objectivity" in absolute Napoleonic terms. In Lakoff's words:

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[833] "You cannot give what you do not have".

[834] There was no evidence to show revocation of the 1940 surrender of mineral rights so it could not have been included in the 1945 surrender prior to sale of the land to the Veterans' land program.

[835] *Friends of the Old Man River Society v. Canada* at {42}.

> "To be objective, we must be aware that we have a particular conceptual system, we must know what it is like, and we must be able to entertain alternatives".[836]

The same calibrated concept of objectivity may be applied to legal reasoning. Though none of the judgments examined for this study took scientific account of the subjective nature of human thought processes, some did articulate a value oriented concept of objectivity and many traditional common law practices accommodate what is, after all, a part of everyone's experience.

Notwithstanding the examples discussed in this section, the Court consistently advocated a model of reasoning governed by principled choices, most notably in the *Secession Reference*. Yet Canada's traditional approach to "Indians" was formulated by policy makers who firmly believed that the land they sought to "develop" was theirs and that the original peoples belonged to a backwards, dying race whose survivors needed to be assimilated into a British imperial organization that was destined to govern the world. This was the epitome of colonialism. As a consequence, a key question about any particular judgement concerns whose categories were chosen to serve as the containers for the reasoning and why. Over all, the post s.35 judgements remained profoundly colonial in their capacity to impose externally defined frames of reference, categories and prototypical models on Indigenous people even though, among themselves, the judges demonstrated the awareness and tolerance of alternatives that is characteristic of postcolonial reasoning.

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[836] Lakoff, *Women, Fire, and Dangerous Things* at 264. See also Skutnabb-Kangas (1981, xiii) as cited by Penetito, "Research and context for a theory of Maori schooling".

5.5 Judicial Frames of Reference

> "The patterns of abuse and harm do exist today, not only as today's reality but also as multigenerational legacies that will extend into the future unless the patterns are changed." [837]
>
> Wanda D. McCaslin (Métis) 2005,
> "Naming the Realities of Life"

The majority of the judgments examined for this study followed a set formula. They described the "facts", the applicable Canadian "law" and the reasoning in the "Courts below" before defining the issues to be considered at the Supreme Court and presenting the analysis that justified the Court's conclusions. Because of this, the frames of reference set out by settler society legislation or applied by the trial and appeal courts are readily accessible. However, judicial representations of the frames of reference asserted by the parties to the litigation remained surprisingly vague given the primacy of equality rights in the modern Canadian Constitution and the Court's claim that s.35(1) of the *Constitution Act, 1982* is intended to have a conciliatory function.[838]

Although arguments made by one side or another were referred to from time to time, they were not set out systematically in every case as one might expect if one of the Court's purposes is to serve as a forum for public discussion.[839] References to frames of reference used by the Indigenous society concerned tended to arise in extraneous commentary like Binnie's ruminations on merged sovereignty in

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[837] McCaslin, *Justice as Healing*..

[838] Note eg. *Van der Peet*, [31].

[839] See eg. McLachlin, "Welcome". By contrast, see *Bennell v. State of Western Australia* [2006] FCA 1243 which takes a more systematic approach to the presentation of Indigenous arguments.

Mitchell[840] or when raised by Indigenous people as a defence to violations of the settler society's norms. They were not part of the structure of the Court's analysis, occurring, if at all, as part of the evidence to be examined as happened in *Delgamuukw* or in the cases concerned with Mi'kmaq rights. This cavalier disregard for Indigenous reality and the colonial character of Canadian history made it difficult to determine what, exactly Indigenous parties had pleaded within the structure for legality imposed upon them. For example, in *St. Mary's Indian Band v. Cranbrook,* Lamer's statement of the issues concluded with:

> "In my view, the other two issues raised by the appellants do not arise on the facts of this case." [841]

Without access to the pleadings, there is no way of knowing what those issues were and he did not explain how he made this determination. This leaves us to wonder how many other issues may have been overlooked or swept aside in other cases, reminding us of the enormous supervisory power exercised by the Court through its capacity to determine which cases will or will not be heard and which frames of reference it will support or impose. It also suggests that the St. Mary's Indian Band may have been operating on the basis of a different conceptual framework – one that cannot be determined by reading the resulting judgment. As Kuhn pointed out, people tend to ignore facts and questions that do not fit the paradigm they are applying, and this is precisely what Lamer did when the St. Mary's Indian Band case reached his court.

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[840] *Mitchell v. M.N.R.* at [130].

[841] *St. Mary's Indian Band v. Cranbrook,* [1997] 2 S.C.R. 657 119 at [11].

The same considerations arise concerning whatever was argued by the interveners who participated in all but ten of the cases examined.[842] Once again, their perspectives were only occasionally set out and there is no readily available means of determining what points of view they put forward or whether the Court represented those that were mentioned accurately. As a consequence, the judgments serve exclusively as a record of the frames of reference adopted by the judges who served at the various levels of the settler society's system of courts.

5.5.1 Subjectivity v. the *Nowegijick* Principles

The Court's apparent lack of concern for the perspectives of both the parties and the interveners may be an unconscious perpetuation of the colonial belief that one's own point of view represents an "objective" standard that exists independently of human beliefs and perceptions. The postcolonial movement has been accompanied by a rise in consciousness concerning the profound variability in frames of reference that may be found as one moves across time or from one culture or sub-culture to the next. This in turn raises questions concerning the protective function traditionally claimed by the Crown. The *Secession Reference* insisted that it was not the role of the judges to impose their personal preferences.[843] Yet, choices and perceptions are inevitably coloured by personal experience. In order to uphold egalitarian principles, judges must accordingly be introspective enough to be conscious of the choices they make and articulate enough to relate these choices to

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[842] The cases without interveners were: *Jack and Charlie ; R. v. Horse; Roberts v. Canada ; Lac Minerals Ltd. v. International Corona Resources Ltd.*; *Mitchell v. Peguis Indian Band ; Williams v. Canada*; *Goodswimmer v. Canada; R. v. Catcheway; Musqueam Indian Band v. Glass*,; *R. v. Deane.*

[843] See eg. *Reference Re Secession of Quebec* at [101].

the fundamental principles agreed upon by the society or societies concerned as well as to the perspectives of the parties involved in the situation at hand.

This requires a very high level of analytical skill, though it is not unobtainable. Sensibility on this order might even have been part of British Imperial legal methodology. For example, back in 1921 the Privy Council in England made similar observations concerning the caution required to ensure respect for the multiple perspectives and concepts of legality incorporated in the British Empire. In *Amodu Tijani*, which considered Southern Nigerian land rights, Viscount Haldane insisted on the need for:

> "the study of the history of the particular community and its usages in each case".[844]

Though writing several decades before Kuhn's influential work, he seems to have been conscious of the same idiosyncrasies of human cognition. He pointed out that explanations of Indigenous concepts in English legal terms were "mere analogies of English jurisprudence" and, with the support of his Privy Council colleagues, he stipulated that:

> "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English

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[844] *Amodu Tijani* [1921] 2 A.C. 399 at 403. See also Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's Aquisition of their Territories* [Doctoral Dissertation, Faculty of Law, Oxford University, 1979) 45-61; Brian Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of *Delgamuukw*" (2001) 35:1 UBC L.R 43; "Common Law Origins of Aboriginal Entitlements to Land" 29:3 Manitoba L.J.289.

> law. But this tendency has to be held in check closely.[845]

Forbearance with regard to the preferences or conceptual frameworks of others appears to have been considered so important to the English that the concomitant limitations extended even to the monarch as seen Lord Denning's 1964 declaration in *Southam v. Smout* that:

> " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.' So be it – unless he has justification by law."[846]

This ethos of imperial honour and restraint was not confined to judicial reasoning. School children were also lectured on tolerance as can be seen in a 1919 Saskatchewan high school civics text which reasoned:

> "Since Canada is now assuming in a definite way the duties of empire, there is a certain imperial feeling that we should strive to develop, The British Empire is so vast that it contains within itself nations of all languages and all religions. As a citizen of the Empire you should, therefore, have respect and tolerance for the opinions of others. Our empire cannot long continue to exist, unless it is something for which our brother nations may all have an ardent loyalty, whatever may be their creed, race or tongue. This imperial feeling will also help us in our national affairs, for it will enable us to be sympathetic to our fellow citizens throughout the Dominion."[847]

The capacity to recognize and respect "internal" jurisdictions must have facilitated the spread of the community imagined by British imperialism. In North

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[845] *Amodu Tijani* [1921] 2 A.C. 399 at 402-3.

[846] *Southam v. Smout* [1964] 1 Q.B. 308 at 320.

[847] R.S. Jenkins, *Canadian Civics,* Saskatchewan Edition (Toronto: The Copp, Clark Company Limited, 1919), 167.

American Euro-Indigenous relations, it can be seen in the creative compromises of the eighteenth century described by White[848] and, as recently as 1909, Frank Oliver who was Canada's Minister of the Interior, expressed a governmental policy of respecting the Six Nations right to continue using their traditional government.[849] However, the rationale for colonial encroachment tended to supercede the ethos of respect and imperial forebearance as can be seen, for example, in the obliteration of Metis governments in the West or, according to Allen, in the earlier colonization of Ireland.[850] Certainly, the extension of the principle of self-government to the settler colony of Canada appears to have facilitated its retraction from Indigenous peoples in the case of the Six Nations.[851]

Amodu Tijani may have inadvertently contributed to the extension of this colonizing dynamic into Canadian legal reasoning for, in the course of explaining the importance of respect for cultural difference, Haldane cited *St. Catherine's Milling* as authority for the proposition that "Indian title to reserve lands in Canada" was a "usufructuary right". His comment completely overlooked the fact that neither the character of "reserve lands" nor "native title" was at issue in that case[852] and that Lord Watson had specifically stated that he was not expressing an opinion

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[848] White, *The Middle Ground.* For problems and miscommunications that resulted see eg. Walters, "Brightening the Covenant Chain".

[849] Frank Oliver to Chief J.S. Johnston, Deputy Speaker, Six Nations Council (5 April, 1909) in *Petition and Case of the Six Nations of the Grand River* presented to the Colonial Office, 25 August, 1921) PAC ARA A-dossiers 1918-1940 inv. no. 1521.

[850] See Allen, The Invention of the White Race.

[851] Woo, "Canada's Forgotten Founders"; Woo, Canada v. The Haudenosaunee (Iroquois) Confederacy at the League of Nations..

[852] *Amodu Tijani* [1921] 2 A.C. 399 at 403.

on "the precise quality of the Indian right". [853] This subtle error helped establish a path leading away from the very principles Haldane espoused. The power of his casual comment arose in part because, unlike the British, who could refer to local customs and practices to define their laws, Canadians were living far from their ancestral homes and the legal regime they applied was imported. As a consequence, they they had no local laws that the Crown could protect and, through institutions like the Privy Council itself, they had developed the habit of deferring to the authority of the "motherland". Such, according to the cognitive theorists, is the effect of subjectivity and lived experience.

5.5.1.1 Judicial Awareness of Subjectivity

Though differences between Canadian juridical assumptions and English sensibilities tend to be ignored[854], the members of the Court who wrote the decisions examined in this study frequently demonstrated an understanding of the subjective nature of their analyses. The authors of judgments were usually identified and phrases like "in my view" occurred regularly. Such self-awareness is fully consistent with a scientifically informed concept of objectivity that attempts to account consciously for the beliefs and assumptions that shape the terms of reference chosen.

As will be discussed below, the judges whose opinions were considered for this study often went to great lengths to explain the principles that founded their

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[853] *St. Catherine's Milling and Lumber Company v. The Queen* (1888) 14 App.Cas. 46 at 55. See Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada" at 50. The problem was not mentioned in Brian Slattery's thesis.

[854] Historical researchers like McNeil, Walters, Clark, Donovan and Pesklevits and have, however, brought some aspects of this dynamic to light.

reasoning. Even if they did not agree, they routinely expressed respect and deference for the analysis of prior decision makers, particularly when "findings of fact", issues of credibility[855], or expert assessments[856] were involved. However, they could also rely arbitrarily on personal sentiment or invoke the mythically pristine standard of objectivity to which Napoleon aspired. For example, in *Delgamuukw* Lamer baldly declared:

> "I believe that all the parties have characterized the content of aboriginal title incorrectly."[857]

Scientifically speaking, nothing can be "correct" except in relation to some standard. According to democratic theory, the measure of correctness is collective public opinion as determined through formal legislative processes. However in this instance Lamer resorted to a personal standard. Instead of grounding his analysis in a collectively defined legality created with the consent of the people affected, he sought to impose his own ill explained beliefs. This gave his reasoning a colonial tinge.

5.5.1.2 Unacknowledged Subjectivity

As far as the goal of decolonization is concerned, this dynamic was much more insidious when the judges did not acknowledge that they were applying a personal or culturally determined perspective in relation to concepts that were fundamental to the issues before them. Colonial modes of reasoning asserted themselves at this level even in cases that are celebrated for affirming "Aboriginal

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[855] *Delgamuukw v. British Columbia* at [79].

[856] *Paul v. B. C.(Forest Appeals Commission)* at [31].

[857] *Delgamuukw v. British Columbia* at [110].

rights". For example, *Nowegijick*, the oft cited first case in this study, is best known for the principle that:

> "Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians".[858]

Yet this case registered nine out or ten of the indicia of colonialism.

When we look to see why this happened we see that Gene A. Nowegijick is identified only as an "Indian". This is a category that exists only in Canadian law. It is defined by the *Indian Act* but, there was no evidence of such a classification in any Indigenous culture. The characterization represents a mode of thought that came into being because of European in-migration that affected peoples who were otherwise distinct. As such, it maintains the "othering" that has been much discussed by scholars like Said and Memmi. The case came to court because of a demand for income tax supported by the coercive power of the Canadian state. Nowegijick was not free to imagine his existence according to the parameters of his ancestors. Proceedings took place in the language and according to the institutions of the colonizing culture. The way in which Nowegejick constructed his identity in Indigenous terms was neither acknowledged nor explained. Even the attempt to be respectful by referring to him as "Mr. Nowegijick" imposed the British social category of "Mister".

Of course, none of these concerns would have had a colonizing effect if "Mr. Nowegijick" had voluntarily adopted Anglo-Canadian language, culture and political norms. However, evidence to this effect was conspicuous by its absence.

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[858] *Nowegijick v. The Queen* at 30.

The analysis began with the blunt declaration that "Indians are citizens". No evidence or legal explanation was offered to support this assertion. It may have felt like a magnanimous gesture to the members of the Court because it distanced them from the uncomfortable fact that "Indians" were once excluded from the definition of a "person" under Canadian law. However, the aura of abuse that hangs over past and even present Canadian-Indigenous relations was not acknowledged. The analysis simply presumed cultural and political assimilation.

The reason for this founding premise may not have been so generous. The full sentence in which the statement occurred reads as follows:

> "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act,* they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens"[859]

In other words, the purpose seems to have been to establish basic liability for Canadian income tax. Yet it is misleading in this regard because the *Income Tax Act* under which Nowegijick was charged stipulates that tax liability is based on being a "resident in Canada", not on citizenship.[860]

The most serious problem with this statement from a postcolonial perspective is, however, that the reference to citizenship implies political participation in the establishment of the tax regime that simply did not exist. As Dickson stated, income tax was introduced as a temporary war-time measure in 1917, long after the antecedent to s.87 of the *Indian Act* was implemented. It is, as he pointed out, an "idle pursuit at best" to speculate about whether parliament

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[859] *Ibid.* at, 36.

[860] *Income Tax Act*, s.2(1); *Nowegijick v. The Queen* at 34.

intended the s.87 exemption to extend to a tax that had not yet been created.[861] Yet, whatever nation or nations Nowegijick's Indigenous ancestors belonged to, they had no representation in either of the parliaments that pased the legislation being considered by the Court. In 1917, it might be recalled, "Indians" were explicitly excluded from the definition of a "person" in Canadian law.[862] Under the circumstances, it can hardly be considered that Nowegijick's people became subject to Canadian laws as a result of:

> "the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage..."[863]

In other words, the *Nowegijick* case does not meet the standards affirmed by the International Court of Justice in the *Western Sahara* case in 1975. Since Canada was a voluntary participant in the institutions that articulated the norms applied in *Western Sahara* this situation presents a structural flaw in the *Nowegijick* reasoning.

The same problems trouble Dickson's application, in the same case, of *Bachrach v. Nelson's* finding that "money" is "property".[864] He did not set out the principles applied to make this determination, so his adoption of the language of this American case is, in essence, another example of pure reliance on the social authority accorded to his personal opinion. His deference to the reasoning of the Supreme Court of Illinois also violates the popular representation that is

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[861] *Nowegijick v. The Queen, ibid.*

[862] *Indian Act,* 1906 S.C. 15 Geo. VI c.29 as amended by 1-2 Ed. VII, 1910 c.28; 1-2 Geo V, 1911 c.14; 4-6 Geo. V, 1914 c.35; 8-9 Geo. V.

[863] *Western Sahara,* I.C.J., 16 October, 1975 at 12, [57].

[864] *Nowegijick v. The Queen* at 38 citing *Bachrach v. Nelson,* 182 N.E. 909 (1932).

fundamental according to English constitutional norms. If the case Dickson relied on had reasoned on the basis of the customs of both Nowegijick's people and of Canadians it would have been applying "the laws of the land"; however, this aspect of the reasoning relied on an external interpretation of words in a language that was certainly foreign to the targeted party's ancestors.

5.5.1.3 Respect for Indigenous Perspectives

These shortcomings do not detract from the fact that the *Nowegejick* case did represent a significant breakthrough in postcolonial terms. The Court's enunciation of the principle that Indigenous perspectives must be acknowledged and that the words of statutes and treaties must be interpreted "in the sense in which they would naturally be understood by the Indians" [865] might be seen both as a restoration of the classical British constitutional paradigm that was founded on the laws of the land and as a repudiation of the colonial presumption of Indigenous inferiority that ensured that their points of view were routinely ignored.

5.5.1.4 Creative Accommodation?

In fairness to Dickson and the members of the Court it should be noted that it is unlikely that international law was presented in any of the pleadings before them. Nowegijick's taxable income of only $11,057.08 indicates a significant power imbalance between him and the Canadian state. Notwithstanding the presence of a long list of Indigenous interveners, the time frames and cost involved were not conducive to the articulation of arguments involving the kind of fundamental paradigmatic reorientation required to persuade Canadian judges to think of

Indigenous peoples on a fully equal basis. Those involved in Nowegijick's defense may well have decided that it would be strategically politic to settle for an attempt to reestablish the kind of creative ambiguity that appears to have governed Indigenous relations with Europeans in the early contact era.[866] They limited their arguments to a narrow sphere and, since the political status of Nowegijick's people was not in issue, the case cannot be taken as authority for the statement made in *obiter* that "Indians are citizens" of Canada.

5.5.2 Who Framed the Issues?

With regard to all of the judicial reasoning examined in this study, it is important to remember that, as Lamer pointed out in the *Remuneration Reference*, the party who frames the issues plays a significant role in determining the grounds on which analysis proceeds.[867]

5.5.2.1 The Power of the Crown

There was plenty of evidence to validate the judicial perception that they were imprisoned to some extent by the questions before them.[868] When considering who framed the issues in the sixty-two cases in the core sample examined, it is obvious that the Crown exercised by far the greatest influence. (See Appendix 5) Only three cases involved private suits against indigenous parties and none involved

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[865] *Ibid.* at 37.

[866] See White, *The Middle Ground.*

[867] *Remuneration Reference* at [82].

[868] *Ibid* at [82].

an Indigenous complaint about a purely private matter.[869] Aside from the two references to the court by governments, fully thirty cases began with penal charges against Indigenous people. Most of these concerned hunting or fishing rights. Only the robbery of a pizza parlour in *R. v. Williams*[870] and the murder in *R. v. Gladue*[871] were conventional crimes with no direct connection to the historical fact of colonization. Two further cases involved non-Indigenous penal charges. Four involved tax or customs levies and ten arose from the state's ability to encroach on Indigenous ways of life by granting land title, rights of way or licences for logging, power export or road construction to outside interests. Thus, a quick review that does not address the colonizing aspects of the situation surrounding such matters as *Guerin*'s lease and the band council elections in *Corbiere* and *Goodswimmer,* demonstrates that most of the cases required the Court to reason according to frames of reference established by agents of one aspect or another of the Crown.

5.5.2.2 The Crown's Duty to Protect

This leads us to consider who the "Crown" or government actually represents. In *Sparrow,* Dickson and LaForest stated that a general guiding principle for s.35(1) was that:

> "...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of

[869] Though *Wewaykum Indian Band v. Canada* involved a dispute over land rights, it concerned the Crown's attribution of a reserve.

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

[871] *R. v. Gladue.*

> aboriginal rights must be defined in light of this historic relationship."[872]

We might thus expect the Crown to promote, protect and act on behalf of Indigenous points of view. However, when we look at the interests supported by the Crown in the 62 cases examined, we find that only six involved no element of adversity between the Crown and Indigenous interests. As listed in Appendix 5, the Crown supported private property interests in 27 cases. It supported Indigenous interests in only six cases. In five of these it was acting against another Indigenous point of view and in one against a private complainant.[873] Despite the presumption that the Crown played a fiduciary role, there were no instances of litigation initiated by the Crown on behalf of an Indigenous interest or of prosecution by the Crown to defend Indigenous rights. Moreover, the federal Crown acted as an intervener in 22 cases and provincial Crowns acted as interveners in 37 cases. There is no evidence that any of these interventions supported Indigenous positions. In effect, as might be expected given the historical genesis of the Crown's presence, it represented settler society.

Indigenous interests were, however, allied with those of some members of settler society in seven cases suggesting that support from private organizations, such as environmental groups, is more readily available to Indigenous peoples than Crown support. Many of the settler interests with which the Crown aligned itself were able to mount their own legal arguments creating a reduplication of anti-

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[872] *R. v. Sparrow* at 1108.

[873] *Mitchell v. Peguis Indian Band.*

Indigenous effort. There were private interveners in a total of 22 cases, while only 10 cases had no interveners at all.

With the Crown acting at times as both prosecutor and intervener, Indigenous interests were often required to defend themselves against multiple manifestations of the settler culture. Moreover, as well as having a behind-the-scenes involvement in *Wewaykum II* before he became a member of the Court, Binnie was counsel of record for the Crown in two cases that opposed Indigenous points of view.[874] Under the circumstances, it is difficult to see how it can be argued that the Crown's position in relation to Indigenous interests, as defined by the Indigenous peoples themselves, has been "trust-like, rather than adversarial".

5.5.3 Whose Frames of Reference Prevailed?

Another indication of the Court's stance with regard to Indigenous points of view can be found by considering whose frames of reference were ultimately validated by the judgments rendered.

5.5.3.1 Who Won?

The oppressive character of the Crown's use of the Court seems to be accentuated when we consider who "won" in the cases involving penal charges. As set out in Appendix 5, charges against a total of 99 Indigenous people were considered in 30 cases. Of these, 70 people were convicted, 13 were acquitted and retrial of one kind or another was ordered for 15. Thus, despite the ordeal involved

[874] *Guerin v.The Queen; Ontario v. Bear Island Foundation.*

in contesting a charge all the way to the Supreme Court of Canada, only a small percentage of those charged were eventually exonerated.

Aside from the tax and customs charges that were of concern in four cases, colonial social norms were expressed through the granting of licences and leases to non-Indigenous interests in 14 cases. This dynamic, coupled with the Court's standard procedural methodology of applying legislation and principles established without Indigenous involvement, enhanced the colonizing burden represented by the use of the Supreme Court as a venue for resolving intercultural issues.

5.5.3.2 Who Used the Court?

Under the circumstances, it should not surprise us to find that, according to the cases that reached the Supreme Court, it does not appear to have been an institution that was voluntarily chosen by Indigenous peoples to regulate their rights amongst themselves. None of the cases examined in this study called on the Court to resolve disputes that exclusively concerned Indigenous parties with no Crown implication. Of the eighteen cases that were instituted by Indigenous parties all but one named a settler government as the defendant.

5.5.3.3 Creative Use of the Right of Reply

Because Indigenous people have become familiar with the customs of settler society some of the cases instituted by the Crown or by business interests could be considered to have been intentionally provoked. Two began with blockades, three with tax assessments and one with the registration of cautions on land claimed by the Crown. In *R. v. Jones* a Band Council Resolution renounced federal and

provincial jurisdiction and in *Pamajewon* and *Mitchell* non-compliance with settler regulatory regimes was deliberate, public and pre-meditated. This may also have been the case with *Marshall/Bernard.* This approach may have been adopted in part as an assertion of Indigenous sovereignty, but also because any accused or respondent may use the right of reply guaranteed by standard court procedure to introduce a point of view that differs from that of the accusing party. It should be remembered that in all of these instances prosecution was not the only option available to the Crown. It could have chosen to accept and accommodate Indigenous conceptualizations of their rights.

5.5.3.4 *Mitchell* and the Problem of Issue Re-definition

In *Mitchell* the Court was dealing with a situation in which Canadian law was intentionally being tested by an Indigenous applicant. The international boundary with the United States as well as provincial boundaries had been drawn through a pre-existing community. It is currently impossible to drive from the Ontario part of Akwesasne to the Quebec part without passing through the United States and Cornwall Island can only be reached by road by passing either through a toll bridge or the Canadian border control.[875] Mike Mitchell, the Chief of the Mohawk Council of Akwesasne, knew that he would be charged when he refused to pay customs on goods he was carrying to symbolize unity within the Mohawk nation.[876] He explicitly described himself as "a citizen of the Mohawk Nation"[877]

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[875] The U.S. border control is on the outside edge of the reserve, rather than in the middle.

[876] *Mitchell v. M.N.R.* at [2].

[877] *Ibid.* at [67].

and claimed his right on this basis with regard to personal goods, community goods and goods for small scale trade. [878]

The trial court found that there was an Aboriginal, but not a treaty right "to pass freely across what is now the border" and to carry goods for noncommercial scale trade. On appeal, this right was confirmed within the traditional range of Mohawk trade, limited to goods purchased in New York state, brought to a border crossing between New York and Ontario or Quebec and used only for trade with other Aboriginal communities within those two provinces.[879] However, at the Supreme Court of Canada, McLachlin redefined the issue as an unlimited right to trade across the St. Lawrence River, broadly phrased so as to include mobility rights which had been carefully excluded from the issue submitted for consideration.[880] She then found that the claim for the right as she had redefined it had not been made out. This dynamic effectively prevented formal analysis of the issues as understood by Mike Mitchell and the Mohawk nation.

5.5.3.5 Interpretation of Indigenous Culture in *Mitchell*

McLachlin's failure to address the question that had actually been brought before the Court may have been due in part to an inability to grasp the social parameters of an alien culture about which the court evidently knew little. This is suggested by the misrepresentation in the majority reasons of some of the expert

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[878] Peter W. Hutchins, Anjali Choksi, "From *Calder* to *Mitchell*: Should the courts Patrol Cultural Borders?" in *2001 Constitutional Cases: Fifth Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada* (Toronto: Osgoode Hall Law School, Continuing Legal Education, 12 April, 2001).

[879] *Ibid* at [5-7].

[880] *Ibid* at [16- 25, 60]; Hutchins, Choksi, "Fom *Calder* to *Mitchell*" .

evidence that had been presented at trial. McLachlin's reasoning was based, in part, on the assertion that:

> "Richter contends that warfare between the Five Nations and their northern neighbours precluded the possibility of trade (at 28-29)"[881]

What Richter actually wrote, as a quote from his work provided by McLachlin herself demonstrated, was that:

> "...a *lack* of reciprocity, as epitomized by the absence of trading relationships, could easily lead to a presumption of hostility."[882] [italics in original]

That is to say, McLachlin reversed the order of causality suggested by Richter[883] in a passage that he identified as conjecture saying:

> "Whatever the case may have been...For the Five Nations, the theme of reciprocity and exchange, war and peace, and alliance and spiritual power entwined to define most relationships among persons, kin groups, and villages."[884]

Given Richter's conclusion, it is difficult to understand why McLachlin claimed that:

> "...while Richter's book may support the pre-contact existence of north-south trade routes, it refutes the direct involvement of the Mohawks in this trade."[885]

Richter's book did nothing of the sort. Its thesis was that if there were Iroquois, there was reciprocity and exchange. Besides, Richter was not addressing the Court's question of whether or not north-south trade existed. He was demonstrating

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[881] *Mitchell v. M.N.R.* at [44].

[882] *Ibid.*

[883] War prevented trade instead of lack of trade led to a presumption of hostility.

[884] Daniel K. Richter, *The Ordeal of the Long-house: The Peoples of the Iroquois League in the Era of European Colonization* (University of North Carolina Press, 1992) at 29.

[885] *Mitchell v. M.N.R.*. at [46].

his assertion that: "Reciprocity...infused Iroquois concepts about property".[886] This surely supported Mitchell's claim that "trade and commerce [is] central to their soul"[887] and accordingly integral to the Mohawk sense of who they are.

McLachlin's understanding of Mitchell's pleadings was so disoriented that it is only by reading Binnie's minority reasons that we learn that Mitchell based his rights on Haudenosaunee citizenship as established in the pre-contact era.[888] However, neither judgment mentioned the recognition of Indigenous sovereignty that characterized early Anglo-Iroquois relations or the era when Britain dreamed of establishing "Indian" buffer states between the loyal colonies and the rebellious United States.[889] This significant contextual void may explain why Binnie's attempt to reinterpret the *Two Row Wampum* violated the very principle commemorated by its symbolism. (See s.5.1.3.1 above)

We need only turn back a few paragraphs to see where Binnie's well-intended reasoning went off course as far as giving equal weight to "aboriginal and non-aboriginal" perspectives is concerned. Mitchell's argument focused exclusively on trade with "other First nations".[890] His view, as stated by Binnie, was that:

> "Akwesasne is a Mohawk community that has existed from time immemorial, with its own laws and government, and we have consistently been

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[886] Richter, *The Ordeal of the Long-house* at 21.

[887] *Mitchell v. M.N.R.* at [18].

[888] *Ibid.* at [67. 70. 109].

[889] See eg.Mark Walters, "Brightening the Covenant Chain : Aboriginal Treaty Meanings in Law and History after *Marshall*" (2001) 24.2 *Dalhousie L.J.* 75 at 110; Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New Haven: Yale University Press, 1962); Rémi. Savard, "Un projet d'État indien indépendent à la fin du XVIIIe siècle et le traité de Jay" 24.4 *Recherches amérindiennes au Québec* (1994-5) 57; Allan W.Eckert, *A Sorrow In Our Heart: The Life of Techmseh* (New York: Konecky & Konecky, 1992) at 347, 385.

[890] *Mitchell v. M.N.R.*. at [16].

> determined to maintain the sovereignty of our Nation".[891]

Historically speaking, the community at Akwesasne has not existed since time immemorial, but the Mohawk community that inhabited a much wider geographic sphere has.[892] In effect, Mitchell asserted his rights in terms of a concept of nationality that was relationally defined in keeping both with Mohawk custom and the semantic origins of the concept of a "nation".[893]

Binnie, by contrast, applied a territorial concept of nationality stating that, in his view, the claim could:

> "only properly be construed as an international trading and mobility right".[894]

Thus, like McLachlin, he reformulated the question posed to suit his own conceptual framework, giving priority to Euro-American boundaries and semantic preferences. Though not explicitly explained, his presumption that Canadian nationality and jurisdiction are, and must be, territorially defined can be seen in statements such as:

> "Canadian sovereign authority has, as one of its inherent characterstics, a monopoly on the *lawful* use of military force within its territory".[underlining added][895]

or:

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[891] *Mitchell v. M.N.R.*. at [117].

[892] In the pre-contact period Iroquoian communities typically moved every 12 to 20 years. A community was established at that location in the 1740's or early 1750's. Gerald F., *Kahnawa:ke: Factionalism, Traditionalism, and Nationalism in a Mohawk Community* (Lincoln: University of Nebraska Press, 2004) at 12.

[893] He was not a formal representive of his people in this proceeding and the community he represented was not defined. Since he described himself as "Mohawk", he might have defined it by membership through birth or formal adoption into the Wolf, Bear or Turtle clan of the Kanienkehaka Nation. See eg. Annemarie Anrod Shimoney, *Conservatism Among the Iroquois at the Six Nations Reserve* (Syracuse, N.Y: Syracuse University Press, 1994). Gerald R. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford, 1995). However, as Daren Bonaparte has pointed out, every community that survived colonialism is a mishmash of tribes genealogically speaking.

[894] *Mitchell v. M.N.R.*. at [126].

[895] *Mitchell v. M.N.R.*. at [153].

> "Control over the mobility of persons and goods into ones country is, and always has been, a fundamental attribute of sovereignty". [underlining added][896]

In other words, even though relations between the Mohawks and the British Empire were originally established at a time when both polities were relationally defined, Binnie responded in terms of the modern Canadian concept of nationality that assumes a territorial paradigm in keeping with the definition of a "state" set out by the 1933 *Montevideo Convention* (See 1.2 and 3.2 above). His approach was consistent with vernacular usage such as the Canadian Broadcasting Corporation's "National News", which refers to events on the territory over which the Canadiasn federal government claims jurisdiction. In the terminology of the people of Akwesasne, this shift from a relational to a territorial concept of nationality or statehood represents a violation of the *Two Row Wampum* that envisions two separate vessels sailing on separate paths on the same river. In terms of the metaphoric understanding of the people of Akwesasne, *Mitchell* represents an attempt to use Canadian law to steer the Indigenous canoe.[897]

5.5.4 The Anglo- Canadian Socio-Cultural Framework

Because of the structure and mandate of the Court, even successful cases like *Guerin* have had to frame the issues in terms that make sense according to Anglo-Canadian legal custom. The bias in favour of the conceptual categories of the colonizing cultures created by the use of the colonizers' languages and institutions was accentuated by the law that was applied. If the judges had been applying

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[896] *Mitchell v. M.N.R.*. at [160].

[897] See eg. Katenies [aka Janet Davis] v. Her Majesty the Queen, Superior Court of Justice, Province of Ontario, City of Cornwall , Motion to Dismiss Information #C2202/03 12 January 2007.

statutes passed according to the customs of the people concerned using egalitarian democratic processes, their reasoning would have rated high on the postcolonial scale for this indicater. However, as pointed out by the *Royal Commission on Aboriginal Peoples,* the dominant culture has been attempting to displace and assimilate Indigenous peoples since the end of the eighteenth century.[898]

Though we have supposedly entered an age of "Negotiation and Renewal" the Court has yet to develop a methodological approach in this regard and, with the exception of the treaty cases and *Wewaykum II,* consideration of the nature of the processes that produced any of the "law" relied upon by the Court was conspicuously missing. All of the statutes and judicial precedents used to frame analysis in the cases included in this study were produced by the colonizing culture using legislative processes that included no institutional recognition for any Indigenous jurisdictions. In short, the Court considered the issues that arose in an institutional context that has failed to adjust its policies and procedures to reflect the egalitarian norms that emerged during the twentieth century. As a consequence, Indigenous polities were not accorded respect in a way that is comparable to that enjoyed by the founding colonies that have been incorporated as "provinces" in Canada.

5.5.4.1 Ignoring Indigenous Historical Experience

This failure to adapt manifested itself, not so much in the reasoning itself, as in what was missing from the reasoning. The Court's methodology for applying Canadian laws gave no consideration to the fact that many were creations of an age

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[898] Erasmus, Dussault, (RCAP, 1996), *Looking forward, looking back.*

when Indigenous people had no vote.[899] As previously mentioned, they were even excluded from the definition of a "person" by the *Indian Act* between 1876 and 1951.[900] Furthermore, as set out in *Mabo*, the British law applied in colonial contexts developed a legal fiction that pretended Indigenous peoples had no law.[901]

Though both Lamer and McLachlin cited *Mabo* in *Van der Peet*, neither the Supreme Court nor the Canadian legal profession as a whole has engaged in as much reflection as one might have expected concerning the implications of this received legality. The Court, in particular, has generally assumed the legitimacy of British assertions of sovereignty, framing events as if the the Indigenous peoples had no history during the thousands of years that preceded the arrival of Europeans. For example, in *Guerin*, the Musqueam were anachronistically described as "descended from the original inhabitants of Greater Vancouver".[902] The city was only a century old at the time of this decision. The Musqueam had been there for millennia[903] and the Court's characterization camouflaged this fact. Anachronisms of this kind were accompanied by reliance on the very colonial legality that the Court ostensibly repudiated when it found that s.35 had "changed the rules of the game". [904] Thus, seminal cases like the *Secession Reference* and *Van der Peet* relied

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[899] Until 1960, except for a few who could vote before 1898. S.C. 1960, c.39. See Richard H. Bartlett, " Citizens Minus: Indians and the Rights to Vote" (1979) 44 Sask. L. Rev. 163; Sally M. Weaver, "The Iroquois: Grand River Reserve, 1875-1945" in Edward S. Rogers and Donald Smith eds. *Aboriginal Ontario, Historical Perspectives on the First Nations* (Toronto: Dundurn, 1994), 213; Woo, *Canada v. the Haudenosaunee Confederacy* s.3.3.3.1.

[900] *Indian Act, 1876,* S.C. 1876, c.18 (39 Vict.) s.12; *Indian Act,* S.C. 1951, c. 29 s.123.

[901] *Van der Peet* at [40 and 265].

[902] *Guerin v. the Queen* at 339.(Wilson)

[903] Dickson later acknowledged they had been there at least 1,500 years, though archaeological dating and oral tradition suggest occupation has been much longer. *R. v. Sparrow* at 1094; *Musqueam Indian Band,* http://www.musqueam.bc.ca

[904] *R. v. Sparrow* at 1105 citing Lyon, "An Essay on Constitutional Interpretation".

uncritically on "historical practice" as a source of law much as the research participants referred to by Kuhn continued to sort black hearts into the pile of red cards.[905]

This somewhat naïve concept of history as a repository of both constitutional norms[906] and Aboriginal rights is consistent with what MacDougall, among others, has identified as an English cultural tendency to see "history" as "a justification of whatever is".[907] Its effect has been to tie the Court's reasoning to the colonial conduct that founded the Canadian state. However, a dawning wariness with regard to some of the assumptions of that era did crystalize into an articulated concern in Binnie's supplementary reasons in *Mitchell*, which cautioned that:

> "Care must be taken not to carry forward doctrines of British colonial law into the interpretation of s.35(1) without careful reflection".[908]

His awareness that tensions do surround the Court's reliance on "history" can be seen in his observation that:

> "The courts have attracted a certain amount of criticism from professional historians..."[909]

In an attempt to justify the contradictions raised by the Court's reliance on superficial investigations of past social dynamics, he suggested that:

> "The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution findings of certain historical facts.

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[905] Kuhn, *The Structure of Scientific Revolutions*, 63 citing Bruner, Postman, "On the Perception of Incongruity".

[906] *Reference re Succession of Quebec*, S.C.C. [1998] 2 S.C.R.217 at [49].

[907] MacDougall, *Racial Myth in English History* at 90.

[908] *Mitchell v. M.N.R.*. at [149].

[909] *R. v. Marshall* at [36-37].

> The litigating parties cannot wait for the possibility of a stable academic consensus. The judicial process must do the best it can."[910]

He does not seem to have realized the extent to which the need for "findings of historical facts" was culturally constructed and though he acknowledged that the past was necessarily seen "as through a glass darkly"[911], this did not prevent the Court from continuing to apply its impugned quasi-historical methodology. As McLachlin explained in *Marshall/Bernard*, according to the test that the Court has devised for "Aboriginal title":

> "The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question."[912]

In other words, the test is founded on historical speculation for, as McLachlin herself admitted in *Marshall/Bernard*:

> "...one must look to evidence. But evidence may be hard to find....The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists".[913]

This suggests that the Court has reached the point of recognizing that there are problems with the methodology it has established for determining Aboriginal rights but it has yet to find an adequate replacement. Thus. as Kuhn pointed out, old methods of analysis persist as we wait for a new paradigm to emerge. Responsibility for the Court's shortcomings in this regard must, in all probability, be born in part by the legal profession as a whole for there is little indication that the pleadings presented to the Court were conducive to the profound reorientation

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[910] *R. v. Marshall* at [36-37].

[911] *R. v. Marshall* at [3].

[912] *R. v. Marshall; R. v. Bernard* at [51].

required. Though a full discussion of the use of history by the courts and by the Canadian legal profession is beyond the scope of this work, the Court's reliance on past practices instead of principled negotiation to define legality is problematic from a postcolonial perspective, not only because of the unreliability of this procedure, but also because it allows the past to colonize the present.

5.5.4.2 Indigenous Rejection of Canadian Frames of Reference

Because this research focuses exclusively on Supreme Court judgments, an investigation of the reasons why Indigenous people have not used the judicial system to mediate their differences with Canadian state agencies lies beyond its scope. However, the fact that the courts have almost invariably required the application of Canadian frames of reference must surely be a factor. Historical experience is likely another reason for this reticence. For example, the Haudenosaunee/Six Nations are still marked by events of the 1920's when they attempted to mount a formal legal argument that the *Indian Act* was *ultra vires* the *B.N.A. Act.*[914] Despite top legal counsel, unremitting effort and appeals to all possible authorities in Colonial society, they were ultimately excluded from all courts, both within the British empire and internationally. Their traditional government was deposed by Canada in 1924 and the *Indian Act* was amended to prevent "Indians" from collecting funds to hire lawyers.[915] This may be one reason why some Indigenous people today refuse to use Canadian institutions, insisting that

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[913] *R. v. Marshall; R. v. Bernard* at [64].

[914] They argued that Britain could not give Canada more rights than it had so s.91(24) only gave a right to negotiate with "Indians".

[915] Woo, "Canada's Forgotten Founders"; *Indian Act,* R.S.C. 1927 c. 98 s.141.

resolution of the issues that arise should be negotiated on a nation to nation basis.[916] A third factor may be related to the fact that many Indigenous communities lack even such basic amenities as clean drinking water. This suggests that economic and social hardship must also present a significant barrier to realization of the ideal of free access to the court system.

5.5.4.3 Judicial Awareness of the Problem

In practical terms, the lopsided character of the cases that come before the Court contradicts the egalitarian democratic ideals espoused by judicial reasoning and the Court's uneasiness on this count was sometimes evident. As Dickson and LaForest observed in *Sparrow*:

> "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right."[917]

This comment appears to have had little, if any, impact on the habitual conduct of government functionaries. Such bureaucratic indifference may explain the sense of outrage expressed by the Court in *Mikisew Cree First Nation,* the last case in the core sample analysed for this study, which railed from the first paragraph against "the indifference of some government officials to aboriginal people's concerns".[918] It may be worth noting, however, that such indifference is encouraged by Canada's institutional structure which provides Indigenous venues for collective representation with little substantive power.

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[916] See eg., "From the Women Title Holders of the Rotino'shon:ni also known as the Six Nations Iroquois Confederacy on Turtle Island to Mme. Michaelle Jean, Governor General of Canada" 20 June, 2006, *Mohawk Nation News*, (23/08/2006).

[917] *R. v. Sparrow* at 1095.

5.5.5 *Sui Generis* Reasoning

Throughout the judgments examined for this study the Court accepted the proposition that, as stated in *R. v. Côté,* the *Constitution Act, 1982* "changed the landscape of aboriginal rights in Canada".[919] However, as Kuhn has pointed out, there is a tendency to try to make anomalies fit existing paradigms. One of the techniques used by the Court to gloss over the rupture represented by the twentieth century repudiation of colonialism has been the classification of "Aboriginal Rights" as *"sui generis"* meaning simply that they do not fit the traditional categories of English law. This device is inherently colonial in that it takes the conceptual framework of the in-migrating culture as the standard against which Indigenous rights must be measured. However, it may also function as a mechanism for implementing postcolonial legality to the extent that it created a space for Indigenous points of view, particularly in formulations that emphasized the fiduciary duty of the Crown. This is what Borrows and Rotman hoped would happen when they reviewed the "The Sui Generis Nature of Aboriginal Rights" in 1997.[920]

5.5.5.1 Definition of "*Sui Generis*"

When considering what, exactly, the members of the Court meant when they used the term "*sui generis*" it should be noted that Aboriginal rights are not the only ones that the Court has described in this way. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, which did not concern Indigenous rights, Sopinka called the

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[918] *Mikisew Cree First Nation v. Canada* .

[919] *R. v. Côté* at [51].

[920] John Borrows, Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights": Does it Make a Difference ?" (1997) 36 *Alta. L. Rev.* 9.

action for breach of confidence *sui generis* because it did not fit "the traditional jurisdictional bases for action of contract, equity or property".[921] Similarly, in *Friends of the Oldman River Society,* La Forest stated:

> "I agree that the Constitution Act, 1867 has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several heads of power assigned to the respective levels of government".[emphasis added][922]

In these instances, the term "*sui generis*" meant simply that something did not fit established categories.

5.5.5.2 *Sui Generis* Ambiguity

Anglo-Canadian law as applied at the height of the colonial era during the "Displacement and Assimilation" stage identified by the *Royal Commision on Aboriginal Peoples*[923] conflicted both with the treaty-based legality that governed relations during the stage of "Contact and Co-operation" and with modern international standards to which Canada has agreed. A person who was not familiar with current Canadian case law might accordingly expect the term "*sui generis*" to be applied to the temporally limited concept of legality that prevailed during the stage that Canada is attempting to leave behind according to the *Royal Commission.*[924] This, however, is not how this term was used in the cases considered for this study.

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[921] *Lac Minerals Ltd. v. International Corona Resources Ltd.* at {29}.

[922] *Friends of the Old Man River Society v. Canada* at {41}.

[923] Erasmus, Dussault, (RCAP, 1996), *Looking Forward, Looking Back,* 38-41.

[924] See eg. Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) *McGill L. J.* 308; Thomas Isaac,

Guerin was the first in this sample to use the term "*sui generis*" to describe "Aboriginal rights". In *Mitchell v. Peguis*, Dickson summarized his reasoning in that case saying that the "Indian interest in land" was a:

> "*sui generis* interest, the nature of which cannot be totally captured by a lexicon derived from European legal systems".[925] [italics added]

Though this appears to legitimize Indigenous difference, "*sui generis*" identification also confirmed the social barrier established by the in-migrating culture. It was not used to invoke the Crown's protective duty towards both Indigenous and immigrant legality in the sense that English tradition recognized the Danelaw along with the laws of Essex and Mercia or modern Canadian law recognizes provincial jurisdictions or even the customs of an industry as seen in *Lac Minerals.* Instead, the term *sui generis* elicited the kind of "othering" that Said has described. If the Court had adopted a fully egalitarian postcolonial methodology, it would have pointed out that each jurisdiction has its own internal logic and inter-cultural norms cannot be unilaterally defined by Anglo-Canadian institutions. They must be mutually agreed upon by the people concerned, including those who happen to be Indigenous if they are to have legal and political legitimacy. Thus, despite the Court's best intentions, the *Guerin* formulation of the *sui generis* principle had an effect that was decolonizing in its recognition of Indigenous difference but ultimately colonizing in its imposition of an externally defined conceptual framework.

"The Concept of the Crown and Aboriginal Self-Government" (1994) 14.2 *Can. Jo. Native Studies,* 221; Walters "The "Golden Thread" of Continuity".

[925] *Mitchell v. Peguis Indian Band* at {31}. See *Guerin v. the Queen* at 382, 385, 387. Also: *Simon v. The Queen* at [33] ; *R. v. Sioui* at {16}.

According to the embodied theory of knowledge, patterns of thought become entrenched in the very physiology of our being. This may explain why, despite repeated statements concerning the importance of recognizing Aboriginal perspectives, this is not what the Court did in most instances. Habits formed through past experience may be so strong that they induce people to act ways that contradict principles they have consciously endorsed. It was thus quite predictable to find a judicial tendency to revert to constructions of knowledge that were established during their formative schooling and that reflected the assumptions of the era when Indigenous peoples were excluded and ignored.

Analysis of Aboriginal rights according to a framework that sees them as *sui generis* appears to be part of this phenomenon. This establishment of Canadian terms of reference as the standard against which Indigenous experience is to be measured violated the principle of equality that is primordial from a postcolonial perspective. Moreover, the *sui generis* classification camouflaged the ordinary nature of some of the issues brought forward. For example, *Guerin* concerned misconduct by Indian Affairs officials who leased land on terms that were not agreed to by the Musqueam. The scenario presented would have been grounds for legal action even if the victims were not Indigenous. The Court's digressions concerning "Indian title" and *sui generis* rights made the situation seem unnecessarily exotic reflecting, once again, the colonial "othering" described by Edward Said. Yet, the recognition that the Musqueam had rights on a parity with other human beings was decolonizing in a context that had developed under the

aegis of an act that had excluded "Indians" from the definition of a "person" until after the judges sitting on the case had reached adulthood.

5.5.5.3 Acknowledgement of Indigenous Difference

When the *sui generis* concept was used to acknowledge cultural difference, the Court's theoretical approach to Indigenous points of view was generally equalizing. In her dissenting reasons in *Horseman*, which were supported by Dickson and L'Heureux-Dubé, Wilson reasoned that :

> "The interpretative principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis*...These treaties were the product of negotiation between two very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into"[926] [italics added]

Similarly, after considering the "historical context" that produced the document under consideration in *R. v. Sioui*, Lamer dealt with an obvious cultural imbalance by finding that the treaty actually negotiated was oral. With regard to the treaty-making capacity of those involved, he noted that:

> "The question of capacity has to be examined from a fundamentally different viewpoint and in accordance with different principles for each of these groups".[927]

In *Sparrow*, Dickson and LaForest likewise cautioned that:

> "Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their concept of what the reasons for judgment in *Guerin* referred to as the "sui generis" nature of aboriginal rights."[928]

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[926] *R. v. Horseman* at {6}.

[927] *R. v. Sioui* at {16}.

[928] *R. v. Sparrow* at 1112.

In *Delgamuukw* again, Lamer's rather fulsome description remained conscious enough of the culturally specific nature of the Court's perspective to place "normal" in quotes saying:

> "What the Privy Council sought to capture (in *St. Catherine's*) is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple....It is also *sui generis* in the sense that its characteristics cannot be completely explained by reference to either the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives."[929]

These statements provide ample evidence of the Court's quest to recognize Indigenous terms of reference and accord Indigenous peoples equal treatment with members of the colonizing culture in a way that is consistent with the principles that Canada has agreed to uphold at the United Nations.

5.5.5.4 Colonization in *Guerin*

The principle that Aboriginal perspectives must be respected was, however, frequently ignored in practice. An example showing how this happened can be seen in *Guerin*, where we find that Dickson was aware of the difficulties created by the kinds of categorical misfit that have been of concern to modern historians. He struggled with the phenomenon, finding that the descriptions in previous cases of "Indian title" as "a beneficial interest of some sort" or as "a personal and usufructory right" involved the application of "a somewhat inappropriate terminology drawn from general property law" whose categorization was not quite

[929] *Delgamuukw v. British Columbia* at [113].

accurate.[930] However, after this moment of lucidity, he launched promptly into an ethnocentric analysis that ignored "aboriginal perspectives" and relied on categories defined by the very Anglo-centric custom that he had described as "somewhat inappropriate" in the previous paragraph. He declared that:

> "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown."

The concept of a "title" that rests "in the Crown" reflects a decidedly English way of looking at the world. The rest of Dickson's explanation veers even further into ethnocentrism stating:

> "While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise on surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians".[931][underlining added]

This brief passage incorporates a good half dozen concepts that might require some explanation in an introductory class on Anglo-Canadian legal reasoning. The audience Dickson was addressing obviously did not include the Indigenous people whose rights were in issue. *Guerin* concerned the Musqueam. Yet the judgement included no reference to any evidence concerning Musqueam concepts of land rights.[932] Notwithstanding their "win" in the outcome, it is thus impossible to tell whether or not Dickson's analysis seemed plausible according to their traditional terms of reference.

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[930] *Guerin v. the Queen* at 382.

[931] *Ibid.*

5.5.5.5 Conclusions

Kuhn's observation that a paradigm will continue in use, even when it is discredited unless there is an alternate to take its place may explain the Court's reliance on "*sui generis*" identification and its frequent reassertion of Canadian conceptual categories despite its insistence on the importance of accommodating Aboriginal perspectives. None of the cases included a full account of Indigenous legality and the Court structure itself asserted Canadian frames of legal and historical preference. Under the circumstances, it should not surprise us that the members of the Court found it difficult to access analytical modes that may have been more amenable to respecting Indigenous priorities.

5.5.6 History and the "Integral to a distinctive culture" Test

The Court's reliance on historically based cultural assumptions generated another set of problems created largely by the imperative character of judicial practice. History would not have assumed the same importance if consensual legal methodologies had been employed. Moreover, though Canada is institutionally designed to accommodate a measure of consensual legality, Parliamentary procedure is adversarial and it does not promote the type of interactive consultation and exchange provided for by the Haudenosaunee *Great Law of Peace* or used in the development of international conventions at the United Nations. Nevertheless, the existing institutional framework does allow the Court to use history in ways that may either enhance or diminish colonizing effects. For example, despite its imposition of an external perspective, *Guerin* upheld the Musqueam right to make

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[932] If none was entered in evidence, its absence was not noted.

their own business decisions and in *Sioui* the Court sought an understanding of the intentions of all parties to the treaty considered. Both cases affirmed principles that are well established within British legality, suggesting that reaffirmation of some Anglo-Canadian legal traditions may support the emergence of decolonizing norms.

We might consider, for example, McLachlin's "empirical approach" in her dissenting reasons in *Van der Peet*, which suggested:

> ... "we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s.35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?" This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis."[933]

This passage promotes reliance on behavioural precedent mirroring the cognitive theorist's description of how human reasoning is actually structured. The problem is that the history we have inherited contains colonial elements that have been formally repudiated by both Canadian law and international accords and the problems involved in implementing this revised concept of legality are not addressed.

Though the methodology described by McLachlin is English, it need not be fully colonial. So long as it is applied in a way that excludes colonizing behaviours, it can create a space for the kind of creative accommodation that Richard White has

suggested held sway in the Great Lakes region during the 17th and 18th centuries.[934] This is possible because the character of the procedure McLachlin proposed depends entirely on who is taken to have identified rights in the past and who is determining how things should be characterized in the present. If interpreted in light of either the Crown's traditional obligation to uphold the laws of the land or the consensual norms of postcolonial legality, one would expect this methodology to make Indigenous perspectives central to the consideration of "Aboriginal rights", especially when one recalls the ancient English customary ideal of trial by a "jury of peers", the equality provisions in the 1982 Canadian *Charter of Rights and Freedoms* or the Court's assertion that s.35 established new rules for "the game". If the "time-honoured methodology of the common law" is applied on that basis, it may promote decolonization.

5.5.6.1 The *Van der Peet* Effect

Van der Peet seems to have crystallized the Court's use of history for the purpose of determining "aboriginal rights", so it is worth taking a closer look at the concepts it applied. True to some of the most ancient tenets of British tradition, the very first consideration addressed in the "Integral to a Distinctive Culture Test" set out by Lamer in his majority reasons was the "perspectives of the aboriginal peoples themselves". In light of the monarch's traditional obligation to protect the laws and customs of the people, this would appear to be a very conventional English approach. Lamer did not go so far back in time, however, to establish this principle. He cited Dickson and La Forest in *Sparrow* as saying that it is:

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[933] *R. v. Van der Peet* at [261]. See also Hutchins & Choksi, "From *Calder* to *Mitchell*" at 25.

> "...crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[935]

In other words, he took an authoritarian rather than a principled approach, relying on the Court's own recent jurisprudence rather than on deeply rooted British or inter-cultural law and tradition.

As L'Heureux-Dubé pointed out in her dissent, Lamer himself did not actually follow the principle he set out.[936] It would seem that his own lived experience took precedence over the idealized customs of the legal tradition to which he was heir, for he immediately imposed colonial norms by insisting that:

> "It must also be recognized, ... that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure."[937]

Within these conceptual confines, Lamer's reasoning swayed to the postcolonial end of the spectrum by acknowledging the weight of academic opinion that, as stated by David Elliott, "the prior aboriginal presence is at the heart of the concept of aboriginal rights".[938] He quoted Mark Walters, not once, but twice, for his postcolonial assertion that:

> "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] perspectives".[939]

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[934] White, *The Middle Ground.*

[935] *R. v. Van der Peet* at [49] citing *R. v. Sparrow* at 1112.

[936] *R. v. Van der Peet* at [141].

[937] *R. v. Van der Peet* at [49] citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1112.

[938] *R. v. Van der Peet* at [41] citing David Elliott, *Law and Aboriginal Peoples of Canada* (2nd ed) (North York, Ontario: Canadian Legal Studies Series. Captus Press, 1994) at 25.

[939] *R. v. Van der Peet* at [42] & [49] citing Mark Walters, "British Imperial constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 *Queen's L. J.* 350 at 412-13.

However, the attraction of this quote, which was also referred to twice by McLachlin in her dissent[940], may have lain in the lifeline it offered to the *non*-aboriginal part of its equation. Though affirming "aboriginal rights", Lamer may have latched on to Walters' formulation because it seemed to grant permission to return to familiar conceptual ground. This subliminal thread may have run through McLachlin's dissent as well for she interpreted Walter's statement to mean, not that an egalitarian negotiated paradigm was required, but rather that:

> "We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal right."[941]

Since the "common law" in question was English, this affirmed the superimposition of foreign legal concepts. The fact that English common law did not exist in the pre-existing aboriginal context was not discussed in these formulations that implicitly demanded acceptance of colonization as a precondition for the establishment of "Aboriginal rights" by requiring conformity to "the Canadian legal and constitutional structure."

Attempts of this kind to reaffirm the familiar are, as Kuhn pointed out, entirely predictable. Despite accumulated anomalies, old paradigms continue in use until viable replacements are found and, in this instance, the Court did not even identify the need for a new paradigm. Nevertheless, the Court did reject some of the founding tenets of colonialism. Lamer's majority reasons in *Van der Peet* began with a statement supported by the full Court that almost acknowledged the colonial character of the past, saying:

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[940] *R. v. Van der Peet* at [232] & [310].

[941] *R. v. Van der Peet* at [232].

> "In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[942] [underline in the original]

Over all, however, the fact of colonization and the Court's complicity in it was not quite admitted and continuation of the old legality was tacitly endorsed through the use of "history" to affirm "whatever was".[943] In short, the Court did not reject colonialism as one might have expected it to given the wording of s.35(1) of the *Constitution Act, 1982,* the simultaneous assertion of egalitarian principles in the *Charter of Rights and Freedoms* and the recognition that "the rules of the game" had changed.[944]

5.5.6.2 Lacunae in *Van der Peet*

According to Kuhn, the paradigms we use determine what facts are considered relevant and even what facts are seen. This effect can be found in the *Van der Peet* analysis where the opening recognition of prior Indigenous presence was followed by a yawning gap. According to the postcolonial ideals espoused, one might have expected the Court to proceed by describing the development of the Sto:lo relationship with the British and identifying how the rule of Anglo-Canadian law came to be established. Sto:lo opinion on this issue was surely not only

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[942] *R. v. Van der Peet* at [31].

[943] MacDougall, *Racial Myth in English History* at 90.

[944] *R. v. Sparrow* at 1105 citing Lyon, "An Essay on Constitutional Interpretation".

relevant, but crucial. It was, after all, their rights on their ancestral homeland that were being considered.

According to evidence placed before the *Royal Commission on Aboriginal Peoples* and published the same year as this judgment, Sto:lo society only permitted male heads of households to speak at official public gatherings though they represented the entire family.[945] *Van der Peet* provided no explanation as to how the woman, whose simple sale of ten fish came to serve as the flagship for defining "Aboriginal rights", fell into the position of defending not simply her own conduct and the custom of her own family and nation, but also the rights of all Indigenous people in Canadian law.

This situation is partly a product of the externally imposed character of the issues the Court was asked to consider. If evidence of a kind that seemed pertinent was unavailable, Lamer could at least have acknowledged this fact and sought a means of accommodating Sto:lo perspectives as was done in *Sioui*. However, he seems to have lost sight of the importance of Sto:lo consent to British sovereignty and of the need for information on their opinion in this regard. The discussion denied their human intellectual and law generating capacities, turning them into an object for anthropological examination. The fact that their name means "people of the river"[946] suggests, in itself, that from their point of view their rights should have been defined in relation to the river and its resources. However the English translation of their name was not even considered by the majority and might not have been mentioned were it not for L'Heureux-Dubé's dissent.

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[945] Dussault & Erasmus, R.C.A.P. v.2 pt.1 *Restructuring the Relationship*, 122.

In short, the Court's postcolonial intentions seem to have drowned when confronted by colonial reality. The emphasis placed on the acknowledgement that the Indigenous peoples "were already here" seems almost comical because it is so obvious that one wonders why it took the Supreme Court of Canada to notice. Yet instead of deconstructing Canada's colonial heritage, Lamer simply assumed that Canadian law applied to the distinctive Sto:lo culture, jumping right into an assertion that:

> "what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."[947]

From a postcolonial perspective, this statement is problematic because there was no demonstration that Dorothy Van der Peet's people ever accepted incorporation in the Canadian state.

Even if Canadian jurisdiction could be assumed, the analysis failed to invoke the egalitarian principles set out in the *Constitution Act, 1982,* which is supposedly the legal vehicle for the opinion of the Canadian people. It relied instead on the academic opinion of Mark Walters. Though his egalitarian formulation corresponded to the egalitarian requirements of Canadian law, one wonders why the Court did not ground its reasoning directly in the Constitution itself. The reliance on academic opinion alone is difficult to reconcile with democratic theory.

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[946] *R. v. Van der Peet* at [209].

[947] *R. v. Van der Peet* at [32].

On top of this, Lamer seems simply to have taken Walter's principle of cultural equality as a green light for the reassertion of what felt proper and familiar to him. His historical analysis depended entirely on categories that were specific to his own culture leading him to discount traditional exchanges between kinship groups to make the remarkable claim that:

> "The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive that the exchange of fish was not a central part of Sto:lo culture".[948]

In the end, Dorothy Van der Peet was convicted on the basis of an externally defined test that was not devised until her case reached the Supreme Court level. Under the circumstances, it was not possible for her to know in advance the case she had to meet and so the outcome contradicted the norms of procedural fairness outlined by the Court in other contexts.[949] What could be more colonizing than that?[950]

5.5.6.3 Alternative Models for Colonization

In their different dissenting reasons, L'Heureux-Dubé and McLachlin also relied on "history" to found "aboriginal rights" instead of Indigenous participation and consent. L'Heureux-Dubé, who campaigned for attention to "the broader context of the historical aboriginal reality in Canada"[951], was astute enough to notice that the crux of the standard set by the "integral to a distinctive culture" requirement

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[948] *R. v. Van der Peet* at [90].

[949] See eg. *Singh v. Minister of Empolyment and Immigration* [1985] 1 S.C.R. 177.

[950] The fact that non-Aboriginal people may encounter the same problem in dealing with the Supreme Court does not diminish the colonizing effect. Colonialism, as defined for the purposes of this study, may happen internally through the oppression of one class or group by another as well as interculturally.

lay in its application.[952] She emphasized the importance of being sensitive to the perspective of the particular Aboriginal culture in question, rejecting the "search for a pristine aboriginal society"[953] and Lamer's limitation of the right to practices that are individual or distinct.[954] In her view:

> "Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystalized in some sort of "aboriginal time" prior to the arrival of Europeans".[955]

Her solution was a "dynamic right" approach that would ensure the "continued vitality" of Aboriginal rights[956] by recognising practices that had been considered significant for "a substantial period of time". This she defined by accepting Brian Slattery's suggestion that "in most cases a period of twenty to fifty years would seem adequate".[957]

This figure, it might be noted, was arrived at without consultation or negotiation with the Sto:lo whose opinions on these issues were not considered in the discussion of their rights. There was likewise no evidence of the opinion of any of the other "Aboriginal people" whose rights were ostensibly being defined. Thus, despite significant insights and strong postcolonial sentiment, L'Heureux-Dubé slipped back into the familiar colonial mold by using declaratory law and failing to acknowledge a jurisdiction within which Indigenous peoples could define their

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[951] *R. v. Van der Peet* at [105].
[952] *R. v. Van der Peet* at [148].
[953] *R. v. Van der Peet* at [168].
[954] *R. v. Van der Peet* at [151-2].
[955] *R. v. Van der Peet* at [165].
[956] *R. v. Van der Peet* at [172].
[957] *R. v. Van der Peet* at [177] citing Slattery, "Understanding Aboriginal Rights" at 758.

culture for themselves. Her formulation left any adaptation or innovative practice vulnerable to challenge by the in-migrating culture during the first several decades. Moreover, she retained the Euro-Canadian assumption that history can be objectively determined by an institution that is external to the culture in question. This can be seen in her reliance on her own culture's Bering Straight land-bridge theory of Indigenous origin, proffered without offering any evidentiary proof in its support.[958]

McLachlin was the only member of the Court who would have acquitted Dorothy Van der Peet outright. As shown in the quote above, she arrived at this conclusion through a reassertion of the English common law model, which led her to conclude that:

> "It may now be affirmed with confidence that the common law accepts all types of aboriginal rights, "even though those interests are of a kind unknown to English law".[959]

This interpretation is fully consistent with the monarch's traditional obligation to protect the laws and customs of the land. The colonizing assumption that "the law" was English was thus offset by England's traditional acceptance of "aboriginal rights". McLachlin even went so far as to assert that the Crown could not transfer rights to non-Aboriginal people "without the consent of aboriginal people, without treaty, and without compensation".[960] This is a fully postcolonial formulation that conforms to the modern requirements of international law.

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[958] *R. v. Van der Peet* at [106].

[959] *R. v. Van der Peet* at [269] citing Lord Denning in *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788.

[960] *R. v. Van der Peet* at [310].

McLachlin's reasoning in *Van der Peet* raises questions concerning why her subsequent reasoning did not consistently apply a consent-based concept of legality. How, for example, could such a strong expression of postcolonial principle devolve into the *Marshall/Bernard* presumption that all Mi'kmaq rights had evaporated except "the right to practice a traditional 1760 trading activity in the modern context"?[961] The roots of this colonial backlash might be traced in part to McLachlin's reliance on the materialistic Euro-Canadian concept of history, which led her to declare that:

> "What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case."[962]

She seems to have been unaware of the extent to which "facts" are designed by cultural and linguistic categories. For example, she adopted *Sparrow's* analysis of "fishing" as if it concerned only a physical resource which could be divided into "aboriginal", "commercial" and "sports fishing" with no apparent awareness of how these categories were products of her own culture's habits of thought and practice.[963] This, along with her limitation of the Sto:lo right in *Van der Peet* to "the aboriginal people's historical reliance on the resource" presumes that the "aboriginal right to fish" did not occupy the entire material and conceptual field of "fishing" at contact. Yet, paradoxically, like all of the other cases included in this study, *Van der Peet* included no evidence to demonstrate that the interjection of colonial resource

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[961] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII) at [26].

[962] *R. v. Van der Peet* at [269] citing Brennan J. in *Mabo v. Queensland[No.2]* (1992), 175 C.L.R. 1 at 58.

[963] *R. v. Van der Peet* at [269].

exploitation is sustainable over long periods of time comparable to the thousands of years that sustained Indigenous use.

McLachlin seems similarly to have accepted the proposition that prior to 1982 the Crown could legally extinguish Indigenous rights if the intention was "plain and clear".[964] No explanation was offered to indicate the source of this concept of legality or how it might be reconciled with the current presumption of the human equality of Indigenous people.[965] There was likewise no explanation provided for McLachlin's statement a few paragraphs later that the Crown could not transfer rights to non-Aboriginal people: "without the consent of aboriginal people, without treaty, and without compensation".[966] In other words, conflicting concepts of legality were proffered without providing a formula for transition or coordination.

In fairness to her, and to the other members who sat on that Court, it should be noted that *Van der Peet* was heard in 1995, a year before publication of the reassessment of Canadian history provided by the *Royal Commission on Aboriginal Peoples.* Since all of the members of the Court were born and raised in a colonial culture, it is entirely possible that none had any personal experience of the respect for custom-generated legality of the kind represented by Lord Denning's support for the right of cricket players to use a ground they had been keeping for a mere 70 years despite complaints by the residents of a new housing development that their

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[964] *R. v. Van der Peet* at [286].

[965] The suggestion that this contradiction is implicitly resolved because colonial legality should be respected in the interest of stability only makes sense from a perspective that excludes Indigenous reality and the profoundly destabilizing effect of the experience of being colonized. From a postcolonial perspective, the question is whether any Indigenous people ever viewed Anglo-Canadian law from the stage of "Displacement and Assimilation" as legitimate.

[966] *R. v. Van der Peet* at [310].

windows were being smashed by errant balls.[967] It is quite possible that none of the members of the Court noticed the contradictions inherent to their attempt to impose their own culture's concepts of law and history in a colonial setting. Reflections along this line were, after all, just beginning in Canadian society as a whole.

5.5.6.4 The Court's Interpretive Monopoly

Even if Indigenous peoples shared Canadian concepts of history, the Court's framing of the past and its appropriation of the right to determine what is "integral" to Indigenous cultures is problematic from a postcolonial point of view. Through *sui generis* differentiation, the Court has treated Indigenous peoples as exotic others, simply assuming the universal validity of its own cultural terms of reference, including language, time frames and the system of legal categorization applied. It has asserted important facts without providing an evidentiary foundation and, though some of the treaty cases acknowledged that Indigenous points of view might differ from those of settler society, the overall standard upheld was based on traditional "common law methodology".

This introduced a decolonizing influence by providing a means for recognizing Indigenous cultures. Yet, the judicial appropriation of exclusive interpretative authority enhanced the colonizing effect of English precedent by ignoring the part of British tradition that extended jurisdictional respect to those under sovereign protection. Despite the Supreme Court's concern for the bias created by the way issues were brought before it, it has contributed in its own way

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[967] *Miller v. Jackson* (1977) Q.B. 966.

to the colonizing character of its judgments. Through the *Van der Peet* methodology it has turned interpretation of the Aboriginal rights protected by s.35(1) of the *Constitution Act, 1982* first and foremost, into a unicultural exercise that takes the colonizing culture's perspective as the norm.[968] *Van der Peet* did nothing to counter the observation made by Bell and Asch that the Court has developed a tradition of "moulding Aboriginal interests into familiar categories of English law and measuring their enforceability by English standards."[969] In this regard, it should be remembered that, unlike the English who have their parliament and unlike the members of Canada's majority cultures, the Indigenous peoples have no legislative power in Canada and thus no power to modify or reverse judicial interpretations of the law with which they disagree.

5.5.7 Signs of Paradigmatic Stress and Change

The foundational nature of the shift in the concept of legality that has accompanied decolonization has left the Court in an awkward position. As Kuhn's theory might lead us to expect, the field is rife with anachronisms which the judges sometimes found overwhelming. In *Mitchell v. Peguis,* Wilson noticed the deeply rooted character of the issues presented and demurred saying:

> "Because these issues concern fundamental questions about the relationship between the courts and government, this Court is ill-equipped to engage in the delicate task of rewriting the law in this area."[970]

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[968] See eg. *Guerin v. The Queen; St. Mary's Indian Band v. Cranbrook* etc.

[969] Bell, Asch, "Challenging Assumptions" at 38 & 45.

[970] *Mitchell v. Peguis* at {25}.

Equipped or not, people expect the Court to come up with solutions".[971] Despite the obvious institutional and historical bias in the formulation of the issues all of the members of the Court have attempted to demonstrate an egalitarian approach to Indigenous rights though the results have been ambiguous.

5.5.7.1 Exclusion from "Reasonable Persons"

The classical standard applied in the judicial analysis was based on the standard of the "reasonable person". As described in *Wewaykum II,* this approach takes the inherently subjective nature of knowledge into account by specifying that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" so

> "...in cases where disqualification [of a judge] is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was."[972] [emphasis in original]

Unfortunately, in this instance, the Court appears to have excluded Indigenous people from its definition of a "reasonable person". Both the plaintiff and the defendant were Indigenous. Both claimed bias on account of Binnie's earlier involvement in the first *Wewaycum* case on behalf of the Crown. Yet the Court upheld Binnie's judgment.

The concept of human equality has, however, become so firmly entrenched in Canadian culture that it can now be presumed that Indigenous people tend to be included in the category of "reasonable persons" in most circumstances. None of

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[971] *Marshall I* at [37].(Binnie)

the cases included in the study embarked on the kind of "civilizing" discourse that can be found in discussions concerning "Indians" in the 1920's.[973] The trouble is that, in the absence of a jury or democratically instituted legislation, the only standard of reasonableness the judges have is themselves. Like the rest of us, they are subject to the conditioning provided by their particular experiences and, as Kuhn observed, old paradigms tend to persist, reasserting themselves with particular force in the face of the stress created by anomalous circumstances. This may explain the ghostly invasion of archaic perspectives that had been rejected at the conscious level though their imprint can be found in one form or another in almost all of the cases included in this study.

5.5.7.2 Recognition of Indigenous Frames of Reference

Treaty interpretation seems to have inspired some of the most comprehensive consideration of Indigenous frames of reference. Dickson's oft quoted analysis in *Nowegijick* recognized that:

> "From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which the Indians were unfamiliar"[974]

Similar reasoning seeped into cases that did not involve treaty relations. In *Sparrow* Dickson found it was:

> "...crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[975]

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[972] *Wewaykum Indian Band v. Canada II* at [66].

[973] See eg. *Sero v. Gault* (1921) 64 D.L.R. 327 (Ont. S.C.).

[974] See eg. *Mitchell v. Peguis* at {39} citing Dickson C.J. in *Nowegijick v. The Queen* at 36.

[975] *R. v. Sparrow* at 1112

Reasoning from a point of view reminiscent of that adopted in 1921 by Viscount Haldane for the Privy Council in *Amodu Tijani*[976] (which they did not cite), Dickson and LaForest warned that:

> "Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their concept of what the reasons for judgment in *Guerin* referred to as the "sui generis" nature of aboriginal rights".[977]

Even though the institutional venue and the way in which the issues were brought before the Court created an inherent cultural bias, the fact that conventional Canadian frames of reference might not fit Indigenous people was plainly on the table throughout all of the cases. McLachlin seems to have been particularly punctilious about articulating this principle. In *Mitchell*, she acknowledged that:

> "Cultural identity is a subjective matter and not easily discerned."[978]

She went on to say:

> "...judges must resist facile assumptions based on Eurocentric traditions..."[979]

In *Marshall/Bernard* she likewise noted that:

> "To determine the aboriginal entitlement one looks to the aboriginal practices rather than imposing a European template.."[980]

Yet, despite this conscious legitimization of Indigenous points of view, the Court generally failed to systematically explore or apply Indigenous perspectives and its

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[976] *Amodu Tijani* [1921] 2 A.C. 399 at 407.

[977] *R. v. Sparrow* at 1112.

[978] *Mitchell v. M.N.R.* at [32].

[979] *Ibid* at [34].

[980] *R. v. Marshall/Bernard* at [48-9].

reasoning was often inimical to Indigenous preferences as can be seen in the high rate of convictions upheld (See Appendix 5). This problem may be due in part to the character of the pleadings received and it suggests that the task of escaping "fascile Eurocentric assumptions" may be much more challenging than the Court's good intentions might lead us to believe.

5.5.7.3 Institutional Deficiency

The difficulty the Court experienced with regard to "the aboriginal perspective" and the concept of objectivity discussed by Lakoff and taught to university science students by Nelson may be attributable in part to the institutional context in which it functions. The adversarial structuring of traditional court procedure tends to straight-jacket judicial reasoning into a binary "P, not P" container-metaphor format. This feeds the perception that there must always be a "winner" and a "loser". Coupled with the Court's failure to systematically present the arguments of the parties and the interveners and to relate its decisions to their frames of reference, it is not surprising that judicial reasoning often creates considerable dissatisfaction among Indigenous peoples.

Other than the haphazard appearance of subsequent appeals on different facts, there is no institutionalized means of providing feed-back to the judges concerning the impact of their decisions. The response of the Wewaykum or Campbell River Band to the first *Wewaycum* case was noted in *Wewaykum II* as follows:

> "They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "paper claim" And in

> effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed."[981]

Though the Court dismissed the Indigenous objections in that instance, the fact that it felt impelled to issue supplementary reasons in *Marshall*[982] confirms the sense that a venue that allows a broader exploration of the issues may be required. Decolonization does, after all, present a rather daunting challenge. In effect, the postcolonial paradigm requires adaptation of a complex and socially entrenched body of law so as to uphold Canada's international commitments and accommodate both Indigenous and Canadian interests on an egalitarian basis.

Deficiency in current institutional structures is also suggested by *R. v. Deane*.[983] Kenneth Deane was the Ontario Provincial Police officer who shot Dudley George at "Ipperwash Provincial Park", which was situated on land expropriated from the Stoney Point band for military use during World War II.[984] Deane was convicted of criminal negligence causing death after the trial judge found that his claim to have seen muzzle flashes was "concocted ex post facto in an ill fated attempt to disguise the fact that an unarmed man had been shot".[985] The appeal on the grounds that a *voir dire* should have been held was rejected by the majority of the Ontario Court of Appeal with one dissent. In a two sentence judgment, the Supreme Court found that even if a *voir dire* should have been held, no substantial miscarriage of justice had occurred.

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[981] *Wewaykum Indian Band v. Canada II* at [16].

[982] *Marshall I*; *Marshall II*.

[983] *R. v.Deane*.

[984] "Indepth; Ipperwash" , *CBC News Online*:(15 Feb. 2006) http://www.cbc.ca (5/15/2006).

[985] *R. v.Deane* at [65].

According to Canadian terms of reference, this result might seem to vindicate the Indigenous cause. However, there is no evidence to suggest that vindication is what Dudley George's people wanted. It is obvious that they were not satisfied with the result and if one thinks about it, it is easy to understand why. Would the people at the first Wounded Knee have felt that justice had been served if the first soldier who fired a machine gun had been convicted and hung? Not likely.

Indigenous people tend to see the Ipperwash action as part of an on-going process of colonial intimidation.[986] Deane was under orders when he donned his riot gear and loaded his gun. His conviction hung on the interpretation of split second reactions during a tense situation. By making him a scapegoat, attention was deflected from the question of why things became so tense to begin with. Why were there guns? Those in command knew that the "protesters" were unarmed. The Stoney Point claim to the land was well documented and if the province of Ontario disagreed it could have taken its claim to court. It took years of lobbying and a change in the Ontario government before members of George's family managed to get the province to institute an inquiry into the circumstances surrounding his death.[987] But by the time the hearing ended, the land claim had not been settled. Though their concerns were eventually validated by the Inquiry report, the cumbersome character of the whole procedure has not been reassuring.

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[986] Tom Keefer, *Struggle for the Land: Footage of and Statements from participants of the Sicx Nations Land Reclamation (April-June 2006)* (Toronto: Upping the Anti, 2006) uppingtheanti@gmail.com http://auto_sol.tao.ca .

[987] Sidney B. Lindon, Commissioner, *The Ipperwash Inquiry* http://www.ipperwashinquiry.ca (5/15/2006). I have not checked the Inquiry records to verify whether it included evidence that George was shot by two guns.

In effect, the issues that are important for the Indigenous people tend to be sidelined by standard institutional processing even after the mobilization of publicity far beyond the capacity of those involved in most problems involving relations with the colonizing regime. As Dudley's brother Sam stated at the close of the Ipperwash Inquiry, he thought the main issue was all about healing but:

> "Before any healing can take place you must go back to what's causing the sore to fester...once the land is returned, (then we) will start to heal".[988]

This concept of "justice" as "healing" was completely irrelevant to the issues as framed in *R. v. Deane*. It challenges some of the basic assumptions and analogies that have traditionally governed Canadian judicial thinking and suggests that a whole different range of questions must be asked if we are to devise means of respecting Indigenous concepts of justice and social order. As the restorative justice movement suggests, substantial reform may be required in order to reach the Court's goal of accommodating Indigenous preferences.[989]

5.5.8 Conclusions

The Court aims to function as a neutral arbiter and it has explicitly articulated the principle that Indigenous perspectives must be taken into account. This represents a significant departure from the legality of the early twentieth century that was based on the *Indian Act's* legal exclusion of "Indians" from the definition of a "person". However, the issues the Court considered were framed predominantly by the Crown, by members of the colonizing society or by the Court

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[988] Gregory Bonnell, "Harris' desire to end Ipperwash standoff influenced police: George lawyer", *Rogers Communications Inc.* (21 Aug. 2006) http://www.680news.com

[989] See eg. McCaslin, *Justice as Healing*.

itself. Because this study focused exclusively on judgments and the Court did not provide systematic accounts of the pleadings of the parties and interveners it is not possible to determine whose frames of reference prevailed. The high rate of Indigenous convictions does, however, suggests a bias in favour of Crown perspectives which do not necessarily correspond to those of the Canadian public. Moreover, characterization of Indigenous interests as *sui generis* served to help the Court evade the aberrant nature of colonial legality and the rigorous application of universal legal standards, while the *Van der Peet* methodology reaffirmed the colonial cultural habit of imposing externally defined concepts and definitions instead of respecting the jurisdictional authority of Indigenous peoples and requiring the colonizing society to negotiate mutually agreeable terms of co-existence.

6.

Trends and Conclusions

> "The world has changed and with it the culture and expectations of the aboriginal peoples have changed, as they have for the rest of us."[990]
>
> Binnie, J. 2006
> *McDiarmid Lumber v. Gods Lake First Nation*

"No one Elder knows the complete story"[991]

Sharon Venne, 1997
"Understanding Treaty 6"

The role of the colonial phenomenon in changing the "culture and expectations" of Indigenous peoples seems obvious. However, the Court's reasoning is just beginning to come to terms with a set of circumstances that, to put it bluntly, violated modern legal norms. Its stated goal in interpreting s.35(1) of the *Constitution Act, 1982* has been to reconcile the assertion of British sovereignty to which Canada is heir with the fact that the land was originally occupied by other peoples.[992] Yet the Court, like the rest of Canadian society, has barely begun to excavate the fact that these people are still here today, trying to live their lives in spite of it all.

Conditioned as we are to believe in the honour and integrity of the Canadian state and of the immigration and refugee processes through which our ancestors

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[990] *McDiarmid Lumber Ltd. v. Gods Lake First Nation.*at [2].
[991] Sharon Venne "Understanding Treaty 6" at 176.
[992] *R. v.Van der Peet* at [32].

settled here, it is tempting for members of the dominant society to ignore a problem of which we were once unaware and which, from an internal cultural perspective, has been created by a change in legal sensibilities. The Court's attempts to mediate on-going cultural differences that have persisted despite centuries of assimilative effort and that continue to underlie inter-cultural relations have been exacerbated by profound changes that have occurred over time in concepts of "law" and "sovereignty" as Canada emerged from the colonial setting. Though full exploration of the ways in which such concepts have evolved over the past five hundred years is beyond the scope of this work, it is worth noting that these changes sometimes seem more apparent to Indigenous peoples than they do to the general Canadian public.

Many Indigenous peoples still have strong cultural memories of the treaties signed with Queen Victoria or of their struggles to prove that they were "allies, not subjects of Britain". By contrast, the re-writing of history that has accompanied Canada's establishment as an independent state has induced younger generations of Canadians and recent immigrants to ignore the country's British imperial ties.[993] It is frequently assumed that independent Canadian statehood began with Confederation in 1867.[994] This makes it difficult for them to understand Indigenous perspectives on the inter-cultural relationships that were negotiated in the past or to acknowledge the historical processes through which the culturally protective role assumed by the Crown in the *Royal Proclamation, 1763* devolved into the cultural

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[993] According to a 2007 Ipsos-Reid survey only eight percent of Canadians knew Queen Elizabeth II was the head of state. Reuters, "We don't know us: Most would flunk citizenship test", *The [Montreal] Gazette* (30 June, 2007) A12.

[994] The presumption that Canada was established by Confederation in 1867 can be seen eg. in Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Don Mills, Ontario: Oxford University Press Canada, 1998 at 1.

appropriation represented by the Supreme Court of Canada's *Van der Peet* methodology.

In reflecting on his relations with the Ojibway, Rupert Ross observed that:

> "My own cultural eyes have often tricked me into seeing things that Aboriginal people did not – or completely missing things they thought too obvious to point out.".[995]

The same perceptual mis-match colours judicial reasoning concerning the recognition of "existing aboriginal and treaty rights" in the *Constitution Act, 1982.* From the Court's perspective, Anglo-Canadian sovereignty defined in modern territorial terms is unquestionable. The problem it confronts is that this was not a *terra nullius.* The Indigenous peoples *were* here first. However, the bottom line, as Lamer stated in *Delgamuukw* is that: "We are here to stay".[996]

From Indigenous perspectives, by contrast, Anglo-Canadian sovereignty of whatever form is an unwelcome imposition and the problem is that we are *still* here. The society to which we belong has appropriated *all* of the resources, it has destroyed the environment and traditional knowledge, it interferes constantly with their lives, it refuses to respect the original treaties and it attack them with externally imposed laws instead of engaging in rational egalitarian discussions so we can live in harmony and protect the environment for the generations to come. Yet we are also part of nature and we also want meaningful participation in the decisions that shape our lives. Most of us belong to a mongrelized mob of people and our adherence to the dominant culture is often something of a compromise in which we too feel powerless. Our ancestors came from many lands, yet our ties with them

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[995] Ross, *Returning to the Teachings* at 52.

have been cut. We do not understand long term relationships. Many of us have never even visited the disparate territories of our ancestors. And we cannot turn back time. We were born, socialized and culturally blended here. We are made of the same earth as the Indigenous peoples, but we have lost all sense of tradition and we have no experience of any form of government other than American bombast and the dregs of British colonialism currently in place.

When the basic concepts used to structure judicial reasoning are considered, it becomes apparent that the Court's self-defined task of dealing equitably with the confusion we have all inherited is not as simple it might seem at first glance. The vocabulary of "sovereignty", "law", "history", "land title" and "government" all import the culturally specific norms and expectations of the colonizing culture that designed the Court in the first place. The preliminary investigations of the *Royal Commission on Aboriginal Peoples* and the research of a growing number of postcolonial scholars make it obvious that the conceptual categories used by the Court to frame and construct knowledge differ, not only from those used by Indigenous peoples, but also from those used within the in-migrating culture at the time when Europeans relations began with the original peoples of the land known by the Court as "Canada". We have all changed. We continue to change. Yet old habits of thought remain deeply entrenched and unless we learn about alternatives we cannot make the informed choices that are required to establish and maintain the respectful egalitarian relations that characterize postcolonial legality.

It is almost a century since European anthropologists recognized one of the messages of the *Two Row Wampum*: Different cultures use different institutions to

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[996] *Delgamuukw v. British Columbia* at [186].

structure their existence.[997] More recently, Kuhn and the cognitive theorists have demonstrated some of the ways in which the metaphors, paradigms and conceptual categories that define knowledge are both culturally specific and idiosyncratic. The mental frames of reference that we use affect our perceptual capacities precluding the pristine objectivity to which the Court has traditionally aspired. Yet it is impossible to think without these cognitive tools. Old models can and must continue in use until new ones emerge and because of this, colonizing ethnocentrisms are inclined to persist despite the Court's best intentions.

None of the judgments considered for this study referred to enough information about the Indigenous societies concerned to provide much insight into their norms or terms of reference. This prohibits any fair assessment of the Court's successes or failures at inter-cultural reconciliation and it should be born in mind that, even though the analysis presented here is based on international norms, these were formulated without Indigenous participation. Over all, the first quarter century of Supreme Court interpretation of the Aboriginal and treaty rights protected by s.35(1) of the *Constitution Act, 1982* seems to have evicerated the power of this provision by validating external interpretations of the rights concerned.[998] Since the Court's concept of legality focuses on *enforcement,* this in itself binds Canadian legality to the colonial paradigm, inhibiting development of the consensual mind set that marks egalitarian practice.

> It is here that the ghosts of Wounded Knee reside. Over two thousand years ago, there was a famous exchange that began when Mencius asked King Hui of Liang:

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[997] Bell, Asch, "Challenging Assumptions" at 64-5.

[998] See eg. *Guerin v. The Queen; St. Mary's Indian Band v. Cranbrook* etc.

> "Is there any difference between killing a man with a stick or with a sword?"

The King acknowledged that there was not and his moment of insight came with the next question:

> "Is there any difference between killing with a sword and killing with government?"[999]

By the same token, those functioning in institutions of the in-migrating governmental culture like the Supreme Court of Canada may want to consider whether there is any real difference between the colonization effected through the crazed slaughter committed by adolescent soldiers at Wounded Knee a century ago and the sedate suffocation of Indigenous physical and cultural habitats by the mountains of verbiage that may be generated through the use or abuse of judicial processes today. The ongoing persistence of severe social problems, including evidence suggesting that the community with the highest suicide rate in the world is an Indigenous reserve in Ontario, suggests that there may not be.[1000]

There is no doubt that the Supreme Court of Canada is seeking to do its share to counteract this situation by defining a postcolonial role for itself. Many of the ideals it expressed in the cases considered for this study correlate strongly with the postcolonial norms defined in international law. The judges have repeatedly reiterated their intention to respect Indigenous points of view and, most recently, Bastarache writing for the full Court in *R. v. Sappier; R. v. Gray* stated that it would be a mistake:

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[999] See Legge, *The Works of Mencius*. This translation is based on Charles Muller http://www2.gol.com/users/acmuller/cantao/mencius.htm (17/12/1997).

[1000] On the Pikangikum Reserve in Ontario, 7 of Juliette Turtle's 12 children have committed suicide. Steve Lambert, "An Unlikely Place for Hope" *The [Montreal]Gazette*, (8 Jan. 2007) A11.

> "...to fall into the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes."[1001]

Yet, as Kuhn and the cognitive theorists have demonstrated, the very cognitive tools we use to shape our thoughts predispose us to the type of blindness that induces the misperception of black hearts slipped into a seemingly familiar deck of cards.

The only reliable means of ensuring that the resolution of any particular issue does not violate either Indigenous or postcolonial norms is to reach consensual accords with the people concerned or to at least exercise discretion and refrain from encroaching when accords have not been not reached. The problem presented by postcolonial methodology is that it is often difficult to see when our behaviour represents an encroachment on others, particularly when engaged in a movement into their ancestral homelands. The polishing of the *Covenant Chains* of Iroquoian tradition once provided a mechanism for developing this level of understanding but, as Mark Walters has demonstrated, the old diplomacy was abandoned by the in-migrating culture in the course of the colonization process that established our current understanding of "Canada".[1002]

Rupert Ross, like others concerned with restorative justice, has pointed out that the Court's adjudicative function conflicts with the balancing, mediative norms of Indigenous legality.[1003] Moreover, from a Haudenosaunee perspective, and perhaps even from the perspective of all Indigenous peoples, the Court's legitimate function is confined to regulating matters that are internal to the Anglo-Canadian

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[1001] *R. v. Sappier/Gray* at [46].

[1002] Walters, " The "Golden Thread" of Continuity".

[1003] See eg. Ross, *Returning to the Teachings* at 56.

boat in the *Two Row Wampum* analogy[1004]. Yet this does not mean that it has no role to play in the decolonization process. The Court's judgments may be crucial to reviving the inter-cultural respect found in the old treaties as well as in the *Royal Proclamation, 1763*. The colonizing aspects of its function may be reduced or eliminated if it prioritizes the postcolonial values that are already entrenched in Canadian law and confines its reasoning to defending the honour of the Crown by ensuring that "existing aboriginal and treaty rights" as understood by the Indigenous peoples are respected.

This concluding chapter reviews the Court's function from this perspective. It begins by assessing its current vision of Aboriginal and treaty rights as summarized in three cases released in December, 2006 that were not included in the list considered for the core analysis. It then provides an overview of the Court's strengths and weaknesses as measured against the indicia of colonialism and postcolonialism that were used to assess the judgments produced during the first quarter century since Canada's constitutional recognition of "aboriginal and treaty rights". In conclusion, it considers how the Court and legal practitioners may be able to ensure continued progress towards realization of the postcolonial ideals to which Canada has ascribed both at the international level and in the *Constitution Act, 1982*.

[1004] See eg. Deskaheh, *The Redman's Appeal for Justice* (Brantford: D. Wilson Moore Ltd, 1924) reproduced in Appendix C13, Woo, *Canada v. The Haudenosaunee.*

6.1 The Court's December 2006 Vision

> "...once it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternate candidate is available to take its place...
>
> ...anomaly does not always induce crisis."
>
> Thomas Kuhn,
> *The Structure of Scientific Revolutions*[1005]

The three judgments released in December 2006 suggest that legal reasoning functions according to the same pattern as scientific theory. The Supreme Court of Canada has settled into an approach that resembles "normal" research as defined by Kuhn. Although each case resulted in two judgments, there was a high degree of consensus among the members of the Court concerning the norms and conceptual procedure that should be applied. By current standards, these cases are unlikely to become important precedents with the stature of *Nowegijick, Guerin, Sioui, Sparrow, Van der Peet* or *Delgamuukw*. They serve instead as refinements of a conceptual model that has already become established. However, they also contain the seeds of what may eventually result in a substantial redefinition of the Court's role.

6.1.1 "Aboriginal Rights" in *R. v. Sappier; R. v. Gray*

R. v. Sappier; R. v. Gray concerned New Brunswick charges against Maliseets Dale Sappier and Clark Polchies and Mi'kmaq Darrell Joseph Gray for harvesting timber on "Crown land".[1006] The case illustrates some of the on-going

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[1005] Kuhn, *The Structure of Scientific Revolutions*, 77, 81.

[1006] *R. v. Sappier/Gray.*

problems faced by Indigenous peoples as well as the Court's capacity to both facilite and restrain the paradigmatic transition from colonial to postcolonial legality.

As the genesis of the issues presented to the Court demonstrates, the simple enactment of new norms, as happened in 1982 with the Constitutional recognition accorded to Aboriginal and treaty rights, is not sufficient to prevent on-going belligerence against Indigenous peoples on the part of Canadian and provincial officials. Nor is the affirmation of these rights by the Supreme Court of Canada any guarantee of respect. In 1984, *Guerin*'s interpretation of "aboriginal rights" found that the relationship of the Crown with "the Indians" was fiduciary[1007] and in 1990 *Sparrow* found that it was "trust-like, rather than adversarial".[1008] The Court has consistently reiterated this position over the years, yet both *Sappier* and *Gray* began with the laying of penal charges and proceeded through repeated Crown appeals of the acquittals granted by lower courts.

The antagonistic character of this form of inter-cultural relations was perpetuated by Crown counsel at the Supreme Court level where it most certainly did not act as a fiduciary to the Indigenous defendants. Some of the arguments put forward concerned frivolous technicalities. Thus, objections were made concerning the appeal court's use of findings of fact in *Bernard* as well as its reference to an academic paper that was not entered in evidence though it was offered and mentioned in testimony by the Crown's own witness. Success on such grounds

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[1007] *Guerin v.The Queen* at 376.

[1008] *R. v. Sparrow* at 1108.

could only have prolonged procedure without changing eventual conclusions concerning either the facts or the law.

Crown counsel also argued that that New Brunswick legislation passed in 1840 and 1862 was evidence of the Crown's intention to extinguish any Aboriginal right to harvest wood. Hostile arguments of this kind that assert a colonial model of legality that Canada has renounced at the international level seem to have been encouraged by ambiguous aspects of the Court's reasoning. To date, the Court has not provided a clear definition or rejection of colonialism *per se.* In this instance, Bastarache's insistence that "the Crown bears the burden of proving extinguishment"[1009] was consistent with the fiduciary role of government. His resistance to might-makes-right legality is consistent with postcolonial norms and his application of the rule of law principle to the Crown reaffirmed the aspects of English tradition that correspond to postcolonial norms. However, a colonial undertow was created, by his support for *Delgamuukw's* affirmation of the power to extinguish Aboriginal rights, narrow though it was. Despite his support for postcolonial values, his assertion that this could only be done by the Imperial Crown seems simultaneously to condone externally imposed legality. As long as the Court continues to accept the legitimacy of rules imposed without the consent of the people concerned, the door will remain open to further forays against Indigenous peoples founded on a morality that plainly violates both modern standards and those of the early contact era.

According to Kuhn, contradictions of the kind seen in this part of the judgment are characteristic of periods of paradigmatic change. Similar confusion is

also reflected in the discordant approaches taken by the various New Brunswick courts to the question of whether Indigenous peoples could cut trees on the land used by their ancestors since time immemorial. There seems generally to have been agreement that such actions should be permissible, although judicial theories concerning why varied considerably. In Provincial Court, Sappier and Polchies were told that they did not have "an aboriginal right to harvest timber for personal use" because their culture "would not have been fundamentally altered had wood not been available" and

> "any human society living on the same lands would have used wood and wood products for the same purposes."[1010]

However, the judge found that their actions were protected by a valid treaty right. The Crown's appeal was dismissed by the Court of Queen's Bench, then the Court of Appeal told them that they had *both* an Aboriginal right and a treaty right.

By contrast, Darrell Gray was told in Provincial Court that he had an Aboriginal right, but *not* a treaty right. The Court of Queen's Bench allowed the Crown's appeal, then the Court of Appeal restored his acquittal. As if their lives had not been held in suspense long enough, the Crown appealed both acquittals to the Supreme Court of Canada. Given the fiduciary role ascribed to the Crown by the Court, one can only wonder why the Crown continued to jeopardize the individuals who had become ensnared in this situation instead of formulating a reference to clarify the evident confusion in Canadian law. An even more postcolonial solution would have involved negotiations with the Mi'kmaq and

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[1009] *R. v. Sappier/Gray*at [57].

Maliseet to develop a co-operative plan, not just for using, but also for managing the resource concerned.

The Court can only deal with pleadings as presented and it does not seem to have been completely blind to what was happening. Despite his seeming ambivalence on the question of extinction, Bastarache's response was framed by postcolonial concerns. Drawing on the *Van der Peet* dissents of L'Heureux-Dubé and McLachlin he reiterated that:

> "different people may entertain different ideas about what is distinctive"

He insisted that:

> "...it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making".[1011]

acknowledging that:

> "...the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages."[1012]

However, his basic approach maintained the colonizing aspects of Lamer's *Van der Peet* methodology. He applied an external evaluation and defined the right concerned very narrowly saying:

> "the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it."[1013]

[1010] *Ibid.* at [57].

[1011] *Ibid.* at [46].

[1012] *Ibid,* at [44].

[1013] *Ibid.* at [40].

In so doing, Bastarache not only ignored the effect of this prolonged and costly litigation on the lives of the accused but also implicitly denied their capacity to "understand" their own way of life. Like other judges in previous cases, he applied a unilaterally determined adjudicative methodology to intercultural relations that were initially negotiated by treaty, presuming that "understanding" was an exclusive prerogative of one party's court. There was, accordingly, no balancing against a comparable analysis of the colonizing society as might have been expected had the dispute been considered by a neutral international court. Yet the Court was placed in a difficult position, for it is more or less constrained to deal with the questions before it as represented by the pleadings at hand.

As various commentators have noted, this ethnocentric approach appears to have closed the door on the Indigenous right to self-government.[1014] In so doing, it has created a rupture between the Court's reasoning and the principles enshrined in the international treaties that Canada has signed stating, for example, that:

> "All peoples have the right to self-determination."[1015]

Because of this, the impact of Bastarache's acknowledgment of the fact of cultural difference was neutralized. He failed to assimilate the implications of this principle and his reasoning continued to reflect the colonial cultural conditioning that shaped the twentieth century. In his words, the *Van der Peet* test states that:

> "In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to

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[1014] See eg. Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre,University of Saskatchewan, 2001), 85; Bradford W. Morse, "Permafrost Rights: Aboriginal Government and the Supreme Court of Canada in *R. v. Pamajewon*" (1997) 42 *McGill L. J.* 1011.

[1015] See eg. *The International Covenant on Civil and Political Rights* s.1.

> the distinctive culture of the aboriginal group claiming the right"[1016]

It might be noted that although this interpretation of s.35(1) of the *Constitution Act, 1982* was not instituted with the free and informed consent of the people concerned, it is not in itself colonizing in character. It could be read simply as a restatement of s.35(1). The colonial aspects of the Court's reasoning entered through the ethnocentric way in which it applied this test. In effect, despite asserting a desire to protect traditional means of survival and avoid racialized stereotyping[1017], the Court failed to adopt the stance of a neutral arbiter when considering the relative rights of the Indigenous and in-migrating cultures.

To begin with, Bastarache's reasoning provided virtually no insight into how the Mi'kmaq and Maliseet themselves perceive their cultures and traditions. We do not even know much about what their pleadings were. This defect may be attributable, in part, to the problems associated with being forced by virtue of the charges to function in an alien cultural medium on the advice of lawyers who belong to the colonizing culture. Regardless of its origin, the result was an implicit denial of the Indigenous capacity to think, to reason or to define their own social rules. This can be seen in Bastarache's assertion that the accused's claim to the right to harvest wood for personal uses was "too general" and his insistence on redefining it as "a right to harvest wood for domestic uses as a member of the aboriginal community".

In effect, instead of looking at the defendant's view of their rights and the Crown's view, then considering the difficulties involved in reconciling the two cultural approaches, Bastarache imposed his own definition of the issue, confining

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[1016] *R. v. Sappier/Gray* at [20] citing *R. v. Van der Peet* at [46].

his consideration of "actual practice" to the externally observable. Thus "culture" was not considered in a broad sense that incorporates the full range of social function including the capacity to develop a society and rules of conduct. Bastarache, with the full Court's support, focused on whether the accused's ancestors actually used wood. This made it possible to avoid fundamental questions related to how the in-migrating culture claims to have gained jurisdiction over the Indigenous peoples and ownership of the land to begin with or how dual standards of legality could apply so as to deny the Indigenous peoples the right to self-determination or even representation in the law making process.

Bastarache's reasoning also followed the Court's tradition of assuming that there is only one objective standard of reality: its own. Because of this, he and his supporters demonstrated no consciousness of the extent to which their point of view was culturally framed. He repeatedly described the Maliseet and Mi'kmaq as "migratory"[1018] even though their actions took place within the territory that has always been used by their ancestors whereas the laws applied were derived from a culture that had migrated from the other side of the Atlantic Ocean. Similarly, the defining moment for "aboriginal rights" was the time of contact, but the Crown was not required to meet the same standard by proving its rights at the same point in time.[1019] If such an egalitarian approach had been taken, the fact that the Crown had no law-making rights on the land concerned in the pre-contact period would have become patently obvious.

[1017] *Ibid.* at [38, 46]

[1018] *Ibid* at [2, 24, 26].

[1019] *Ibid.* at [24].

Binnie's dissenting comment suffers from the same defect. He objected to the majority's exclusion of the right to "barter (and, its modern equivalent, sale) within the reserve or other local aboriginal community".[1020] As he, himself, pointed out, trade is a natural and efficient use of human resources. His stipulation that this should be allowed might seem to be more liberal at first glance. Yet, how did he gain the right to tell the Mi'kmaq and Maliseet whether or not they could trade and with whom? The existence of this right was not even in issue in this case; however, he agreed with the majority that "trade, barter or sale" outside the reserve or even with another "local aboriginal community" should be excluded from the shred of an Aboriginal right that the Court was prepared to affirm. Though all of his comments in this regard would be considered *obiter* or collateral opinion that is not binding according to English tradition, their effect is to condone racially tainted constraints that fly in the face of the international free trade movement.

Sappier/Gray illustrates the ivory tower isolation of a Court that has not benefited from Indigenous participation of the kind enjoyed by the *Royal Commission on Aboriginal Peoples*. This has created areas of blindness that have prevented well meaning judges from noticing that if a *Van der Peet* analysis had been applied to define Mi'kmaq trading practices at contact it would become obvious that they most certainly did barter with strangers. As the evidence discussed in *Marshall* suggests, that appears to have been the very essence of their relations with Europeans during the first couple of centuries following contact.[1021] Without the capacity to barter, the Indigenous peoples would not even have been

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[1020] *Ibid* at [74].

[1021] *Marshall I* at [38].

able to make the treaties that are now being so extravagantly interpreted by the heirs of the colonizers.

Areas of conceptual blindness of this kind cloud the effect of the Court's dismissal of the Crown's appeals so seriously that *Sappier/Gray* can hardly be considered a victory for the Mi'kmaq and Maliseet. The Court retained the right to impose its view of the world and its definition of legality. In so doing, it failed to interpret s.35(1) in a way that protects a jurisdictional sphere broad enough to allow any culture to live and breathe. Indeed, the Mi'kmaq and Maliseet right to use the resource was defined so narrowly that Indigenous peoples remain at risk from on-going attempts by Crown agents to micro-manage their lives. At the same time, the need to develop cooperative policies on resource management was completely ignored, leaving both parties in a condition of vulnerability as far as protection of the shared environment is concerned.

6.1.2 "Treaty Rights" in *R. v. Morris*

The same kind of problems can be seen in *R. v. Morris*. This case arose when Ivan Morris and Carl Olsen, who were members of the Tsartlip Band of the Saanich Nation, were charged with violating British Columbia's *Wild Life Act* after they shot at a decoy set up to trap illegal hunters.[1022] The majority of the Court upheld their treaty rights so they were acquitted, yet the judicial willingness to ignore treaty etiquette and to persist in using colonial models of reasoning is a cause for serious concern from a postcolonial perspective.

[1022] *R. v. Morris.*

This was the first judgment concerning Aboriginal rights written by Deschamps and Abella. They may have introduced a new approach in that the facts of the case, as they presented them, demonstrate both the fragility of postcolonial legality in the current Canadian cultural climate and its viability in the context of the institutions that are already in place. According to their account, in 1852, when the Saanich Nation signed a treaty with James Douglas, the Governor of the British colony on Vancouver Island, they were assured that they would be "at liberty to hunt over the unoccupied lands...as formerly". At that time there were at most 1,000 settlers among a population of 30,000 "Indians" on Vancouver Island.[1023] In the pre-contact era, it had been the custom of the Tsartlip to hunt at night with lights. In more recent times, when the population dynamics had reversed, the British Columbia Minister of Forests, David Zirnhelt made a commitment to ensure that there would be no prosecutions for the exercise of their treaty rights. The Tsartlip were accordingly able to negotiate an agreement with Doug Turner, the region's chief conservation enforcement officer, to ensure that he would be called if any member of their nation was arrested for night hunting. Those involved were released once their identity was confirmed. [1024] By this simple method, the treaty was respected, unnecessary court procedures were avoided, the Tsartlip were allowed to determine who their members were and relations were conducted in accord with the egalitarian, negotiated norms of postcolonial legality.

When Mr. Turner retired, colonial legality reappeared with a vengeance. After a meeting at a "rod and gun" club where complaints were expressed about

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[1023] *Ibid.* at [21] citing *R. v. White*, (1964), 50 D.L.R. 2d 613 at 657.

[1024] *Ibid.* at [7]

night hunting by "Indians", a conservation officer organized a decoy operation to trap night hunters. The existence of the treaty was ignored. There was no discussion whatsoever with the Tsartlip about this change in procedure or about any concerns that may have been raised by other hunters.[1025] Though there was no evidence of a single accident caused by Aboriginal night hunting, it was simply assumed that the practice was dangerous and that this entrapment procedure was an acceptable means of dealing with the situation.[1026]

Thomas Kuhn, the cognitive theorists and Rupert Ross have all observed that people fail to see evidence that does not accord with their operative paradigms. The very fact that Deschamps and Abella saw the value of reporting the elements of postcolonial legality in the pre-charge setting suggests their capacity to reason in postcolonial terms. Even though they failed to comment on the legality represented by the pre-charge mode of inter-cultural co-operation, they emphasized the consensual nature of treaty rights[1027] and confirmed the most postcolonial elements of the Court's prior formulations. For example, they cited McLachlin's dissent in *Marshall I* for her statement that:

> "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed".[1028]

Though they did not cite *Nowegijick*, they repeated McLachlin's assertions in *Marshall I* that words:

[1025] *Ibid.* at [8]

[1026] *Ibid.* at [5].

[1027] *Ibid* at [37].

[1028] *Ibid.* at [18] citing *R. v. Marshall I* at [78].

> " must be given the sense which they would naturally have held for the parties at the time"

and

> "[t]treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories."[1029]

They also confirmed the idea that oral promises are part of the treaty.[1030]

Yet, even though Deschamps and Abella ultimately acquitted the accused because of the express terms of the treaty, their judgment exhibited nine out of ten characteristics of colonial legality. They accepted the legitimacy of non-consensual regulation. They assumed that the Tsartlip had "agreed to relinquish control over their lands on Vancouver Island" without offering any evidence to suggest that the Tsartlip themselves had ever accepted such a broad interpretation of their agreement.[1031] They applied a Canadian constitutional division of powers analysis and presumed that Canada's federal government had "jurisdiction over Indians" without providing any evidence to suggest that the Tsartlip had ever agreed to be assimilated into Canada.[1032] They also accepted the idea that "insignificant" infringements of treaty rights were legal on the basis of unilateral declarations to this effect by institutions of the colonizing society.[1033] The discordance of this last position with accepted international etiquette might be easier to understand if we consider how Canadians would feel if American agents started crossing the border to make arrests or hand out tickets for the violation of perfectly reasonably safety

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[1029] *Ibid.*

[1030] *Ibid.* citing *R. v. Marshall I* at [12].

[1031] *Ibid.* at [25].

[1032] *Ibid.* at [42].

[1033] *Ibid* at [50].

laws passed by the states of Washington or Vermont. In summary, the declaratory approach adopted by the majority judgment contradicted the very essence of negotiation required to maintain treaty legality.

The judges were set up to fail in this regard by the way in which the case came to Court. The presumption that Indigenous sovereignty and treaties can be ignored and that inter-cultural disagreements may properly be addressed by laying penal charges is a remnant of practices that developed during the colonial era. Normally problems with treaty interpretation are resolved through negotiations between the signatories. If the parties fail to reach agreement, they may appoint a mutually agreed upon arbiter or appeal to an international court established by an organization to which both belong. This is the kind of approach applied when Sir William Johnson was the Superintendent of Indian Affairs following the establishment of the Department of Indian Affair in 1755. However, relations changed over time and the establishment of the League of Nations served to formalize the exclusion of Indigenous peoples from equal membership in the major organizations that have developed to address international concerns.[1034] This has changed the character of relations with Indigenous peoples even though some people, like David Zirnhelt, have demonstrated the ongoing viability of the old negotiated practices.

In Canada the power imbalance between the Indigenous peoples and the colonial governments has become so extreme that normal treaty protocols are now habitually ignored. Though the term "*sui generis*" was not mentioned in *Morris*, the

tendency to forget about the methodology normally associated with treaty relations was everywhere apparent. Because this cultural habit has become entrenched, Indigenous people have, to date, found no easily accessible venue where they can bring complaints concerning treaty or jurisdictional violations by Canadian officials.

One consequence of the practice of laying penal charges against the Indigenous hunters to address questions concerning inter-cultural hunting regulation is that the Court's attention focused on their conduct, leaving that of the conservation officers completely unexamined. Since a treaty defense was raised, and the existence the treaty was not in issue, the focus might more properly have shifted to examining the conduct of Canada's administrative agents. They are the ones who represented Canada with regard to the treaty. They are the ones who responded in an aggressive manner that violated international norms and they are the ones over whom Canadian courts might normally be expected to exercise jurisdiction. The use of unilaterally determined adjudication to redefine the terms of a treaty violates the very essence of treaty legality. The matter should more properly have been turned over to the original signers of the treaty or their successors so that a solution could be negotiated by the proper parties. If this failed, it might then be turned over to a mutually determined arbiter for adjudication. This is what treaty legality suggests. Yet, the Court presumed instead that it had the capacity to resolve the matter based on its own determination of what was in the minds of the Tartlip both when they signed the treaty and when they interpreted it in the modern context.

[1034] See eg. Woo, "Canada's Forgotten Founders". Though the United Nations has now instituted a Permanent Forum on Indigenous Issues where Indigenous peoples are represented, this is not the

The effect of this presumption was particularly apparent in the dissent written by McLachlin and Fish. Though theirs was the opinion of a minority of three judges as opposed to the majority of four, it remains significant first because a full court of nine judges could swing a future decision in the other direction and second because the majority relied on McLachlin's explanation of treaty rights in *Marshall I.* There was no evidence to suggest that the Tsartlip would disagree with Mclachlin and Fish's finding that the treaty right to hunt "excludes dangerous hunting".[1035] There is also nothing controversial about McLachlin's general description of the principles of treaty interpretation. However, there was no description of the Tsartlip's concept of the treaty and issues that might have arisen during proper treaty negotiations were not raised. It is, for example possible, that the danger that concerned McLachlin and Fish was a product of an exaggerated interpretation of any settlement rights that may have been implicit or actually agreed to under the treaty that was negotiated at a time when there were less that 1,000 settlers in a land inhabited by 30,000 Indigenous people.

Another problem with the minority reasoning in *Morris* concerns its reliance on principles such as Cory's statement in *R. v. Nikal* that:

> "The government must ultimately be able to determine and direct the way in which these rights should interact."[1036]

This formulation ignored the fact that the government in question did not and does not represent the Indigenous peoples concerned. *Nikal* was not even about treaty rights. The presumption made by McLachlin and Fish that the laws of one party to

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same as having a vote in the General Assembly. http://www.un.org/esa/socdev/unpfii/

[1035] *R. v. Morris* at [64].

a treaty may be unilaterally imposed without even consulting the other follows the colonial model of forced political incorporation.

The fact that the Tsartlip hunters' rights were determined solely on the basis of who the majority of the Court happened to be also modelled the might-makes-right legality that typifies colonial practice. None of the Court's reasoning served to support or reinstate the political recognition and negotiated accommodation that was in place before the old conservation officer retired. Neither judgement commented on the probable need for re-negotiation because of the massive in-migration that has reversed the population dynamics during the past century and a half, creating a situation that may not have been in the reasonable contemplation of the Tsartlip at the time of the original agreement. On top of this, the members of the rod and gun club were left with no venue for resolving their safety concerns that were legitimate according to three members of the Court. Thus, despite ostensible support by the majority for the Tsartlip's treaty rights, the overall effect of this case was to affirm colonial legality and to undermine or deny the sovereignty that is implicit in the capacity to negotiate a treaty.

It is unlikely that any of the judges on the Court saw their reasoning in this light. As Kuhn and the cognitive theorists have pointed out, one of the major difficulties associated with paradigm change is the tendency to revert to established habits of thought, especially when they are supported by institutionalized procedures. The fact that the Court has expressed treaty rights in postcolonial terms and is beginning to see the elements required to constitute postcolonial legality leaves room for some hope. Yet *Morris* ultimately violated treaty protocols. Instead

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[1036] *Ibid* at [123] citing *R. v. Nikal.*

of focusing on the issue of how to ensure that Canadian officials respect Canada's treaty obligations, the Court imposed a unilaterally determined interpretation on members of the other polity. This serves to reinforce the Indigenous people's continued vulnerability to prosecution based on vagaries of Canadian policies that remain shielded from legal scrutiny and that may continue to fluctuate according to who is hired and who retires.

6.1.3 *Gods Lake First Nation*

The Court was confronted with yet another manifestation of Canada's ambiguous colonial legacy in *McDiarmid Lumber Ltd. v. Gods Lake First Nation*, the third judgment released in December, 2006.[1037] This case concerned a lumber company's right to garnish funds deposited in an off-reserve bank account and provided by the Canadian government to pay for health, education and welfare on an impoverished northern reserve. McLachlin for a majority of six found that the funds were not protected from garnishment, while Binnie, with Fish and Abella concurring, found that the Comprehensive Funding Arrangement (CFA) that supplied the money in the account should be considered a treaty, making the funds exempt from garnishment under s.90(10)(b) of the *Indian Act*.

Because it applied a treaty model, the minority reasons scored higher on the postcolonial scale than the majority judgment, which relied heavily on Canadian legislation and judicial precedents with its statement that:

[1037] *McDiarmid Lumber Ltd. v. Gods Lake First Nation.*

> "It is not the practice of this Court to reverse its previous decisions in the absence of compelling reasons to do so."[1038]

McLachlin accepted at face value the 1938 declaration of a Minister of Mines and Resources who, in keeping with the self-serving rhetoric of his day, declared that there was a "need to develop a spirit of self-reliance and independence in our Indian wards" so they could "in the course of time become absorbed into the ordinary citizenship of the country".[1039] Because of this, she failed to comment on the contradiction between the claimed desire to promote self-reliance in a previously independent people and the ultimate goal of colonial absorption.

Binnie took what might be considered a more realistic approach. He pointed out that God's Lake had no road or rail link to the rest of the province. The reserve was entirely funded by the federal government through the CFA. Only 10% of the houses had sewers and, with a population of less than 1,300, the community provided 10% of the tuberculosis cases in Manitoba.[1040] The hard reality, as Binnie pointed out, is that:

> "bands like God's Lake have no access to the commercial mainstream, and no realistic prospect of ever obtaining it".[1041]

Though he did not comment on the relationship between Canada's commercial aspirations and the expropriation of resources that served to confine Indigenous peoples to reserves, he concluded his reasoning by pointing out that:

> "If the garnishee is successful there will not be enough money to pay for essential public services, This means

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[1038] *Ibid.*.

[1039] *Ibid.* at [52] citing Canada, *House of Commons Debates*, 30 May, 1938 at 3349-50.

[1040] *Ibid* at [82-84].

[1041] *Ibid.*at [107].

> either band members will live in the "third world conditions" described by RCAP or the federal government will step in at some stage to fund the delivery of the essential services it had already funded under the CFA but which funds were diverted to other priorities determined by the band council. The first alternative is to perpetuate what RCAP calls a national embarrassment. The other alternative is for the public to pay twice." [1042]

Therein lies one of the paradoxes of this case. It was not really about Aboriginal rights at all. Though acknowledged, the existence of Treaty No. 5, which formally defined relations between the British Crown and the people of God's Lake lay buried in the background of the reasoning. This case was actually about Canadian public administration and it illustrates just how little voice in their affairs some Indigenous peoples have. The 150 paragraphs in the judgments gave us no insight into how the debt that resulted in the order for garnishment arose in the first place. Moreover, by allowing garnishment from off-reserve accounts, the majority judgment may encourage the use of on-reserve banks creating some industry for a few reserves, at least. Thus, despite its higher colonial rating, it may ultimately have given Indigenous peoples in general more financial power. With no understanding of the real concerns of the Indigenous people involved, the reader of these judgments can only guess about their import and potential impact.

6.1.4 Summary

It is evident that the current members of the Court are aware of some of the dilemmas presented by the Indigenous presence and by the colonial character of Canada's historical heritage. Though Binnie's reasoning in *God's Lake* was only

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[1042] *Ibid* at, [149].

supported by the minority, McLachlin has written some staunchly postcolonial arguments in the past and the full Court would likely agree with his statement that:

> "The history of the Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures. Of course, arrival of new settlers also brought considerable benefits....Yet...at some point the dispossession has to stop."[1043]

The problem is that the Court's functioning can play only a small part in reversing the colonial dynamic. It was not designed to perform this role. Its very institutional structure is the product of a colonizing concept of legality and this creates a predisposition to ethno-centric results despite the incorporation of postcolonial norms in the Canadian constitution.

As demonstrated by the December 2006 cases, the judges support postcolonial principles at the theoretical level. However, they ultimately defined all of the Aboriginal rights concerned by applying externally imposed systems of categorization. Their procedural methodology led them to ignore the need for a consensual basis for legality and they relied, instead, on precedents that the Court itself had created in its previous reasoning. This made their approach more colonial in character than that applied by Sir William Johnson in the era of the *Royal Proclamation, 1763*. Instead of protecting Indigenous jurisdictions they ignored them. They violated treaty protocols and the initial nation to nation relationship to exclude Indigenous peoples from the process of negotiating modern interpretations of formal agreements that had been made with the in-migrating culture. They also

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[1043] *Ibid.* at [106].

deviated from the British model of legality that requires the monarch to defend the laws and customs of the land.

The pleadings submitted by the parties were not examined for this study and they were not summarized in the judgments so it is not possible to determine what alternatives were presented to the Court. However, the disjunction between the Court's stated ideals and its effective practice seems to confirm Kuhn's theory that old paradigms will not be abandoned unless acceptable replacements have emerged. The Court's approach also seems to illustrate Lackoff's theory that the categories we use to form our thoughts are based on immediate experience. As products of a colonial culture, none of the members of the Court have lived in a place where their ancestors were indigenous. Instruments like the Cabot Charter, the *Colonial Laws Validity Act*[1044] and even the "patriation" process used to institute the *Constitution Act, 1982* demonstrate that the British colony of Canada has always functioned on the basis of a legality whose legitimacy is founded, at least ceremonially, on the command of a distant monarch. Canada still has a Governor General and, despite the formal law-making functions of the federal parliament and the provincial legislatures, the citizens of this country have not experienced the kind of locally derived legality enjoyed by Lord Denning's cricketers.[1045] In Canada's case, the majority of the population has no local custom to which a monarch, as the notional representative of the people, can refer. The Court's tendency to apply a command model of legality based on the norms of a distant land from which only part of the

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[1044] *Colonial Laws Validity Act, 1865*, U.K. 28 & 29 Vict. c.63.

[1045] *Miller v. Jackson* [1977] Q.B. 966.

people came is accordingly consistent with the lived experience of the judges themselves.

The profile presented by the December 2006 judgments is only very marginally less colonizing in character than the collective profile presented by all of the cases considered for this study. The indicia of the colonial and postcolonial paradigms identified in *Sappier/Gray* registered 7.5/6 suggesting a decline of colonial characteristics in conjunction with an increase in postcolonial attributes compared to *Nowegijick*, the first case in the study which measured 9/5. (See Appendix 4) However, the majority judgments in *McDairmid Lumber v. God's Lake First Nation* and *R. v. Morris* measured 9/3.5 and 9/6 respectively and the dichotomy between legal ideals and judicial practice that marked *Nowegijick* is as evident as ever suggesting that the Court has yet to find an effective way to implement the new paradigm that it has, none the less, endorsed at the idealized level.

6.2 Apparitions of Colonial and Postcolonial Paradigms

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."
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> "The question is," said Alice, "whether you can make words mean so many different things".
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all
>
> *Alice Through the Looking-Glass,* Chapter 6
> as quoted by Lord Atkin,
> *Liversidge v. Anderson* (1942)[1046]

This study has been based on the premise that the constitutional entrenchment of Aboriginal and treaty rights in Canada is part of a process of profound paradigmatic change. The legitimacy of the might-makes-right legality that dominated during the colonial era that produced Canada has been displaced by a focus on human equality and consensual norms. Yet, many state practices concerned with Indigenous peoples remain rooted in the authoritarian habits and coercive customs of the colonial age.

Paradigm change is, however, a complex process that may normally require a few generations to complete. According to embodied theory, this may be due in part to the way experienced models become embedded in the very neural circuitry that generates our thoughts and expectations. At the beginning of the twentieth century universal suffrage was still a live issue. American women who wore

[1046] *Liversidge v. Anderson* [1942] A.C. 206 at 245.

"knickerbocker suits" had the capacity to shock[1047] and Aristide Briand objected to the idea of an external tribunal where "a subject might plead against his government".[1048] His mind may never have changed, but today universal voting rights are taken for granted, most women wear pants and many have become heads of state. As the implications of the principle of human equality percolate slowly through generations and through cultures, the source of legality is defined increasingly in terms of multi-lateral treaties, many of which have established international tribunals with authority to question state practices. These are now seen as supports rather than threats to state integrity.

Kuhn and the cognitive theorists have demonstrated that those functioning according to one paradigm may not be able to see the evidence that supports an alternate mode of understanding. Yet the knowledge that other models can and do exist is crucial to the establishment of egalitarian legality. As discussed above, educators like Nelson and Mitchell have found that students pass through several stages before they are able to make reasoned choices concerning which paradigm to apply.[1049] It is normal for people to respond to unusual events by applying familiar frames of reference or by making moderate adaptations to the models already established in their minds. When an accumulation of anomalies makes this difficult, a variety of alternate theories may emerge and it is only with some difficulty that people learn to function at an expert level by making reasoned decisions based on a

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[1047] Nancy Mitford, *Zelda* (New York: Avon Books reprint of Harper and Row, 1970) at 100.

[1048] Veatch, *Canada and the League of Nations* at 112.

[1049] Nelson, "On the Persistence of Unicorns" at 177; Mitchell, "Current Theories on Expert and Novice Thinking" at 275.

clear understanding of the available options and the values represented by their choices.

In terms of paradigm theory, the Supreme Court of Canada might be seen as an institution that encourages the development of expert models for social and governmental decision making. It provides a venue where behaviour considered anomalous by some parties may be evaluated in relation to both established and alternate paradigms. The eventual judgment seeks to demonstrate how the frames of reference chosen correspond to the values found in legislation that, theoretically at least, represents society as a whole. When norms change, as they have in Canada through the Constitutional recognition of Aboriginal and treaty rights, the Court's role is to define the changes instituted by the legislature and facilitate an orderly transition. Paradigm theory predicts the persistence and reassertion of established frames of reference, though it also predicts that the ability to see in terms of a new paradigm may occur instantaneously like the shifting ability to perceive differing figures in Gestalt images.

This study has attempted to measure the Court's effectiveness at facilitating the decolonization required by s.35(1) of the *Constitution Act, 1982.* It has done so by defining colonialism and postcolonialism in terms of specific indicia suggested by legal history, academic discussion and international law. However, the application of these measures to the Supreme Court's judgments concerning Aboriginal and treaty rights relied ultimately on my own perceptions and my own identification and decoding of the elemental concepts used by the Court to structure its reasoning. I am necessarily subject to the same propensity for bias,

misperception and cognitive blindness as anyone else. Just as the Court has been shackled by a lack of Indigenous members on the panel of judges, I have been shackled by the isolation that characterizes unpublished academic research. Other readers will certainly notice words, phrases or perceptions that I missed and that might tip the scale for any particular judgement in a somewhat different direction.

Although Chapters 5 explains the basis for some of the assessments made, and Appendix 4 provides a schematic overview, this study would become excessively long if the ratings given to all aspects of all cases were explained in full detail or if the Court's understanding of basic concepts like "law", "history" and "sovereignty" were deconstructed. In considering the evaluations provided for individual cases, it should also be remembered that the impact of particular indicia may be extremely variable for they are impossible to categorize with the concrete regularity suggested by the use of numeric attributions. Like the fundamental constitutional principles identified by the Court in the *Secession Reference*, the indicia of colonialism and postcolonialism work together in a symbiotic fashion. Moreover, conflicting characteristics may be woven into the same idea. For example, the *Nowegijick* reliance on "Indian", which is an externally imposed identity, camouflages internal concepts of identity that may be important to an Indigenous party. This is an example of the "othering" that Said identified as a characteristic of colonial society. However, the principle that respect must be accorded to "Indian" perspectives is certainly postcolonial in spirit. It is impossible to measure the impact of these intermeshed indicia separately, particularly when the Court frequently stated but, failed to apply, this principle.

Despite the necessarily approximate character of the assessments that can be made, they do create a general picture. As detailed in Appendix 4, the 62 cases included in the original sample produced 94 judgments concerning Indigenous parties with an average rating of about 8 on the colonial scale and 5 on the postcolonial scale. By contrast, the sixteen assessments concerning non-Indigenous parties averaged 4 on the colonial scale and 9 on the scale of postcolonial indicia. This suggests that the Court's reasoning is significantly more colonial in character when dealing with the rights of Indigenous parties.

The Court's tendency to support the colonizing society's perspective rather than playing a neutral role would appear to be confirmed by the fact that 70 of the 99 individuals charged in the cases considered were convicted, while only 14 were acquitted and 15 were sent for further trial.(See Appendix 5) The robbery of the pizza parlour in *Williams* and the manslaughter in *Gladue* might be considered crimes by anyone's standards. However, most of the "criminality" involved treaty interpretation and culturally defined differences concerning resource use and attribution that, from a postcolonial perspective, should more properly have been resolved through nation to nation negotiations.

A more accurate picture of the Court's function and capacity to promote a postcolonial approach to the protection of Indigenous rights in Canada emerges when the indicia of each paradigm are considered separately:

Table 5. Over-view for Indigenous Parties

	Colonial	%	Postcolonial	%
1. Judge	Alien decision-maker	98	Peer decision	2
2. Parties	Imposed identity	98	Self-determined	24
3. Venue	Foreign language/culture	99	Own language/culture	7
4. Issues	Imposed	95	Mutually determined	26
5. Procedure	In camera/biased	26	Public/interveners/equal	100
6. Evidence	Assumptions	70	Supported by proof	80
7. Concept of Law	Imposed	94	Consensual	38
8. Reasoning	Declaratory	74	Principled explanation	89
9. Values	Authoritarian	85	Egalitarian Respect	54
10. Perspective	Ethno/ego centric	83	Place for others	66
Total		82		49

Table 6. Over-view for Non-Indigenous Parties

	Colonial	%	Postcolonial	%
1. Judge	Alien decision-maker	13	Peer decision	91
2. Parties	Imposed identity	16	Self-determined	91
3. Venue	Foreign language/culture	6	Own language/culture	100
4. Issues	Imposed	38	Mutually determined	95
5. Procedure	In camera/biased	19	Public/interveners/equal	100
6. Evidence	Assumptions	44	Supported by proof	100
7. Concept of Law	Imposed	69	Consensual	63
8. Reasoning	Declaratory	50	Principled explanation	100
9. Values	Authoritarian	75	Egalitarian	81
10. Perspective	Ethno/ego centric	63	Respect/place for others	100
Total		39		92

As the overview that follows suggests, some of the colonizing aspects of the judgments are built into the structure of the Court and traditional Canadian legal practice. On the other hand, the judgments consistently rated high on the postcolonial side for indicia that correspond to the postcolonial aspects of Anglo-Norman legal custom. There was also a tendency to deviate from this traditional pattern of reasoning when the result would conflict with the concept of Canada that had been established by the judges' direct experience within a society that was established by a colonial process that ignored the rights of Indigenous peoples. The result is a mixed and somewhat schizophrenic profile that has varied little during the

quarter century since Canada formally recognized "existing Aboriginal and treaty rights".

6.2.1 The Judges

Under a colonial regime, legality is imposed by an alien decision maker. Postcolonialism, by contrast, bases legality on consensual decision making. The very use of an adjudicative process presupposes an imposed solution. This has colonizing implications whose effect may be counteracted if a society has chosen to use judicial procedures either as part of a freely chosen constitution or as part of an inherited cultural tradition that the people continue to support.

As far as Indigenous relations with Canada are concerned, there was no evidence in any of the cases studied that any of the Indigenous peoples affected used an institution comparable to the Supreme Court of Canada. The alien background of the judges sitting on the Court was obvious. As discussed in section 5.3 above, all were members of the colonizing society. Because of this, 98% of the cases concerning Indigenous rights scored on the colonial side of the scale on this indicia. The exceptions are, none the less, instructive. In *Roberts* and *Wewaykum I*, opposing Indigenous parties appear to have chosen to bring their dispute to the Canadian judicial system rather than resolving it by whatever other means may have been available to them. This seemingly voluntary choice diminished the colonizing effect of Canada's colonial involvement. *Goodswimmer* likewise, concerned council administration under the *Indian Act* suggesting that those involved accepted the Canadian regime, at least for the purposes of that particular dispute.

By contrast, all of the judgments concerning non-Indigenous parties rated on the postcolonial side of the scale except the assessment of the *Secession Reference* for Quebec and the assessment for the fishermen in *Marshall II.* The population concerned in both of those instances was initially conquered. Though both came from cultures that participated in the European ethos of conquest and aggrandizement, this approach has theoretically been abandoned. However, the implications of this change have not been fully assimilated and the contents of the judgments suggest that the fishermen have been excluded from participation in the development of sustainable fisheries policies just as the Mi'Kmaq were.

The colonial paradigm made an even stronger appearance against a non-Indigenous party in the *Secession Reference* where Quebec declined to participate but was represented by a Court appointed *amicus curia.* This is worth noting because, as the reflections on neo-colonialism and internal colonialism suggest, the problems presented by coercive modes of operation are not confined to historically based inter-cultural relationships. As the Court pointed out in the *Secession Reference*, Quebec is well represented in Canadian institutional function. Yet the pretense that the people of Quebec could be represented by an externally appointed *amicus curia* was, in the circumstances, fully colonial in character even if Maître Joli-Cœur, the appointed representative, was a well known advocate for Quebec independence.

As far as decolonizing the judicial dimension is concerned, it should be noted that the judges themselves have no control over the composition of the Court. Short of recusing themselves, there is little they can do to reduce the colonial impact

of this factor. Though the appointment of more Indigenous judges could have a moderating influence, the recruitment of "natives" to participate in imposed institutions is characteristic of the colonial dynamic described by Memmi. Unless more Indigenous peoples voluntarily choose to use the Canadian judicial system to resolve their legal problems, the only way to fully decolonize this indicia with regard to the determination of Indigenous rights would be to obtain the free and informed consent of the Indigenous nations concerned.

6.2.1 The Parties

Colonial legality functions in terms of imposed identities, requiring the colonized either to leave or to assimilate into the colonizing regime. Postcolonial identity, by contrast, is self-determined and based on informed consent. Thus the terms by which smaller polities became associated with or incorporated in larger ones are easily identifiable.

The cases examined for this study generally considered the Indigenous parties to be both Canadian citizens and "Indian", "Métis" or "aboriginal" as defined in Anglo-Canadian legislation formulated in ways that did not meet current international norms. The status of "Indian" was based on acts passed by parliaments in which no Indigenous peoples were represented, as was the status of "aboriginal". All Indigenous parties were assumed to be Canadian even though there was no evidence that this identity was freely chosen on the basis of the fully informed consent of those concerned. The laying of charges under provincial legislation imposed modern Canadian definitional parameters that, in some cases, conflicted with the identities defined by previous treaty negotiation with representatives of the

British empire. Because of this, 98% of the judgments concerning Indigenous people scored on the colonial side of this indicia.

Several cases scored on both the colonial and post-colonial scales, however. Recognition by the Court of Indigenous identities as the Indigenous parties themselves see them would increase postcolonial scores in this field. *Powley*'s support for the Métis right to define themselves on the basis of self-identification, ancestral connection and community acceptance[1050] was fully post-colonial in approach. It would seem to represent a breakthrough in this regard; however, the Court's reasoning in *Blais*, which was released simultaneously, contradicted postcolonial legality by insisting that the colonizing culture's concept of the law would prevail.[1051]

A glimmer of hope for consolidation of the Court's acceptance of Indigenous identities as Indigenous peoples themselves see them may be discernable in the Court's subsequent support for the Haida Nation's right to be consulted when there was a "credible but unproven claim" of title to the land concerned.[1052] Questions concerning identity are difficult to disentangle from shifts over time in the concept of sovereignty in the colonizing culture and issues related to ownership of land and resources. They teeter on the edge of being political questions, highlighting some of the conceptual ruptures between modern legal ideals and traditional practices. As a consequence, the Court's future inclinations are difficult to predict. However, both *Powley* and the description of the previous conservation officer's methodology in

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[1050] *R. v. Powley* at [30].

[1051] *R. v. Blais* at [33].

[1052] *Haida Nation v. British Columbia* at [37].

Morris demonstrate that acceptance of self-determined identities need not result in seismic changes in day to day practice. The creative ambiguity that is said to have characterized 18th century inter-cultural practice in the Great Lakes region[1053] may still be a viable alternative to colonialism.

6.2.3 The Venue

Though Canadian constitutional custom sees the Court as a neutral institution, designed to mediate conflicting social interests in a just and equitable manner, it is clearly an institution of the colonizing society. As Rupert Ross and many other authors have observed, the languages used by the judges and the pattern of interaction followed reflect assumptions about the nature of social order and the character of "truth" that conflict with those found among at least some Indigenous peoples.[1054] The focus of this work has not been on an exploration of these differences. However, recognition of their existence is unavoidable if one wishes to prioritize and validate egalitarian norms. Because no spheres of autonomous Indigenous jurisdiction were recognized, assessment of the venue scored on the colonial side of the equation for 99% of the judgments concerning Indigenous parties.

Like the judges and the parties, this element lies predominantly beyond the control of the judges themselves. Judicial protests against the use of penal procedures to define Aboriginal rights appeared in *Sparrow* and again in

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[1053] White, *The Middle Ground.*

[1054] There is an emerging body of interdisciplinary research concerning race and inter-cultural problems. See eg. Laurence J. Kirmayer, Cécile Rousseau, Myrna Lashley, "The Place of Culture in Forensic Psychiatry" (2007) 35 *J Am Acad Psychiatry &Law*, 98.

Marshall/Bernard[1055] and some cases left matters to be resolved through further negotiations. However, none of the judgments included a discussion concerning how to determine whether the Court was the appropriate place for determining the issues at hand. There was no information concerning the mother tongue of any Indigenous parties and only 7% of the judgments concerning Indigenous people registered on the postcolonial side of the scale.

Questions related to how appropriate the venue is lie largely outside the traditional Canadian legal paradigm which generally assumes its own validity. Thus information that may have altered assessment of this element may not have been included in the judgments. In *Simon*, however, the colonizing effect was moderated by evidence that the Mi'kmaq had agreed that disputes of the kind in question should be resolved in a British Court.[1056] Though there was little real choice of venue in practical terms, the Musqueam ability to draft their own statement of claim in *Guerin* introduced an element of choice that goes beyond whatever may be expressed through the procedural right of reply. *Musqueam v. Glass* likewise concerned a lease drafted under Canadian law and *Quebec v. Canada (National Energy Board)* drew on an identity defined though the negotiations that led to the *James Bay Act*.

As with the judges and the parties, the colonizing effect of the venue may diminish or disappear when it is voluntarily chosen by those concerned. Since Canadian identity was presumably chosen by the immigrant population[1057], the

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[1055] See *R. v. Sparrow* at 1095; *R. v. Marshall/Bernard* at [142].

[1056] *Simon* at [6].

[1057] There may, however, issues in this regard related to people who came as slaves, indentured servants or refugees. See. Macklem, *Indigenous Difference and the constitution of Canada* at 129.

reverse pattern appeared in the non-Indigenous assessments with the exception of analysis for Quebec of the *Reference re Secession of Quebec.* In that case, the non-consensual imposition of British subject status coupled with the non-consensual participation of Quebec in the reference created a fully colonial profile.[1058]

Again, as with the assessments of the judges and the parties, the colonizing effect of this element is unlikely to change unless more Indigenous peoples agree to use Canadian courts to resolve their legal problems. Judges may, however, moderate the colonizing impact of the venue if they acknowledge the cultural bias that is implicit to their function and remain attentive to the disadvantages created by social history as well as linguistic and cultural differences.

6.2.4 The Issues

Colonial legality imposes issues that are framed according to the laws and understanding of the dominant culture. Postcolonial legality, by contrast, seeks to equalize human relations by focusing on the points of agreement that may be found despite conflicting conceptual parameters. As Richard White's analysis of early inter-cultural relations in the Great Lakes region demonstrated, it is not even necessary for the parties to agree about what the issues are so long as they find a mutually accepted *modus operandi.*[1059] Because people tend to be blind to concerns that may be important to paradigms they neither share nor understand, issue definition in itself should be determined through a process of negotiation.

[1058] Though the French settlers and their descendants were legally free to return to France under the *Treaty of Paris, 1763*, this was likely a practical impossibility for most, just as it was impossible for my Dutch ancestors to return to Holland once they discovered that the land they had spent their life savings to reach was not empty, while living conditions and winter weather were much harsher than anticipated.

[1059] White, *The Middle Ground.*

In the cases considered for this study, the Crown's ability to lay penal charges allowed it to impose its own terms of reference, excluding concerns that may have been primordial to the Indigenous peoples ensnared by webs of colonial assumption. Moreover, the cultural belief that a neutral perspective is possible induced judges in several cases to reframe the issues according to either personal or cultural preferences. In *Sparrow,* for example, Dickson and LaForest defined the issue narrowly so it concerned only net length, ignoring the Musqueam desire to protect their historical ability to regulate their own fishery autonomously. Likewise, in *Mitchell v. M.N.R.* both judgments redefined the issues in a way that avoided acknowledgment of the national status that was primordial from the Mohawk perspective. For reasons that correspond to those affecting the previous three indicia, 95% of the judgments concerning Indigenous parties rated on the colonial side of the scale on issue definition.

A score of 27 was, none the less, reached on the postcolonial side. This was due largely to procedures that allowed the Indigenous parties to contribute to the framing of the issues. In *Guerin*, for example, the Musqueam initiated the action and it was their decision to plead in terms of the *Indian Act* and the legality of the colonizing culture. Even when a case was initiated with a penal charge, as happened in the case of *Powley*, a judgment could score on the postcolonial side of the scale if it defined the issues in a way that took Indigenous perspectives into account instead of ignoring or discrediting them.

The consensual element in issue definition may be derived from a legislative process in which those concerned participated. For example, it may be considered

that people have agreed to highway traffic standards both through their access to the legislative process and through the commitment to comply with those rules that is implicit in licensing requirements.

Because postcolonialism aims at egalitarian social treatment, a judgment that ignores any party's understanding of the issues can have a colonizing impact even on members of the colonial culture itself. The effect of dealing with any legal ambiguity through coercive measures such as the laying of a criminal charge is the same regardless of one's ancestry. Similarly, the use of a judicial process in the *Firearms Reference* supported an authoritarian methodology to resolve matters that should have been worked out through multilateral negotiations if postcolonial norms had been applied. In *R. v. Deane*, the focus on the actions of a single policeman likewise framed the issues in a way that obstructed consideration of broader and more pressing issues related to why armed men were sent to resolve a legal controversy in the first place and why the Indigenous people concerned felt they had no option for protecting their land rights other than physical occupation. Colonial elements were accordingly found in 38% of the judgments involving non-indigenous parties.

Though the judicial capacity to function in terms of postcolonial legality is limited by the structure of their mandate, they can promote general understanding of postcolonial norms by modeling respecting for the multiplicity of perspectives that are brought before them and by addressing the issues as actually understood and presented by the parties. In postcolonial terms, the Court might be expected to acknowledge rather than ignore situations in which the parties' conflicting

perspectives lead to incompatible issue definitions. If the cognitive theorists are correct and understanding is based on lived experience, then the experience of having their perspectives acknowledged, accepted and addressed should make it easier for members of the colonizing society to extend the same courtesy to Indigenous peoples.

6.2.5 The Procedure

Legality based on the command model does not require public processes. Decision-making may take place in one person's mind or behind closed doors among a small group on the basis of evidence that is never disclosed. Postcolonialism, by contrast, seeks to level the playing field. Proceedings are public, there is a right to reply to allegations, to suggest alternate interpretations, to access legal counsel, to question witnesses and to bring new evidence. Parties who believe their rights may be affected by the outcome may also participate by submitting their own arguments and pleadings.

Anglo-Canadian legal tradition has a long history of defending the idea that judicial proceedings should be open, fair and public. As a consequence, 100% of the judgments concerning both Indigenous and non-Indigenous parties scored on the postcolonial side for this characteristic. However, there were colonial indicia in 26% of the judgments concerning Indigenous parties as well as in a few concerning non-Indigenous rights. Most arose because of judgments that were based on tests that were not devised until the Supreme Court level in the case concerned. For example, in *Van der Peet* L'Heureux-Dubé would have allowed a new trial to allow the accused to address the Court's newly defined formulation; however, the majority

judgment did not. Thus Dorothy Van der Peet and her people were never given an opportunity to know the case they had to meet or to respond to it. A similar situation arose when the reasoning applied relied on a judgment that was released after the case was pleaded as happened in *Pamajewon* and *Adams*.

In *Bear Island* there was so little explanation of the Court's thought process that the effect was the same as if no reasons had been given for the decision. In *Oldman River Society* the issues obviously affected the Piegan, but there was no provision for their independent representation.[1060] Similarly, the bands whose livelihood was affected by the decision in *Smokehouse* were not represented in that case. In *Corbiere,* once again, the decision that off-reserve band members had voting rights had a substantial impact on the political power of all reserve residents. Yet, the representation provided by the Supreme Court interveners was spotty to say the least and the trial included no representation for on-reserve residents of the Batchewana band whose situation was in issue. Though the line between political and legal questions is often difficult to draw and a judicial analysis that sets out and discusses basic legal principles might certainly be useful, this case concerned voting rights and the issues it raised should surely have been discussed and determined through a legislative process that directly involved the people affected by the constitutional change that was ultimately implemented.

The highly political character of all of the cases dealt with in this study might be seen in the fact that only ten had no interveners at all. The impact of the interventions is difficult to determine because the judgments did not contain a

systematic account of their concerns. A large number represented various aspects of the Crown. Many represented business interests in the colonizing society and, though a substantial number represented Aboriginal organizations, many of these were funded by the Canadian government. Because of the expense involved in participating in the Supreme Court process, the presence of interveners may actually have amplified rather than rectified power imbalances. As the complaints of the *Native Women's Association* suggest, this may have resulted in under-representation of Indigenous interests that did not accord with the mind-set of the colonizing society or that were not sufficiently funded. This avenue was not explored in this study, though the situation does raise concern about use of the Court to circumvent representative legislative processes.

Wewaykum II was the only case involving a direct allegation of judicial bias. Both Indigenous parties objected when they learned that Binnie, who had written the judgment in *Wewaykum I*, had been involved in the case as Associate Deputy Minister of Justice fifteen years before the hearing. From the perspective of consensual postcolonial legality, this mutual lack of confidence by both parties should, in itself, have been enough to vitiate the first judgment. The Court's assertion that there was no bias stretches credulity since, with the exception of Deschamps, they were judging their own decision.

The problem is that, even if the judgment had been vacated, the only alternative offered by established Canadian institutions was reconsideration by the same judges, but in the absence of Binnie. Except for its failure to acknowledge and

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[1060] The idea of mounting an independent legal intervention may seem self-evident to those involved with the legal analysis on a daily basis, but procedures of this kind are a mere theoretical possibility

explicitly identify the problem, the Court seems to have done the best it could in terms of existing institutional capacity.[1061]

6.2.6 The Evidence

As the reflections of Rupert Ross and Sakej Henderson suggest, the Court's current preoccupation with evidence may well be a product of the Anglo-Canadian paradigm that sees the world in "objective" material terms, seeking to impose an externally defined legality through the classification of human beings as objects that are isolated from the contextual dynamics of human society and the natural environment.[1062] The search for accommodation and common meaning that characterizes postcolonial practice may eventually lead people to refocus their attention towards the development of mutually agreeable modes of co-existence. Though the need to test and investigate conflicting understanding of how relationships were established in the past may continue, the postcolonial emphasis on establishing on-going accords makes it possible to avoid many of the problems created by the hearsay quality of historical evidence.

Attention to the Court's use of evidence remains, none the less, an important means of evaluating the character of the legality applied. Because of its authoritarian tenets, colonialism allows the decision maker to decide which evidence is relevant on the basis of whatever seems true or fair according to dominant modes of thought. A judge may even take judicial notice of "facts" that are highly debatable to one or the other of the parties. This can lead to outright

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that is difficult to access for most who are outside the legal profession.

[1061] A jury opinion might have been more interesting. An appeal might have been possible under the Operational Protocol of the *International Covenant on Civil and Political Rights.*

errors. As Kuhn and the cognitive theorists have pointed out, people have a tendency to ignore or misperceive evidence that does not fit their paradigms. The use of "history" in the *Reference re Secession of Quebec* is a good illustration of this phenomenon.(See s.6.3 above). Because postcolonialism seeks to foster mutual respect and accommodation, it retains an interest in testing presuppositions both to unmask illusions and misconceptions and to demonstrate the viability of alternate frames of reference.

As with other concerns that draw on concepts developed as part of traditional Anglo-Canadian legality, most of the judgments considered in this work took a methodical approach to the use of evidence. This resulted in a score of 80% with regard to the provision of proof to found the facts that were relied upon in the reasoning. However, at 70%, the score on the colonial side was almost as high. This was due predominantly to the Court's reliance on legal fictions and culturally determined assumptions concerning Canadian history and legality. Though the judges acknowledged on many occasions that the Indigenous peoples were here before Europeans arrived, no proof was offered to demonstrate exactly how the Crown came to "own" the land and how Canadian laws came to exercise authority over Indigenous peoples. Though Sir William Johnson may be rolling over in his grave, a territorial conception of British sovereignty was simply assumed. Despite the opening to Indigenous perspectives represented by *Delgamuukw's* acceptance of the evidentiary value of oral histories, previously established rules were not observed in a consistent or even handed way. The lack of evidence concerning Indigenous consent to participate in the Canadian polity was not even noticed and

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[1062] For discussion on Henderson's point see eg. Ross, *Returning to the Teachings* at 110.

the conspicuous absence of any indication that any Indigenous people played any role in the legislative processes that developed the laws applied was simply ignored.

The rupture with evidence-based proof of facts that this created was everywhere apparent. Because they continued to function according to the colonial frames of reference in which they were educated, none of the judges seem to have identified the need to define key categories used to structure their reasoning. *Nowegijick* assumed that "Indians" were Canadian citizens. *Guerin* assumed that British Columbia could legitimately transfer title to lands reserved for "Indians" to Canada's federal government and that "Indian Bands" did not have full ownership rights.[1063] In *Canadian Pacific Limited v. Paul,* the Court found that the railway had a legal right of way even though it was unable to determine the status of the land.[1064] In *Sioui*, Lamer introduced his analysis with the claim that "Indians" are better versed in negotiations today than they were at the time the original agreement was signed. This was based on the self-interested description of inter-cultural relations provided by the 1899 U.S. Supreme Court decision in *Jones v. Meehan* even though Lamer himself recognized that this assessment was made a full century after the events described.[1065] It did not even concern the same people or place. *Sparrow* simply announced that there was no doubt concerning the sovereignty, legislative powers and "underlying title" of the Crown, then went on to presume that colonial legislation is an effective means of "conserving and managing" a natural resource like the fishery.[1066] Is intent proof of effectiveness? If it was, science would never

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[1063] *Guerin v.The Queen* at 349.

[1064] *Canadian Pacific Limited v. Paul.*

[1065] *Sioui* at {7} citing *Jones v. Meehan*, 175 U.S. 1.(1899) at 10-11.

[1066] *R. v. Sparrow* at 1103 and 1113.

change and doctors would still be letting blood and using leeches to cure disease. In *Badger*, Cory cited representations made in relation to Treaty 4 and Treaty 6 as evidence of promises made in relation to Treaty 8.[1067] And so it goes. In keeping with the English tendency to confuse myth with history discussed by MacDougall[1068], most of the judgments exhibited an unwillingness or inability either to distinguish legal fiction from demonstrable fact or to see the need to do so. There was, in short, a complete collapse of otherwise stringent requirements regarding the need to provide evidence as proof of facts especially when it came to questions related to sovereignty and title.

6.2.7 The Concept of Law

The change in the concept of law from the command model imposed by the state on its people during the colonial era to the postcolonial approach that founds legality on the informed consent of those concerned lies at the very heart of this analysis. The concept of legality applied by the Court was ambiguous as might be expected during a period of paradigmatic change. Strong expressions of postcolonial legality were left stranded in introductory discussions of legal principles as the judgments proceeded to reinforce the colonial habits of thought and expression in which the judges had been schooled. This pattern could be found, not only in the judgments concerning Indigenous rights which scored 94% on the colonial scale to 38% on the postcolonial side, but also in those concerned with non-Indigenous parties which rated 69% to 63%. The differences between the two profiles is due largely to the effect of reasoning based on legislative intent. This

[1067] *R. v. Badger* at [56].

approach is postcolonial when the people concerned have chosen to belong to the polity in question and have representation in its legislature. On the other hand, it is highly colonial when imposed on Indigenous peoples who have neither chosen to be assimilated nor been offered representation in Canada's law-making institutions. They are certainly not "Partners in Confederation" in the sense that Nova Scotia and New Brunswick are.

The high score on the colonial side of this indicator for both classes of people reflects an unquestioning perpetuation of traditions developed during the colonial era. Reduction on the colonial side of the scale will require a systematic rethinking of the Court's function in terms of the egalitarian democratic principles that are already enshrined in Canada's constitution and supported in theory by the Court. Because of the human tendency to perpetuate the paradigms in which we have been trained, members of the Court who wish to take an egalitarian stance when mediating the rights of the colonial and Indigenous cultures will have to guard against a tendency to assume that Canadian law as applied internally in Canadian culture is the only relevant law. This approach was all pervasive in the judgments concerning Indigenous rights as manifested in the presumption that the Indigenous individuals concerned were all Canadian citizens subject to Canadian legality. One consequence of this presumption was that haphazardly chosen people were placed in a position where they were required to defend Indigenous rights even though there was no evidence that any had been properly designated by their people to do so. Even Chief Mitchell in *Mitchell v. M.N.R.* was acting in his personal capacity and

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[1068] MacDougall, *Racial Myth in English History.*

not as a representative of his people despite his election as a member of the colonially imposed *Indian Act* Council.[1069]

The Court took a diametrically different approach with regard to the representative capacity of individual Canadians, even when they had been formally engaged to act as agents of the Canadian government. For example, in *Ross River Dene Council Band* the issue, as phrased by Lebel for the majority, concerned how *Indian Act* reserves were created in a non-treaty context.[1070] The band understood actions and statements made by employees of the Department of Indian Affairs as representations of the opinion of the Canadian government. However the Court found that the agents of the Crown that the Dene actually met did not have sufficient authority to bind the Crown and that something comparable to an Order in Council was required. It thus established a dual standard. The pleadings led by whichever Indigenous individuals happened to be charged with a penal violation could affect the rights of their nation or of Indigenous peoples in general regardless of their authority to do so according to their internal laws and customs. On the other hand, representations made by Indian Agents acting on behalf of the Canadian government were not sufficient to demonstrate that a particular piece of land was accepted as a reserve by the Canadian administration.

Inequities of this kind only become apparent if one adopts a paradigm that considers the Indigenous right to consensual legality on a level of parity with that of the colonizing society. Paradigmatic change in this area might seem to require a seismic reordering of conventional legal reasoning notwithstanding the

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[1069] Mohawk national identity is expressed through membership in their traditional council of which he was not a member, so this was the only approach open to him.

entrenchment of egalitarian principles in the Canadian constitution, contract law and international relations. However fears in this regard may be exaggerated. The fact that the Ross River Dene and Indian Affairs agents were able reach mutual accords until recently suggests that the effects might be somewhat less than catastrophic on the level of practical co-existence. The same dynamic can be seen in the negotiated legality that prevailed before the change in conservation officer described by Deschamps and Abella in *Morris*. Indeed, support for egalitarian legal principles runs in filigree throughout the judgments suggesting that the problem is not so much one of philosophy as of focus. As awareness of the viability of postcolonial legality increases, and as Indigenous rights in this regard become more widely known and accepted by members of the public, the judges sitting on the Court and the lawyers who address them may find more effective means of translating their egalitarian ideals into practice.

6.2.8 The Reasoning

Unlike postcolonial legality, which is based on informed consent, colonial law's reliance on command and the use of force to obtain obedience has no need for reasoned explanations. Yet a strong tradition of reasoned analysis can be found in the English tradition that requires judges to "find" the law in the customary practices of the people, in judicial precedent and in the wording of statutes passed by elected legislatures. Fully 89% of the judgments concerning Indigenous parties and 100% of those concerning the non-Indigenous provided principled explanations for the decisions rendered. The exceptions were due largely to reliance on culturally

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[1070] *Ross River Dena Council Band v. Canada* at [11].

entrenched generalizations that failed to take account of Indigenous reality as happened in the *Secession Reference* which considered history without taking accound to Indigenous experience.

The Supreme Court's power to make decisions within the parameters of the Constitution that are not subject to review except by Parliament resulted, none the less, in relatively high scores on the colonial side of the scale. Legal rules, principles and assessments of fact were simply declared in many instances without demonstrating any connection to law, to evidence or to the customs of the people concerned. Incidents of this kind averaged 74% for judgments concerning Indigenous parties and 50% for those involving non-Indigenous parties. Sometimes judges relied on a simple "I think". Sometimes they relied on precedent without identifying any legal principle to justify or explain the choice. Sometimes those precedents were their own previous decisions which is tantamount to saying: "This is the law because I say so and because I said so before.".

Just as the characteristics of the Canadian constitution are tightly woven and interrelated, so too are the characteristics of colonial and postcolonial legality. Many of the incidents of declaratory reasoning were related to affirmations of culturally defined conceptions of Canada that ignored Indigenous experience. They were thus related to evidentiary problems and the challenge presented by everyone's tendency to understand the world from their own ethnocentric perspective. The inclination to avoid going through the steps required for expert level reasoning in such instances thus relects the black heart phenomenon noted by Kuhn where people made

assumptions based on established habit and failed to take account of the colour they actually saw.

Habits of thought related to reliance on authority that became entrenched during the colonial age may also have resulted in a tendency to seek refuge in *any* authority without considering whether or not it was appropriate in the circumstances. Examples of this can be found in the literal approach that has been taken to the 19th century Marshall decisions from the United States Supreme Court or in Binnie's uncritical acceptance of Vattel's declaratory concept of legality in *Mitchell*[1071] as well as in his claim that Aboriginal people are full participants in a shared Canadian sovereignty because the *Royal Commission on Aboriginal Peoples* said so.[1072] Chief Justice Marshall, Vattel and the *Royal Commission* are valuable sources of information concerning the social contexts that have prevailed at various times and places in the past. However, their views are all opinion. If "law" is defined by democratic standards, they are not sources of Canadian law and they cannot supplant the need for proof of informed consent. Yet the drive to maintain the patterns established by lived experience is so strong that even those with the highest level of expertise at legal reasoning may experience moments of blindness when entrenched paradigms are challenged.

6.2.9 The Values

Reasoning can be principled without being egalitarian and it can be based on statutes, evidence and public procedures without respecting democratic norms.[1073]

[1071] *Mitchell v. M.N.R.* at [163].

[1072] *Ibid* at [135].

[1073] Consider, eg. Stevenson in *Friends of the Old Man River Society v. Canada.*

Colonial law is authoritarian. In extreme forms, it founds legitimacy on status in an externally imposed social hierarchy. In this sense it is completely incompatible with the fundamental requirement for equality that characterizes postcolonial legality.

The right to equality is entrenched in s.15 of Canada's *Constitution Act, 1982* and the principle of "equality before the law" is deeply embedded in Anglo-Canadian legal tradition. One might accordingly expect the judgments analyzed for this study to demonstrate strong performance on the postcolonial side of the scale for this characteristic. However s.15 of the *Constitution Act, 1982* was rarely mentioned and the judicial analyses of Indigenous rights scored 86% with regard to manifestations of authoritarian values and only 54% on the egalitarian side. Even the judgments concerning non-Indigenous parties, which had an 81% egalitarian rating, registered a score of 75% for authoritarian belief.

This profile may have been due in part to the penal character of the processes that brought many of the issues to the Court. Despite the early complaint mentioned in this regard in *Sparrow*, and its more strident reiteration in Lebel's minority reasons in *Marshall/Bernard*, the Court generally accepted power relations as they had developed during the colonial era. Most judgements proceeded from a perspective reflecting the kind of belief in authoritarian legality found in McLachlin and L'Heureux Dubé's minority reasons in *Nikal* which declared :

> "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."[1074]

[1074] *R. v. Nikal* at [CXXV].

The crucial question, from a postcolonial perspective, is not the social status of those who have the opinion, but rather the procedure by which the legality in question was defined. If the Courts mentioned had found that the requirement for a fishing licence was included in a law passed by a legislature in which Nikal and his people had representation, this approach would not have been problematic. However, Nikal was not a guest on a territory with whose laws he had implicitly agreed to abide. He had not left the land of his ancestors. McLachlin and L'Heureux Dubé proposed to ignore the rules that had been passed by his band council and convict him on the basis of laws that had been externally imposed without the consent of his people.

The authoritarian character of the Court's concept of legality could also be seen in its acceptance of the idea that the Crown could extinguish rights in certain circumstances. This is inconsistent with the English concept of legality which focuses on the Crown's protective mandate and considers the monarch to be subject to the laws and customs of the land. For example, in *Ross River*, it interpreted the Crown's prerogative power as absolute, subject only to clear and express statutory limitation.[1075] The Court generally seems to have taken the position that it was required to "grant a certain level of deference" to "government".[1076] Though any legal system must have a method for adapting to unanticipated circumstances, the Court's approach failed to make a clear distinction between "government" as a representative of the will of the people expressed in legislative instruments and the interpretation of the Crown's authority adopted by unelected administrative officers.

[1075] *Ross River Dena Dena Council Band v. Canada* at [4].

[1076] See eg. Lamer in *R. v. Gladstone*, [1996] 2 S.C.R. 723 at [83].

Though *Guerin* found the Crown liable, there was little recognition of the need to hold people in administrative positions accountable. Wilson's minority reasons in that case even went so far as to suggest that though there had been "concealment amounting to equitable fraud", officials in the Department of Indian Affairs were not liable because it was the result of their "paternalistic attitude" rather than an intent to harm.[1077] Similar liberties were granted by Iacobucci, writing for the Court in *Lovelace,* where he seems to have presumed that the Canadian government has an option to withhold the right to self-government from Indigenous peoples.[1078] Such presumptions of colonial authority contrast sharply with Lord Denning's concept of the poor man's humble cottage where the wind could enter but the King could not.[1079]

Generally the Court failed to discuss the application of egalitarian democratic norms to "government" or Indigenous rights. Despite its idealized function as a neutral institution, most of the judgments also failed to take the steps required to demonstrate neutrality in mediating the parties' conflicting interpretations of the law. The Court's hierarchical conceptualization of legality was reflected in the way the judgments all began with a ritual summary of the reasoning in "the courts below" treating law as a question of expert analysis in which the interpretations of the governed were of little or no significance. A more postcolonial approach was adopted by the *Bennell* case in Australia which took the trouble to put

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[1077] *Guerin v. The Queen* at 356.

[1078] *Lovelace v. Ontario* at [78].

[1079] *Southam v. Smout* at 320.

the perspectives of the parties on record before finding that "native title" had survived colonization in the city of Perth.[1080]

The seeds of a similar methodology might be seen in the few cases that set out the parties arguments or pleadings at trial.[1081] *Ross River* also included a summary of the interveners' arguments and *Delgamuukw* took a definate step in this direction with its acceptance of oral histories. However, the Court's reasoning generally failed to take a systematic approach to the problem of presenting Indigenous points of view, offering only sporadic flashes of insight even into whatever might have been pleaded. Unlike *Bennell's* recognition of a sphere within which the Indigenous people themselves had authority to mediate their rights, this was acompanied by the colonizing presumption that the Supreme Court of Canada was competent to interpret the complex traditions of other cultures. Binnie's well-meaning concept of "merged sovereignty" in *Mitchell* went so far as to propose a novel and somewhat bizarre reinterpretation of the *Two Row Wampum* analogy that violated the basic principle of separate jurisdictional authorities that this symbolism is commonly understood to represent. [1082]

According Kuhn's theory, this may have happened because people are often unable to see evidence or questions that do not relate to their own paradigms. This may explain why, despite the precedent set by *Sioui*, the Court rarely explored Indigenous perspectives before embarking on its goal of inter-cultural conciliation. Many members of the Court demonstrated a nascent capacity to identify concerns

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[1080] *Bennell v. State of Western Australia* [2006] FCA 1243.

[1081] See eg. *Quebec v. Canada (N.E.B.)*; L'Herueux-Dubé in *Corbiere v. Canada* at [106-109], *Lovelace v. Ontario*; *Wewaykum Indian Band v. Canada* at [31-41]; *R. v.Blais* at [36-40]

[1082] *Mitchell v. M.N.R.* at, [130].

that are of central importance to Indigenous cultures. One notable example of this is found in McLachlin's minority judgment in *Opetchesaht* where she recognized the need for future generations to retain the right to manage their land. Yet, with the exception of a few cases that supported negotiations, the conceptual frameworks applied were usually unilaterally defined in keeping with the authority traditionally accorded to judges in Anglo-Canadian tradition.

In general, the Court's authoritarian concept of legality functioned through an unquestioning acceptance of the legal and constitutional perspective imposed by the colonial historical process. This could be found even in Binnie's minority reasons in *Mitchell* that recognized that Mohawks and Canada each have their "own framework of legal rights and responsibilities".[1083] The Court exhibited little awareness of Canada's failure to meet international norms in its relations with Indigenous peoples and it was also not unusual for a case to be determined on the basis of conceptual structures devised by the judges and previously known to neither party giving neither a right to reply.[1084]

Despite the authoritarian character of the Court's basic approach to legality, egalitarian principles fluttered through the reasoning from the very beginning, starting with *Nowegijick*'s concern for the way things were understood by the "Indians". *Guerin*'s confirmation of the Indigenous need to be able to consent to the terms of a contract like everyone else was phrased in terms of a *sui generis* right founded in a fiduciary obligation on the part of the Crown. The effect of this recognition rippled out to the rest of Canada through Sopinka's suggestion in *Lac*

[1083] *Ibid.*

[1084] Note eg. *R. v. Van der Peet*; *Blueberry RiverIndian Band v. Canada.*.

Minerals that dependency or vulnerability was the basis for fiduciary obligation in general.[1085] This suggests a revival of understanding concerning the limited but protective role set out for the Crown according to English constitutional tradition.

Sioui also rested on an egalitarian foundation, emphasizing the importance of the common understanding of the parties when interpreting treaties and recognizing that the document written by British officials were only a partial record of an oral agreement. This principle seems to have been violated or contradicted, however, by the practice of allowing the courts of one party to assume interpretative authority. This resulted in several cases that supported the idea that treaty rights could be curtailed by unilateral regulation on the part of only one of the signatories.[1086] Nevertheless, Lamer's reasoning in *Delgamuukw* opened the door to Indigenous perspectives a crack by finding that oral histories were admissible in evidence and by demonstrating a desire to found the concept of "title" on the perspectives of both cultures.[1087]

As can be seen in *Delgamuukw*, the Court appears to be developing an increasing awareness of its ability to delegate decision making to the parties so that they can reach negotiated agreements once the parameters of the law have been defined. Movement in this direction was supported by the Court's insistence that Canadian officials need to found their reasoning on consultation at least. In *Blueberry River* both Gonthier and McLachlin founded legitimacy on the postcolonial international standard of "full, free and informed consent"[1088]

[1085] *Lac Minerals Ltd. v. International Corona Resources Ltd.* at {19}.

[1086] See eg. *R. v. Sundown,* [1999] 1 S.C.R.393 at [45].

[1087] *Delgamuukw v. British Columbia* at [1113].

[1088] *Blueberry River Indian Band v. Canada* at [4] and [85].

McLachlin's confirmation in *Haida Nation* that the governmental duty to consult is legal, not just a moral also supports this methodology. Though her judgment in the *Taku River Tlingit First Nation's* case found that there was no requirement to reach agreement, the full Court supported Binnie's assertion in *Mikisew Cree First Nation* that:

> "Consultation that excludes from the outset any form of accommodation would be meaningless".[1089]

In short, the Court has not yet escaped the ambivalence apparent in Canada's "democratic" reliance on an imposed imperial constitution or in the way the *Secession Reference* procedure contradicted its assertion of the principle that the consent of the governed is basic to the understanding of a free and democratic society.[1090] It is, however, becoming increasingly aware and supportive of the components of postcolonial legality.

6.2.10 The Perspective

Like the novices in Nelson's study of the ways in which college students develop reasoning skills, the colonial perspective presumes that there is only one correct way of looking at things.[1091] Postcolonialism, by contrast, relies on the application of expert reasoning skills. It requires a capacity to identify different models of understanding, an awareness of the values involved and reasoned choice based on the principle of human equality. The colonial perspective is thus ego centric or ethnocentric, while the postcolonial perspective is concerned with respecting alternate perceptual frameworks.

[1089] *Mikisew Cree First Nation v. Canada* at [54].

[1090] *Reference Re Secession of Quebec* at [67]

In order to perform their role, judges require expert reasoning ability so it is not surprising to find that 100% of the judgments concerning non-Indigenous parties scored on the postcolonial side of this indicator. However, the Court had a 63% score on the colonial side and the profile of the judgments concerning Indigenous parties was 83% colonial to 66% postcolonial. For the assessments concerned with non-Indigenous interests the high score on the colonial side was attributable in part to the Court's custom of reasoning as if there is ideally only one standard of correctness. This may be one of the reasons why the pleadings and rationale of the parties were not set out. The *Reference Re Secession of Quebec* ignored the colonizing character of the conquest as well as the history of Canada as experienced by minorities that have suffered unequal and unjust treatment including Chinese, Japanese and East Indians. *Marshall II* seemed blind, both to the fears of the non-Indigenous fishermen and to their professional expertise, while the *Firearms Reference* failed to appreciate that farmers and those who support their families by hunting have an experience of both guns and cars that differs from that of urban judges. Meanwhile *Deane* demonstrated no insight into the conceptual trap created when police officers armed with guns were ordered to remove Indigenous people instead of protecting their right to have their concerns addressed through systematic processes that allowed both parties to present their legal position.

The ethnocentric character of the Court's approach was much more marked when it came to the Indigenous cases. A few aspects of this situation were discussed in detail in section 5 above though a more comprehensive analysis could be made of the Court's assumptions concerning the nature of law, history, sovereignty, land title

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[1091] Nelson, "On the Persistence of Unicorns" at 177.

and other concepts used to structure its reasoning. According to the cognitive theorists, rationality is impossible unless a basic prototypical structure has been established. Because of this, we must all start from egocentric and ethnocentric perspectives. The key to postcolonial legality lies in our ability to recognize and respect other people's frames of reference. Because of this, the Court's scores on the postcolonial side of this factor are the most interesting. Indeed, almost every case included at least some indication of insight in this regard, even if it played a very minor role in the eventual outcome.

Many judgments acknowledged, either explicitly or implicitly, that Indigenous world views are different. *Nowegijick, Guerin* and *Sioui* established principles of cross cultural respect that were cited in many subsequent cases. The approaches they took were consistent with the approach taken in some cases concerning non-Indigenous people. For example, Sopinka in *Lac Minerals* found that usages should be established by those who were familiar with them, not by "experts"[1092] while La Forest favoured a combined approach recognizing, with regard to the definition of custom based on practice since time immemorial, that:

> "Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom."[1093]

In practice, however, the Court often failed to apply the principles it set out. The judgments contained little if any indication of how situations were viewed by Indigenous elders and experts.[1094] The celebrated judgment in *Delgamuukw* did not use the Indigenous evidence presented to affirm any rights. It merely found that oral

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[1092] *Lac Mineral Ltd. v. International Corona Resources Ltd.* at {23}.

[1093] *Ibid.* at [58].

[1094] Authors who interviewed Indigenous elders were cited in *R. v.Horseman.*

histories were admissible in evidence when attempting to defend those rights. The deference traditionally accorded to trial court findings of fact, which was replicated by validating the discretion of the *Royal Commission into the Marshall Prosecution*[1095] was not extended to Indigenous venues. Indigenous interpretations of their rights were not relied upon by the Court and assertions that s.35(1) protected an Indigenous jurisdiction of one kind or another such as can be found in *Sparrow*[1096], *C.P. v. Matsqui*[1097], *Pamajewon*[1098] or *Mitchell v. M.N.R.*[1099] were barely acknowledged let alone discussed. Was this deliberate? Or was the Court simply incapable of entering such a discussion because it could see no paradigm for inter-cultural co-existence other than that provided by British sovereignty? Even when Indigenous peoples used institutions defined by Canadian legislation, the Court seemed to discount their jurisdictional roles.[1100]

Dickson seems to have anticipated this problem in *Mitchell v. Peguis* when he observed that it might not be easy for the Court to see things as seen by the "Indians".[1101] The *Secession Reference* claim that the Constitutional protection of Aboriginal peoples was considered "important" seems open to question given the Court's assertion in the same case that their interests would only be "taken into account" in constitutional negotiations between Canada and Quebec.[1102] This

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[1095] *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution),* [1989] 2 S.C.R. 788.

[1096] *R. v. Sparrow* at 1100.

[1097] *C. P. v. Matsqui.*

[1098] *R. v. Pamajewon* at [13,14].

[1099] *Mitchell v. M.N.R.*, [125 et seq.]

[1100] See eg. *C. P. v. Matsqui*; *R. v. Nikal*; *R. v. Lewis.*

[1101] *Mitchell v. Peguis* at 11.

[1102] *Reference Re Secession of Quebec* at [82 and 139].

suggests that "important" did not amount to recognition of political parity or equal negotiating power.

There were, however, many signs of willingness to accommodate Indigenous points of view. *Gladue* emphasized respect for Indigenous concepts of restorative justice.[1103] In *Corbiere,* L'Heureux-Dubé's minority reasons included a perfectly postcolonial definition of the "reasonable person" stating:

> "I would emphasize that the "reasonable person" considered by the subjective-objective perspective understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others"[1104]

Binnie stated for the majority in *Marshall I* that:

> "there can be no limitation on the method, timing and extent of Indian hunting rights under Treaty, apart, I might add , from a treaty limitation to that effect"[1105]

The decision in *Deane* amounted to a firm assertion that unarmed "Indians" can no longer be shot and there was Iacobucci's declaration for the majority in *Osoyoos* that the Court would not "give legal effect to an unauthorized act of the state".[1106]

Despite the Court's apparent difficulty in this regard, a few of the more recent cases seem to be developing some willingness to support modest measures of autonomy. *Powley* determined that a Métis community could self-identify who its members were (though still subject to Canadian court control). *Haida Nation,* which began by setting out the problem from a Haida perspective, allowed them to seek the remedy they wanted instead of reformulating the proceedings according to judicial preference. Though the Court has not gone so far as to defend the

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[1103] *R. v. Gladue* at [70].

[1104] *Corbiere v. Canada* at [65].

[1105] *R. v.Marshall I* at [65].

international standard of prior informed consent, *Mikisew Cree First Nation,* at least found that:

> "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".[1107]

This falls short of the traditional British ideal of protecting a legality based in the custom of the people; however, it does represent a substantial reorientation from colonial habit of simply ignoring Indigenous peoples and their social rules.

[1106] *Osoyoos Indian Band v. Oliver* at [69].

[1107] *Mikisew Cree First Nation v. Canada* at [64].

6.3. Towards a "Postcolonial" Role for the Court

> "The Ghost Dance is natural reason and transmotion; that is, the resurrection dance is a visionary motion of sovereignty."[1108]
>
> Gerald Vizenor
> *Postindian Conversations*, 1999.

> "Instead of focusing on what was done in the past, the Ojibway concentrate on healing the personal or interpersonal dysfunctions that caused the problem in the first place." [1109]
>
> Rupert Ross,
> *Dancing with a Ghost*, 1992.

As Thomas Kuhn pointed out, the perceptual shift that creates the ability to see in terms of a new paradigm may occur instantaneously like the switch in our perception of Gestalt images. The cognitive ability to change what was background into foreground and *vice versa* can turn the opaque image of a chalice into two lovers or reveal a cup that has always been there though it passed unobserved. Institutional habit may reinforce perceptual modes that bind us to the past and it often takes a generation or more for a paradigm change to become institutionalized. This raises the question of where we are right now in relation to the transition from colonial to postcolonial concepts of legality.

The Supreme Court of Canada has already accepted the basic elements of postcolonial legality at the idealized level. It has recognized that the mere physical ability do do something does not make it "legal".[1110] It has firmly endorsed the

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[1108] Vizenor, *Post Indian Conversations* at 166.

[1109] Ross, *Dancing with a Ghost* at 46.

[1110] *Reference Re Secession of Quebec* at [106].

concept of human equality. It has recognized that Indigenous peoples have different points of view. It has supported the use of negotiation and consultative processes and it has recognized that the Constitutional recognition of Aboriginal and treaty rights in s.35(1) of the *Constitution Act, 1982* signifies a need for change. However, it remains bound to the colonial past both by the form of its institutional structure and by culturally entrenched customs and habits of thought.

Despite the best of apparent intentions, the Court has shown little consciousness of the depth to which its reasoning is entangled with ethnocentric concerns and assumptions that conflict both with Indigenous concepts of social order and with the principles that the Court itself seeks to uphold. As the tenor of the three decisions released in December 2006 suggests, this means that the door has not yet opened to a reconciliation between Indigenous and settler concepts of legality that might return relations to the relatively egalitarian and cooperative mode of operation that the *Royal Commission on Aboriginal Peoples* found during the first centuries after contact. The Court seems to have settled, instead, into a pattern that affirms the primacy of the colonizing culture's needs and priorities. That is to say, it has maintained the power of Canadian administrators to interfere with the lives of Indigenous peoples and to make declarations concerning the character of the law without regard for democratic procedural norms or the consent of those concerned.

Though the Court's capacity to move in a postcolonial direction has been hampered both by the legal tradition it has inherited and by the preemptive quality of the issues it has been asked to consider, it does have a capacity to model postcolonial behaviour and facilitate change. The hierarchically authoritarian

character of the judicial role and court procedures makes it difficult for judges to escape their personal frames of reference. However, as the analysis of the ten individual indicia of colonial and postcolonial legality suggests, the members of the Supreme Court of Canada already have the expertise required to reason in postcolonial terms. They may accordingly reduce the differences between their handling of Indigenous rights and their treatment of the rights of Canadians in general by applying their skills in a more methodical way.

They might, for example, routinely set out and address the issues as understood by each of the parties instead of skipping this step to reframe them according to their own preferences. They might take care to ensure that all assertions of fact are founded on evidence instead of assuming the validity of culturally determined truisms. They might pause to consider whether the laws they seek to uphold were the product of a legislature that represented the people to whom they are being applied. Then, if they do, the Court could assert a vision of legality that views the interpretations of administrative agents and officials in parity with those of ordinary citizens instead of according them deferential, quasi-oligarchic respect.

That is to say, if the goal is to treat everyone equally, Canadian judges could enhance the neutrality of their office by reaffirming the traditional British constitutional principles that subjected even kings to the rule of law. For example, tests like that set out in *Van der Peet* could be considered in relation to colonial society as well as to that of the Indigenous person whose rights have been challenged before attempting to reconcile the perspectives before the Court. In other

words, the honour of the Crown might be interpreted in a way that respects the Indigenous sovereignty implicit in the fact that early relations were based on treaties. They could also expand the support that they have already offered for negotiated settlements by refusing to interpret treaties according to laws that have been unilaterally imposed by one signatory. As demonstrated by the Australian court in *Bennell*, Indigenous rights can be legally recognized without causing a collapse of the institutional structures imposed through colonialism. It is possible, for example, to support the right of Indigenous jurisdictions to settle matters that are of internal concern. It is also possible to recognize conflicting concepts like "title" without resolving all of the issues this may raise or disturbing the barbecues in everyone's back yard. The challenge is to make a legal space within which Indigenous cultural rights can be exercised in peace. As the accommodation that prevailed before *R. v. Morris* arose suggests, non-intrusive approaches have already proven functional in Canada. Their affirmation and maintenance may simply be a matter of ensuring that administrative officials and members of the Canadian public are educated to recognize and respect Indigenous rights. The Court has a valuable role to play in this regard.

One of the greatest challenges, as the judges themselves have recognized, is to see things as Indigenous people see them. This is particularly difficult given the current composition of the Court and education of its members. However, another challenge suggested by Kuhn's theory is related to the need for a new paradigm to replace the concept of sovereignty and constitutional relations inherited from the colonial era. As the Court itself suggested in the *Secession Reference*, inspiration to

this end might be found in the precedents provided by Anglo-Canadian history. The Court might, for example, reaffirm the deference to popular legality that ideally characterized British constitutional mores so as to revive the creative accommodation that, as documented by White and by the *Royal Commission on Aboriginal Peoples*, prevailed during the early colonial. The Court, and the lawyers who plead before it, might also pay greater attention to the principles articulated in the international conventions and accords that Canada has already signed, or even to those represented in the constitutional models provided by the Indigenous peoples themselves. There are many ways to validate the equality that founds postcolonial legality, especially since it is already entrenched in Canada's Constitution.

The capacity to repeat established patterns is in us all, for better and for worse. So too is the capacity to change. When reflecting on what the traditions of her people would have to say about the way she, in 2006, had unwittingly mimicked her grandmother's 1957 complaint about noisy music and youthful exuberance, Maria Campbell applied a philosophy that, according to Rupert Ross, is part of a collection of principles known as *The Sacred Tree* and shared by Indigenous Americans in general.[1111] It is also part of the philosophy that governed classical China.[1112] She said:

> "All things change. There are two kinds of change. The coming together of things and the coming apart of things. Both kinds of change are necessary and are always connected to each other.

[1111] Ross, *Returning to the Teachings* at 68.

[1112] See eg. Richard Wilhelm, Cary F. Baynes trans. *The I Ching or Book of Changes* (Princeton Uniersity Press, 1950); Woo, "Repairing the Dome of Heaven".

> It would be good I think for each of us in this new year to pick up a child, sit with down with them in a quiet place discuss the inheritance we are leaving them.
>
> They should know why we are doing this."[1113]

We are all inhabited by ghosts of many origins and contradictory persuasions, but with knowledge comes choice. Canada's history is awkward and embarrassing. It includes many violations of basic human rights principles. Yet there is no need to follow the cavalry into the nineteenth century. We can, to use Brian Slattery's analogy, excavate our assumptions.[1114] In so doing, we may find not only hidden constitutions, but also forgotten treaties like the *Covenant Chain.* If we listen carefully, we may begin to understand what Indigenous peoples have been saying all along. We may yet learn how to let others help clean our ears so we can hear, our eyes so we can see and our throats so our word ring true. When delusions and obstructions are swept from our minds, we may yet develop the ability to participate in the kinds of negotiations that will help open new paths towards the postcolonial legality that we have already endorsed. The Court can make a space for this process to begin.

[1113] Maria Campbell, "Reflections: Could that really be kokum in the mirror?", 10.1 *Eagle Feather News* (January 2007) 5.

[1114] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar. Rev.* 727.

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R. v. Horseman, [1990] 1 S.C.R. 901; 1990 CanLII 96.
R. v. Sioui,[1990] 1 S.C.R. 1075; http://www.lexum.umontreal.ca.
R. v. Sparrow ,[1990] 1 S.C.R. 1075; http://www.lexum.umontreal.ca.
Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85; 1990 CanLII 117.
Ontario (Attorney General) v. Bear Island Foundation, [1991] 2 S.C.R. 579; 1991 CanLII 75.
R. v. Jones, [1991] 2 S.C.R. 110; 1991 CanLII 31.
Friends of the Old Man River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; 1992 CanLII 110.
Williams v. Canada, [1992] 1 S.C.R. 877, 1992 CanLII 98.
Quebec (Attorney General) v. Canada (National Energy Board, [1994] 1 S.C.R. 159, 1994 CanLII 113.
R. v. Howard, [1994] 2 S.C.R. 299; 1994 CanLII 86.
Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627; 1994 CanLII 27.
Canadian Pacific Ltd. v. Matsqui Indian Band, [1995]1 S.C.R.3; 1995 CanLII 145.
Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) [1995] 4 S.C.R. 344; http://www.lexum.umontreal.ca.
R. v. Badger, [1996] 1 S.C.R. 771; 1996 CanLII 236.
R. v. Nikal, [1996] 1 S.C.R. 1013; 1996 CanLII 245.
R. v. Lewis [1996] 1 S.C.R. 921; 1996 CanLII 243.
R. v. Van der Peet, [1996] 2 S.C.R. 507; http://www.lexum.umontreal.ca.
R. v. Gladstone, [1996] 2 S.C.R. 723; http://www.lexum.umontreal.ca..
R. v. Smokehouse Ltd., [1996] 2 S.C.R. 672; http://www.lexum.umontreal.ca.. .
R. v. Pamajewon, [1996] 2 S.C.R. 821; http://www.lexum.umontreal.ca.. .
R. v. Adams, [1996] 3 S.C.R. 101; 1996 CanLII 169.
R. v. Côté, [1996] 3 S.C.R. 139; 1996 CanIII 170.
Goodswimmer v. Canada (Miinister of Indian Affairs and Northern Development), [1997] 1 S.C.R. 309; 1997 CanLII 371.
Opetchesaht Indian Band v. Canada, [1997] 2 S.C.R. 119; 1997 CanLII 244.
St. Mary's Indian Band v. Cranbrook, [1997] 2 S.C.R. 657; 1997 CanLII 364.
Delgamuukw v. British Columbia [1997] 3. S.C.R. 1010; http://www.lexum.umontreal.ca.
R. v. Williams, [1998] 1 S.C.R. 1128; 1998 CanLII 782.
Reference Re Secession of Quebec, [1998] 2 S.C.R. 217; http://www.lexum.umontreal.ca.
R. v. Sundown, [1999] 1 S.C.R.393; 1999 CanIII 673.

Appendix 2 : JUDICIAL CAREERS

Judge Birth place	Education	Age At call	Career/ Practice	Teaching	Age at bench
Hon. Rolland Almon Ritchie Halifax	King's College B.A. Oxford B.A.	24 N.S.	Halifax firm W.W.II Halifax practice. Commission on Newfoundland's terms of union.	Dalhousie	49 S.C.C.
Hon. Robert George Brian Dickson* Yorkton, Sask.	U. Manitoba LLB.	24 Man .	Insurance, WW II, Winnipeg firm	U. of Man.	47 Man. Q.B.
Hon. Jean Beetz Montreal	U de Montreal B.A. LL.L Rhodes Scholar B.A.	24? P.Q.	Trudeau adviser	U de Montréal	46 Que. C.A.
Hon. Willard Zebedee Estey (son of James W. Estey, S.C.C.) Saskatoon	U Sask. B.A. LL.B. Harvard LL.M	28 Ont	WW II Toronto firm	U. of Sask.	54 Ont H.C.
Hon. William Rogers McIntyre Lachine, Que.	U. Sask B.A. LL.B	29 Sask B.C.	WWII Victoria firm		49 B.C. S.C.
Hon. Julien Chouinard Quebec City	Laval B.A. LL.L Rhodes Scholar B.A.	24 Que.	Quebec City firm Que. Deputy Min. Justice	Laval	46 Que. C.A.
Hon. Antonio Lamer* Montreal	U of Montreal LL.L	24 Que	Law practice	U de Montréal	36 Que. C.A.
Hon. Bertha Wilson Scotland	U. Aberdeen M.A. Teachers' cert. Dalhousie LL.B	35 N.S. 36 Ont.	1949 emigrated Toronto firm		52 Ont. C.A.
Hon. Gerald Eric Le Dain Montreal	McGill B.C.L. Lyon, Doc.	25 Que 44 Ont.	WWII Montreal firm LeDain Commission	McGill Osgoode Hall	51 F.C.A.
Hon. Gérard V. La Forest Grand Falls, N.B.	St. Francis X U. N.B. B.C.L. Rhodes Scholar B.A. Yale LL.M, J.S.D.	23 N.B.	Fed. Dept Justice Asst-Dep. A.G. Corporate adviser	U.N.B. U. of Alberta	55 N.B. C.A.
Hon. Claire L'Heureux-Dubé Quebec City	Laval LL.L	25	(took break to raise family) Quebec firm at 42	Lecturer family law for Barreau	46 Que. S.C.

Judge Birth Place	Education	Age of Call	Career Practice	Teaching	Age At Bench
Hon. John Sopinka Broderick, Sask. to Hamilton at 8.	U of Toronto B.A. LL.B.	27 Ont 4 prov 2 terr.	Toronto Argonaut (professional football) Toronto law firm	Osgoode U of T	55 S.C.C.
Hon. Charles Doherty Gonthier Montreal	Bac.Paris McGill BCL	24 Que	Montreal firm		46 Ont. S.C.
Hon. Peter deCarteret Cory Windsor, Ont.	U. Western Ont. B.A. Osgoode, LLB	25 Ont.	RCAF pilot Holden Murdoch		49 Ont. H.C.
Hon. Beverley McLachlin* Pincher Creek, Ab.	U. Alberta M.A. LL.B.	26 Alta 28 B.C.	Edmonton, Ft. St. John, Vancouver firms	U.B.C.	38 B.C. Co. Ct.
Hon. William Stevenson Edmonton	U.of Alberta B.A. LL.B	24	Edmonton firm Last P.C. case	U. of Alberta	41 Alta Dist. Ct.
Hon. Frank Iacobucci Vancouver	U.B.C. Cambridge B.com, LLB, Dip Int'l law, LLD.	33	N.Y. firm Dep. Min. Justice Consultant to fed and prov. Gvts	U of Toronto	51 F.C.
Hon. John C. Major Mattawa, Ont.	Loyola, U of T B.Com. LLB.	27 Alta	Calgary firm Inquiries re bank failures		60 Alta C.A.
Hon. Michel Bastarache N.B. ?	Moncton. B.A. U de M LL.L U of O LL.B Nice public law	33 N.B. 38 Alta 39 Ont	Legal translator Life Insurance VP Ottawa and Moncton firms	U. of Moncton U of Ottawa	48 N.B. C.A.
Hon. William Ian Corneil Binnie Montreal	McGill B.A. Cambridge LLB, LLM U of T LLB	27 G.B. 28 Ont 36 Yk.	Int. Ct of Justice Legal counsel Tanzania Assoc. Dep. Min. Justice McCarthy Tetreault	Osgoode Hall	59 S.C.C.
Hon. Louise Arbour Montreal	B.A., LL.L U de M	24 Que 30 Ont.	Law Clerk SCC Law Reform Commission Women's prison inquiry; Prosecuter Int. Ct	Osgoode Hall York	40 Ont. H.C.

Judge **Birth Place**	**Education**	**Age at call**	**Practice**		**Age At Bench**
Hon. Louis LeBel Quebec City	College des Jesuits B.A. Laval LL.L U of T LLM DES Laval	23	Quebec firm	U of Ottawa Laval	45 Que. C.A.
Hon. Marie Deschamps Repentigny	U de M LL.L McGill LL.M	23	Montreal firms		38 Que. S.C.
Hon. Morris Fish Montreal	McGill B.A. BCL Universite de Paris	26 Que 30 PEI 36 Alta	Montreal Star Journalist Montreal firm Cliche commission	McGill U. of Ottawa U. of Toronto	50 Que. C.A.
Hon. Rosalie Silberman Abella Stuttgart, to Toronto at 4	U of T BA, LLB	26 Ont.	Litigation Toronto Marshall Inquiry	U of Toronto	30 Ont. Family Ct.
Hon. Louise Charron Sturgeon Falls, Ont.	Carleton B.A. U of O. LLB.	26 Ont.	Ontario firms Asst. Crown Atty	U. of Ottawa	37 Ont. C.A.
Hon. Marshall Rothstein Winnipeg	U Man. B.Com, LL.B.	26 Man	Quebec firms	U. de Montréal	49 F.C.
Average Age		**26**			**47**

Appendix 3 :JUDICIAL REASONING PROFILES

A3.1 Decisions re Indigenous Rights

Judge * appointed Chief Justice -written judgments in **bold**	Appoint.	Retired	No.of decisions	**Colonial**	**Post Colonial**
Hon. Rolland Almon Ritchie	05-05-1959	31-10-1984	1	9	5
Hon. Robert George Brian Dickson*	26-03-1973	30-06-1990	12	8	5.6
*18-04-1984			**4**	**8.5**	**6**
Hon.Jean Beetz	01-01-1974	10-11-1988	9	8.2	4.9
			2	**9**	**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	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	4.8
*07-01-2000			**15**	**7.8**	**5.1**
Hon. William Stevenson	17-09-1990	05-06-1992	4	8.5	3.5
			2	**9.5**	**2.5**
Hon. Frank Iacobucci	07-01-1991	30-06-2004	38	8.4	4.7
			6	**7.6**	**5.8**
Hon. John C. Major	13-11-1992	25-12-2005	36	8.3	4.7
			2	**8.5**	**4**
Hon. Michel Bastarache	30-09-1997		21	7.7	5.3
			4	**7.8**	**6**
Hon. William Ian Corneil Binnie	08-01-1998		21	7.6	5.4
			4	**7.5**	**6.3**
Hon. Louise Arbour	15-09-1999	30-06-2004	14	8	5.2
Hon. Louis LeBel	07-01-2000		17	7.7	5.2
			2	**9.5**	**3.2**
Hon. Marie Deschamps	07-08-2002		7	7.4	5.4
Hon. Morris Fish	05-08-2003		4	7.1	5.1
Hon. Rosalie Silberman Abella	30-08-2004		2	6.5	4.4
Hon. Louise Charron	30-08-2004		2	6.5	4.4
Male average : (all judgments)				**8.2**	**4.8**
Female average :				**7.4**	**5**
Total judgment average :				**8**	**4.9**

A3.2 Decisions re. Non-Indigenous rights

Judge * appointed Chief Justice	Appoint.	Retired	No. of decisions	**Colonial**	**Post Colonial**
Hon. William Rogers McIntyre	01-01-1979	15-02-1989	1	1.5	10
Hon. Antonion Lamer*	28-03-1980	06-01-2000	6	4.5	8.9
Hon. Bertha Wilson	04-03-1982	04-01-1991	2	2	9.8
Hon. Gérard V. La Forest	16-01-1985	30-09-1997	4	3.8	9.1
Hon. Claire L'Heureux-Dubé	15-04-1987	01-07-2002	8	4.6	9
Hon. John Sopinka	24-05-1988	24-11-1997	3	4.2	9
Hon. Charles Doherty Gonthier	01-02-1989	31-07-2003	8	4.8	4.8
Hon. Peter deCarteret Cory	01-02-1989	01-06-1999	4	4.9	9.1
Hon. Beverley McLachlin*	30-03-1989		8	4.6	9
Hon. William Stevenson	17-09-1990	05-06-1992	1	4	7.5
Hon. Frank Iacobucci	07-01-1991	30-06-2004	7	5.3	8.6
Hon. John C. Major	13-11-1992	25-12-2005	5	4.8	8.7
Hon. Michel Bastarache	30-09-1997		4	4.3	9.1
Hon. William Ian Corneil Binnie	08-01-1998		5	4.8	8.7
Hon. Louise Arbour	15-09-1999	30-06-2004	3	4.7	8.8
Hon. Louis LeBel	07-01-2000		3	4	8.8
Male average : (all judgments)				**4.2**	**8.5**
Female average :				**4**	**9.2**
Total judgment average :				**4.2**	**8.7**

Appendix 4 : ASSESSMENT OF REASONING

-See Chapter 4.4 for selection criteria.

-The 62 court cases included in the basic study included 96 judgments. For these, a particular judge or judges was identified as the author of 88. Three decisions released in December 2006 were included for some purposes, raising the number of cases assessed to 65 and of assessments to 100.

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

-No evaluation is considered conclusive or authoritative. As discussed in the text, all are necessarily subjective and incomplete.

A4.1 Summary

A4.1.1 Summary for Non-Indigenous Parties :

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

A4.1.2 Summary for Indigenous Parties

	Case	Judge	Year	Colonial	Postcolonial
1	1. *Nowegijick v. The Queen*	Dickson	1983	9	5
2	2. *Guerin v. The Queen*	Wilson	1984	7.5	6.8
3		Dickson		8	6.3
4		Estey		9.5	6.8
5	3. *Jack and Charlie*	Beetz	1985	10	3.5
6	4. *Dick v. The Queen*	Beetz		8	3
7	5. *Simon*	Dickson		8	7.5
8	6. *Horse*	Estey	1988	9	1.3
9	7. *Francis*	La Forest		9	2
10	8. *Canadian Pacific v. Paul*	COURT		9	5.5
11	9. *Roberts*	Wilson	1989	4	10
12	11.*N.S.(A.G.) v. N.S. (Marshall)*	La Forest		6	6
13	12.*Horseman*	Wilson	1990	7	6.5
14		Cory		9	4
15	13. *Sioui*	Lamer		6.5	7.5
16	14. *Sparrow*	Dickson and La Forest		9	5
17	15. *Mitchell v. Peguis Indian Band*	Dickson		8	6.5
18		Wilson		8.5	5.5
19		La Forest		8.5	5.5
20	16. *Bear Island Foundation*	COURT	1991	10	2.3
21	17. *Jones*	Stevenson		9	2
22	18. *Oldman River Society* Piegan	La Forest		10	3
23		Stevenson		10	3
24	19. *Williams v. Canada*	Gonthier	1992	5	6.5
25	20. *Quebec v. Canada (N.E.B.)*	Iacobucci	1994	7	5.5
26	21. *Howard*	Gonthier		9	4
27	22. *Native Women's Association*	Sopinka		8	6.5
28		L'Heureux-Dubé		8	8
29		McLachlin		9	6.5
30	23. *C.P. v. Matsqui Indian Band*	Lamer	1995	8	4
31		La Forest		9	3.4
32		Major		8	4
33		Sopinka		5.5	6.5
34	24. *Blueberry River Indian Band*	Gonthier		7.5	6
35		McLachlin		5.5	6.5
36	25. *Badger*	Sopinka	1996	10	3.25
37		Cory		10	3.5
38	26. *Nikal*	Cory		10	3.5
39		McLachlin		10	3.5
40	27. *Lewis*	Iacobucci		10	3
41	28. *Van der Peet*	Lamer		10	2.5
42		L'Heureux-Dubé		9	5
43		McLachlin		6.5	6
44	29. *Gladstone*	Lamer		9	4
45		La Forest		9	3
46		L'Heureux-Dubé		8.5	5
47		Mclachlin		9	4.5
48	30. *Smokehouse*	Lamer	1996	10	3
49		L'Heureux-Dubé		7	4
50		Mclachlin		7	4

Summary for Indigenous Parties cont.

	Case	Judge	Year	Colonial	Postcolonial
51	31. *Pamajewon*	Lamer		10	2
52		L'Heureux-Dubé		10	2
53	32..*Adams*	Lamer		10	4
54		L'Heureux-Dubé		10	4
55	33. *Côté*	Lamer		10	2.5
56	34. *Goodswimmer* (F.C.A.)	Stone J.A.	1997	3	10
57	35. *Opetchesaht*	Major		9	4
58		McLachlin		6.5	6.5
59	36. *St. Mary's Indian Band*	Lamer		10	3
60	37. *Delgamuukw*	Lamer		9	3
61		La Forest		9	3
62	38. *Williams*	McLachlin	1998	6	7
63	39. *Secession Reference*	COURT		9	2
64	40. *Sundown*	Cory	1999	8	4
65	41. *Gladue*	Cory andIacobucci		7	7
66	42. *Corbiere*	McLachlin and Bastarache		10	5.5
67		L'Heureux-Dubé		10	5.5
68	43. *Marshall*	Binnie		9	6
69		McLachlin		9	3.5
70	44. *Marshall II*	COURT		9	4.3
71	45. *Firearms Reference*	COURT		10	1
72	46. *Catcheway*	Iacobucci	2000	4	7
73	47. *Lovelace*	Iacobucci		9	6
74	48. *Musqueam v. Glass*	McLachlin		4	9
75		Gonthier		4	9
76		Bastarache		4	9
77	49. *Deane* (ON.C.A.) re. George	McLachlin	2001	9	4
78	50. *Mitchell v. M.N.R.*	Mc Lachlin		10	3
79		Binnie		10	4.5
80	51.*Osoyoos*	Iacobucci		8	6
81		Gonthier		9	4.5
82	52. *Kitkatla*	Lebel	2002	9	3
83	53. *Ross River Dena*	Bastarache		10	3.3
84		Lebel		10	3.3
85	54. *Wewaykum*	Binnie		7	9
86	55. *R. v. Powley*	COURT	2003	7.3	8
87	56. *R. v. Blais*	COURT		8	4.5
88	57. *Wewaykum* II	ALL 8		10	2.5
89	58. *Paul*	Bastarache		7	6
90	59. *Haida Nation*	McLachlin	2004	6.5	8
91	60. *Taku River Tlingit*	McLachlin		9	3
92	61.*Marshall/Bernard*	McLachlin	2005	9	2.75
93		LeBel		9	3.75
94	62. *Mikisew Cree*	Binnie		4	6
	Average :			**8**	**4.9**

A4.2 Indicia of Colonialism and Postcolonialism

As explained in the text, the numerical evaluations produced by this methodology are necessarily subjective and should be interpreted with discretion.

(yes) * = 1 (some) s = 1/2 (little) l = 1/3
Left of cell = Colonial indicia. Right of cell = Postcolonial indicia

A.4.2.1 Profile for Non-Indigenous Parties

			Judge	Parties	Venue	Issues	Procedure
1	*Lac Minerals*	Sopinka	*	*	*	*	*
2		La Forest	*	*	*	*	*
3	*N.S.(A.G.) v. N.S. (Marshall)*	La Forest	*	s	*	*	*
4	*Oldman River Soc.*	La Forest	*	*	*	*	*
5		Stevenson	*	*	*	*	*
6	*Smokehouse*	Lamer	*	*	*	* *	* *
7		L'Heureux-Dubé	*	*	*	* *	*
8		Mclachlin	*	*	*	* *	*
9	*Secession Reference* re. Canada	COURT	*	*	*	*	*
10	. re. Quebec	COURT	* *	*	* *	*	* *
11	*Marshall II* . Fishermen	COURT	*	* *	*	*	*
12	*Firearms Reference* . re. Alberta	COURT	s	*	*	* *	*
13	*Musqueam v. Glass* . re. renters	McLachlin	*	*	*	*	* *
14		Gonthier	*	*	*	*	*
15		Bastarache	*	*	*	*	*
16	*Deane* . re. Deane	McLachlin	*	*	*	* *	*
	Totals :		2 / 14.5	2.5 / 15	1 / 16	6 / 15	3 / 16
	Percent :		**13 / 91**	**16 / 94**	**6 / 100**	**38 / 95**	**19 / 100**

			Evidence	Law	Reasoning	Values	Perspective
1	*Lac Minerals*	Sopinka	*	*	*	* *	s *
2		La Forest	*	*	*	*	s *
3	*N.S.(A.G.) v. N.S. (Marshall)*	La Forest	*	* *	*	* *	* *
4	*Oldman River Soc.*	La Forest	*	* *	* *	* *	* *
5		Stevenson	*	*	* *	*	* s
6	*Smokehouse*	Lamer	* *	*	* *	*	*
7		L'Heureux-Dubé	*	*	*	* *	*
8		Mclachlin	*	*	*	* *	*
9	*Secession Reference* re. Canada	COURT	* *	* *	* *	* *	* *
10	. re. Quebec	COURT	* *	* *	* *	* *	* *

11	*Marshall II* . Fishermen	COURT	* *	*	* *	* *	*
12	*Firearms Reference* . re. Alberta	COURT	* *	*	* *	*	*
13	*Musqueam v. Glass* . re. renters	McLachlin	* *	*	*	*	*
14		Gonthier	*	*	*	*	*
15		Bastarache	*	*	*	*	*
16	*Deane* . re. Deane	McLachlin	* *	* *	* *	* *	* *
	Totals :		7 / 16	11 / 10	8 / 16	12 / 13	10 / 12.5
	percent :		**44 /100**	**69 / 63**	**50 /100**	**75 / 81**	**63 /100**

A4.2.2 Profile for Indigenous Parties

			Judges	**Parties**	**Venue**	**Issues**	**Procedure**
1	*Nowegijick*	Dickson	*	*	*	*	*
2	*Guerin*	Wilson	*	* l	*	s s	*
3		Dickson	*	* l	*	s s	*
4		Estey	*	* l	*	* s	s *
5	*Jack and Charlie*	Beetz	*	*	*	*	* *
6	*Dick*	Beetz	*	*	*	*	*
7	*Simon*	Dickson	*	* *	* *	*	*
8	*Horse*	Estey	*	*	*	*	*
9	*Francis*	La Forest	*	*	*	*	*
10	*C. P. v. Paul*	COURT	*	*	*	*	*
11	*Roberts*	Wilson	*	*	* *	*	*
12	*N.S.(A.G.) v. N.S.*	La Forest	*	*	*	*	*
13	*Horseman*	Wilson	*	*	*	* s	*
14		Cory	*	*	*	* s	*
15	*Sioui*	Lamer	*	* *	*	* s	*
16	*Sparrow*	Dickson / La Forest	*	*	*	* s	*
17	*Mitchell v. Peguis Indian Band*	Dickson	*	*	*	* s	*
18		Wilson	*	*	*	* s	*
19		La Forest	*	*	*	* s	*
20	*Bear Island*	COURT	*	*	*	* *	* *
21	*Jones*	Stevenson	*	*	*	* s	s
22	*Oldman River Soc.*	La Forest	*	*	*	*	* *
23		Stevenson	*	*	*	*	* *
24	*Williams v. Can.*	Gonthier	*	*	*	* s	*
25	*Que.v.Can.(NEB)*	Iacobucci	*	* s	*	*	*
26	*Howard*	Gonthier	*	*	*	* s	*
27	*Native Women's Assn*	Sopinka	*	* *	*	* *	*
28		L'Heureux-Dubé	*	* *	*	* *	*
29		McLachlin	*	* *	*	* *	*
30	*C.P. v. Matsqui*	Lamer	*	* *	*	*	*
31		La Forest	*	* *	*	* s	*
32		Major	*	* *	*	* s	*
33		Sopinka	*	* *	*	* s	*
34	*Blueberry River*	Gonthier	*	*	*	* s	*

35		McLachlin	*	*	*	* s	*
36	*Badger*	Sopinka	*	*	*	*	* *
37		Cory	*	*	*	*	* *
38	*Nikal*	Cory	*	*	*	*	* *
39		McLachlin	*	*	*	*	* *
40	*Lewis*	Iacobucci	*	*	*	* s	* *
41	*Van der Peet*	Lamer	*	*	*	*	* *
42		L'Heureux-Dubé	*	*	*	*	*
43		McLachlin	*	*	*	*	*
44	*Gladstone*	Lamer	*	*	*	*	*
45		La Forest	*	*	*	*	*
46		L'Heureux-Dubé	*	* s	*	* s	*
47		Mclachlin	*	*	*	*	*
48	*Smokehouse*	Lamer	*	*	*	*	* *
49		L'Heureux-Dubé	*	*	*	*	*
50		Mclachlin	*	*	*	*	*
51	*Pamajewon*	Lamer	*	*	*	*	* *
52		L'Heureux-Dubé	*	*	*	*	* *
53	*Adams*	Lamer	*	*	*	*	* *
54		L'Heureux-Dubé	*	*	*	*	* *
55	*Côté*	Lamer	*	*	*	*	* *
56	*Goodswimmer* (F.C.A.)	Stone J.A.	*	*	*	*	*
57	*Opetchesaht*	Major	*	*	*	*	*
58		McLachlin	*	*	*	* s	*
59	*St. Mary's*	Lamer	*	*	*	*	* *
60	*Delgamuukw*	Lamer	*	*	*	*	*
61		La Forest	*	*	*	*	*
62	*Williams*	McLachlin	*	*	*	*	*
63	*Secession Ref.*	COURT	*	*	*	*	*
64	*Sundown*	Cory	*	*	*	*	*
65	*Gladue*	Cory/ Iacobucci	*	* *	*	*	*
66	*Corbiere*	McLachlin/ Bastarache	*	*	*	*	* *
67		L'Heureux-Dubé	*	*	*	*	* *
68	*Marshall*	Binnie	*	*	*	*	*
69		McLachlin	*	*	*	*	*
70	*Marshall II*	COURT	*	*	*	*	*
71	*Firearms Reference*	COURT	*	*	*	*	* *
72	*Catcheway*	Iacobucci	*	*	*	*	*
73	*Lovelace*	Iacobucci	*	*	*	*	*
74	*Musqueam v. Glass*	McLachlin	*	* *	* *	* *	*
75		Gonthier	*	* *	* *	* *	*
76		Bastarache	*	* *	* *	* *	*
77	*Deane* (ON.C.A.)	McLachlin	*	*	*	*	*

78	*Mitchell v. M.N.R.*	Mc Lachlin	*	*	*	*	* *
79		Binnie	*	*	*	*	* *
80	*Osoyoos*	Iacobucci	*	*	*	*	*
81		Gonthier	*	*	*	*	*
82	*Kitkatla*	Lebel	*	*	*	*	*
83	*Ross River Dena*	Bastarache	*	*	*	*	* *
84		Lebel	*	*	*	*	* *
85	*Wewaykum*	Binnie	*	* *	* *	*	? *
86	*R. v. Powley*	COURT	*	* *	*	* *	*
87	*R. v. Blais*	COURT	*	*	*	* s	*
88	*Wewaykum* II	ALL 8	*	*	*	*	* *
89	*Paul*	Bastarache	*	*	*	* *	*
90	*Haida Nation*	McLachlin	*	* *	*	* *	*
91	*Taku River Tlingit*	McLachlin	*	*	*	*	*
92	*Marshall/Bernard*	McLachlin	*	*	*	*	*
93		LeBel	*	*	*	*	*
94	*Mikisew Cree*	Binnie	*	*	*	*	*
95	*Sappier/Gray*	Bastarache	*	* *	*	* s	*
96		Binnie	*	* *	*	*	*
97	*McDairmid Lumber*	McLachlin	*	* *	*	*	*
98		Binnie	*	* *	*	*	*
99	*Morris*	Deschamps /Abella	*	* *	*	*	*
100		McLachlin/ Fish	*	* *	*	*	*
	Totals :		**98 / 2**	**98 / 24**	**99 / 7**	**95 / 26**	**26 / 100**

			Evidence	**Law**	**Reasoning**	**Values**	**Perspective**
1	*Nowegijick*	Dickson	* *	*	* *	* *	* *
2	*Guerin*	Wilson	s *	* *	s *	* *	* *
3		Dickson	* *	* s	* *	s *	* *
4		Estey	s *	* *	* *	* *	* *
5	*Jack and Charlie*	Beetz	* *	*	* *	*	* s
6	*Dick*	Beetz	*	*	* *	*	*
7	*Simon*	Dickson	*	* s	* *	* *	* *
8	*Horse*	Estey	*	*	* l	*	*
9	*Francis*	La Forest	*	*	* *	*	*
10	*C. P. v. Paul*	COURT	* s	* *	* *	* s	* s
11	*Roberts*	Wilson	*	* *	* *	* *	*
12	*N.S.(A.G.) v. N.S.*	La Forest	*	* *	*	* *	*
13	*Horseman*	Wilson	* *	* *	*	*	* *
14		Cory	* *	*	* *	*	* s
15	*Sioui*	Lamer	s *	* *	s *	*	s *
16	*Sparrow*	Dickson / La Forest	* *	* s	* *	* s	* *
17	*Mitchell v. Peguis Indian Band*	Dickson	*	* *	* *	* *	* *
18		Wilson	* s	* s	s *	* *	* *
19		La Forest	* s	* s	s *	* *	* *
20	*Bear Island*	COURT	*	*	* l	*	*
21	*Jones*	Stevenson	*	*	*	* s	* s

22	*Oldman River Soc.*	La Forest	*	*	*		*	*	*		*	
23		Stevenson	*	*	*		*	*	*		*	
24	*Williams v. Canada*	Gonthier		*	*	*		*		*		*
25	*Quebec v. Canada (N.E.B.)*	Iacobucci		*	*			*	*	*	*	*
26	*Howard*	Gonthier	*	*	*	s	*	*	*		*	
27	*Native Women's Assn*	Sopinka	*	*	*			*	*	*	*	s
28		L'Heureux-Dubé	*	*	*	*		*	*	*	*	*
29		McLachlin	*	*	*		*	*	*	*	*	s
30	*C.P. v. Matsqui*	Lamer	*		*			*	*	s	*	s
31		La Forest	*		*		*		*		*	s
32		Major	*		*			*	*	*	*	s
33		Sopinka		*	*	*		*		*	s	*
34	*Blueberry River*	Gonthier	*	s	s	*	*	*	s	*	s	*
35		McLachlin		*	s	*	s	*		*	s	*
36	*Badger*	Sopinka	*	s	*	l	*	*	*		*	s
37		Cory	*	s	*	l	*	*	*	l	*	s
38	*Nikal*	Cory	*	*	*		*	*	*	l	*	
39		McLachlin	*	*	*		*	*	*	l	*	
40	*Lewis*	Iacobucci	*		*	s	*	*	*		*	
41	*Van der Peet*	Lamer	*	*	*		*	s	*		*	
42		L'Heureux-Dubé	*	*	*		*	*	*	*	*	*
43		McLachlin	s	*	*	*		*	s	*	s	*
44	*Gladstone*	Lamer	*	*	*		*	*	*	s	*	s
45		La Forest	*	*	*		*	*	*		*	
46		L'Heureux-Dubé	*	*	*		*	*	*	s	s	s
47		Mclachlin	*	*	*		*	*	*	s	*	*
48	*Smokehouse*	Lamer	*	*	*		*	*	*		*	
49		L'Heureux-Dubé		*	*			*	*	*		*
50		Mclachlin		*	*			*	*	*		*
51	*Pamajewon*	Lamer	*	s	*		*	s	*		*	
52		L'Heureux-Dubé	*	s	*		*	s	*		*	
53	*Adams*	Lamer	*	*	*		*	*	*		*	*
54		L'Heureux-Dubé	*	*	*		*	*	*		*	*
55	*Côté*	Lamer	*	s	*		*	s	*		*	s
56	*Goodswimmer* FCA.	Stone J.A.		*	*	*	*	*	*	*		*
57	*Opetchesaht*	Major	*	s	*	s	*	*	*	s	*	s
58		McLachlin	s	*	*	*	s	*	s	*		*
59	*St. Mary's Indian Band*	Lamer	*	*	*	?	*	s	*		*	
60	*Delgamuukw*	Lamer	*	s	*		*	s	*	s	*	s
61		La Forest	*	s	*		*	s	*	s	*	s
62	*Williams*	McLachlin		*	*	*		*		*	*	*
63	*Secession Ref.*	COURT	*		*	s	*		*		*	s
64	*Sundown*	Cory	*	*	*			*	*		*	*

65	*Gladue*	Cory/ Iacobucci	*	* *	*	* *	* *
66	*Corbiere*	McLachlin/ Bastarache	* s	* *	* *	* *	* *
67		L'Heureux-Dubé	* s	* *	* *	* *	* *
68	*Marshall*	Binnie	* *	* *	* *	* *	* *
69		McLachlin	* *	*	* *	*	* s
70	*Marshall II*	COURT	* *	* ?	* *	* *	* l
71	*Firearms Ref.*	COURT	*	*	*	*	*
72	*Catcheway*	Iacobucci	*	*	*	*	*
73	*Lovelace*	Iacobucci	* *	* s	* s	* *	* *
74	*Musqueam v. Glass*	McLachlin	*	*	*	*	*
75		Gonthier	*	*	*	*	*
76		Bastarache	*	*	*	*	*
77	*Deane* (ON.C.A.) re. George	McLachlin	* *	*	*	* *	* *
78	*Mitchell v. M.N.R.*	Mc Lachlin	* *	*	* *	*	*
79		Binnie	* *	*	* *	* s	* *
80	*Osoyoos*	Iacobucci	*	*	* *	* *	* *
81		Gonthier	* *	*	* *	*	* s
82	*Kitkatla*	Lebel	* s	*	* *	*	* s
83	*Ross River Dena*	Bastarache	* *	*	* *	*	* l
84		Lebel	* *	*	* *	*	* l
85	*Wewaykum*	Binnie	*	* *	* *	* *	* *
86	*R. v. Powley*	COURT	*	* *	* *	* *	l *
87	*R. v. Blais*	COURT	*	*	* *	*	* *
88	*Wewaykum* II	ALL 8	* s	*	* *	*	*
89	*Paul*	Bastarache	*	*	*	* *	* *
90	*Haida Nation*	McLachlin	*	* *	*	s *	* *
91	*Taku River Tlingit*	McLachlin	* *	*	* s	*	* s
92	*Marshall/Bernard*	McLachlin	* *	*	* s	* l	* l
93		LeBel	* *	*	* s	* l	* *
94	*Mikisew Cree*	Binnie	*	*	*	*	*
95	*Sappier/Gray*	Bastarache	s *	*	*	* s	* *
96		Binnie	s *	*	* *	* s	* *
97	*McDairmid Lumber*	McLachlin	* s	*	* *	*	* *
98		Binnie	*	* *	*	*	*
99	*Morris*	Deschamps /Abella	* *	* *	* *	*	* *
100		McLachlin/ Fish	*	*	* *	*	* s
	Totals : nearest %		**70 / 80**	**94 / 38**	**74 / 89**	**85 / 54**	**83 / 66**

A.4.3 Assessments of December 2006 Reasons

A.4.3.1 Summary

	Case	Judge	Colonial	Postcolonial
63	*Sappier/Gray*	Bastarache	7.5	6
		Binnie	7.5	6
64	*McDairmid Lumber*	McLachlin	9	3.5
		Binnie	5	7
65	*Morris*	Deschamps/Abella	9	6
		McLachlin/Fish	9	3.5
	Average :		**7.8**	**5.3**

A.4.3.2 Judicial Profiles

			Judges	Parties	Venue	Issues	Procedure
95	*Sappier/Gray*	Bastarache	*	* *	*	* s	*
96		Binnie	*	* *	*	* s	*
97	*McDairmid Lumber*	McLachlin	*	* *	*	*	*
98		Binnie	*	* *	*	*	*
99	*Morris*	Deschamps /Abella	*	* *	*	*	*
100		McLachlin/ Fish	*	* *	*	*	*
	Dec 2006 Totals		6 / 0	6 / 6	6 / 0	6 / 1	0 / 6
	Dec 2006 in %		**100 / 0**	**100/100**	**100 / 0**	**100 / 17**	**0 / 100**

			Evidence	Law	Reasoning	Values	Perspective
95	*Sappier/Gray*	Bastarache	s *	*	*	* s	* *
96		Binnie	s *	*	*	* s	* *
97	*McDairmid Lumber*	McLachlin	* s	*	* *	*	*
98		Binnie	*	* *	*	*	*
99	*Morris*	Deschamps /Abella	*	* *	*	*	*
100		McLachlin/ Fish	*	*	* *	*	* s
	Dec 2006 Totals		4 / 3.5	6 / 2	5 / 3	5 / 2	3 / 5.5
	Dec 2006 in %		**67 / 58**	**100 / 33**	**83 / 50**	**83/ 17**	**50 / 92**

A4.4 Case Profiles

Caveat: - Interpretations are subjective.

-Notes supporting each evaluation do not represent all of the evidence that might be used to illustrate each indicia.

-Focus is on isues related to Indigenous rights, not internal Canadian administration.

1. *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 1983 Canlii 18 (S.C.C.).

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 person on a reserve from taxation.

1. **Judge – Alien/Peer** –No Indigenous input
2. **Parties – Imposed Identity/ Self-Determined**

Imposed: "Mr. Nowegijick is an Indian within the meaning of the *Indian Act*".(31)
"Indians are citizens"-(36) presumed inclusion in Canadian polity.

3. **Venue – Foreign language & culture/ own** –language & Indigenous identity not on record
4. **Issues – Imposed – mutually determined** –Tax assessment imposed.
5. **Procedure – in camera/biased/public interveners equal:** Public process, many interveners
6. **Evidence – assumptions – supported by proof**

Assumptions: eg.Canadian citizenship assumed.
Proof: Basic facts of case agreed by both parties

7. **Concept of law – imposed / consensual** No evidence of consent to the regulatory scheme. No Indigenous participation in the enactment of the laws applied
8. **Reasoning – Declaratory – Principled**

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

9. **Values – Authoritarian – Egalitarian** The sentiment that "Indians are citizens" is egalitarian but it is simply declared without proffering any proof to this effect.

Perspective – Ethno/Ego centric- Cross-cultural respect 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.

Assessing Judicial Decision-making:

	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	Yes
Total		9		5

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, not in s. 18 of the *Indian Act*, but in aboriginal title. p.348-8 Measure of damages for breach of this duty is actual loss. p.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/ Self-Determined
imposed identity: as "indians" under the Indian Act, not challenged by Musqueam
-identified in Indian affairs terms as band – own ID (see their web cite) not explained
Self-determined: to the extent that they drafted their own statement of claim

Venue – Foreign language & culture/ own Foreign: Note colonial frame of reference p.331-40

Issues – Imposed – mutually determined
Imposed: Issues addressed in analysis are products of judge's constitutional conception.
Mutually negotiated: Action initiated by Musqueam
-Their decision not to question Indian Act & phrase issues in colonizers terms p.340
-Initiation of action asserts personhood of "Indians"

Procedure – in camera/biased/public intervenors equal
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 issue requested. p.353

Evidence – assumptions/ supported by proof
Assumptions: Assumed B.C. had jurisdiction over reserves to pass to Canada in 1938. p.349
Proof:-oral evidence accepted- Musqueam witnesses alive & cross examined
-Musqueam assertions corroborated by Indian affairs documentation

Concept of law – imposed / consensual
Imposed: -accepted imposed character of constitution (though not contested by Musqueam)
-accepted "paternalistic attitude" of Indian Affairs as defense against deceit & tort damages.
Consensual: based fiduciary obligation on Aborigial title & right to consent. p.349.

Reasoning – Declaratory – Principled
Declaratory – Crown sovereignty assumed. "I think" rights based on "historic reality" p.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 instutional 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" p.350

Values – Authoritarian-Egalitarian
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"p.350

10. Perspective – Ethno/ego centric – Respect for others
Ethnocentric: Constitutional understanding ignores the fact of colonialism
Respect: Strong support for requirement for consent & consultation p 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 liablity is not a trust, but a fiduciary duty rooted in the fact that Indian title is inalienable except to the Crown.
-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.

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions/ supported by proof**
   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" p.383 (34)
   -"The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery"; "the purpose of the surrender...etc.p.38 (35)
7. **Concept of law – imposed / consensual**
   Imposed – relies entirely on B.C.'s 1938 transfer of Indian reserves to Canada p.380 (33)
8. **Reasoning – Declaratory – Principled**
   -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* p.377-9 –not based on need for consent by Musqueam for constitutional participation.
   Principled - recognized categorization problems characteristic of paradigm change but did not identify cause. Noted problem of applying "inappropriate terminology drawn from general property law" p.382
9. **Values – Authoritarian-Egalitarian**
10. **Perspective – Ethno/ego centric – Respect for others**
    Ethnocentric – accepted colonial analysis by Marshall. Used a cite that clearly explains the impairment created by colonization, but accepted it without question rather than repudiating it. p.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: Because 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 it breaches this duty it will be liable for the actual losses caused.
-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 agent of colonizing government. The result is logical inconsistency.
-This reasoning was not pleaded so it was not well researched. Inconsistent with agency law.[1115]

4. **Issues – Imposed – mutually determined**
   Imposed: Law of Agency not raised by the parties.
   Mutually negotiated: as per other judgments
5. **Procedure – in camera/biased/public intervenors equal**
   Irregular: Issue of agency introduced though no evidence it was argued by the parties.
6. **Evidence – assumptions/ supported by proof**
   Assumptions: Adopted same colonial views as Wilson and Dickson.
   -No evidence that Musqueam voluntarily chose Indian Affairs to seek a lease or act as agents
   Supported by Proof: Adoped same proof as Wilson, Dickson & trial judge.
7. **Concept of law – imposed / consensual**
   Imposed: Accepted imposed constitution & Indian Act.
   Consensual: Law of agency is based on consensual principles
8. **Ratio – Authoritarian-Egalitarian**
   Authoritarian: Imposed an analysis not argued by the Musqueam. Assumed validity of *Indian Act* despite lack of Musqueam participation in Canadian political insitutions
   Egalitarian: Dealt with fact that "surrender" was not a release in the sense of terms in general law
   -attempt to be egalitarian in ascribing same meaning to law of agency
9. **Reasoning – Declaratory – Principled**
   Declaratory: adopted Trial judges' unprincipled approach to damages. Neither party pleaded agency.
   Principled: -attempted to find a principled basis for the decision.p.394
10. **Perspective– Ethno/ego centric – Respect for others**
    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" !!! p.392 -Relied on "agency as prescribed by Parliament" without noting that Musqueam did not participate voluntarily & had no right to vote at the time 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 language/culture	Yes	Own language/culture	
4. Issues	Imposed	Yes	Mutually determined	Some
5. Procedure	In camera/biased	Some	Public/interveners/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

[1115] James I. Reynolds, "A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples (Saskatoon: Purich Publishing, 2005) at 81.

3. *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332; 1985 CanLII 8 (S.C.C.),
BEETZ J. (Dickson C.J. Estey, McIntyre, Chouinard)
Main Point : Provincial regulation of deer hunting doesn't interfere with Indigenous religious motives.
Parties – Imposed Identity/ Self-Determined Indians under *Indian Act*
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined Charged
Procedure – in camera/biased/public interveners equal -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.
7. Concept of law – imposed / consensual No participation in making the laws imposed
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1985 CanLII 80 (S.C.C.).
BEETZ J. (Dickson C.J., Estey, McIntyre, Chouinard)

Main Point: A provincial law that does not single our 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 – Principled Declaratory source of law
Values – Authoritarian – Egalitarian –accepts law alien to accused
Perspective – Ethno/Ego centric- Cross-cultural respect

	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	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, 1985 CanLII 11 (S.C.C.).
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 arrises."[38]

Judges – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Indian Act identity is imposed, Micmac treaty identity is chosen/negotiated
Venue – Foreign language & culture/ own
Micmac agreed disputes should be tried in British courts 1752 treaty s.8 [6]
Issues – Imposed – mutually determined
RCMP charge
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
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 – Declaratory – Principled –principled reliance on precedents
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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; 1988 CanLII 91 (S.C.C.)
ESTEY J. (Beetz, McIntyre, Lamer, Wilson, Le Dain, L'Heureus-Dubé)

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 – Imposed – mutually negotiated - charge
Procedure – in camera/biased/public intervenors equal
Evidence – assumptions – supported by proof
Assumptions: ultimate objective of Treaty (9)
Concept of law – imposed / consensual
Imposed –UK parliament source of legality for Canada (5)
Reasoning – Declaratory – Principled
Declaratory –reliance on precedents without identifying principle (8, 11)
Values – Authoritarian – Egalitarian
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: unilateral interpretation of Treaty 6
-only considered internal Euro-Canadian law
-presumes "Indians" have no rights unless requested from the British(para47)
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; 1988 CanLII 31 (S.C.C.).
LA FOREST J. (Dickson C.J. Beetz, Estey, McIntyre, Lamer, Wilson, LeDain L'Heureux-Dubé)

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; 1988 IIJCan 104 (C.S.C.)
(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.
(Comment in *Delgamuukw:* aboriginal title is "more than the right to enjoyment and occupancy"[1116])

Evidence – assumptions – supported by proof
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 / consensual
Imposed: Decided based on preference.(23) Ignored lack of Indigenous political rights.
Consensual: consideration of legislative law making
Reasoning – Declaratory – Principled
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 – Egalitarian
Authoritarian: Acceptance of orders.
Egalitarian: Attempt to apply principles consistently to both parties.
Perspective – Ethno/Ego centric- Cross-cultural respect
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

[1116] *Delgamuukw v. British Columbia* at [119].

9. *Roberts v. Canada*, [1989] 1 S.C.R. 322; 189 CanLII 122 (S.C.C.)
WILSON J. (Dickson C.J., Beetz, Lamer, Le Dain)(Le Dain took no part in the judgment)

Main Point: The law of aboriginal title is Federal common law.
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 – Alien/Peer - judge neutral between parties who accept the system
Parties – Imposed Identity/ Self-Determined –parties accept Indian Act regime
Venue – Foreign language & culture/ own –parties appear to have adopted a foreign culture
Issues – Imposed – mutually determined –issues not externally imposed
Procedure – in camera/biased/public interveners equal –public process
Evidence – assumptions – supported by proof –evidence of case law supplied
Concept of law – imposed / consensual – imposed by act in which parties had virtually no say
Reasoning – Declaratory – Principled –principles explained –relies on statutory grant
Values – Authoritarian – Egalitarian –relies on statutory dictate
10. Perspective – Ethno/Ego centric- Cross-cultural respect – 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 Lts. v. International Corona Resources Ltd.***, [1989] 2. S.C.R. 574, 1989 CanLII 34.
SOPINKA J. (dissenting in part) McIntyre concurring.

Main Principle : "Not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature".[1117]

1. **Judge – Alien/Peer**
   Peer: member of same culture
2. **Parties – Imposed Identity/ Self-Determined**
   Self-determined: through incorporation
3. **Venue – Foreign language & culture/ own**
   Own Language & Culture:
4. **Issues – Imposed – mutually determined**
   Mutually Negotiatied: on the basis of pleadings
5. **Procedure – in camera/biased/public intervenors equal**
   Public: normal due process
6. **Evidence – assumptions – supported by proof**
   Findings supported by proof
7. **Concept of law – imposed / consensual**
   Consensual: based on contract & equity. All agree on use of this legal system to resolve their dispute re legal interpretation & on test for Breach of confidence (La Forest (43)
8. **Reasoning – Declaratory – Principled**
   Principled
9. **Values – Authoritarian – Egalitarian**
   Egalitarian – dependency or vulnerability as basis of fiduciary obligation [PC] 19
   -reasonable person test
10. **Perspective – Ethno/Ego centric- Respect for others**
    Ethno-centric: relevant parties determined purely on basis of colonial perspective
    -narrowly defined with no consideration of Indigneous rights that may be involved.
    Respect: usages to be established by those familiar with them, not experts

	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

[1117] *Lac Minerals Lts. v. International Corona Resources Ltd.* at 597. (Sopinka J. see also La Forest (49)

10.2 ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2. S.C.R. 574, 1989 CanLII 34.
LA FOREST J. (Wilson, Lamer JJ.)

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

Most categories as per Sopinka. Sopinka might be given one point under values on the colonial side.

9. Values – Authoritarian – Egalitarian

Egalitarian
-remedy allows parties to obtain a reference if they cannot agree on evaluation of adjustments.

11. Perspective – Ethno/Ego centric- Respect for others
Ego centric: Failure to articulate *Lac's* point of view.
Respect: Custom should be defined by parties & experts. Legal significance by courts.
-"custom" a rule with the force of law existing since time immemorial – not in issue here
"Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom"[1118]

	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

[1118] *Lac Minerals Lts. v. International Corona Resources Ltd.* at 58. (La Forest)

11. ***Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marchall Prosecution),*** **[1989] 2 S.C.R. 788; 1989 CanLII 39 (S.C.C.).**
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.

1. **Judge – Alien/Peer** Alien for Marshall, peer for others.
2. **Parties – Imposed Identity/ Self-Determined**
   For Marshall, imposed Canadian citizenship. For the Commission imposed by order, but self-determined in the sense of being a product of their society.
3. **Venue – Foreign language & culture/ own** Foreign for Marshall. Own for A.G.
4. **Issues – Imposed – mutually determined.** Both contributed.
5. **Procedure – in camera/biased/public interveners equal** -fair.
6. **Evidence – assumptions – supported by proof** Supported
7. **Concept of law – imposed / consensual** -
   Imposed: reasoned on the basis of the Commission's authority under the "Order in council" that set it up, rather than on the basis of accountability to the people under democratic procedure.(5)
8. **Reasoning – Declaratory – Principled** - principled
9. **Values – Authoritarian – Egalitarian**
   Authoritarian: The Commission – to protect cabinet members from public scrutiny
   [belief that security is served by secrecy – League of Nations did not agree!!]
   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.
10. **Perspective – Ethno/Ego centric- Respect for others**
    Ethnocentric: reliance on 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 re 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 re Marshall		6		6

12. 1 *R. v. Horseman*, [1990] 1 S.C.R. 901; 1990 CanLII 96 (S.C.C.).
WILSON J. (with 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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: by a charge
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumptions – no proof to support agreement that Canada could regulate
-no evidence regulations necessary for species preservation
Proof – much support for her historical findings
Concept of law – imposed / consensual
Imposed – supports expanded interpretation without suggesting renegotiation of treaty to protect conservation interests
Consensual – strong support for treaty terms
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Respect for others
Ethnocentric – allows 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; 1990 CanLII 96 (S.C.C.).
CORY J. (with Lamer, La Forest & Gonthier JJ.)
Main Principle: Parliament of the colonizing party can unilaterally extinguish treaty rights.

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 not.(25).
Ignored lack of Indigenous political rights.
On extinguishment issue, began by setting out 2 legal principles(20) but he did not apply them. He looked only at how 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 native 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)

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**
   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
7. **Concept of law – imposed / consensual**
   Imposed: "Federal government" can unilaterally alter treaty rights (24)
8. **Reasoning – Declaratory – Principled**
   Declaratory- tends to rely on authority of precedents rather than on the principles they contain
   Principles –identifies some principles at the beginning re treaty
9. **Values – Authoritarian – Egalitarian**
   Authoritarian:
10. **Perspective – Ethno/Ego centric- Respect for others**
    Ethnocentric: assumes his concepts of "government" and "province" are the only one applicable
    -believes that settler legislation protects bears without questioning the 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. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total		9		4

13. *R. v. Sioui*,[1990] 1 S.C.R. 1075; http://www.lexum.umontreal.ca
LAMER J. (Dickson C.J. Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Coru McLachlin JJ.)
Main point: Capacity of Indigenous nations to enter treaties 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" [1119] Treaties should be interpreted according to the common intent of the parties.
Judge – Alien/Peer Alien – members of colonizing culture
Parties – Imposed Identity/ Self-Determined
Imposed: "Indians" under Canada's *Indian Act.* Self Determined: Huron identity acknowledged
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: charge, framed by Quebec officers. Mutually determined: through right to defence
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumptions: Indians are better versed in negotiations today(7)
- assumption that jurisdiction is territorially defined;
that purpose of English & French was to control territory by force (8)
-assumed that past constitutional conceptions conformed to modern ones
Proof: primary documents used to support many findings
Concept of law – imposed / consensual
Imposed – "The treaty gives the Hurons the freedom to carry on their customs and their religion" (22) [These rights existed pre-contact]
Consensual –consent needed to extinguish treaty (20)
Reasoning – Declaratory – Principled
Declaratory -claim that Indians "not on a par with a sovereign state"
Principled- interpret on the basis of historical context & perception of the parties (97)
Values – Authoritarian – Egalitarian
Egalitarian: emphasis on common understanding of the parties; respects "Indian" perspective (7)
Perspective – Ethno/Ego centric- Respect for others
Ethnocentric – texts & authorities used are unicultural
-anachronistic imposition of modern, unilaterally determined legislative framework
-accepted derogatory racist characterizations (7, 9)
- characterization of British practice as "exploration & settlement"
-examination of document as "a treaty under the Indian Act" (anachronistic) (11)
-only considers Crown's reasons for treaty commitment (11)
-subordination of Indigneous rights to recreational practices
Respect – recognizes differing viewpoints but doesn't consider capacity of signing "chiefs" (16)
-must examine from different point 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/ego centric	Some	Respect for others	Yes
Total		6.5		7.5

[1119] *R. v. Sioui*,[1990] 1 S.C.R. 1075; http://www.lexum.umontreal.ca at {25 of 25}

14. *R. v. Sparrow*, [1990] 1 S.C.R. 1075; www. lexum.umontreal.ca
DICKSON C.J. & 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 aboriginal rights are taken seriously. "Aboriginal and treaty rights may be overridden if the government is able to justify the infringement" [1120]
[Theory is post-colonial – method of reasoning & practice advocated is colonial]

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
   Mutual –issues raised by both parties
5. **Procedure – in camera/biased/public intervenors equal**
6. **Evidence – assumptions – supported by proof**
   Assumptions –no evidence to prove the regulations function to conserve the resource(1113)
   -"never any doubt that sovereignty" legislative power & underlying title in Crown(1103)
   Proof –use of anthropologist, regulatory history
   -supports 1973 change in policy with document (1104)
7. **Concept of law – imposed / consensual**
   Imposed –sovereign may extinguish an aboriginal right with clear & plain intent.(1099)
   Consensual –Constitution is a statement of the will of the people (1106)
8. **Reasoning – Declaratory – Principled**
   Declaratory –did not explain why extinguished rights can't be revived. Just list of similar cases.(1091) Declared conservation uncontroversial(1113) & consisitent with aboriginal practice(1114) Guidelines pulled from a hat (1115)
   Principled: - Nowejick etc (1107)
9. **Values – Authoritarian – Egalitarian**
   Authoritarian: concept of Canadian "sovereign power" (1109)
   -imposition of British rule on Musqueam ignored throughout; dictated guidelines(1115)
   Egalitarian: Reasoned response to both parties
10. **Perspective – Ethno/Ego centric- Cross-cultural respect**
    Ethnocentric – aboriginal rights are sui generis [takes self as standard] (1112)
    -ignored Aboriginal perspective in favour of internal analyses such as Slattery(1109-10)
    Respect –penal trial not best venue for determining Aboriginal right (1095)
    -need to be sensitive to sui generis nature of aboriginal rights, aboriginal perspectives (1112)
    -"for the Musqueam, fishery 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/ego centric	Yes	Respect for others	Yes
Total		9		5.5

[1120] *R. v. Badger* [1996] 1 S.C.R. [74].

15.1 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; 1990 CanLII 117 (S.C.C.)
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]
Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Cite: "as long as Indians not affected qua Indians..." (18)
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed –garnishment order
Mutually determined –able to raise argument within the parameters of the proceedings
Procedure – in camera/biased/public intervenors equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual
Consensual: *Nowegijick* principle primordial.
Imposed: Canada's ability to impose its laws unquestioned.
Reasoning – Declaratory – Principled
Principled:eg set out & explained Nowegijick principle (11)
Values – Authoritarian – Egalitarian
Egalitarian: understands by analogy to treaty & use of Nowegijick
Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1990 CanLII 117 (S.C.C.)
WILSON J (Lamer, L'Heureux-Dubé)

Main Principle: Fundamental questions about the relationship between the courts and government should be resolved by the legislature.
Concept of law – imposed / consensual
Consensual: for legislature to reform law of garnishment
Imposed: Unquestioned reliance on Blackstone & old cases. Note Blackstone's defn.
Reasoning – Declaratory – Principled
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; 1990 CanLII 117 (S.C.C.)**
LA FOREST J. (for majority – with La Forest, Sopinka. Gonthier JJ. Wilson'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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public intervenors equal
Evidence – assumptions – supported by proof
Assumptions: no evidence to support claim native peoples accepted British sovereignty (31)
-ignores wealth given 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 / consensual
Imposed: -ignores non-participation of "Indians" in the development of the legislation
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Authoritarian" Parliamentary intent for statute prevails over Indian understanding (40)
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: view of history – no doubt re 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; 1991 CanLII 75 (S.C.C.)
THE COURT (Lamer C.J., La Forest, Gonthier, McLachlin, Stevenson JJ.)

Main Principle: 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"
Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Indigenous attempt to wrestle with the foreign legality that had been imposed.
Procedure – in camera/biased/public interveners equal
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 – assumptions – supported by proof
Evidence was not used to demonstrate the legal findings
Concept of law – imposed / consensual
Imposed: Presumption that Anglo-Canadian law is the only relevant consideration
Reasoning – Declaratory – Principled
Declaratory: no explanation of how the facts 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 – Egalitarian
Authoritarian: basically declares a state of affairs
Perspective – Ethno/Ego centric- Cross-cultural respect
-declaration that the issues were purely factual, though applying their own frames of reference.
-acceptance of small treaty annuities and reserves as adequate compensation for 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". Presumption colonial culture has full managerial power.[1121]

	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

[1121] See Biber, "Being/Nothing".

17. *R. v. Jones*, [1991] 2 S.C.R. 110; 1991 CanLII 31 (S.C.C.).
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.

[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.]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Unequal: 5 governmental interveners supporting Ontario against a small band.
Evidence – assumptions – supported by proof
Assumption: No evidence to support the regulatory scheme applied.
Concept of law – imposed / consensual
Imposed: Ignored evidence showing that the Band did not consent to application of Canadian law
Reasoning – Declaratory – Principled
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 – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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/interveners/equal	Some
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	Some
10. Perspective	Ethno/ego centric	Yes	Respect for others	Some
Total		9		2

18.1 (a) ***Friends of the Old Man River Society v. Canada (Minister of Transport)*****, [1992] 1 S.C.R. 3; 1992 CanLII 110 (S.C.C.).**
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.

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

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined Society created its own legal identity
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: No evidence that the Piegan were represented either by the environmental plaintiff or the governments concerned.
Procedure – in camera/biased/public interveners equal
Biased: In a matter that obviously affected the Piegan, there was no provision for their representation.
Public- Equal: Indigneous organizations allowed to participate as interveners
Evidence – assumptions – supported by proof
Assumptions: Perspective on what was relevant determined uniquely by colonial society.
Proof: Facts considered proven by documentation
Concept of law – imposed / consensual
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 – Declaratory – Principled
Though principles relied upon, there was obviously a wide range of opinion concerning how they applied

Values – Authoritarian – Egalitarian
Some deference to the intention of the legislature, but Piegan opinion was completely ignored.
Perspective – Ethno/Ego centric- Cross-cultural respect
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 re Piegan		10		3

18.1 (b) LA FOREST J. –Evalutation re the Oldman River Society
Friends of the Old Man River Society v. Canada (Minister of Transport)

Social order voluntarily accepted by members of the majority society.

Concept of law – imposed / consensual
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/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 re Society		4		10

18.2 *Friends of the Old Man 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.

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**	
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 Society		4		7.5

19. *Williams v. Canada*, [1992] 1 S.C.R. 877, 1992 CanLII 98 (S.C.C.)
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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Imposed: No treaty adherence to Anglo-Canadian regime
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public intervenors equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual
Consensual: Band & Williams participated in UI program
Imposed: reasons on the basis of paternalistic protection rather than contractual term for tax exemption
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Egalitarian: looks for consistency and predictability in the law
Perspective – Ethno/Ego centric- Cross-cultural respect
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

***Quebec (Attorney General) v. Canada (National Energy Board,* [1994] 1 S.C.R. 159, 1994 CanLII 113 S.C.C.).**

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.

-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.

1. **Judges – Alien/Peer** No evidence of Cree on Board whose decision was upheld.
2. **Parties – Imposed Identity/ Self-Determined** Meaning of *James Bay Act* is unclear & in dispute.
3. **Venue – Foreign language & culture/ own** Disagreement between Cree & Canadians over the *Act.*
4. **Issues – Imposed – mutually determine.** Project to export electricity seems to be Canadian initiative protested by Cree.
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**
7. **Concept of law – imposed / consensual** The Cree obviously do not consent to the project
8. **Reasoning – Declaratory – Principled** Principles for founding the decision are explained.
9. **Values – Authoritarian** – 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.
10. Perspective – Ethno/Ego centric- Cross-cultural respect.

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; 1994 CanLII 86 (S.C.C.)
GONTHIER J. (Lamer C.J., La Forest, Sopinka, Cory, McLachlin, Iacobucci)

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

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
NO PROOF: 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 / consensual
Imposed: Did not consider whether the people relinquished "all privileges" with informed consent
Reasoning – Declaratory – Principled
Declaratory: Little or no attention to principles like *Nowegijick* 'perception' & *Sioui* express words needed to extinguish.
Values – Authoritarian – Egalitarian
Authoritarian: Did not consider whether the members of the band gave their informed consent to giving up their rights
Perspective – Entno/Ego centric- Cross-cultural respect
Ethno/ego centric: Prefer's trial judge's understanding of treaty to that of accused. Completely unaware of the tensions between 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

22.1 *Native Women's Assn. Of Canada v. Canada*, [1994] 3 S.C.R. 627; 1994 CanLII 27 (S.C.C.)
SOPINKA J. (Lamer C.J. La Forest, Gonthier. Cory, Iacobucci, Major)

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

[From a postcolonial perspective, the real problem with the funded organizations is that they were selected by Canada. 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 the Canadian practice.]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Self-determined: membership in organization
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: "Walsh J. framed the issues" . Huge state funding.
Mutually determined: Brought action based on own analysis.
Procedure – in camera/biased/public intervenors equal
Evidence – assumptions – supported by proof
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 superficial)
Concept of law – imposed / consensual
Imposed: Sees "government" as holding wide discretion. No consideration of those not represented in organizations.
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
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 – Etho/Ego centric- Cross-cultural respect
Ethnocentric: "the Aboriginal community of Canada" [Said's othering]
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's 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; 1994 CanLII 27 (S.C.C.). L'HEUREUX-DUBE J.

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

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 conscnsual 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/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	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; 1994 CanLII 27 (S.C.C.). McLACHLIN J.

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

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; 1995 CanLII 145 (S.C.C.).LAMER C.J. (Cory)

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

[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.]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Imposed under the Indian Act, self-determined acceptance of a colonial legal regime.
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: Case decided on argument not in pleadings or made in argument at trial. [111]
Procedure – in camera/biased/public interveners equal
Bias: Issue of bias raised in oral argument and not part of the originating notice of motion
Evidence – assumptions – supported by proof
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 / consensual
Imposed: presumption that federal or provincial appointment solves the problem of bias for someone external to the culture
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: based entirely on analysis of Canadian law, Parliament's intent, Indian Act etc.
-assumption bands have no "governmental experience" unless using Anglo-Canadian institutions[43]
-doesn't see neutrality principle proposed not followed by Canada when adjudicating Indigenous rights.[95]
-assumption that federal appointment to tribunal would solve problem of "independence" & "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 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		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; 1995 CanLII 145 (S.C.C.).

LA FOREST J.

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

Agrees with Lamer & Major: Dismiss the appeal with costs.
Declaratory/Authoritarian – no explanation of why he thinks the band lacks the required expertise.
Ethnocentric: presumes the perspective of the dominant culture is the only one that counts

	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; 1995 CanLII 145 (S.C.C.).

MAJOR J. (McLachlin)

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]

[No account taken of the major difference between Indigenous situation & that in the precedent used.]
Evidence – assumptions – supported by proof
Assumption: Board has no expertise on property law – composition of tribunal is unknown as is the potential decision.
Concept of law – imposed / consensual
Imposed: Colonial legality interpreted in a way that denied a forum for Indigenous interpretation.
Reasoning – Declaratory – Principled
Principled: Principles applied carefully set out.
Values – Authoritarian – Egalitarian
Authoritarian: Parliaments intent to grant jurisdcition
Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1995 CanLII 145 (S.C.C.).
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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual

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

Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Perspective – Ethno/Ego centric- Cross-cultural respect
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)***

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

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

1. Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed legal conceptual framework, but able to file pleadings within those terms of reference.
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
Imposed: accepted Indian Act regime
Consensual: "intention-based approach" [7] based on "full and informed consent" [4]
Reasoning – Declaratory – Principled
Principles underlying most reasoning set out but the conceptual framework applied was declared.
Values – Authoritarian – Egalitarian
Authoritarian: imposed a conceptual structure that was not pleaded by either party giving no right to answer
Egalitarian: legitimacy based on "full and informed consent" [4]
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: Presumed surrender drafted by Indian Affairs represented "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 (Department of Indian Affairs and Northern Development)*

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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Proof: Insists on proof of band's intent & on revocation of 1940 surrender [81-5]
Concept of law – imposed / consensual
Reasoning – Declaratory – Principled
Declaratory: No evidence to show that purpose of Indian Act is to honour band intent.
Principled: very
Values – Authoritarian – Egalitarian
Egalitarian; "full, free and informed consent" standard [85]
-insistence on compliance with statutory scheme, objection to unilateral changes by the Crown[88]
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: deference to statutory scheme 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; 1996 CanLII 236 (S.C.C.)
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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Biased: Crown given new trial to meet analytical scheme. Badger & Kiyawasew were not.
Evidence – assumptions – supported by proof
Assumption: Conservation legislation passed before the treaty so "clearly understood" that rights under the treaty were subject to legislation. No evidence offered to show actual understanding.[11]
Concept of law – imposed / consensual
Imposed: Belief that treaty can be unilaterally altered by the legislation of one party.
Consensual; to the extent that Cory's explanation of a treaty adopted
Reasoning – Declaratory – Principled
Declaratory: eg use of Horseman to say NRTA extinguished right to hunt on Crown land [29]
Principled: quest for principles in precedents.
Values – Authoritarian – Egalitarian
Authoritarian: Validated the harassment represented by use of penal charges to define treaty rights.
Perspective – Ethno/Ego centric- Cross-cultural respect
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

25.2 *R. v. Badger*, [1996] 1 S.C.R. 771; 1996 CanLII 236 (S.C.C.)

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

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.*

****Despite highly colonial profile, articulated attempt to see what "the Indians understood".**
Representations re Treaty 4 & Treaty 6 cited as evidence of promises re Treaty 8 [56]
Relied on the authority of his own past judgment in *Horseman.*
Judson's categorization of "Aboriginal rights" and "treaty rights" unevenly applied.

5. Procedure – in camera/biased/public interveners equal
Biased: Crown given new trial to meet analytical scheme. Badger & Kiyawasew were not.
4. Evidence – assumptions – supported by proof
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- no evidence given to this effect[70]
Evidence: reference to experts & to evidence of promises made and conditions at time.
5. Concept of law – imposed / consensual
Imposed: Law by government in which "Indians" had no representation altered treaty
Consensual: cited Judson's explanation of a treaty [Did he understand it?]
6. Reasoning – Declaratory – Principled
Declaratory: Cites self in *Horseman*, rather than any principles, for limitations imposed on treaty
Principled: fine principles stated [41] but not applied
7. Values – Authoritarian – Egalitarian
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
8. Perspective – Ethno/Ego centric- Cross-cultural respect
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 Law	Imposed	Yes	Consensual	Little
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; 1996 CanLII 245 (S.C.C.).
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]

-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.
4. Issues – Imposed – mutually determined -charge
5. Procedure – in camera/biased/public intervenors equal
Biased: reliance on decision of "Law Officers of the Crown" instead of neutral tribunal XLIII
6. Evidence – assumptions – supported by proof
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 w/ogvt regulation[XCVI] control by central authority[CI]
Proof. Government provided no evidence to justify licence [CXI]
7. Concept of law – imposed / consensual
Imposed: unquestioningly accepted declaration of government official as law[XXXV]
Reasoning – Declaratory – Principled
Declaratory: Over-arching assumption that only Canada had law. Principled: many set out & used
Values – Authoritarian – Egalitarian
Authoritarian; ignored requirements for democratic legality
Egalitarian; some lip-service to the idea that consultation required re conservation [CX]
Perspective – Ethno/Ego centric- Cross-cultural respect-place for others
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; 1996 CanLII 245 (S.C.C.).
McLACHIN 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]

27 *R. v. Lewis* [1996] 1 S.C.R. 921; 1996 CanLII 243 (S.C.C.)
IACOBUCCI J. (Lamer C.J. LaForest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Major)

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

-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.

6. Evidence – assumptions – supported by proof
Assumptions: of valid Canadian jurisdiction. No evidence of parties practice during century between establishment of the reserve & the charges.
7. Concept of law – imposed / consensual
Imposed: No consideration of importance of band anticipation in fisheries regulation
Consensual: some defference to Parliament, but band representation ignored.
8. Reasoning – Declaratory – Principled
Declaratory: eg. Crown met fiduciary obligation
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: only "Parliament's objective" [77] and Canadian legal principles & processes considered.
-How would the judges respond if someone came along and ruled that others could have equal access to their homes?

	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; 1996 CanLII 216 (S.C.C.)
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"[48] that existed prior to contact.[60]

-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 she had to meet. No wonder! I was decided until the case reached the S.C.C.

4. Issues – Imposed – mutually determined
Imposed: charge plus new issues developped at both appeal and SCC levels
5. Procedure – in camera/biased/public intervenors equal
No retrial now that case to meet is known.
6. Evidence – assumptions – supported by proof
Assumptions: Appellant given no chance to seek evidence as required by the new "legal" test
Proof: reliance on trial judges findings of fact
7. Concept of law – imposed / consensual
Imposed: *Worcester v. Georgia* "power, war, conquest" concept accepted.[37]
Lamer made up his own test then said she did not meet it.
8. Reasoning – Declaratory – Principled
Declaratory: requirements for test [68 – 74] no principle, no source, no example.
The "prior to contact" requirement was simply stated based on his own reasoning. McLachlin agrees.[247]
Principled: eg. use of *Mabo*
9. Values – Authoritarian – Egalitarian
Authoritarian: presumption that judge can make law with no reference to the community concerned
10. Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: Indigenous rights must be reconciled with "Crown sovereignty" [31] [62]
-Canadian-Aboriginal relations seen as relationship between two cultures [42]
-presumed exchange between kin was not really "trade" [87]
-mentioned principle of considering "aboriginal perspective" [49] and looking at the particular community [69] but did not apply it. Relied entirely on professors and "experts" from his 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/ego centric	Yes	Respect/Place for others	
Total		10		2.5

28.2 *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507; 1996 CanLII 216 (S.C.C.)
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]

[some genuine consideration of native perspective [166] but still imposes external analysis.
[would send back on extinguishment & justification. Problem with recently devised judge-made law – none of the parties know the case to meet!!!]

5. Procedure – in camera/biased/public intervenors equal
Would allow retrial.
6. Evidence – assumptions – supported by proof
Assumptions: No evidence to support historical claims eg. Bering bridge theory [106] Except Marshall decisions which are opinion only as he was not a direct witness.[107]
7. Concept of law – imposed / consensual
Imposed – "government" must be able to direct rights for natives & the rest of Canadian society [122]
8. Reasoning – Declaratory – Principled
Declaratory: eg. time requirement 20-50 years based on Slattery not consensual democratic process.[177]
9. Values – Authoritarian – Egalitarian
Authoritarian: Sees law as an exercise in external analysis
Egalitarian: strong emphasis on perspective of Aboriginal peoples
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: Saw 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 turning point" exaggerates importance from Indigenous perspective[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/ego centric	Yes	Respect/Place for others	Yes
Total		9		5

28.3 *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507; 1996 CanLII 216 (S.C.C.)
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]

6. Evidence – assumptions – supported by proof
Assumption: direct sale of land to settlers was prohibited to ensure a fair exchange [270]
No evidence aboriginal people engaged in "sport fishing"[279]
Proof: British common law respected aboriginal law [267-70]
7. Concept of law – imposed / consensual
Imposed: Assumed legitimacy of colonially imposed system, & judicial assessment of Native law.
Consensual: Crown should not be permitted to transfer rights without aboriginal consent[310]
-emphasis on treaty process & negotiation [313]
8. Reasoning – Declaratory – Principled
Principles: detailed explanations of all points – principles sought
9. Values – Authoritarian – Egalitarian
Authoritarian: accepts legitimacy of colonially imposed law [264]
Egalitarian: "Aboriginal peoples, like other peoples..."[251]
10. Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: view of history [232] treaties sought to provide aboriginal peoples with a land base[271]
Respect/Place: Walters quote 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/ego centric	Some	Respect/Place for others	Yes
Total		6.5		6

29 .1 *R. v. Gladstone*, [1996] 2 S.C.R. 723; http://www.lexum.umontreal.ca. (S.C.C.)
LAMER C.J. (Sopinka, Gonthier, Cory, Iacobucci, Major)

Main Points: If an Aboriginal right has no internal limit on its exercise, it may be justifiable for the government to impose a limit.[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.

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

6. Evidence – assumptions – supported by proof
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]
Evidence: eg re fishery [49,50]
7. Concept of law – imposed / consensual
Imposed: Does not question Canadian capacity to govern Indigenous resource
8. Reasoning – Declaratory – Principled
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]
9. Values – Authoritarian – Egalitarian
Authoritarian: "governments" must make decisions to allocate rights [65]
Egalitarian: Considered consultation, though standard only "cognizant of the views" [84]
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		9		4.

29.2 *R. v. Gladstone*, [1996] 2 S.C.R. 723; http://www.lexum.umontreal.ca. (S.C.C.)
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.

-couldn't see similarity between traditional trade practices & offer to trade with the Japanese.
-note the court's 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 OIC – which have 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.

6. Evidence – assumptions – supported by proof
Assumptions: Says "perspective of the aboriginal people" must be relied on but made a decision without any evidence of that perspective re defining the character of the accused's actions eg. a Heiltsuk jury
7. Concept of law – imposed / consensual
Imposed: OIC or regulation can extinguish Aboriginal right [31, 32]
-assumed complete regulatory authority [82]
8. Reasoning – Declaratory – Principled
Declaratory; supports OIC & regulations over parliamentary process
Principled: Understanding of principles is superficial & culturally specific.
9. Values – Authoritarian – Egalitarian
Authoritarian: Belief Crown should have power to extinguish Aboriginal rights {p.49, para 25}
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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

29.3 *R. v. Gladstone*, [1996] 2 S.C.R. 723; http://www.lexum.umontreal.ca. (S.C.C.)L'HEUREUX-DUBÉ J.

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

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; http://www.lexum.umontreal.ca. (S.C.C.) 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.

-By postcolonial standards, 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 at one time.

Her request for evidence to show the modern equivalent of a sustenance livelihood does help make a place

	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. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Yes
Total		9		4.5

30.1 *R. v. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; http://www.lexum.umontreal.ca. (S.C.C.).
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.

Judge – Alien/Peer Alien to Indigenous people
Parties – Imposed Identity/ Self-Determined Co. determined its own identity.
Venue – Foreign language & culture/ own. Foreign for Indigenous, chosen for company.
Issues – Imposed – mutually determined – a charge
Procedure – in camera/biased/public interveners equal -case to meet not known in advance
Evidence – assumptions – supported by proof
Assumptions: The only way to see things is according to colonial categories
Concept of law – imposed / consensual
Imposed: no evidence that the Indigenous people participated in forming the law
Reasoning – Declaratory – Principled
Declaratory: Required to meet *Van der Peet* test, released simultaneous with SCC judgment
Values – Authoritarian – Egalitarian
Authoritarian: No chance for company of bands to participate in making conservation regulations
Perspective – Ethno/Ego centric- 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. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; http://www.lexum.umontreal.ca. (S.C.C.). 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.

NB**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.
-still accepts imposed legality. –
-NB**people concerned not represented in case concerned with their rights

Judge – Alien/Peer member of Smokehouse Ltd's culture
Parties – Imposed Identity/ Self-Determined Smokehouse incorporated
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined Charge – bands involved not even intervenors
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual
Imposed: rights may be extinguished through series of legislative acts[76]
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian willing to consider other culture on equal basis
Perspective – Ethno/Ego centric- Cross-cultural respect

	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; http://www.lexum.umontreal.ca. (S.C.C.). 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.

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

31.1 *R. v. Pamajewon*, [1996] 2 S.C.R. 821; http://www.lexum.umontreal.ca. (S.C.C.).
.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".

N.B. 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?
Note: reliance on unilaterally designed legal instruments eg Royal Proclamation.
Refusal to answer the defense raised: That the bands had "a broad right to manage the use of their reserve lands".

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Biased: Decision in February, but reasons rely on *Van derPeet* released Aug. 21st.
Evidence – assumptions – supported by proof
Assumptions: No evidence to support the assertion of governmental authority over bands
Proof: Reference to expert's evidence -
Concept of law – imposed / consensual
Reasoning – Declaratory – Principled
Declaratory: Indigenous perception of rights is "at a level of excessive generality".
Values – Authoritarian – Egalitarian
Perspective – Ethno/Ego centric- Cross-cultural respect

	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; http://www.lexum.umontreal.ca. (S.C.C.).
L'HEUREUX-DUBÉ

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.

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; 1996 CanLII 169 (S.C.C.).
LAMER C. J. (La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major J.J.)

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]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture / own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Bias: Case argued before *Van der Peet* which structured the decision.
Evidence – assumptions – supported by proof
Assumption: minimizing the effect of contact on a culture [46]
-assumes academic experts know the culture better than the people.
Proof- reliance on trial evidence of experts & Chief.
Concept of law – imposed / consensual -
Imposed – no ref to need for Indigenous consent to regulation
Reasoning – Declaratory – Principled
Declaratory: Reliance on the Court's constricted view of rights in *Van der Peet*.[34] [47]
Values – Authoritarian – Egalitarian -authoritarian
Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1996 CanLII 169 (S.C.C.).
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; 1996 CanLII 170 (S.C.C.).
LAMER C.J. (Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major)

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.

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

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Bias: case to meet not known. Case argued at all levels on theory that proof of title was necessary
Evidence – assumptions – supported by proof
Assumptions: boundaries & limits of New France never defined but jurisdiction assumed.
Canada has legal jurisdiction.
Proof: reliance on experts
Concept of law – imposed / consensual
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]
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian –declared law of *Van der Peet, Sparrow* accepted
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: "Outaouais region of Quebec"[2]
Lack of consciousness of how own conceptual frameworks imposed. Especially in 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 explanation	Some
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/Place for others	Some
Total		10		2.5

33.2 La Forest agreed, subject to his comparison of the right to a "servitude".
33.3 L'Heureux-Dubé agreed subject to her reasons in *Adams.*

34. *Goodswimmer v. Canada*, [1997] 1 S.C.R. 309; 1997 CanLII 371 (S.C.C.)
LAMER C.J. (La Forest, L'Heuruex-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major JJ.)

-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 quality of the Federal Court of Appeal decision.
-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, 1995 CanLII 3580 (F.C.A.)**

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 – Alien/Peer –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 – Imposed Identity/ Self-Determined
Both appear to accept *Indian Act* identity.
Venue – Foreign language & culture/ own
Though the language & culture is foreign, both appear to have adopted it.
Issues – Imposed – mutually determined Mutually determined issue re statute interpretation
Procedure – in camera/biased/public interveners equal -public
Evidence – assumptions – supported by proof –relied on contents of statutes & legislative history
Concept of law – imposed / consensual – relied choice of chief by electoral majority according to a system that both parties agree to.
Imposed: as legislated by parliament & interpreted by Court, majority rule.
Reasoning – Declaratory – Principled Principles from case law explained, though source is in declaration of British law.
Values – Authoritarian – Egalitarian. Egalitarian vote, authoritarian process, analysis
Perspective – Ethno/Ego centric- Cross-cultural respect. 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 the 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 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		3		10

35.1 *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119; 1997 CanLII 244 (S.C.C.).
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 Indigneous values that emphasize the rights of future generations.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof [N.B. this is 18A application]
Assumption: Canadian approval to alienate land meant to protect native land base [52](discuss)
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 / consensual
Imposed: reliance on an imposed regulatory scheme [56]
Consensual: reliance on Band council consent, no claim for unfairness or uneven bargaining power [56]
Reasoning – Declaratory – Principled
-did not dig as deeply as McLachlin
Values – Authoritarian – Egalitarian
Authoritarian: accepted authority of Council with limited temporal mandate to make perpetual alienation.
Refused to lift the institutional veil
Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1997 CanLII 244 (S.C.C.).**
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 the 2 year Band council mandate.[92]

Values applied correspond to international postcolonial norms.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined –Indigenous arguments used
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
Imposed: discussed in terms of parliament's or Crown's intent rather than people's
Consensual: importance of consent for long-term commitments
Reasoning – Declaratory – Principled
Declaratory: founds "Indian" rights on colonial declaration (proclamation) [82]
Principled: good at finding principle that binds enactment [eg. Pt. IV]
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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. Perspective	Ethno/ego centric		Respect/place for others	Yes
Total		6.5		6.5

36. *St. Mary's Indian Band. v. Cranbrook (City)* [1997] 2 S.C.R. 657; 1997 CanLII 364 (S.C.C.)

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

[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: the true purpose of the dealings & the intention of the parties [15] Yet the surrounding facts surrounding 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.]

4. Issues – Imposed – mutually determined

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

5. Procedure – in camera/biased/public interveners equal

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]

6. Evidence – assumptions – supported by proof

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.

7. Concept of law – imposed / consensual

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

8. Reasoning – Declaratory – Principled

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]

9. Values – Authoritarian – Egalitarian

Authoritarian: as under above points – affirms the "*Indian Act* reality"[38]

10. Perspective – Ethno/Ego centric- Cross-cultural respect

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 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/ego centric	Yes	Respect/place for others	
Total		10		3

37.1 *Delgamuukw v. British Columbia* [1997] 3. S.C.R. 1010; http://www.lexum.umontreal.ca.
LAMER C.J. (Cory, Major J.J.)

Main Points : -Oral histories should be accepted on an equal footing with historical documents[87]
-aboriginal title it must be understood by reference to both common law and aboriginal perspectives."[1122]
-It 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 societiesallows it to be used for certain activities."[111]
-for a use that aboriginal title does not permit (eg strip mining) the land must be surrendered.[131]
-s. 35(1) provides a constitutional basis for negotiation -"We are all here to stay" [186]
[note -weakness of trial – all that evidence & only 1 judge to assess it – confused assessment
-detailed accounts of prior reasoning but not of pleadings of parties or interveners]

6. Evidence – assumptions – supported by proof
Assumption: -colonial era provided solid foundation for modern legality eg. use of *St. Catherines* [175]
-federal government functioned to protect aboriginal rights and land [176]

7. Concept of law – imposed / consensual
Imposed: Reliance on Crown's assertion of sovereignty. *Nowegijick* not mentioned.
Belief that he can dictate. "I laid down in *Gladstone*"[167]

8. Reasoning – Declaratory – Principled
Declaratory: many "principles" based on his own previous reasoning [140,141] [148] [165]

9. Values – Authoritarian – Egalitarian
Authoritarian; acceptance that assertion of sovereignty is a valid foundation for 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 culture's perspectives[113]

10. Perspective – Ethno/Ego centric- Cross-cultural respect
Ethno-centric: insistence that aboriginal land rights are *sui generis* [112=113]
-definition of right in terms of *Indian Act* & Canadian decisions [120-121]
-reliance on academic opinion within his culture [145]
-common law as source of aboriginal title [147]
-application of Canadian constitutional principles when Indigenous peoples did not participate in the formation of the constitution[177-8]
Respect: importance of oral histories recognized and supported.
-aboriginal perspective, including aboriginal law, to be considered as source of title[147][149]
-strong support for negotiations & 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/ego centric	Yes	Respect/place for others	Some
Total		9		3

[1122] *Delgamuukw v. British Columbia* at [113].

37.2 *Delgamuukw v. British Columbia* [1997] 3. S.C.R. 1010; http://www.lexum.umontreal.ca. LA FOREST J. (L'Heuruex-Dubé) (McLachlin J.)

Main Points: If aboriginal people continue to occupy & use land then it is necessarily of central significance to them
-"in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But aboriginal peoples must not be forgotten in this equation."[1123]

37.3 *Delgamuukw v. British Columbia* [1997] 3. S.C.R. 1010; http://www.lexum.umontreal.ca. MCLACHLIN J.

Agreed with both Lamer & La Forest's judgments.

38. *R. v. Williams*, [1998] 1 S.C.R. 1128; 1998 CanLII 782 (S.C.C.)

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]

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined** Accused is "aboriginal"
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined** Though charged, issue was raised by accused.
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof** Reference to studies to support findings
7. **Concept of law – imposed / consensual**

Imposed; legitimacy of use of Criminal code & Canadian legality taken for granted
Consensual: reliance on Parliamentary intent

8. **Reasoning – Declaratory – Principled** –principles enunciated
9. **Values – Authoritarian – Egalitarian** –aim to equalize position before the law
10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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

[1123] *Delgamuukw v. British Columbia* at [204].

39 (a) ***Reference Re Secession of Quebec,*** **[1998]** ***2 S.C.R. 217;*** http://www.lexum.umontreal.ca (S.C

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

Main Point" "The corollory 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"[1124] If not negotiated in accord with constitutional principles, secession would not have the legitimacy needed for recognition by the international community.[1125]

Strong postcolonial initiative muddied by perpetuation of colonial historical perspectives & methodologies.

Judge – Alien/Peer

Peer: Judges members of culture of birth or choice

Parties – Imposed Identity/ Self-Determined

Self-Determined: birth identity or chosen by immigration

Venue – Foreign language & culture/ own

Own: Imposed by conquest, or chosen by immigration

Issues – Imposed – mutually determined –set by elected representative

Procedure – in camera/biased/public interveners equal

Evidence – assumptions – supported by proof

Assumptions: status of Indigenous peoples is irrelevant to the formation of the Canadian state. All Canadians supported what the dominant actors did. [Almost no primary sources cited]

Proof: references to events & procedures [33-46]

Concept of law – imposed / consensual

Imposed: Accepts British proclamatory authority [39]

Consensual: charted participation of colonies; confederation to "work together"[43]

-requirement for negotiation under the constitution to effect legitimate secession[104]

Reasoning – Declaratory – Principled

Declaratory: Principles declared on the basis of subjective analysis

Principled: Principles identified and applied. Principle of "effectivity" rejected [106]

Values – Authoritarian – Egalitarian

Authoritarian: Constitution established by Imperial Parliament

Egalitarian: Canada established so different races can work together [43]

Consent of the governed is basic to understanding of free and democratic society.[67]

Perspective – Ethno/Ego centric- Cross-cultural respect

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 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: Canada		5		10

[1124] *Reference Re Secession of Quebec* at [88].

[1125] *Reference Re Secession of Quebec* at [96].

39(b) *Reference Re Secession of Quebec* [1998] *2 S.C.R. 217;* http://www.lexum.umontreal.ca (S.C.C.)
Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.
For Quebec: The fact that the Constitution considered was imposed by conquest was not considered.

1. **Judge – Alien/Peer** – Chief Justice and two judges from Quebec[135], but with allegiance to Canada
2. **Parties – Imposed Identity/ Self-Determined** – province of Canada
3. **Venue – Foreign language & culture/ own**

Foreign: Legal system imposed by conquest, but
Own: Formally participated in formulation of constitution, French is an official language.

4. **Issues – Imposed – mutually determined**

Imposed; Quebec did not agree to participate. Amicus curiae appointed but supported case against secession[135] but procedure was public with some interveners from Quebec.

5. **Procedure – in camera/biased/public interveners equal.**

Bias: Amicus curiae supported case against secession[135]
Open: Many intervenors

6. **Evidence – assumptions – supported by proof**

Assumptions: judicial notice of an Anglo-Canadian version of history
Proof: Data concerning Quebec participation in Canada

7. **Concept of law – imposed / consensual**

Imposed: Quebec bound by a constitution it did not consent to [47]
Consensual: Negotiation required if a clear majority votes on a clear question

8. **Reasoning – Declaratory – Principled**

Declaratory source of principles. (Based on judicial opinion concerning a tautologically selective account of history)

9. **Values – Authoritarian – Egalitarian**

Authoritarian: The legitimacy of the Imperial foundation of the state assumed.
Egalitarian: Support for minority rights & popular voice through vote

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

Ethnocentric: ignored 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/ego centric	Yes	Respect/place for others	Yes
Total: Quebec		10		8

39 (c) *Reference Re Secession of Quebec 2 S.C.R. 217;* http://www.lexum.umontreal.ca (S.C.C.) Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Aboriginal interests were specifically represented by 4 of the 13 interveners. The court referred to "aboriginal peoples" to defend its claim that Canada has a "long tradition of respect for minorities"[82] and to cast doubt on the undecided question of whether or not Quebec represented a "people".[138-139]
Yet its version of history and account of the effect of international law completely ignored the ambiguity raised when Indigenous experiences are considered and it declined to consider "the concerns of the aboriginal peoples".[125], [139].

Judge – Alien/Peer –No Indigenous judges
Parties – Imposed Identity/ Self-Determined generic "aboriginal peoples" seen as minorities.[96]
Venue – Foreign language & culture/ own
Foreign: imposed system, foreign languages
Issues – Imposed – mutually determined: set by representative of colonial governments
Procedure – in camera/biased/public interveners equal – Indigenous interveners.
Evidence – assumptions – supported by proof
Assumptions: No evidence to support claim of protection for aboriginal rights [46]
Concept of law – imposed / consensual Need for Indigenous consent ignored [139]
Reasoning – Declaratory – Principled
Declaratory: Principles declared on the basis of subjective analysis
Values – Authoritarian – Egalitarian
Authoritarian: Despite presence of many Indigenous interveners, the legitimacy of the colonial assumption of sovereignty was assumed.
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: included "races" do not include Indigenous peoples[43] Indigenous languages ignored. Subjection of Métis represented by Riel not mentioned.[45] Treaties with Indigenous nations ignored.
Right of colonial peoples to self-determination declared "irrelevant to this Reference."[132]
Respect : Constitutional protection for Aboriginal peoples considered "important"[82] but would only be "taken into account" in constitutional negotiations between Canada and Quebec.[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/interveners/equal	Yes
6. Evidence	Assumptions	Yes	Supported by proof	
7. Concept of Law	Imposed	Yes	Consensual	Some
8. Reasoning	Declaratory	Yes	Principled explanation	
9. Values	Authoritarian	Yes	Egalitarian	
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Some
Total: Indigenous		9		2

40. *R. v. Sundown,* [1999] 1 S.C.R.393; 1999 CanlII 673 (S.C.C.)
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]

Note:- 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 right to hunt".

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**

Assumptions: "virgin Forest" pre-colonization??[43]

7. **Concept of law – imposed / consensual**

Imposed: honour of Crown understood as unilateral treaty interpretation[24]
Crown could legislate to limit hunting rights [46]

8. **Reasoning – Declaratory – Principled** *Badger* principles applied
9. **Values – Authoritarian – Egalitarian** Advocated curtailing treaty right through regulation[45]

Relied on precedential authority without considering consensual spirit of treaty procedure

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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; 1999 CanLII 679 (S.C.C.).**
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.

-"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.

1. Judge – Alien/Peer
2. Parties – Imposed Identity/ Self-Determined
Imposed concept of "aboriginal" but accused self-identified as "Cree".
3. Venue – Foreign language & culture/ own
4. Issues – Imposed – mutually determined
5. Procedure – in camera/biased/public interveners equal
6. Evidence – assumptions – supported by proof –Articles, RCAP considered.
7. Concept of law – imposed / consensual
Imposed: Colonial legal framework not questioned
Consensual: Indigenous concepts from RCAP accommodated
8. Reasoning – Declaratory – Principled
9. Values – Authoritarian – Egalitarian
Authoritarian: Judge declares sentence
Egalitarian(?) restorative justice –goal of restitution & reintegration in community
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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; 1999 CanLII 687 (S.C.C.).
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]

-same profile as majority decision

[-State 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.]

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**

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

5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**

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]

7. **Concept of law – imposed / consensual**

Imposed: Lesser Slave Lake submissions re consultative process ignored, like majority.
Consensual: absolute denial of political rights decried [19]

8. **Reasoning – Declaratory – Principled**
9. **Values – Authoritarian – Egalitarian**

Egalitarian: purpose of s.15 [5]

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

Ego/ethnocentirc: 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; 1999 CanLII 687 (S.C.C.).
L'HEUREUX-DUBÉ (gonthier, Iacobucci, Binnie)

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]

-finding is postcolonial in recognition of 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.
-completely ignores the well documented goal of assimilation that prevailed at the time the basic form of the *Indian Act* was set.
-remedy with only 18 month suspension completely ignored the complexity of consultation required making the required expertise very thin on the ground & making everyone prioritize their issue.

5. Procedure – in camera/biased/public interveners equal
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] and the absense of evidence concerning their situation was a factor in the reasoning [69].
6. Evidence – assumptions – supported by proof
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.
7. Concept of law – imposed / consensual
8. Reasoning – Declaratory – Principled
Declaratory: legality based on own prior reasoning.[97] dictatorial remedy ignored band realities [118]
Principled: common-law methodology used [110]
9. Values – Authoritarian – Egalitarian
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]
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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] Context is "Canadian society".[63] Failed to see concerns raised by C-31influx 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; http://www.lexum.umontreal.ca (S.C.C.)

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

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.

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**

Assumption: "In my view, the treaty rights are limited to securing "necessaries".[7]
[note unsubstantiated acceptance by expert & Binnie that treaty rights were "subject to regulation" [38]
Proof: careful consideration of the documentary sources. Reference to Dr. Patterson's evidence[37]

7. **Concept of law – imposed / consensual**

Imposed: dependent of 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]

8. **Reasoning – Declaratory – Principled**

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

9. **Values – Authoritarian – Egalitarian**

Authoritarian: Imposed own category and threatened Marshall for violation.[8]
Egalitarian: "A deal is a deal. The same rules of interpretations should apply."[21]

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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 explanation	Yes
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; http://www.lexum.umontreal.ca (S.C.C.)
MCLACHLIN J. (Gonthier J.)

Main Point: 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]

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

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined assumed Mi'kmaq were British subjects
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumptions: -that the Mi'kmak were British subjects & acknowledged British jurisdiction over N.S [86]
Proof: -used to support finding of mutual understanding[89]
Concept of law – imposed / consensual
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.
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Authoritatian: 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 – Ethno/Ego centric- Cross-cultural respect
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; 1999 CanLII 666 (S.C.C.).**

THE COURT (Lamer C.J. L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Binnie)

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]

[-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.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
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 – Principled
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.* eg.
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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: for **Mi'kmaq**		9		4.3

44 (b) *R. v. Marshall* [1999] 3 S.C.R. 533; 1999 CanLII 666 (S.C.C.).

THE COURT (Lamer C.J. L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Binnie)

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]

[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 – Alien/Peer -social experience & culture radically different from fishermen
Parties – Imposed Identity/ Self-Determined –
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 – Foreign language & culture/ own -Canadian institutional venue
Issues – Imposed – mutually determined –The motion considered was filed by the Coalition.
Procedure – in camera/biased/public interveners equal –public, interveners, arguments reviewed
Evidence – assumptions – supported by proof – as for Mi'kmaq
Concept of law – imposed / consensual –Imposed by Court interpretation. Enforcement of regulations is at the unfettered discretion of "the Government".[2]
Reasoning – Declaratory – Principled –as for Mi'kmaq
Values – Authoritarian – Egalitarian - as for Mi'kmaq
–high level of government regulatory discretion equally applied to all
Perspective – Ethno/Ego centric- Cross-cultural respect –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. Perspective	Ethno/ego centric	Yes	Respect/place for others	
Total: Settler		7		6

45. *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783; 2000 SCC 32 (CanLII).
THE COURT
(McLachlin C.J.L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel)

Main Point: Act's purpose is to protect public safety. Parliament may control indirectly[40]
1. Judge-Alien/Peer Are judges peers to farmers & hunters?
6.Evidence – assumptions – supported by proof
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]
7. Concept of law – imposed / consensual Imposed: Parliament's purpose conflated with bureaucratic interpretation [20] Consultation not needed[56]
8. Reasoning – Declaratory – Principled Declaratory: Rand J. in *Margerine Reference* cited without explanation re ends served by criminal law[32]
"prohibitions and penalties are not regulatory in nature"[38]
10. Perspective – Ethno/Ego centric- Cross-cultural respect:
Ethnocentric: Concept of guns, cars [43-45] What did interveners argue? Analysis of the perspectives of farmers & huntrers conspicuous by its absence.

	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: re Alberta		6		6.5

Main Point: Consultation with "rural aboriginal Canadians" has no bearing on division of powers analysis.[56] [Issues may be characterized to completely exclude Indigenous concerns.]
Procedure -in camera/biased/public interveners equal Most Indigenous peoples not represented
Evidence – assumptions – supported by proof –Assumption: People who would have trouble accessing the registration scheme would be able to argue their case in court.[56]
Concept of law – imposed / consensual Consultation not required to ensure legality..[56]
Reasoning – Declaratory – Principled -principles externally applied.
Values – Authoritarian – Egalitarian –no inclusion in formation of regulatory scheme
Perspective – Ethno/Ego centric- Cross-cultural respect
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: Aboriginal		10		1

46. *R. v. Catcheway,* [2000] 1 S.C.R. 838; 2000 SCC 33 (CanLII).
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]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined – charge but defence raised the issue at hand
Procedure – in **camera/biased/public interveners equal**
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual Crown agreed – evidence showed bias
Reasoning – Declaratory – Principled –prior involvement raises reasonable apprehension of bias
Values – Authoritarian – Egalitarian –standard rules of procedural fairness applied
Perspective – Ethno/Ego centric- Cross-cultural respect –New trial ordered –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; 2000 SCC 37 (CanLII).
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.
-At this point, s.15(2) appears to serve as an aid to interpreting the rights protected by s.15(1).
-The casino program did not affect the core of federal jurisdiction under the *Constitution Act, 1867* s.91(24)
[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?]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Imposed: Identity of all parties defined in relation to Canada's *Indian Act*[79]
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: Parties status defined by the *Indian Act.*
Mutually Determined: Parties defined the issues brought to court
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumption: a casino operation can be used to promote equality
Proof: the background and development of the scheme
Concept of law – imposed / consensual
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 – Principled
Declaratory: approach relies heavily on the subjective interpretation of the judiciary
Principled: Serious search for guiding principles though contact with reality lost in esoteric legalisms.
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: "reasonable person, in the circumstances of the claimant"[55] applied to find, in essence, that the claimants were unreasonable to raise their concerns[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. *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633; 2000 SCC 52 (CanLII).
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]

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".

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.
Judge – Alien/Peer - Judges are alien to Musqueam culture
Parties – Imposed Identity/ Self-Determined Chose to lease under Canadian law
Venue – Foreign language & culture/ own Chose to lease under Canadian law
Issues – Imposed – mutually determined Imposed by the renters but according to lease terms
Procedure – in camera/biased/public interveners equal
Evidence – assumptions/supported by proof *Except McLachlin omission re Salish Park[13.26]
Concept of law – imposed / consensual –concern with intent of the parties
Reasoning – Declaratory – Principled
*Declaratory: (McLachlin only) Evidence regarding Salish Park was ignored without explanation
Values – Authoritarian – Egalitarian Applied same rules to all regardless of status.
Perspective – Ethno/Ego centric- Cross-cultural respect
-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

49. *R. v.Deane,* [2001] 1 S.C.R. 279; 2001 SCC5 (CanLII).
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; 2000 CanLII 17047 (ON.C.A.).**
Main Point : Procedural error does not merit a retrial unless it could produce a different outcome.

The fundamental issues concerning relations between Canada and the Indigenous nations was 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.

1. **Judge – Alien/Peer** - same basic socialization for Deane/ foreign for George

Parties – Imposed Identity/ Self-Determined Canadian citizen/alien designation as "aboriginal"
Venue – Foreign language & culture/ own –own culture/colonially imposed culture
Issues – Imposed /mutually determined –protocols & legal code Deane professionally supported
Procedure – in camera/biased/public interveners equal -public
Evidence – assumptions – supported by proof
Assumption; deceptive basis for the police action against the protesters ignored
Proof: evidence concerning Deane's actions closely considered
Concept of law – imposed / consensual Imposed command model: Deane consented through parliament to the standards of his culture/ not George
Reasoning – Declaratory – Principled
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 – Egalitarian
Authoritarian command model of legality implemented & supported
Egalitarian equality before and under the law imposed
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: No insight into the conceptual trap created for Deane inducing him a lie/imagined 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 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 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; 2001 SCC 33 (CanLII).
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]

[technique used was to redefine the issues then to claim that the new definition was not met]
[according to Binnie, there was much debate on sovereignty at trial & at the SCC [69] but McLachlin avoided this issue which is actually central to the case[64] – or at least it seems to have been from the perspectives of both Mitchell and the Crown.
Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Biased: case to meet defined in territorial terms at the SCC then used 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 – supported by proof
Assumptions: Characterizations of *Adams*, and *Gladstone* ignore their acknowledged evidentiary limits[52]
Little evidence to show Mohawks did not carry goods north of river (but main problem is categorization)
Role of Mohawks in modern state formation ignored.
Evidence: much close analysis though eg. she misread Richter.
Concept of law – imposed / consensual
Imposed: The Court asserted the right to characterise the right claimed based on *Van der Peet*[15]
Reasoning – Declaratory – Principled
Declaratory: Conceptual requirements – of time & space [55]
Assertion of the doctrine of continuity not founded in "prior informed consent" or anything else [62]
Values – Authoritarian – Egalitarian
Authoritarian: Mohawk cultural conceptions ignored. Equal access to law making function not considered.
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: Ignored symbolic nature of Mitchell's action though evidence was before the court.[85-89].
Imposed 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/ego centric	Yes	Respect/place for others	
Total		10		3

50. 2 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; 2001 SCC 33 (CanLII).
BINNIE J. (Major J.)

Main Points : Control over the mobility of persons and goods into 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. [172-3]
-adopted McLachlin's reasons, so most of the same indicia apply. Additional considerations :

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined Set out Mitchell's arguments but answered own conception of the issues
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumptions: Canada's international obligations depend on instruments it 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 / consensual
Imposed: audacious reinterpretation of the Two Row ignored the need for consent to agreements [130]
-ignored need for consent to found a"confederal relationship"[150]
Reasoning – Declaratory – Principled
Declaratory: Claim 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]
-accepted that sovereignty could simply be declared by 1783 Treaty of Paris[157]
- Vattel's declaratory concept of legality uncritically accepted.[163]
-asserted a right to impose an external assessment of what defines Mohawk culture [164]
Values – Authoritarian – Egalitarian
Egalitarian: Mohawks Canada each have "own framework of legal rights and responsibilities.[131] [So blind to meaning of Two Row & need for sharing that it detracts from shared sovereignty concept]
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric : 1906 Privy council concepts uncritically accepted.[108] "The 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: Mohawk problems & wish to reunite community divided by imposed boundary described.[77, 90]"From 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/ego centric	Yes	Respect/place for others	Yes
Total		10		4.5

51.1 ***Osoyoos Indian Band v. Oliver (Town),*** **[2001] 3 S.C.R. 746; 2001 SCC 85 (CanLII).**
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]

[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.]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined laws imposed but band decided to tax.
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Noted the problem of insufficient evidence on significant aspects of the case[38-40]
Concept of law – imposed / consensual
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
-Indigneous rights emphatically subordinated to Crown sovereignty[166-7]
Reasoning – Declaratory – Principled many principles based on own reasoning
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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/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	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; 2001 SCC 85 (CanLII).**
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]

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]

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**

Band decided to tax canal lands in context of imposed laws

5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**

Assumed the appropriation of the land the canal was on was valid.

7. **Concept of law – imposed / consensual**

Imposed: distinction between consensual sale and non-consensual expropriation irrelevant [138]

8. **Reasoning – Declaratory – Principled**

Declaratory: reliance on the court's own past findings[138] Law of expropriation [149]
Principles: Those relied on are explained

9. **Values – Authoritarian – Egalitarian**

Authoritarian: understanding of Indians irrelevant to expropriation of their land [124]
Governor in Council may impose terms as he sees fit.[131]

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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 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		4.5

52. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146; 2002 SCC 31 (CanLII).
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]

[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.]
Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own equated with all people in B.C. [69]
Issues – Imposed – mutually determined Need to prove aboriginal right, not established that "the essential and distinctive core values of Indianness" were affected.[76]
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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]
-assumption 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 – imposed / consensual
Considered exclusively according to Canadian constitutional parameters
Reasoning – Declaratory – Principled as per usual case law analysis
Values – Authoritarian – Egalitarian Minister's consent required, not the peoples'.s.13(4)
Perspective – Ethno/Ego centric- Cross-cultural respect
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 Indigneous 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; 2002 SCC 54 (CanLII).
BASTARACHE J. (McLachlin C..J. L'Heureux-Dubé) (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]

[supporting reasons - Score as per LeBel's reasons]
6.Evidence – assumptions – supported by proof
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]
7. Concept of law – imposed / consensual
If the Dena are part of Canada, no consideration of the terms of their joining.
8. Reasoning – Declaratory – Principled
Declaratory: requirements for reserve creation set out, but source not explained [1, 6]
9. Values – Authoritarian – Egalitarian
Authoritarian: "the Crown is still free to deal with its land in any other manner it wishes"[7]
10. Perspective – Ethno/Ego centric- Cross-cultural respect
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; 2002 SCC 54 (CanLII).
LEBEL J. (Gonthier, Iacobucci, Major, Binnie, Arbour)

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.

1. **Judge – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**

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 authorative to bind the Crown.[As in *Bear Island* effect goes beyond declaratory reasoning]

6. **Evidence – assumptions – supported by proof**

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]

7. **Concept of law – imposed / consensual**

Imposed: issue of Indigneous 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, [19]were left in the air.

8. **Reasoning – Declaratory – Principled**

-the "reasonably seen by the First Nation" test was identified [64,69] but not really applied.

9. **Values – Authoritarian – Egalitarian**

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.

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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

54. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245; 2002 SCC 79 (CanLII).
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
Judge – Alien-Peer
Parties – Imposed Identity/ Self-Determined Indian Act incorporated chosen designation
Venue – Foreign language & culture/ own 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 – Imposed – mutually determined Decided own issues
Procedure – in camera/biased/public interveners equal ?
Bias? Binnie, the judge who wrote the reasons, was Crown counsel in early stages(Wewaykum II)
Evidence – assumptions – supported by proof
Proof: detailed bureaucratic paper trial [10]
Concept of law – imposed / consensual
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 – Principled
Declaratory assertion of the political trust doctring [73]
Values – Authoritarian – Egalitarian
Authoritarian: reliance on Anglo-Canadian legality
Egalitarian: Crown conceived as neutral arbiter in accord whith the character of the application[96]
Perspective – Ethno/Ego centric- Cross-cultural respect
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; 2003 SCC 43 (CanLII).
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]

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined** Imposed minority status, but self-identified
3. **Venue – Foreign language & culture/ own**
4. **Issues – Imposed – mutually determined** charge countered by self-determined argument
5. **Procedure – in camera/biased/public interveners equal**

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.

6. **Evidence – assumptions – supported by proof** –evidence reviewed
7. **Concept of law – imposed / consensual**

Consensual: self identification & aqcceptance of community determines identity [31-3]

8. **Reasoning – Declaratory – Principled** eg. purpose of s.35 protection a declared principle [13]

Van der Peet principles declared applicable

9. **Values – Authoritarian – Egalitarian**

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]

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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; 2003 SCC 44 (CanLII).
(McLachlin C..J. Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.)

THE COURT

Main Points: Metis are not entitled to benefit from the protection for "Indians" under the N.R.T.A.
-Metis 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.

-only Crown's view of the law considered [33]
-colonizing effect of case derives from foundation on an imposed legality. Metis arguments (as reresented by the Court) did not disturb this.

4. Issues – Imposed – mutually determined
-imposed by charge. Issues determined by Blais' pleadings [13] but legal framework (NRTA) is imposed.
5. Procedure – in camera/biased/public interveners equal
6. Evidence – assumptions – supported by proof Agreed facts re basic charge. Noted how evidence supported trial findings[20] MacDonald quote [22] Census data [27]
7. Concept of law – imposed / consensual
"rightly or wrongly, this view did not extend to the Metis"[33]
8. Reasoning – Declaratory – Principles explained, but based on Crown's imposed legality [note some seeming illogical arguments of Metis eg. [36]
9. Values – Authoritarian – Egalitarian
10. Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: Observation that Metis did not seek Crown protection[20] is strange given public knowledge of military conquest of Riel & Metis.
Respect: Crown & Metis perspectives referred to [20] Metis 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; 2003 SCC 45 (CanLII).
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]

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**

Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined Crown filed motion [22], Court invited submissions [24]
Procedure – in camera/biased/public interveners equal
-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?
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 (international) assessment.
Evidence – assumptions – supported by proof
Assumption: no evidence to support the clam 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 / consensual
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 – Principled
Declaratory: assessment founded on their own conviction.[90]
Principled: eg re bias & need for justice to be seen to be done
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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 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	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; 2003 SCC 55 (CanLII).

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]

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**

Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined -charge
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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]

[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.]

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined** Haida identity accepted – as Aboriginal in Canada

Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined Imposed by incursion of logging; Haida determined issues
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Concept of law – imposed / consensual
Imposed: Crown assumption of "discretionary control"accepted. [18]
Consensual: Haida may choose what remedy to seek.[13]
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Authoritarian: decision-making remains in "the government" despite "deep consultation"[44]
Egalitarian: emphasis on consultation as "talking together for mutual understanding"[43]
Perspective – Ethno/Ego centric- Cross-cultural respect
Ethnocentric: presumption that only Canada has 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 the 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/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	Some	Egalitarian	Yes
10. Perspective	Ethno/ego centric	Yes	Respect/place for others	Yes
Total		6.5		8

***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 nations' 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.

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined** very! "TRTFN"[1]
3. **Venue – Foreign language & culture/ own**

Foreign: "the TRTFN...whiched to have its concerns addressed on a broader scale than that which is provided for under the Act".[36]

4. **Issues – Imposed – mutually determined**
5. **Procedure – in camera/biased/public interveners equal**
6. **Evidence – assumptions – supported by proof**

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]

7. **Concept of law – imposed / consensual**

Imposed: Tlingit concept of requirements rejected in favour of those in provinces legislation.[43-4] Consent clearly not required here.

8. **Reasoning – Declaratory – Principled**

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.

9. **Values – Authoritarian – Egalitarian**

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]

10. **Perspective – Ethno/Ego centric- Cross-cultural respect**

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 SCC 43 (CanLII).**
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]

-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.
2. Parties – Imposed Identity/ Self-Determined –presumed to be under British rule
6. Evidence – assumptions – supported by proof
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
7. Concept of law – imposed / consensual
Imposed: treaty interpretation is a unilateral process[13] title= exclusionary control[77]
Imperial authority of "his Majesty" presumed to define legality [97-105]
8. Reasoning – Declaratory – Principled
Declaratory: Source of authority is own previous reasoning [13]
"Thus the truck house clause was concerned with traditionally traded products".[19] though there was no evidence that this superimposed limitation was in the contemplation of the parties in 1760-61.
9. Values – Authoritarian – Egalitarian
Authoritarian: Reliance on the Court's own previous interpretation of 1760-61treaties 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.
10. Perspective – Ethno/Ego centric- Cross-cultural respect
Ethno/Ego centric: Conclusion that there is no ground for concluding 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 SCC 43 (CanLII).**
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.

[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]
1. Judges – Alien/Peer
2. Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumption: Mi'kmaq could not cut large logs because they lacked the necessary tools.[121][1126]
Concept of law – imposed / consensual
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Accepted authority of Anglo-Canadian court in face of egalitarian assertions of the need to take account of "the aboriginal perspective".eg.[139].
Perspective – Ethno/Ego centric- Cross-cultural respect
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

[1126] 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) at 48.

62. ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*** **2005 SCC 69 (CanLII).**
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]

1. **Judges – Alien/Peer**
2. **Parties – Imposed Identity/ Self-Determined**

Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
–no evidence they asked to join Canada , lack of interest in reserve.[3]
-Road was an external initiative.
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Proof: shows roads change wildlife patterns[44]
Concept of law – imposed / consensual
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 – Declaratory – Principled
Principled: based on honour of the Crown
Values – Authoritarian – Egalitarian
Egalitarian: principle of looking at both perspectives actually applied throughout the reasoning.
Perspective – Ethno/Ego centric- Cross-cultural respect
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

63.1 R. v. Sappier; R. v. Gray, **2006 SCC 54 (CanLII)**
BASTARACHE J. (McLachlin C.J. LeBel, Deschamps, Fish, Abella, Charron, Rothstein)

Main Principle: Defence of aboriginal right to harvest wood for domestic purposes made out.

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Canadian Citizens but Indigenous
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Defined by charge under Crown Lands Act, though could raise defence
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
Imposed; *Van der Peet test* [22] primacy to Court's recognition [23] [31], [38]
Reasoning – Declaratory – Principled
Principled; use of *Van der Peet* test, *Adams*
Values – Authoritarian – Egalitarian
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 – Ethno/Ego centric- Cross-cultural respect
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. Perspective	Ethno/ego centric	yes	Respect/place for others	yes
Total		7.5		6

63.2 *R. v. Sappier; R. v. Gray,* 2006 SCC 54 (CanLII)

BINNIE: Main Point Barter should be permitted on the reserve, but not outside.
-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 SCC 58 (CanLII)

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.

-N.B. uncritical reference to assimilation policy of 1938[52]

Evidence – assumptions – supported by proof
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 / consensual
Imposed: laws of colonizing society imposed (Indian Act, Trust & Loan Companies Act, case law, Parliament's wish[20]
Reasoning – Declaratory – Principled
Values – Authoritarian – Egalitarian
Authoritarian: Should not disturb parliament's distinction [
Perspective – Ethno/Ego centric- Cross-cultural respect
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

64.2 *McDiarmid Lumber Ltd. v. Gods Lake First Nation* 2006 SCC 58 (CanLII)

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 / consensual
Imposed: Indian Act standard
Consensual: reliance on treaty ideal; need for change anticipated [144]
Reasoning – Declaratory – Principled
Principled –reliance on equitable of interpretation
Values – Authoritarian – Egalitarian
Authoritarian: interpretation of Canadian statutes made without Indigenous input [127]
Egalitarian: treat all bands equally [121] predictability [146] avoid national embarassment [149]
Perspective – Ethno/Ego centric- Cross-cultural respect
-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 SCC 59 (CanLII)

DESCHAMPS & ABELLA JJ (Binnie, Charron)

Main Points : *Sparrow & Badger* justifications only apply when government is acting within its constitutionally mandated powers [55]

Issues – Imposed – mutually determined
Imposed: charge, acceptance of non-consensual regulation
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
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 / consensual
Imposed: division of powers analysis [42] -"insignificant" infringements of treaty rights OK[50]
-*Sparrow* defn of infringement [51]
Consensual: treaty respected
Reasoning – Declaratory – Principled
-declaratory (reliance on McLachlin)use of principles [29]
-"insignificant" infringements of treaty rights OK[50]
Values – Authoritarian – Egalitarian
Authoritarian: -"insignificant" infringements of treaty rights OK[50]
Perspective – Ethno/Ego centric- Cross-cultural respect
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 SCC 59 (CanLII)
MCLACHLIN C.J. & FISH J. (Bastarache)

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]

Judge – Alien/Peer
Parties – Imposed Identity/ Self-Determined
Venue – Foreign language & culture/ own
Issues – Imposed – mutually determined
Imposed: charge, reasoning relies on past jurisprudence in the colonial culture[85]
Procedure – in camera/biased/public interveners equal
Evidence – assumptions – supported by proof
Assumption: accused are Canadians [85] hunting at night is dangerous[108]
Concept of law – imposed / consensual
Imposed: analysis begins with 91(24); "province" or "government" has right to define[123,124]
Reasoning – Declaratory – Principled
Declaratory: reliance on Court's own reasoning [123]
Values – Authoritarian – Egalitarian
Authoritarian: assumes right to legislate for Indians
"preference for Singh's interpretation "We prefer" [106]
Perspective – Ethno/Ego centric- Cross-cultural respect
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

A5.1 Form of Participation

Formal Initiation	Indigenous Defendant	Settler Defendant	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			
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
Indigenous:			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

A5.2 Penalization of Indigenous Parties

		Number Charged	Acquitted	More trial	Convicted
Nowegijick	tax	1	1		
Jack and Charlie	hunting, ceremonial, B.C.	2			2
Dick	hunting, closed season B.C.	1			1
Simon	hunting, treaty, Micmac	1	1		
Horse	hunting, Treaty 6,NRTA	8			8
Francis	traffic regs on reserve, N.B.	1			1
Horseman	hunting, bear attack, Treaty 8	1			1
Sioui	hunting, in park, treaty	4	4		
Sparrow	fishing, B.C.	1	1		
Jones	bingo, Ont.	2			2
Williams	tax	1	1		
Howard	fishing, closed season, Ont.	1			1
Badger	hunting, Treaty 8, NRTA	3		1	2
Nikal	fishing on reserve, B.C.	1	1		
Lewis	fishing, by reserve, B.C.	3			3
Van der Peet	fish sold, B.C.	1			1
Gladstone	herring spawn on kelp, B.C.	2		2	
Pamajewon	gambling, Ont.	5			5
Adams	fishing, Mohawk, Que.	1	1		
Côté	fishing, traditional, Que.	5	1*		5
Williams	robbed pizza parlour	1		1	
Sundown	hunting cabin, Treaty 6	1	1		
Gladue	manslaughter	1			**
Marshall	fishing eels, Miqmaq	1			1
Catcheway	road block	10		10	
Mitchell	customs , Mohawk	1			1
Powley	hunting, Métis, Ont.	2	2		
Blais	hunting, Métis, NRTA	1			1
Paul	cut logs, B.C.	1		1	
Marshall/Bernard	logging, Mi'kmaq, N.S.	35			35
Totals:		99	14	15	70
* acquitted on one charge, convicted on another					
** re jury selection , served sentence unchanged					