Federal Court  Cour fédérale

Indigenous Laws and Legal Orders Case Reference List

February 22, 2023

The purpose of the case law summary is to provide an initial resource for parties, lawyers, academics and Judges to locate decisions that have considered Indigenous laws and legal orders. This case summary may be viewed as a companion to the Checklist of Matters to Consider When Preparing an Indigenous Law Case (included in the Fourth Edition of the Practice Guidelines for Aboriginal Law Proceedings, September 23, 2021). This case list is not prescriptive and is not intended to be read in a limiting manner. It has been prepared by the law clerks of the Federal Court and does not reflect the views of the Court or any of its judges.

Indigenous Laws and Legal Orders Case Reference List

Alderville First Nation v Canada, 2014 FC 747

Judge	Justice Mandamin
Legal Context	Evidence Objections
Canadian Legal Concepts	Opinion Evidence, Admissibility
Overview	Canada and Ontario objected to the admissibility of a statement made by the Plaintiff First Nations' expert. In the course of giving evidence regarding the First Nations' historical regard for their hunting grounds, the expert made reference to an excerpt from the 1838 memoirs of Thomas Need, an English visitor to Upper Canada who made observations about the interactions between the First Nations and the English colonists. The witness quoted that memoir as saying that the Mississauga, particularly the Curve Lake, were "as tenacious as English landholders of their game…and this is an analogy in which he is saying the Mississaugas are just like English lords. They are the owners and occupiers of hunting chases, of private fisheries, which is the case in England at this period. And also he says the laws aren't just binding on the Mississauga or the Chippewa or the Algonquin. They appear to be binding on non-native settlers." (at para 3) Canada and Ontario objected, alleging the expert was providing legal opinion that was unnecessary and beyond his expertise (at paras 1-5). Justice Mandamin allowed the evidence, concluding that the expert was merely explaining and contextualizing the statements made in the book, not offering a legal opinion (at paras 48-54). Justice Mandamin concluded that properly qualified experts may be permitted to provide opinion evidence relating to legal issues when giving evidence dealing with the history and ethnography of First Nations and their relationship with the Crown (at paras 41-46). Although the expert was not a law professor, the statement touching on Anishinaabe customary law and the history of English fishery and game law was within his expertise as an ethnohistorian (at paras 55-58).
Indigenous Laws and Legal Orders	Justice Mandamin considered the relationship between Indigenous legal systems and Canadian law. He defined "Indigenous legal systems" as "the rules by which Aboriginal people have organized themselves into distinctive societies with their own social, cultural, legal and political structures that predated contact with the Europeans in North America." (at para 22) The common law is capable of giving recognition to and incorporating Aboriginal customary law (at para 26). However, "Aboriginal customary laws, while they exist on their own independent footing, are not an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the independent Aboriginal customary law is recognized as being part of Canadian domestic law. Such an acceptance or recognition may at times have the effect of altering or

	transforming the Aboriginal customary law so that it and Canadian law are aligned. It seems to me this is an aspect of reconciliation as discussed in recent post section 35 Aboriginal jurisprudence." (at para 40) Justice Mandamin also made several comments about the need for expert evidence in Aboriginal litigation, including in relation to Indigenous legal systems and customary law (paras 41-46, 55-56). This evidence might appear on first glance to be impermissible legal opinion (as to the meaning or interpretation of indigenous legal customs), but it is a necessary part of the expert's role in assisting the court when these issues arise. Justice Mandamin overruled the objections to the expert's evidence.
Evidence Considered	Primary source – Thomas Need, *Six Years in the Bush* (1838); Expert evidence of ethnohistorian/anthropologist interpreting that text;
Treatment	This decision has been relied on in cases in Ontario and British Columbia as a basis on which to allow expert evidence going to historical legal matters. Justice Mandamin's comments on how Indigenous legal traditions may be given effect in Canadian law have also been cited with approval. For example, this decision was cited in *Cowichan Tribes v Canada (Attorney General)*, 2020 BCSC 917 for the holding that: "in the area of Aboriginal law dealing with the history and ethnography of First Nations and their relationship with the Crown, properly qualified experts may be permitted to provide opinion evidence which may relate to legal issues" (para 46)
Comments	Justice Mandamin provides a helpful review of the ways in which Indigenous legal traditions may be recognized and given effect in Canadian law including through the common law (paras 26-29), statute (paras 29-31), section 35 (paras 32-36). He concludes that Indigenous customary laws exist on their own independent footing but are not an effectual part of Canadian law unless there is a means or process to recognize the customary law as part of Canadian law. This may involve some alteration or transformation of the customary law, which he says as an aspect of reconciliation (at paras 39-40).

Alexander v Roseau River Anishinabe First Nation Custom Council, 2019 FC 124

Judge	Favel J
Legal Context	Self-government of Indigenous people – councils
Canadian Legal Concepts	Aboriginal and Indigenous law
Overview	Chief and Council passed band council resolution to revoke authority of Custom Council (2017 BCR) — Custom Council then passed resolution to remove elected Chief and Councillors from office and to declare them as ineligible to be nominated or to run as candidates for positions of Chief or Councillor of First Nation (2017 resolution) — Following year Chief and Council passed second band council resolution confirming 2017 BCR (2018 BCR) — Both Custom Council and Chief and Council applied for judicial review — Applications granted — Both 2017 BCR and 2018 BCR amounted to single continuing course of conduct, they both related to same parties, identical relief was sought in relation to both BCRs, and court would treat 2017 BCR and 2018 BCR together — Both decisions of Chief and Council and Custom Council were not in accordance with provisions of Roseau River Anishinabe First Nation Election Act and were invalid — Parties agreed that Act was valid law, and it defined roles and responsibilities of both Custom Council and Chief and Council — There was no provision in Act to revoke authority of Custom Council or replace Custom Council — Mandate did not enable Chief and Council to revoke authority of Custom Council because it was not source of its creation as Custom Council pre-existed mandate — While justification for removal or demanding resignations of Chief and Council may arise, Act contained no process on how that could be accomplished — Court followed prior decision where judge found that Act did not create power to remove Chief and Council, and referendum or some other form of vote was required to allow all members of First Nation to vote on removal — As both decisions of Custom Council and Chief and Council were not made in accordance with Act, issue of procedural fairness did not need to be considered at this time — 2017 BCR and 2018 BCR revoking authority of Custom Council were ultra vires and were invalid — Custom Council's 2017 resolution removing Chief and Council from office was ultra vires and was invalid.
Indigenous Laws and Legal Orders	Elections and governance laws of the First Nation; “indigenous laws may encompass legislation including, but not limited to, election laws and constitutions. The significance and importance of indigenous laws lies in the broad community support for the laws, which are typically drafted with the guidance of respected knowledge keepers, as well as support and adherence to the bodies and the processes established by such laws. Indigenous laws may also encompass indigenous peoples' relationships with one another as well as with the world around them.” (para 18)

	The First Nations' Elections Act found to be valid law.
Evidence Considered	The First Nations' Elections Act and council resolutions in question
Treatment	Cited rarely but in similar context of First Nations council decisions
Comments	The Court advises the First Nation "to engage with their community members and respected knowledge keepers to review their governance structure and laws in the spirit and good faith that their indigenous laws reserve. These worthwhile efforts may come at some financial cost to the community but any such costs will be well worth the effort in bringing the community together to ensure that the integrity of their indigenous laws are maintained." (para 50)

Beaver v Hill, 2018 ONCA 816

Judge	Lauwers JA (van Rensburg JA and Nordheimer JA concurring)
Legal Context	Family law
Canadian Legal Concepts	Aboriginal and Treaty rights; spousal support and child support; Conflict of laws; civil procedure
Overview	Ms. Beaver [the Respondent] and Mr. Hill [the Appellant] were Haudenosaunee and members of the Six Nations of the Grand River. They were in an intimate relationship and had a child together (B.), before the relationship dissolved in 2013. The Respondent made an application in Superior Court for B.'s custody, spousal support, and child support, pursuant to the *Children's Law Reform Act* and *Family Law Act* of Ontario. The Appellant filed an answer and defence to the application, and later an amended answer and defence alleging that the Superior Court did not have jurisdiction to hear the application, as the Appellant had a section 35 right to have the matter resolved pursuant to Haudenosaunee law (para 4). The Respondent successfully moved to strike the Appellant's amended answer. The Motions Judge held that the Superior Court had jurisdiction to hear the dispute, and found that Mr. Hill had no standing to bring a s. 35 claim, nor was his proposed claim justiciable. The order striking the Appellant's amended answer was appealed to the Ontario Court of Appeal [the Court]. On appeal, the Appellant conceded that the Superior Court has jurisdiction to hear the dispute and decide the constitutional issue, but maintained that the Superior Court should not decide the merits of the family dispute – that should be left to Haudenosaunee law and Haudenosaunee institutions to resolve. The Court held that it was premature to dispose of the Appellant's constitutional argument at this early stage (para 13). The Court cautioned that courts should avoid making definitive pronouncements on section 35 rights "where a case is in the early stages and where the applicable law is yet in the early stage of development" (para 29, citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras 32 and 35). The Court permitted the Appellant to seek leave to further amend his answer to particularize the constitutional claim, but maintained the interim support order of the Motions Judge. The Court held that this would properly balance the competing interests (the Respondent's interest in obtaining interim support for herself and B, and the Appellant's interest in having the constitutional claim determinmed) (para 14).

Indigenous Laws and Legal Orders	The Appellant argued that he had a right to be governed by Haudenosaunee laws and governance systems, and to have the dispute resolved within and pursuant to the jurisdiction and authority of "his own government", rather than by or pursuant to the Province of Ontario. He argued that Haudenosaunee laws in relation to this family dispute are "exclusive and compulsory", leaving no room for federal or provincial legislation or common law in determining the dispute (para 53). The Appellant referred to American authorities which allow for "complete Aboriginal sovereignty in some spheres" (para 54). The Court held that while the Appellant's constitutional claim left questions to be answered, the Appellant had standing to bring the claim and it was justiciable (para 69). The Appellant was entitled to claim a personal s. 35 right to Haudenosaunee law and procedure, notwithstanding that the claim may be related to and dependent on a collective claim to self-government (paras 60-65). The Court left open the question of whether the claimed Haudenosaunee law existed, and if so, whether Haudenosaunee law would apply in this case to the exclusion of Ontario law, or whether it would apply to the Respondent and B (paras 66-68).
Evidence considered	*at this early stage, the Court did not consider the scope or content of the claimed Indigenous law*
Treatment	
Comments	

British Columbia (Child, Family and Community Service) v SH, 2020 BCPC 82

Judge	P.D. Whyte Prov. J.
Legal Context	Child Protection
Canadian Legal Concepts	Aboriginal and Indigenous law; family law
Overview	Mother had seven children, although only four were subject of application, and child services had been involved with mother soon after birth of first child in 2000 — After birth of several children, most which were removed from her care, mother became involved with I, who was band chief and considered by social worker to be appropriate supervisor — I successfully applied for custody of one of children, D, and two more children were born to mother and I — Between 2012 and 2015, variety of concerns were reported to director of Child, Family and Community Service, including neglect, family violence and discord, and in 2016, I passed away from cancer — Children were placed with D.L. and C.L. before I passed away, and director proposed that children would remain in their current foster placement with D.L. and D.L. and C.L., who were of Métis heritage, and couple reside in traditional territory — Application brought by director for continuing custody order under s. s. 49(5) of Child, Family and Community Service Act — Application granted — Mother had exercised access with children throughout time they have been in director's care and she had done so with consistent assistance of D.L. and C.L. and they have appropriately supervised access visits — Continued access visits would guarantee children retained connection to their heritage and mother had testified as to her desire to continue to speak to children during visits — Mother wanted to expand their exposure to traditional activities such as moccasin making and beadwork, and these factors were directly reflected in s. 10(3) of Federal Act — Director's plan was to continue with regular visits between children and mother, so long as they continued to be in their best interests and there had been no suggestion in past year that visits have been curtailed or prohibited because mother acted inappropriately.
Indigenous Laws and Legal Orders	"Canada has recognized that provincial child protection laws apply to Indigenous children, so long as they do not conflict with Bill C-92 (which brought into force the Federal Act, SC 2019, c 24) or an Indigenous law or an Indigenous governing body that has met the appropriate standard." (para 105) "For Indigenous laws to be paramount over the BC *Child, Family and Community Services Act*, an Indigenous body must either have a coordination agreement in place, or have made reasonable efforts to enter into a coordination agreement within a year after such an agreement has been requested." (para 110)

Evidence Considered	Written submissions supplied by the Director on the effect the Federal Act had on matters involving children of First Nations descent.
Treatment	Cited by BC and Manitoba cases in similar child protection contexts with First Nations children
Comments	No specific indigenous laws and legal orders considered; analysis of how indigenous law could potentially interact with federal and provincial child and family services legislation

Casimel v Insurance Corp. of British Columbia, 1993 CanLII 1258 (BCCA)

Judges	The Honourable Mr. Justice Lambert; The Honourable Mr. Justice Hutcheon; The Honourable Mr. Justice Hinds
Legal Context	Adoption law; Motor vehicle insurance law
Canadian Legal Concepts	Adoption; Dependent parents; Aboriginal right
Overview	The Court has to determine whether two individuals who customarily adopted their biological grandson as their own son were "dependent parents" and are therefore be entitled to "no fault" death benefits under the *Insurance (Motor Vehicle) Regulations* (paras 1-2, 7). This raises the issue of "the consequences under the general law of the province of a customary adoption brought about in the exercise of aboriginal rights" (para 26). Determining that customary adoption has not been extinguished by either provincial legislation or the *Indian Act*, Justice Lambert, in the name of the Court, answers in the affirmative (paras 43-52). He also makes this finding in light of a body of jurisprudential decisions in which status conferred by Indigenous customary adoption and marriage were recognized by the courts for the purpose of application of Canadian law (paras 36 and 42).
Indigenous Laws and Legal Orders	As both parties agree that customary adoption had occurred, which Justice Lambert indeed finds, he doe not examine its precise nature (paras 14, 52). Justice Lambert, concluding that customary adoption was an integral part of the Stellaquo Band of the Carrier People, finds that, as such, it gave rise to Aboriginal status rights that became protected under section 35 of the *Constitution Act, 1982* (paras 52-53).
Evidence considered	The precise nature of the customary adoption was not explored in the evidence, as both parties agreed it had occurred (para 14).
Treatment	Treated by 21 decisions and several secondary sources. Distinguished in 4 decisions, followed in one decision, considered in 13 decisions and referred to in 2 decisions.
Comments	File number: CA014532, Vancouver Registry Ancillary support considered: Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" (1984) 4 CNLR1 (paras 29, 36).

Coastal GasLink Pipeline Ltd. v Huson, 2019 BCSC 2264

Judge	Church J, in Chambers
Legal Context	Civil Practice and Procedure; Criminal; Environmental; Evidence; Natural Resources; Property; Public; Torts (trespass)
Canadian Legal Concepts	Aboriginal and Indigenous law; Environmental law; remedies
Overview	Plaintiff pipeline operator obtained provincial permits and authorizations required to construct natural gas pipeline project in B.C. — Defendants alleged plaintiff was in traditional Indigenous territory in violation of Wet'suwet'en law and blockaded bridge — Interim injunction was issued enjoining defendants from blocking bridge — Plaintiffs alleged defendants continued to illegally interfere with and block access to project in breach of injunction — Plaintiffs applied for interlocutory injunction and enforcement order, alleging defendants committed nuisance, breaches of Criminal Code of Canada, and various tortious wrongs including intimidation, conspiracy, and interference with economic relations — Application granted — Injunction and enforcement order issued — Indigenous title claims of Wet'suwet'en people had yet to be resolved — Plaintiff had permits and authorizations to conduct work it sought to undertake — Defendants were aware that legal rights they claimed remained outstanding and were at odds with permits and authorizations granted to plaintiff to undertake pipeline project, but chose not to engage in consultation with plaintiff or to challenge validity of permits and authorizations when they were issued — Defendants could not rely on assertion that their actions in blockading roads were in accordance with their Indigenous laws when they failed to take any steps to challenge by legal means permits and authorizations granted to plaintiff — Self-help remedies, such as blockades, undermine rule of law and administration of justice — Supreme Court of Canada has made it clear that such conduct amounts to repudiation of mutual obligation of Indigenous groups and Crown to consult in good faith, and should not be condoned — Defendants obstructed lawfully permitted activity and their recourse to self-help remedies was contrary to rule of law.
Indigenous Laws and Legal Orders	Wet'suwet'en law regarding Indigenous title claims; Wet'suwet'en governance structures (paras 53-56); Unist'ot'en Camp (a matrilineal group); Wet'suwet'en clans (Tsayu and Gidumt'en); the Soverign Likhts'amisyu
Evidence Considered	Expert evidence of Wet'suwet'en society, governance and laws (this was given little to no weight due to concerns about objectivity, impartiality, and partisanship based on the experts public statements) Previous case law which provided descriptions of Wet'suwet'en governance structures and processes (Delgamuukw and in Canadian Forest Products Ltd. v. Sam, 2011 BCSC 676)

Treatment	Few citations. Of interest Re SL, 2020 ABPC 194 cites this decision in the context of a family law/child protection matter as “An illustration of the hardship posed by the nebulous statutory Indigenous governing body definition” and examples of Indigenous groups which operate outside the traditional governance structures and whether these groups were representatives of their peoples.
Comments	Excerpt of interest: Indigenous Law as a Defence [127] As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions: Alderville Indian Band v. R., 2014 FC 747 (F.C.), at para. 40 [128] There has been no process by which Wet'suwet'en customary laws have been recognized in this manner. The Aboriginal title claims of the Wet'suwet'en people have yet to be resolved either by negotiation or litigation. While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law. [129] Indigenous laws may, however, be admissible as fact evidence of the Indigenous legal perspective, where there is admissible evidence of such Indigenous customary laws. It is for this purpose that evidence of Wet'suwet'en customary laws is relevant in this case.

Connolly v Woolrich, [1867] QJ No 1, (1867) 11 LCJ 197 (CQ Sup Ct)

Judge	Hon. Monk, J.
Legal Context	Family law
Canadian Legal Concepts	Solemnization of marriage; Dissolution of marriage; Wills and Estates; Matrimonial property/community of property
Overview	William Connolly and Susanne *Pas-de-Nom* were married in the Athabaska region at *Rivière-Aux-Rats* in 1803, "according to the customs of the country" (para 8). They had several children, and later relocated to Lower Canada. William rose to a high position in the Hudson's Bay Company and became relatively wealthy. Susanne "associated with the people of St. Eustache as his wife" (para 9), and continued to do so until William Connolly unexpectedly married Julia Woolrich in 1832; they had two children. William Connolly died in 1849, and Susanne died in 1862 in Red River. Julia Woolrich died in 1865, leaving "small legacies" to William and Susanne's children, but leaving the "principal part of the property" to her own children (para 10). The Plaintiff, one of Susanne's children, claimed that Susanne, was still alive when William Connolly died in 1849, and she was therefore entitled to half of the late William Connolly's estate at the time of his death. The Plaintiff sought one sixth of his mother's one-half share in the estate. The Defendant claimed that the Cree marriage was never solemnized, "that the usages and customs of marriage observed by uncivilized and pagan nations…cannot be recognised by this Court as giving validity to a marriage", or that in the alternative, the Cree marriage was voidable at will and was repudiated when William Connolly re-married (para 12). The Court found that Susanne and William had been married "according to the then existing customs and usages of the nation of Cree Indians", and that there existed a community of property between them according to the laws of Lower Canada. The Plaintiff was entitled to one-sixth share of one-half of that community of property (para 179)
Indigenous Laws and Legal Orders	The Court found that the common law of England did not prevail in Athabasca at the time of the marriage, "and in any case, that the customs of the Cree Indians relative to marriage were in force there at that time" (para 20). The Court considered the history of settlers' laws on the territory: "Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements" (para 21). The Court acknowledged the historical possession and control of the Athabasca region by the Cree people: "the discoverers and first settlers found these wild regions occupied and held by numerous and powerful tribes of Indians;-- by aboriginal nations, who had been in possession of

	these countries for ages" (para 22). And, colonial claims did not extinguish the existing laws or rights of the indigenous people there: "will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated--that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not--that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives" (para 23). The Court cited with approval the judgment of the United States Chief Justice Marshall in *Worcester against the State of Georgia*: Certain it is, that our history furnishes no example, from the first settlement of our country, *of any attempt on the part of the crown to interfere with the internal affairs of the Indians*, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take ; but never coerced a surrender of them, *He also purchased their alliance and dependence by subsidies ; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only*. [all emphasis in *Connolly*] The Court agreed that indigenous laws persisted in Canada also (para 24). "The sovereign power in these matters, by proclamation, has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them" (para 143).
Evidence considered	Evidence of judges and company officials as to the prevailing legal system in Hudson's Bay Territory (paras 15-19); Primary historical sources as to extent of Hudson's Bay Territory and the legal system therein (para 22); Hudson's Bay Company Charter; Primary historical sources relating to Cree marriage customs (paras 79-82); Witness testimony as to Cree custom (paras 84-106); Statements of decedent that he married "according to the usages *audi* custom of the country" (para 108);
Treatment	Affirmed by the Court of Appeal: Johnstone c. Connolly, [1869] J.Q. no 1; 1 R.L. 253 Cited by BCCA in *Casimel v. Insurance Corp. of British Columbia* (B.C.C.A.), [1993] B.C.J. No. 1834 Cited in several Federal Court decisions: *Pastion v Dene Tha' First Nation*, 2018 FC 648; *Henry v Roseau River Anishinabe First Nation Custom*

	Council, 2017 FC 1038; *Première Nation d'Alderville c. Canada*, 2014 CF 747. The case was also analyzed by Mark D. Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22 Rev Const Stud 347
Comments	

Delgamuukw v British Columbia, [1997] 3 SCR 1010

Judge	Lamer C.J. and La Forest, L'Heureux-Dubé, Cory, McLachlin and Major JJ.
Legal Context	Aboriginal land title claim
Canadian Legal Concepts	A reviewing court must be extremely reluctant to interfere with findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of a witnesses. (para 78) Appellate intervention is warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it. (para 80) Aboriginal rights are truly *sui generis* and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. (para 82) Accommodation must be done in a manner which does not strain the Canadian legal and constitutional structure. (para 82) Courts must come to terms with the oral histories of aboriginal societies, which for many nations are the only record of their past. (para 84) Oral histories largely consist of out-of-court statements, which are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay (para 86) An aboriginal right is the right to use land for a variety of activities, it is a *sui generis* interest in land. (para 111) There is a second source for aboriginal title, the relationship between common law and pre-existing systems of aboriginal law. (paras 114, 126, 147) Occupancy of the land, which is essential in the determination of an aboriginal title, is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. (para 128) Land has an inherent and unique value in itself, enjoyed by the community with aboriginal title to it, the land cannot be put to uses which would destroy that value. (para 129) The content of Aboriginal title (para 117) Aboriginal title is the right to the land itself. (para 138) Proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective. (para 156)

Overview	This is an action commenced by Gitksan and Wet'suwet'en hereditary chiefs, both claiming individually and on behalf of their "Houses" separate portions of 58,000 square kilometres in British Columbia. (para 7) The claim is one for aboriginal title over the land in question. (para 7)
Indigenous Laws and Legal Orders	Adaawk and kungax of the Gitksan and Wet'suwet'en nations are oral histories, which content includes physical representation totem poles, crests and blankets. Their importance is underlined by the fact that they are repeated, performed, and authenticated at important feasts. (para 93) Gitksan Houses have an "Adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. (para 13) Wet'suwet'en each have a "Kungax" which is a spiritual song or dance or performance which ties them to their land. (para 13) Feast halls are significant evidence of spiritual connection between the Houses and their territory. It is where Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions. (para 14) Description of aboriginal oral history (para 85) The adaawk is proof of the existence of a system of land tenure law internal to the Gitksan, serving as historical use and occupation of the territory. (para 94) The kungax is proof of the central significance of the claimed lands to the distinctive culture of the Wet'suwet'en. (para 94) Aboriginal perspective on the occupation of their lands can be gleaned in part from their traditional laws. Relevant laws might include but are not limited to, a land tenure system or laws governing land use. (para 148) Aboriginal perspective must be taken into account alongside the perspective of the common law. Fact of physical occupation is proof of possession at law. Physical occupation may be established in a variety of ways ranging from construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. (para 149) Aboriginal trespass laws or aboriginal laws under which permission may be granted to other aboriginal groups to use or reside temporarily on land, or treaties amongst aboriginal nations may be proof of exclusive occupation of territory by an aboriginal group. (para 157)
Evidence considered	Oral histories and legends were considered as well as experts in genealogy, linguistics, archeology, anthropology and geography. (para 5)

	Totem poles with the Houses' crests carved or distinctive regalia were considered by the trial judge as physical and tangible indicators of the appellants association with the territories. (para 13) McEachern C.J. (BCSC) found that oral histories, totem poles and crests were not sufficiently reliable or site specific to discharge the plaintiff's burden of proof. Although he recognized the social importance of the feast system and the fact that it evolved from earlier practices, he did not accept its role in the management and allocations of lands, particularly after the fur trade. He concluded that he could not infer from the evidence that the Gitksan and Wet'suwet'en peoples possessed or controlled any part of the territory. (para 18) Lambert J.A. (BCCA – Dissenting) found that the appellants' oral evidence should be weighed like all evidence against the weight of countervailing evidence and not against an absolute standard so long as it is enough to support an air of reality. (para 53) Hutcheon J.A. (BCAA – Dissenting in part) held that the traditions of the Gitksan and Wet'suwet'en peoples existed long before 1846 and included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, the right to occupy and control places of economic importance, as well as the institution of the clans and the Houses in which membership descended through the mother and the feast system. (para 70) The trial judged erred in basing his decision on some general concerns with the use of oral histories as evidence in aboriginal rights cases. (paras 97-98) Oral histories were not properly assessed by the trial judge, the treatment of various kinds of oral histories did not satisfy the principles laid down in *R v Van der Peet*. (para 107) Oral histories were used in an attempt to establish occupation and use of the disputed territory, as an essential requirement for aboriginal title. (para 107) The trial judge gave no independent weight to the special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. (para 98) The trial judge erred when he discounted the recollections of aboriginal life offered by various members of the appellant nations which is testimony about personal and family history that is not part of an adaawk or a kungax. This evidence consisted of the personal knowledge of the witnesses and declarations of witnesses' ancestors as to land use. This was considered by the Court as material to the proof of aboriginal title, established the requisite degree of use and occupation to make out a claim to ownership. (para 99)

	Adaawk and kungax are material to the proof of aboriginal title. (para 99) The trial judge expected too much of the oral history of the appellants, to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question, which is an impossible burden to meet. If oral history cannot conclusively establish pre-sovereignty occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. (para 101) Territorial affidavits filed by the appellant chiefs were considered as they were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses introduced for the purpose of establishing each House's ownership of its specific territory (para 102) The affidavits rely heavily on the declarations of deceased persons of the lands, which are a form of oral history. (para 103) Oral histories, generally relate to particular locations, and refer to particular families and communities and may be unknown outside of that community even to other aboriginal nations. (para 106) Excluding territorial affidavits because the claims to which they relate are disputed does not take into consideration that claims to Aboriginal rights and aboriginal title are almost always disputed and contested. (para 106) Casting doubt on the reliability of the territorial affidavits because land claims have been actively discussed for many years fails to take account of the special context of aboriginal claims. (para 106) Claims have been discussed because of BC'S persistent refusal to acknowledge the existence of Aboriginal title until recently. (para 106) In order for the oral history of a community to amount to a form of reputation and to be admissible it must remain alive through the discussions of members of that community; discussions are the very basis of that reputation. (para 106) Amidst the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order for this type of evidence to be accommodated and placed on an equal footing (para 87) Given that most aboriginal societies did not keep written records, failure to do so would impose an impossible burden of proof. (para 87)
Treatment	
Comments	

Edzerza v Kwanlin Dün First Nation, 2008 YKCA 8

Judge	Justice Tysoe
Legal Context	Self-government Agreements
Canadian Legal Concepts	Judicial Review, Prematurity, Statutory Interpretation
Overview	The Kwanlin Dün First Nation [KDFN] concluded a self-government agreement with the Yukon government. As part of the agreement, the KDFN created a constitution [the Constitution] that provided a procedure for challenging the validity of KDFN laws which required review by a Judicial Council. KDFN members sought to challenge election rules made under the new Constitution in the Yukon Supreme Court [YKSC] because the Judicial Council had not yet been established. The matter was stayed while hearings proceeded before an elections appeal board constituted under earlier election legislation that was subsequently dismissed for want of jurisdiction after a judicial review by the Federal Court. The stay on the YKSC proceeding was lifted, and then subsequently re-imposed because the petitioners had not challenged the law before the Judicial Council, which had been established in the interim (paras 2-18, 22). The YKCA upheld the stay. Justice Tysoe applied the modern approach to statutory interpretation and concluded the Constitution should not be interpreted narrowly and required that the validity of KDFN laws be challenged before the Judicial Council if it was constituted at the time of the hearing before the Court (paras 23-27). A provision in the Yukon legislation implementing the self-government agreements that gave jurisdiction to the YKSC over proceedings arising from that legislation did not deprive the Judicial Council of its jurisdiction. Although the election rules may be invalid for violating that legislation it did not mean that the proceeding arose from it (paras 28-30). The KDFN did not act inappropriately in challenging the jurisdiction of the elections appeal board, and there was no evidence of delay after the Federal Court decision finding the board did not have jurisdiction (paras 31-34).
Indigenous Laws and Legal Orders	KDFN Constitution
Evidence Considered	
Treatment	This case has been relied on for its treatment of the KDFN Constitution, and for the principle that courts should respect policy choices made by First Nations and limit judicial interference with Indigenous decision-making processes.
Comments	In *Kwanlin Dün First Nation v Kwanlin Dün First Nation Judicial Council*, 2016 YKSC 35 (CanLII), the YKSC determined that the KDFN

	Constitution and *Judicial Council Act* gave the Judicial Council jurisdiction to apply territorial land legislation and KDFN constitutional values in the review of decision by KDFN administrative bodies in the context of a landlord-tenant dispute (at paras 47-56).

First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs), 2020 CHRT 20

Members	Sophie Marchildon Chair & Edward P. Lustig Member
Legal Context	Child Welfare
Canadian Legal Concepts	Aboriginal and Indigenous law; human rights; Jordan's principle
Overview	Background The Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the CHRA). In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, the same panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the CHRA. This Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays, and denials for First Nations children. The Panel ordered Canada to immediately implement the full meaning and scope of Jordan's Principle. As a result, Canada commenced anticipated 12-month process of engaging First Nations, provinces, and territories on process of expanding the definition of Jordan's Principle. In response, the Panel issued further decision ordering Canada to immediately implement the full meaning and scope of Jordan's Principle, not merely to start discussions to review the definition in the long-term. Canada took steps to implement order while engaging in discussions with First Nations on long-term strategy. The Panel observed that Canada's new formulation of Jordan's Principle remained more restrictive than formulated by the House of Commons to the extent that it applied only to First Nations children "on reserve" and with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered Canada to immediately apply Jordan's Principle to all First Nations children whether resident on or off-reserve. The Panel did not define term "First Nations child" as used in its orders. The Complainant requested adjudication of whether Canada's definition of "First Nations child" for purpose of implementing Jordan's Principle complied

	with the Panel's orders. The Panel determined that adjudication of that issue required a full hearing, but granted interim relief pending adjudication of merits of the "First Nations child" issue. Findings First Nations children without *Indian Act* status who were recognized as citizens or members of their respective First Nations should be included under Jordan's Principle. Eligibility criteria under Jordan's Principle must respect protected rights including First Nations self-government agreements, treaties, customs, laws, traditions and UNDRIP. Ensuring that First Nations children without *Indian Act* status who are recognized as citizens and/or members of their First Nation are not automatically excluded from Jordan's Principle does not necessarily mean that they receive services under Jordan's Principle because a case-by-case analysis was still required. The Panel ordered parties to: • Consult to generate potential eligibility criteria for First Nations children under Jordan's principle; • Establish mechanism to identify citizens and/or members of First Nations; • Include, in those consultations, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act status*; • Immediately consider eligible for Jordan's Principle services those First Nations children who would be come eligible for *Indian Act*; and • Return to the Panel with potential Jordan's Principle eligibility criteria and mechanism by October 19, 2020.
Indigenous Laws and Legal Orders	The Canadian Human Rights Tribunal confirmed that pre-existing Indigenous legal orders were not displaced by the assertion of British sovereignty over Indigenous lands (paras 183, 189, 195, 197) Indigenous customary laws and legal traditions are to be applied in the contexts of the *CHRA* and the *Indian Act*. Specifically in this case, the application of indigenous laws and legal orders supported a broader interpretation of Jordan's Principle eligibility criteria that goes beyond the narrow parameters of the *Indian Act*.
Evidence Considered	Parties to the complaint and interested parties were able to make submission and bring evidence on the status of recognition and importance of indigenous law in this case.
Treatment	This decision appears to only have been cited by one other case (other than decisions flowing from it in the same complaint): *Malone v Canada*

	(Attorney General), 2021 FC 127 [*Malone*]. In *Malone*, J. Lafrenière supported the CHRT's finding that the definition of First Nations' children should be decided by the government and stakeholders.
Comments	

Henry v Roseau River Anishinabe First Nation, 2017 FC 1038

Judge	Justice Mandamin
Legal Context	Elections
Canadian Legal Concepts	Statutory Interpretation
Overview	There were two disputes in this proceeding. The first was a dispute regarding which body should appoint the electoral officers for the Chief and Council election. The dispute was resolved on consent with joint officers appointed by each body. The officers were to resolve any issues jointly, referring them to Justice Mandamin if consensus was not achieved (paras 21-26). In the second dispute an allegation of vote-buying was made after the election. The matter was brought before Justice Mandamin through the procedure outlined above. He concluded that vote-buying violated the RRAFN's laws, but had not been shown in this case (paras 39-72).
Indigenous Laws and Legal Orders	The proceeding was decided on the basis of the RRAFN's Indigenous laws as codified in the *Roseau River Anishinabe First Nation Constitution* [*RRAFN Constitution*] and the *Roseau River Anisihinabe First Nation Election Act* [*RRAFN Election Act*]. When the Federal Court conducts judicial reviews of First Nations' governance issues, it should generally apply the Indigenous law of the First Nation in question (at para 13). The modern rule for statutory interpretation can be applied to Indigenous laws that have been set down in written form (at paras 45-47).
Evidence Considered	
Treatment	This case has been cited positively in subsequent case law. Courts have agreed with the conclusion that written elections and governance laws are Indigenous laws. Courts have also relied on it as authority justifying the application of the modern rule for statutory interpretation to written Indigenous laws, and applied its definition of vote-buying.
Comments	Justice Mandamin conducted the proceeding in accordance with guidance provided to the Federal Court by meetings with Elders in Manitoba and Quebec with a focus on the participation of the parties, the application of and familiarity with RRAFN laws, and process focused on agreement (paras 15 and 73). Justice Mandamin created a specialized procedure for election appeals for the RRAFN granting standing to a number of parties with the opportunity to make submissions before the Court. Of particular note is that he

	provided the officer status as an assessor pursuant to rule 52 of the *Federal Courts Rules* (paras 27-36). The court orders setting out these procedures are helpfully appended to the judgment.

Ignace v British Columbia (Attorney General), 2019 BCSC 10

Judge	The Honourable Mr. Justice Abrioux
Legal Context	In the context of an Aboriginal title and rights claim, application for an order or directions relating to deposition evidence.
Canadian Legal Concepts	Deposition evidence; Aboriginal rights and title
Overview	In the context of their Aboriginal rights and title claim, the plaintiffs, the Stk'emlupsemc te Secwepemc Nation (SSN) made an application for an order in the form of a proposed deposition protocol or, alternatively, directions on the process for taking deposition evidence (para. 5). The Court has to determine: (a) whether a blanket Deposition Protocol is appropriate at this stage of the proceedings; (b) the role of the interpreter/word speller, which is raised by the deposition of Elder Christine Simon; and (c) whether the evidence of an Elder Delores Jules can be taken as part of a panel including another Elder and their daughters, with all four of the women's testimony constituting the "collective" evidence (para 6). Justice Abrioux concludes that (a) while the parties have agreed to certain elements of a Deposition Protocol, unless the terms are also agreed to by the parties, it is premature for the Court to order additional terms to constitute the "blanket protocol", as these terms could apply to witnesses who have not yet been identified; (b) Interpreters/word spellers are permitted to be present at depositions, with their role being to faithfully and accurately reproduce the witnesses' message in the closest natural equivalent of the listener's language without embellishment, omission, explanation, or expression of opinion. The interpreter/word speller should be permitted to seek permission to ask the Elder additional questions for clarifications of the meaning of a given answer, and do so if the parties consent; (c) Elder Jules' deposition evidence may be given as part of a panel and constitute collective evidence in the form of the draft order proposed by Canada at paragraph 67 (paras 7, 80). Justice Abrioux adds that the admissibility of this evidence remains at the discretion of the trial judge (para 7).
Indigenous Laws and Legal Orders	Intending to rely on oral history evidence at trial, SSN submits that its Stsq'ey' (Indigenous law), which reflect Secwepemc spirituality and SSN's connection to its Territory, support its claim to Aboriginal title (para. 9). SSN explains that the Stsq'ey'

	(a) comprise the experiences of Secwepemc ancestors on the land; (b) are written in physical markings on the land and told in Secwepemc stories; (c) are integral to SSN's claim to Aboriginal title (para. 10). Justice Abrioux considers the Stsq'ey' in his analysis regarding where to strike a balance between conventional trial practice, evidence and procedure and Indigenous customs, including the role of interpreters/word spellers and certain Elders testifying as part of a panel (paras 4, 77).
Evidence considered	Affidavit of Chief Ignace regarding the Elder evidence and group evidence (paras 40, 46, 65). Affidavit of word speller Darcy Deneault regarding the role of a word speller (para 31).
Treatment	Referred to in *Giesbrecht v. British Columbia (Attorney General)*, 2020 BCSC 174 at para 31. Treatment in four secondary sources, according to Westlaw.
Comments	Docket: S51952, Kamloops Registry.

Lafferty v Tlicho Government, 2010 NWTCA 4

Judge	Costigan, Paperny, Rowbotham JJA
Legal Context	Self-government agreements
Canadian Legal Concepts	Jurisdiction, Mootness
Overview	The appellants challenged the constitutional validity of a law enacted by the Tlicho Government which provided there would be no more meetings of the Chief's Executive Council, to which the appellants belonged. The Tlicho Constitution provided that challenges were to be heard by the Tlicho Assembly. The Constitution also provided that the Assembly's decision is final. The appellants unsuccessfully challenged the law before the assembly. The appellants subsequently applied to the Supreme Court of the Northwest Territories for an order declaring the law to be *ultra vires*. The Tlicho Government successfully applied to strike the application on the ground that it was an abuse of process seeking to re-litigate issues finally determined by the Assembly (*Lafferty v Tlicho Government*, 2009 NWTSC 35). The decision was appealed. The Court of Appeal dismissed the appeal as moot because the law had been re-enacted. The appellants' attempts to argue collateral issues and vague allegations of damages not advanced in the original application did not suffice to create a live issue requiring the appeal to be heard nonetheless (at paras 8-12). The Court of Appeal also noted that the application was dismissed because it sought a hearing *de novo*, but that the matter may have been allowed to proceed if it had been brought as a judicial review (at paras 2-4).
Indigenous Laws and Legal Orders	Tlicho Constitution
Sources of Indigenous Law	Written Constitution
Evidence Considered	Affidavit Evidence
Treatment	Cited with approval in the Alberta Court of Queen's Bench
Comments	

Pastion v Dene Tha' First Nation, 2018 FC 648

Judge	Grammond, J.
Legal Context	Administrative Law
Canadian Legal Concepts	Elections; Statutory interpretation; Reasonableness review
Overview	The Applicant, Joe Pastion, appealed the results of an election for Chief of the Dene Tha' First Nation [the Nation], claiming that a candidate on the ballot was ineligible to run, and that this could have influenced the results (at para 2). The Election Appeal Board [the Board] found that there was no infraction of the regulations, and that even if there was, it did not significantly affect the results of the election (at para 2). Justice Grammond upheld the decision of the Board.
Indigenous Laws and Legal Orders	Reference to the "custom" of First Nations in the *Indian Act* must be understood in a broad sense as encompassing Indigenous Law, including written laws (paras 7-13). In enacting legislation for selecting its leadership, First Nations may rely on the mechanisms of Western democracy, or may blend Western democracy and Indigenous tradition. The manner in which various sources of law are blended is a matter for each First Nation to decide, and courts should respect those choices (para 14). The enactment of Indigenous election legislation is an exercise of self-government, as is the application of laws. It is desirable that laws be applied by the same people who made them (rather than by the Federal Court) (para 23). Deference is owed to all Indigenous decision makers (para 21-22), but particularly Elders (paras 25-26). Deference is a manifestation of the respect due to Elders in most indigenous societies (para 26). For First Nation election appeal bodies, the election regulations are their "home statute" creating a presumption of reasonableness review (para 27). All of these factors support the application of a reasonableness standard of review (paras 27-29). The Board reasonably found that any challenge to a candidate's eligibility had to be brought immediately after their nomination, rather than after the election (paras 31-44). In this case, the Board has first-hand knowledge of the way in which the Nation has conducted elections (para 42). Where there is an apparent inconsistency or multiple possible interpretations of an Indigenous law, the Indigenous decision-maker is in a better position than the court to understand the purpose and logic of the law in question, and to select an interpretation that will be found legitimate by the members of the community involved (para 46). Although Justice Grammond upheld the Board's finding that there was no infraction, he was asked to comment on the Board's alternative finding that if there was an irregularity, it would not have impacted the result of the election (para 47). First Nation election appeal bodies are not required to

	apply the ‘magic number’ test, which is no longer mandatory in Canadian law (para 52). The question is whether, in the circumstances of the case, the result of the election was significantly affected by an irregularity (para 52). The Board has intimate knowledge of the political situation in the Nation, knowing the candidates, their programs, and the sources of their support among the Nation. The Elders on the Board are in an “infinitely better position” than the court to determine how the election would have proceeded in the absence of the alleged irregularity. Their decision should be respected (at para 55).
Evidence considered	*Report of the Royal Commission on Aboriginal Peoples*, vol 4, *Perspectives and Realities* (Ottawa, 1996)
Treatment	
Comments	

Potskin v Canada, 2011 FC 282

Judge	The Honourable Mr. Justice Mandamin
Legal Context	Motion for recusal
Canadian Legal Concepts	Judicial impartiality Apprehension of bias
Overview	Justice Mandamin issued an order to recuse himself from sitting on the trial in this case as he had previously served as counsel for the mother of the Plaintiffs sixteen years ago.
Indigenous Laws and Legal Orders	Justice Mandamin refers to his taking of the Oath of office on a Bible and with an eagle feather (para 7) The eagle feather informs his oath (para 8) The eagle feather reminds him of the aboriginal perspective, as discussed in *Delgamuukw* at paras 148-150, which must be kept in mind by judges when addressing questions of aboriginal rights (para 8) In reference to the eagle feather, the aboriginal perspective is holistic, it must take in the whole view, as does an eagle in flight (para 11)
Evidence considered	Canadian Judicial Council's *Ethical Principles for Judges* (para 9)
Treatment	
Comments	

Potts v Alexis Nakota Sioux Nation, 2019 FC 1121

Judge	The Honourable Madam Justice McDonald
Legal Context	Application for judicial review
Canadian Legal Concepts	A decision by a First Nation election appeal body tasked with interpreting an election code will generally be reviewed on a standard of reasonableness (para 17) Significant degree of deference must be shown towards a decision of a community electoral law as part of the respect owed to aboriginal peoples in the governance of their internal affairs (paras 18, 40) If an alternative process rooted in Indigenous self-governance is available to adequately resolve an Indigenous election dispute, it is inappropriate for this Court to intervene (para 41) Interpretation of custom electoral regulations
Overview	The Applicant, Pearl Potts, seeks review of the decision of the Electoral Officer of June 20, 2018 regarding her challenge to the Alexis Nakota Sioux Nation's (ANSN) June 15, 2018 election process and results. Ms. Potts made a number of allegations of improper election practices; however, the Officer rejected her appeal as she failed to state her grounds of appeal during the appeal period.
Indigenous Laws and Legal Orders	The ANSN adopted a custom electoral system in 1997 and the ANSN Custom Electoral Regulations outlining the procedural and substantive elements of the custom electoral system (para 4)
Evidence considered	Custom electoral system ANSN Custom Electoral Regulations
Treatment	
Comments	

R v Arnaquq, 2020 NUCJ 14

Judge	The Honourable Justice Paul Bychok
Legal Context	Criminal law—Sentencing
Canadian Legal Concepts	Sentencing principles; *Gladue* principles
Overview	Gary Arnaquq was found guilty of taking part to a riot and causing property damage over $5,000 while in custody at the Baffin Correctional Centre, in Nunavut (paras 1 and 3). Justice Bychok found a number of aggravating factors, including that Mr. Arnaquq incited the riot as well as violence against the guards (para 27). In considering Mr. Arnaquq's circumstances, Justice Bychok takes into account the fact that Mr. Arnaquq says that he is the "dark sheep" of an otherwise respectable and successful family, seemingly increasing his perception of Mr. Arnaquq's moral responsibility as a result (paras 30, 34, 49-50). Justice Bychok also takes into account Mr. Arnaquq's lengthy criminal record, including several violent offences (paras 33-34).
Indigenous Laws and Legal Orders	Having determined that Mr Arnaquq's actions, for a number of reasons, hurt all Nunavummiut (paras 46, 52-53), Justice Bychok considers his actions in light of the principles of Inuit Qaujimajatuqangit (para 54). Justice Bychok explains that the sentence he imposes must reflect the fact that Mr. Arnaquq, "in the most serious of circumstances", failed to observe Inuuqatigiitsiarniq—respecting others, relationships and caring for people—and that he did so (para 54). Justice Bychok writes that the sentence he imposes is consistent with Inuit societal norms, according to which a person could be banished when they endangered the safety of the traditional group (para 55). Justice Bychok adds however that reconciliation and reintegration being hallmarks of Inuit society, many of those persons were later welcomed back into the group (para 55).
Evidence considered	No evidence mentioned regarding the principles of Inuit Qaujimajatuqangit. No *Gladue* report.
Treatment	No treatment.
Comments	Docket: 08-18-480

R v Ippak, 2018 NUCA 3

Judge	The Honourable Justice Ronald Berger
Legal Context	Criminal law
Canadian Legal Concepts	Test for exclusion of evidence under subsection 24(2); Systemic nature of *Charter* violations
Overview	The Court finds that an Inuk man was arbitrarily detained in what constitutes a systemic pattern of *Charter* breaches, thereby warranting the exclusion of the evidence (3.7 pounds of marihuana) that the police found on him. In his concurring reasons, Justice Berger integrates Inuit legal values into his application of the subsection 24(2) analysis (para 94). After acknowledging the existing tension between Inuit law and traditions and the protection of individual liberty through Charter remedies, he determines that Inuit law's restorative approach provides a just solution in the case at bar that is not inconsistent with Canadian legal principles (paras 70, 73-75). Justice Berger writes that when conducting a subsection 24(2) analysis in a case involving an Indigenous accused, Indigenous legal principles and perspectives on criminal law and on the application of the *Charter* must be taken into account into each stage of the analysis in pursuit of the objective of mutually enriching and harmonizing Canadian and Indigenous legal orders (paras 84 and 94). According to Justice Berger, Inuit law plays the greatest role in the third step of the test (*i.e.* society's interest in adjudicating the matter on its merits), where the dichotomy between the competing goals of Canadian and Inuit legal systems emerges most apparent and significant (para 100). Justice Berger concludes that despite their conflicting goals, both systems favour exclusion of the evidence (paras 103-104).
Indigenous Laws and Legal Orders	Justice Berger starts by analyzing the interplay between Canadian law and Inuit law (paras 70-93), before delving into how Inuit law can inform a subsection 24(2) analysis (paras 94-104). Justice Berger writes that within the Inuit legal paradigm, whether a person breaches Canadian law or Inuit maligait, the ultimate consequence is that the person will shorten his or her life (para 87). He further states that the primary intent of Inuit law, as he understands it, is to preserve the community and avoid negative consequences for the individual and the group as a whole (para 87). As for the first stage of the subsection 24(2) analysis, namely the seriousness of the state conduct, Justice Berger writes that as police action cannot be deemed equivalent as elders with social authority within the community, it follows that the enforcement of Canadian law by Canadian

	state actors is not entitled to the same deference in the context of traditional Inuit maligait or tirigusuusiit (para 95). As for the second stage of the subsection 24(2) analysis, namely the impact on the accused's *Charter*-protected interests, Justice Berger states that, considered in light of the objective of Inuit law to reintegrate the individual and preserve the community, the impact of the *Charter* violation and of Mr. Ippak ensuing sentence was even more profound (para 99). As for the third stage of the subsection 24(2) analysis, Justice Berger takes into account the importance, in Inuit law and culture, of the admission of wrongdoing by the offender as well as of reintegration of the individual and preservation of the community before concluding that it does not accord with Canadian society's focus on conviction and sentencing (paras 102-103).
Evidence considered	n/a
Treatment	Although three subsequent decisions cite *Ippak* with approbation, none of these refers specifically to Justice Berger's concurring reasons. A few secondary sources however consider Justice Berger's reasons: see the "Citing References" section on Westlaw.
Comments	Docket: 08-15-001-CAP, Iqaluit Registry <u>Ancillary supports considered:</u> David Milward, *Aboriginal Justice and the Charter – Realizing a Culturally Sensitive Interpretation of Legal Rights* (UBC Press, 2012) (para 73-75). Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 YB Access Just 431 (para 75, n 1). Thomas Dickson "Section 25 and Intercultural Judgment" (2003) 61 UT Faculty of Law Review 141 (para 75, n 1). Jane M. Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime; In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003) 21 Sup Ct L Rev (2d) 3 (para 75, n 1). John Borrows, *Indigenous Legal Traditions in Canada*, Law Commission of Canada (2006) (paras 76-77). John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41: McGill LJ 629 (para 77). Lance Finch, *The Duty to Learn: Taking Account of the Indigenous Legal Orders in Practice*, published in November 2012 for The Continuing Legal Education Society of British Columbia (para 85).

	Inuit Elders: Perspectives on Traditional Law (Iqaluit: Nunavut Arctic College, 1999) (paras 87-89). Mariano Aupilaajurk et al, *Inuit Perspectives on the 20th Century, Volume 4: Inuit Quajimajatuqangit: Shamanism and Reintegrating Wrongdoers into the Community* (Iqaluit: Nunavut Arctic College, 2002) (para 88-90). Dale Dewhurst, "Parallel Justice Systems", in Catherine Bell & David Kahane eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) (para 93). John Borrows & Leonard I. Rotman, *Aboriginal Legal Issues - Cases, Materials and Commentary*, 4th ed (Markham, Ontario: LexisNexis 2012) (para 95, n 2).

R v Itturiligaq, 2020 NUCA 6

Judge	Karan Shaner J.A., Frederica Schutz J.A., Sheila Greckol J.A.
Legal Context	Sentencing; restorative justice; Aboriginal offenders (Gladue)
Canadian Legal Concepts	Constitutional; criminal; human rights
Overview	Accused, 24-year-old Inuit man and traditional hunter for food, intentionally fired hunting rifle at roofline of house after his girlfriend refused to go home with him — Accused, who had no criminal record, entered early guilty plea — Trial judge declared s. 244.2(3)(b) of Criminal Code, which imposed mandatory minimum punishment of imprisonment of four years on conviction for offence, unconstitutional and sentenced accused to less than two years' imprisonment, less credit for pre-sentence custody, and two years' probation — Crown appealed — Appeal allowed; declaration of invalidity set aside and sentence varied to four years' imprisonment — Sentencing judge committed errors that had material impact on sentence to degree that sentence was demonstrably unfit — Accused committed offence of serious violence — Significant penitentiary time was necessary for denunciation and deterrence — Four-year sentence was fit and appropriate for this offence and this offender — As accused was adult whose offending behaviour was inherently dangerous and highly disruptive to public peace, the positive steps he had taken toward rehabilitation were secondary consideration to denunciation and deterrence — Neither fact that offence occurred in small Inuit community, Gladue factors, nor Inuit social justice concepts operated to make mandatory four-year minimum grossly disproportionate sentence for this offender — Accused's youth, lack of criminal record, remorse and rehabilitation prospects provided countervailing mitigation to gravity of offence and aggravating factors and therefore sentence greater than four-year mandatory minimum was not warranted, but these mitigating factors did not weigh so heavily as to — justify imposition of territorial sentence and determination that s 244.2(3)(b) was unconstitutional — As minimum punishment was not grossly disproportionate in circumstances of this case, it was unnecessary to determine whether it was grossly disproportionate in reasonably foreseeable hypothetical case.
Indigenous Laws and Legal Orders	The sentencing judge reiterated findings from earlier decisions regarding residential schools and intergenerational trauma (see *R. v. Mikijuk*, 2017 NUCJ 2, 2017 NUCA 5). Sought to apply Inuit social governance principle of Qaujimajatuqangit into judgments and all practices (paras 25-26). Court of Appeal recognized the important intersection between Indigenous laws and the Canadian criminal system; however, evidentiary record is necessary - the Court cautioned about reliance on Indigenous law in the absence of evidence and lack of community input (paras 74-79).

Evidence Considered	No formal Gladue Report was prepared but relevant Gladue factors were considered
Treatment	This case has been cited across Canada (BC, Saskatchewan, Alberta, Nunavut, and Newfoundland) at both lower and appeal levels; however, they are all in regards to the sentencing for this specific offence (*i.e.* mandatory minimum) in issue, not the Indigenous law
Comments	This case allowed the appeal regarding the length of sentence; however, the Indigenous laws and principles were not at issue. Application for leave to appeal to the SCC filed (alongside companion case *R v Ookowt*, 2020 NUCA 5)

Ratt v Matchewan, 2010 FC 160

Judge	The Honourable Justice Robert M. Mainville
Legal Context	Selection of a First Nation's Chief and Council pursuant to customary code
Canadian Legal Concepts	Recognition of Indigenous governance rights; Jurisdiction of the Federal Court; Duties of fairness and impartiality of administrative bodies
Overview	This case is an application for judicial review challenging the validity of a customary leadership selection process (the impugned selection process; para 1). Both the applicants and half of the respondents allege that they are the legitimate Chief and Council of the *Mitchikanibikok Inik* (Algonquins of Barriere Lake). The other respondents are purported members of the *Mitchikanibikok Inik* Elders Council, who supported the other respondents. As a preliminary matter, Justice Mainville finds that the Federal Court has superviaory authority over the election process at issue even though it was held under custom law. On the merits, Justice Mainville finds that neither the impugned selection process, nor that having previously led to the applicants' purported selection as Chief and Council complied with the *Mitchikanibikok Anishinabe Onakinakewin* (*MAO*), which is the codified leadership selection custom of the *Mitchikanibikok Inik.* Justice Mainville also finds that the impugned selection process was both biased and unfair (para 150). He however declines to embark on a *Corbiere* analysis regarding the alleged exclusion from the eligibility list of selectors of community members living off reserve, due to the absence of standing of the applicants and to the deficiency of the record relating to that issue (paras 155-156).
Indigenous Laws and Legal Orders	The Federal Court considers the *MAO*. The *Mitchikanibikok Inik* are one of the few "Indian bands" that has never been subject to the band elections process under the *Indian Act* (para 9). As such, they may select their leadership in accordance with their customs unimpeded by any conditions or requirements that the Minister may deem appropriate to allow reversion to customary elections (para 10). Indeed, those conditions may sometimes be at odds with traditional leadership selection processes (para 9). Therefore, the *MAO*, if it is not identical to the *Mitchikanibikok Inik*'s ancient traditions, is an unmistakable contemporary product of those ancient traditions (para 19). Justice Mainville first considers whether the *MAO* was complied with in the context of the selection processes at issue, referring specifically to a few *MAO* provisions (paras 107-128). Second, in his analysis regarding whether the process at issue was biased or otherwise unfair, Justice Mainville considers the *MAO*'s three founding principles: *Nitochkiteaminan* (Our Fire), which represents Sun, Earth, and the People as a First Nation; *Niteabetomowinan* (Our Belief), representing the

	knowledge and understanding of the natural law, cultural values, language and respect; and *Nimokichanan* (Our Feast), representing the reaffirmation of the connection with the Land and all living things, maintaining an identity in daily lives and ensuring the survival of the First Nation (paras 23, 133-134). Mentioning that these three principles incorporate the cultural values of respect, unity and good faith, Justice Mainville uses them to support the proposition that those who carry out and supervise leadership selection processes for public bodies, such as a band council, are required at a minimum to project and demonstrate a degree of fair play and impartiality such as to ensure a credible result from those processes (para 133-134).
Evidence considered	1997 report of professor Peter Douglas Elias, who reviewed the *MAO* at the request of the facilitators (reproduced in the affidavit of one of the respondents) (paras 19, 23).
Treatment	Cited by 21 decisions, and by four distinct secondary sources. Followed by two FC decisions; considered by nine decisions; referred to in 10 decisions. The two decisions that considered it with most depth are *Kennedy v. Carry the Kettle First Nation*, 2020 SKCA 32 (paras 8-9 and 36) and *Shirt v. Saddle Lake Cree Nation*, 2018 FC 399 (para 29).
Comments	Docket: T-654-09

Restoule v Canada (Attorney General), 2018 ONSC 7701

Judge	The Honourable Madam Justice Patricia Hennessy
Legal Context	Interpretation, implementation and alleged breach of Robinson Huron Treaty and Robinson Superior Treaty annuity provisions.
Canadian Legal Concepts	The process of negotiation of the Treaties would reflect Anishinaabe perspectives and practices on the means by which consensus would be achieved. (para 62) A strong caution is necessary when reviewing the written record of the events leading up to the negotiations of the Robinson Treaties, as it was created by Euro-Canadians in their languages, from their perspective and usually for their purposes. (para 64) When interpreting a treaty, courts must engage in generous rules of interpretation that extend beyond the four corners of the treaty document. (para 285) The purpose of historic treaties, such as the Robinson Treaties, is to reconcile the pre-existence of Indigenous societies with the assertion of Crown sovereignty. Therefore, treaties must be interpreted in a way that achieves the purpose of the treaty, gives effect to the interpretation of the parties' common intention that best reconciles the interests of both parties at the time the treaty was made, and that promotes the treaty's reconciliatory function. (para 322) A contextual analysis is required in every treaty interpretation. (para 328) The court must consider the possible meanings of the text against the treaty's historical and cultural context. (paras 329-331) A purposive interpretation of the Treaties must be made. (paras 335-339) The honour of the Crown requires that the Crown must implement the Treaties purposively and in a liberal or generous manner. (para 538)
Overview	In 1850 in Bawaating, near Sault Ste. Marie, Ontario, the Anishinaabe of the upper Great Lakes region signed two historic Treaties with the Crown, the Robinson Huron Treaty and Robinson Superior Treaty, that provided for a land cession of a vast territory in Northern Ontario. The Crown paid a lump sum up front and promised to pay a perpetual annuity to the Anishinaabe, to be increased subject to certain conditions. The annuity has not been increased since 1875 when it was set at $4 per person. The nature of the annuity and the conditions under which increases are to be made are the subject of this litigation. Plaintiff First Nations ask the court to interpret the Treaties' promise to increase the annuities according to the common intention that best reconciles the interests of the parties at the time the Treaties were signed

	The first and primary dispute concerns whether the Treaties include a mandatory promise to increase the annuity payments over the equivalent of $4 (equivalent to £1) per person, if the economic conditions allow, or whether that decision is discretionary. The second point of dispute centers on whether the annuity features both a collective amount and a distributive amount.
Indigenous Laws and Legal Orders	Anishinaabe law and legal principles presented at trial were part of the fact evidence into the Indigenous perspective. The plaintiffs did not ask the court to apply Anishinaabe law. (para 13) <u>Governance:</u> Anishinaabe were organized in bands and occupied discrete territories that bands considered communal property. (para 20) Principles of governance were based on sacred laws. Based on Elder testimony, two of the organizing principles of Anishinaabe law and systems of governance were *pimaatiziwin* (life) where everything is alive and everything is sacred and *gizhewaadizin* (the way of the Creator) encompassing the seven grandfather teachings or seven sacred laws of creation. (para 21) According to expert testimony, Anishinaabe governance also included the values of trust, responsibility, reciprocity and renewal and the understanding that the world is deeply interconnected and people must rely on one another to thrive. (para 21) Metaphor of *ishkode* (fire) is central to Anishinaabe governance and politics, fire being part of the diplomatic discourse. Fire was a metaphorical term that could refer to the place where a family lived, to any small gathering of several extended families, to large confederacies of multiple smaller fires, or, more broadly, to a nation or people. (para 22) The metaphor of fire was also used to refer to councils of varying purposes, sizes and compositions. Council fire was a term used to refer to a physical location where meetings were held around which delegates sat with the aim of making decisions and agreements. (para 23) Anishinaabe governance operated as a complex network of common and regional council fires *ishkdoe* that were hosted by an *Ogimaa* (Chief, leader). (para 23) Common councils handled a wide range of matters, including the settlement of internal and external disputed and transactions. (para 24) General or regional councils brought people together from a much wider region to coordinate strategies, plan for concerted action, or make alliances. (para 24)

	New council sites were kindled, when council sessions ended the fire was covered and when a council site was abandoned the fire was put out. (para 25) *Ogimaa* were leaders and each council fire had an *Ogimaa* from a specific doodem who was charged with the responsibility of keeping the fire and by extension hosting the council. (para 26) *Ogimaa* had to demonstrate a record of accomplishments in other roles first, such as warrior or hunter, therefore demonstrating their ability to be a good provider or to protect their people. (para 27) Good leaders were expected to be generous. Political authority was founded in generosity, care for the land and others and commitment to provide for one's people. (para 28) *Ogimaa* were also recognized by Europeans, as the Crown representatives carried out their discussions with them and principal men. (para 29) In Anishinabee worldview, being an *Ogimaa* does not equate to authority, it is rather a concept of leadership that embodied principles of responsibility to and respect for the autonomy of other and sought to achieve consensus among their people. (para 30) *Ogimaa* had no authority over other groups and could not sign treaties on behalf of other polities or their own people without consent. (para 30) Longstanding and continuous use of Anishinaabe place names as evidenced from a comparison of place names ascribed on the 17th century and 19th century maps illustrated the continuity of Anishinaabe governance. (para 31) Anishinaabe had an established tradition of sharing their territory with others, provided authorizationé (para 32) <u>Chief Shingwaukonse</u> Chief Shingwaukonse, Anishinaabe leader was a key player in the principal events leading up to the Robinson Treaties. He addressed petitions and memorials repeating his claims to the rights and authority that flowed from the Anishinaabe's ancient occupation of the territory, as well as his desire for compensation for the collective benefit of his band. He pressed for a settlement of Anishinaabe claims and focused on plans for self-determination and self-sufficiency for his people. (paras 33-38) <u>Kinship and Doodem identity</u> Doodem identity defined Anishinaabe families and polities by creating kin and a sense of connection between those who had the same doodem, regardless of whether they knew one another or had any biological connection at all. With kin came the obligations to show friendship, hospitality and support as well as a sense of responsibility to take care of those kin. (para 39)

	The networks that met at council fires were structured through doodem identity (doodemag in the plural), which articulated their connection to place. A group or band would be known by its Ogimaa's doodem. (para 40) The signatories of the Robinson treaties did have doodem identities. (para 42) <u>Fictive kinship and alliances with colonial actors</u> From the Anishinaabe perspective, if no kin relationship existed, a fictive kin relationship had to be created to initiate a relationship. Fictive kin relationships were equivalent to and entailed the same obligations as real kin relationships. (para 43) Fictive kinship was established through trade, language, and intermarriage that proceeded in accordance with established Anishinaabe protocols in the region. (para 44) Anishinaabe did not view the use of kinship terms with the Crown as a sign of subservience and did not conceive of "father" as an authority figure, but instead as one who was to provide for his children's wants and needs. (paras 45, 87) In the context of the negotiations of the Robinson Treaties, the use of kinship terms served as a diplomatic formality. (para 47) <u>Gift giving, presents and principle of reciprocity</u> Gift giving was ubiquitous among the Anishinaabe and considered an act of moral imperative. Exchanges were made between band members to ensure the health and well-being of the group, and between bands to forge and renew alliances. Hunters shared their bounty knowing that in turn, another hunter would reciprocate and share his when needed. The exchange of gifts among the Anishinaabe also acted as a means of redistributing the wealth throughout the region and encouraging the well-being of one's allies (para 48) Gifts were given in accordance with the principle of reciprocity. The closer the kin relationship between the people, the greater the reliance and, therefore, the implication of trust. (para 49) Gift giving was also part of alliance-making ceremonies and was adopted in alliances between Euro-Canadians and the Anishinaabe. Reciprocal gift giving was representative of the alliance that included the possibility of shared spaces and resources, embodying the principle of mutual interdependence. An alliance included the mutual promise of responsibility for each other. (para 50) Distribution of presents was a custom dating back to almost the point of first contact establishing a binding relationship between Anishinaabe and Europeans. (paras 52-53)

	A metaphor that was directly related to presents and *ishkode* (fire) was "warmth", which meant presents in the sense of warming oneself at the King's Council Fire. Thus, when the British kindled council fires in Anishinaabe territory, these were places where the Anishinaabe could go to receive their annual warmth (presents) and reaffirm and renew their relationship with the Crown. (para 54) <u>Anishinaabe's perspective on creation and relationship to land</u> According to Elder testimony, the Anishinaabe understand themselves as merely one part of creation, deeply connected to and interdependent on the larger collectivity of other being. (para 56) Anishinaabe developed laws that ensured they were relating to the land, animals, flora, fauna, manidoog (spirits), and others in respectful ways that account for mutual responsibility to one another. (para 57) The Anishinaabe's relationship to creation enabled the Anishinaabe to engage with the land, animals, plants, and aadizookaanag (sacred stories) in meaningful ways that nourished them physically and spiritually. These relationships also carried responsibilities. (para 58) Wherever a potential right exists, a correlative obligation can usually be found based on the individual's relationship with the other orders of the world. These stewardship-like concepts (*bimeekumaugaewin*) apply to the Anishinaabe's engagement with the land, plants, and other beings. Principles of acknowledgement, accomplishment, accountability, and approbation are embedded in the Anishinaabe creation epic and associated stories. Anishinaabe legal traditions concerning *bimeekumaugaewin* speak of how the world was created and how beings came to live on the earth; they tell of how the Anishinaabe depended on the Earth, plants, and animals for their sustenance and survival once they arrived. (para 59) Anishinaabe could not act in ways that would violate those relationships that came before their placement on the land and already existent across creation. All of creation sustains, teaches, and heals the humans, the animals, and the plants in a web of interdependence. In return, the Anishinaabe accept responsibility for the land to ensure that it, and the rest of creation, can thrive. (para 60) <u>The Covenant Chain Alliance</u> The Covenant Chain is a British-Indigenous (Haudenosaunee Confederacy) alliance dating back to the early 17th century. The alliance was represented symbolically as a ship tied to a tree, first with a rope and then with an iron chain. The rope represented an alliance of equals; the iron represented strength. The iron chain became one of silver, a metal more durable and more beautiful than iron. The metaphor associated with the chain was that if one party was in need, they only had to "tug on the rope" to give the signal that something was amiss, and "all would be restored." (para 65)

	The British met frequently at designated council fires with the Haudenosaunee to renew the Covenant Chain alliance. (para 66) At the 1755 Council, Sir William Johnson, Superintendent of Indian Affairs, presented the Haudenosaunee with the Union Belt, a wampum belt employed to renew and strengthen the Covenant Chain. (para 66) The Covenant Chain was not an event, but a process that required annual meetings to maintain open communication, mutual agreement, and harmonious relations. (para 66) At these council fires, valuable gifts were exchanged as symbols of good will and tokens of the military and political alliance. (para 67) The British extended the Covenant Chain to hostile First Nations at a series of Councils. (para 69) Johnson convened a Council at Niagara in 1764, which was a diplomatic exercise where the British sought to renew and strengthen the Covenant Chain alliance with the Western Nations, among others. (para 83) At meetings between Johnson and the Indigenous nations, gifts as well as strings of wampum were exchanged between the parties, including the Great Covenant Chain Wampum and the 24 Nation Wampum. (para 84) According to Anishinaabe tradition, the wampum belts where a symbol of promises and mutual support, which renewed and strengthened the relationship with the British. (para 85) <u>Diplomatic discourse and shared metaphors</u> Crown representatives and Anishinaabe leaders developed a mutually understood diplomatic discourse that they used in the decades prior to the Robinson Treaties. This discourse included symbols, metaphors, ceremonies, and items of material culture. (para 89) Indigenous parties sometimes signed treaties with their doodem images. (para 91) <u>Anishinaabe use and understanding of money and the concept of value</u> Anishinaabe knew how to count and could operate in a barter economy with *Made Beaver*, however they did not appreciate the values of large sums of money, which were outside of their trading experiences. Chiefs did not have experience negotiating or receiving large sums of treaty money, they rather had an appreciation of comparative values. (para 166) The Anishinaabe could not estimate the value of land as there was no open market for their land and that there was no culture or tradition among the Anishinaabe of monetizing land. (para 168) The Anishinaabe did consider “value of the land” as something other than monetary. The land was a living part of the web of interconnected relations.

	The people had responsibilities toward the land; the land, in turn, sustained the people and was meant to sustain future generations. (para 169) The value of the land had always been the Anishinaabe's source of their sustenance. (para 170) Treaty Council The substantive treaty discussions started September 5, 1850, following a pipe ceremony and possibly a smudging ceremony. The Treaty Council took place around the Anishinaabe Council Fire at Bawaating (Sault Ste. Marie) and not at the King's Council Fire at Manitowaning, nor at the Legislative Assembly or Executive Council offices of the Provincial. The Treaty Council took place at a central and long-standing site of Anishinaabe governance, it was conducted in Anishinaabemowin, as well as English, and incorporated ceremonies and protocols that characterize the long-standing system of Great Lakes diplomacy. The location of the Treaty Council, as well as the protocols and procedures followed, indicate that the British, including Robinson, had developed at least a functional understanding of the Anishinaabe systems of law, diplomacy, and language. (para 214) Neither Chief could unilaterally accept or reject Robinson's proposal without first discussing it in their own Council. Chief Shingwaukonse and Chief Peau de Chat could only determine through consensus whether to accept or reject the terms, request modifications, or present additional demands. (para 222) Chief Peau de Chat "acknowledged he understood the terms of the treaty & was satisfied." He said "the amt he was to receive made no difference to him. He was already to obey the wishes of his Queen now, as he had always been." Dr. Driben explained this comment from Chief Peau de Chat, stating that this short speech was "in accord with custom, in the characteristic, deferential manner called for on such occasions, as an expression of trust rather than of indifference". Chief Peau de Chat, three other Chiefs, and five principal men signed the Robinson Superior Treaty in open council that day. (para 231) Post-treaty context Post-treaty, the Anishinaabe were concerned with many issues which were considered breaches of their long standing and ongoing treaty relationship with the crown. (para 286-287) On June 1, 1893, the affidavit of Elder John Mashekyash was filed as part of an investigation into the claims for annuities by the Métis. Elder Mashekyash of Batchewana First Nation was present at the negotiations of the Treaties in 1850. The court refused to admit that on its own, the affidavit supports any widespread understanding of the Huron Chiefs at the time the Robinson Huron Treaty was signed. (paras 294, 307-313)

	Anishinaabe are not detail focused in making their claim about annuities, as they were preoccupied with multiple other issues. They were "modest" and "Diplomatic" when making requests under the Treaties. (para 315, 319) It is central for the Anishinaabe to maintain relationships between themselves with others and with the land. (para 326) Certain words and concepts in the Treaties could not be translated into Anishinaabemowin. (para 326) <u>Contextual analysis of common intention</u> The *Aandsokaan* (spirit story) when Nanebozho is transformed into a hare but retains its fundamental identity. (para 353) Wampum belt showing two figures holding hands as links in a chain. (para 353) The shared history, images, and stories reflect the Covenant Chain alliance, the shared concept of preservation of autonomy, and the Nation-to-Nation relationship between the Treaty parties. (para 354) Principles of treaty alliance: mutual respect for each other's autonomy, mutual responsibilities of care, and reciprocity or mutual benefit, as well as renewal of the Covenant Chain alliance to ensure the fulfillment of the other three principles. (para 355) Anishinaabe have an inherent relationship with the land (Anishinaabeakiing). (para 357) Anishinaabe had an interest to enter into a treaty that was consistent with Anishinaabe perspectives, including Anishinaabe law, such as: (para 372) - Kinship: where the Great Mother will be generous and ensure that the Anishinaabe thrive; and - Reciprocity: where the value of the gift received is commensurate with the value of what was given away <u>Consideration of the historical and cultural context of the Robinson treaties</u> A proper analysis of the Treaties must take into account the following historical and cultural context (para 411): - The Anishinaabe perspective, particularly looking at the concepts of respect, responsibility, reciprocity, and renewal as manifested in Anishinaabe stories, governance structures, and political relationships, including alliance relationships; - The historical record of claims and grievances by Anishinaabe Chiefs and leaders Anishinaabe perspective: the Anishinaabe Chiefs and leaders came to the Treaty Council to secure a treaty that was consistent with their long-term relationship with the Crown, which was characterized by the Anishinaabe principles of respect, reciprocity, responsibility, and renewal. From the

	Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown, which was grounded in the Covenant Chain alliance and visually represented on wampum belts with images of two figures holding hands as part of two links in a chain. (para 412) Respect The Anishinaabe were seeking respect for their jurisdiction over the territory (acknowledged in the Royal Proclamation of 1763) and their authority to enter into agreements to share the use of and authority over the territory. The Anishinaabe sought respect for their autonomy, their relationship with the land, and their concepts of governance, as well as a respect for the limits of their experience dealing with Euro-Canadian legal systems and concepts, including the monetization and alienation of land. (para 415) Responsibility The Anishinaabe Chiefs and leaders approached the treaty discussions in accordance with their concept of responsibility, which is connected to the concept of interdependence. The Anishinaabe had a responsibility toward their bands, their clans, and their kin, as well as to the land in all of its manifestations — the animals, flora, fauna, and non-human beings with whom the Anishinaabe shared the territory. There was considerable evidence about the scope of this mutual responsibility. Dr. Stark, for example, described the notion of mutual responsibility in the context of the story of *The Woman Who Married a Beave*r. (para 416) The Anishinaabe Chiefs and leaders came to the Treaty Council with a responsibility to ensure that their people could enjoy continued dependence on the land for their sustenance, their shelter, their medicines, and their spiritual well-being, and, equally, that they could continue to be responsible for that land. Robinson recognized this, evidenced by his initial offer that identified proposed reserves and retained hunting and harvesting rights. (para 417) Reciprocity Reciprocity refers to exchanges within relationships and holds that items of value are given with the expectation that the gift will be returned. In a society without currency, gift exchanges recognized mutual interdependence and resource sharing. (para 418) At the Treaty Council, Chief Shingwaukonse, Chief Peau de Chat, and the other Anishinaabe leaders fully understood that they were providing the Crown with access to and administration over their land for the purpose of Euro-Canadian settlement and development. (para 419) Renewal

	Covenant chain is a process not an event, a process that required annual meetings to maintain open communication, mutual agreement and thus, harmonious relations (para 421) The Robinson Treaties of 1850 descended from that Covenant Chain relationship. The Treaties were a renewal of the ongoing relationship between the Anishinaabe and the Crown. The Treaties were not meant to be the last word on the relationship. Renewal of the relationship was necessary to ensure that both parties could continue to thrive in changing environments. (para 422) For the Anishinaabe, the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances. (para 423) Number of words and phrases from the Treaties were impossible to translate directly into Anishinaabemowin (paras 445-446) The Anishinaabe lived with notions of what they expected of their leaders: to be generous, to live in a good way, to do right by the people. (para 446)
Evidence considered	Both the Robinson Huron Treaty and the Robinson Superior Treaty were at the very heart of this litigation, and therefore were closely scrutinized by the court. The court relied on the following expert witnesses throughout the decision: - Dr. Paul Driben, ethnohistorian qualified as an expert in Anishinaabe cultural traditions, on the details of the Anishinaabe historical use and occupancy of the land, in cross-cultural understandings of both the Anishinaabe and non-Anishinaabe/Crown actors in the treaty-making process. - Ms. Gwynneth Jones, historian qualified as having expertise with respect to the interpretation of historical documents, the interpretation of the interaction between the Canadian government and Aboriginal peoples. - Mr. James Morrison, ethnohistorian qualified as an expert on the Robinson Treaties, with expertise in treatymaking and land settlement in the context of treaty-making in what is now Ontario and qualified to give expert evidence on the social, political, and historical context bearing on the negotiation and 19th century implementation of the Robinson Treaties of 1850, including Indigenous-Crown relations and Anishinaabe history and culture. - Mr. Alan Corbiere, ethnohistorian qualified as an expert in the oral history and written record of the wampum and Covenant Chain relationship between the Anishinaabe and the Crown from the Anishinaabe perspective during the 18th and 19th centuries. - Dr. Heidi Bohaker, historian and ethnohistorian qualified as an expert in the principles of Anishinaabe governance, doodemag,

	alliances, and treaty-making, with a specific expertise in the Anishinaabe cultural and political contexts that may have informed Anishinaabe expectations of treaty-making with the Crown and the Colonial Government. - Dr. Heidi Kiiwetinepinesiik Stark, political scientist qualified with expertise in Anishinaabe jurisprudence and the application of laws through stories and metaphors to direct diplomacy and governance of Anishinaabe nations in their relations and treaty-making with the Crown and US Governments. - Dr. Carl Beal, economist and economic historian qualified as an expert on the economic aspects of historical treaties, including treaties in what is now Ontario. - Dr. Alain Beaulieu, ethnohistorian qualified to give evidence on agreements and events between the British, French, and Indigenous people from a colonial and Quebec perspective, with a particular emphasis on Indigenous European relations in the first era of New France and the first decades of the British regime after 1763. - Dr. Douglas McCalla, University Professor Emeritus at the University of Guelph, qualified as an expert with respect to the social and economic history of Upper Canada/Ontario in the mid-19th century. - Mr. Jean-Philippe Chartrand, anthropologist and ethnohistorian qualified to provide opinion evidence regarding the intentions and understandings of the parties to the Robinson Treaties and related historical events both before and after the making of the Treaties. - Dr. Alexander von Gernet, anthropologist and ethnohistorian qualified to provide opinion evidence with respect to the historical context for the making of the Robinson Treaties, including mining in the upper Great Lakes region in the 1840s, the history of early land treaties in present-day Ontario and northern United States, history of the formation of the Robinson Treaties, including the objectives and understandings of the Anishinaabe and Crown actors as reflected in this historical record. The court also had the privilege of listening to Elders and Chiefs further describing the political, cultural, historical and linguistic traditions of the Anishinaaabe - Elder Fred Kelly, Elder Rita Corbiere, Elder Irene Stevens, and Elder Irene Makedebin, as well as Chief Dean Sayers, Chief Duke Peltier, and Chief Angus Toulouse all gave testimony in this case The parties filed a joint book of approx. 30,000 pages of primary sources and the same volume of secondary source material The court pointed to the possible frailties associated with recollections of past events, including memory defects, interpreter bias, cultural bias, interviewer bias, feedback effect and knowledge bias (paras 295-296)

	Challenges when relying on the record include (para 297): - What information the author of a document had access to - Whether they would have been included or excluded from discussions and conversations taking place on account of linguistic differences; - Whether the author of the document had distinct beliefs and perspectives that influenced how they perceived the event; - Whether the conceptual framework of the author at the time is different from the conceptual framework used today; and - The fact that the Anishinaabe did not write any of the documents (with very few exceptions) for their own purposes or in their own language. The court found that the post-Treaty record, both written and conduct, is vague, inconsistent, and conflicting. It is of limited assistance to the exercise of searching for the parties' common intention. (para 318) Treaty 48 was relied upon by the plaintiffs to demonstrate that the sharing arrangement stipulated made less than 22 years before the Robinson Treaties, provided that the parties agreed on a two-thirds, one-third sharing structure, with two-thirds of the revenues flowing to the First Nation parties. (para 557) Anishinaabe ceremony came into the courtroom and the court process through witnesses, counsel, and members of the host First Nations. (para 602) Ceremonies and feasts on Anishinaabe First Nation territories were held throughout the process. (paras 604, 607) Sacred fires were tended by firekeepers throughout the hearing process. (para 608) Smudging, Eagle Staff and Pipe ceremonies as well as teachings were offered by Elder Leroy Bennett of Sagamok Anishnawbek First Nation. (para 608) The First Nations were warm and generous hosts when the court convened in their communities. As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on bimaadiziwin — how to lead a good life. Often teachings were more specific (e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. (para 610)
Treatment	Reversed in part (not on the matter of Anishinabe law): *Restoule v Canada (Attorney General)*, 2021 ONCA 779

	Application for leave to appeal filed to the SCC on January 20, 2022
Comments	The parties put the Anishinaabe and Euro-Canadian perspective before the court through eighteen witnesses: eleven qualified experts, who all filed extensive reports, sometimes representing years of academic study and investigation, four Elders, and three Chiefs. The areas of expertise included: history, ethno-history, economic history, Indigenous legal orders, and Anishinaabe linguistic and cultural practices and forms (para 8) There was no disagreement that all types of evidence, if relevant and depending on cogency had value. Evidence was not discounted because it came from an unusual source, both Anishinaabe and Euro-Canadian perspective evidence came before the court on equal footing (para 12)

Spookw v. Gitxsan Treaty Society, 2017 BCCA 16

Judge	Justice Harris
Legal Context	Societies
Canadian Legal Concepts	Standing, Fiduciary Duty, Honour of the Crown
Overview	The Gitxsan Treaty Society [GTS] is a non-profit entity formed to engage in treaty negotiations with the Crown on behalf of the Gitxsan First nation. The appellants were a number of Gitxsan Hereditary Chiefs, Indian Bands, and the Gitksan Local Services Society. They sought to wind up or other oppression remedies against the GTS for acting without a proper mandate from the Gitxsan, failing to act in their best interests, and restricting consultation and involvement in treaty negotiations while assuming debt for which the Gitxsan may ultimately be reliable. They also made claims against Canada and British Columbia for breach of fiduciary duty for continuing to negotiate with the GTS after receiving notice the GTS did not have a proper mandate. The chambers judge dismissed the proceeding, finding that the appellants lacked standing (at paras 3-6). The Court of Appeal agreed with the chambers judge. It concluded that the Chiefs could become members of the GTS to seek these remedies as members, which was a reasonable alternative for bringing these matters before the Court, but chose not to. The GTS was developed to participate in the treaty-making process and could not bind the Gitxsan Nation without approval, and these factors were properly considered by the chambers judge (at paras 46-58). The Court also agreed that although the activities of the GTS could affect the interests of the appellants, only their contingent interests were affected because any treaty would require ratification by the Gitxsan Nation. It concluded that the chambers judge recognized that the way the Gitxsan Nation organizes itself in treaty negotiations is a matter of internal self-government, and it was for the community to decide what role the Bands or Society were to play in those negotiations (at paras 59-68). The Court of Appeal found that the Crown's fiduciary duty was not engaged. The distinct interests and constituents represented imply that no fiduciary obligation arises, the Crown cannot have control over the positions of the Gitxsan Nation at the treaty table. There was no undertaking to act in the best interests of the Gitxsan Nation, and the Crown's representation of all Canadian precludes it from placing their interests above all others in negotiations (at paras 69-81). Finally, the Court of Appeal agreed with the chambers judge that a breach of the duty of the honour of the Crown is not a recognized cause of action. It is not a paternalistic concept that requires the Crown to assess GTS' mandate in the treaty process. Any issues regarding the GTS' mandate are

	more properly directed to the arms-length organization created to allocate negotiation support funding instead of the Crown (at paras 82-89).
Indigenous Laws and Legal Orders	This decision presented an overview of the structure of Gitxsan society and traditional governance, including the role of Hereditary Chiefs, Houses (Wilps), Clans (Pdeeks), communities, and the Indian Bands comprising the Gitxsan (at paras 15-18). In describing the lengthy procedural history of this matter, the Court noted that a prior proceeding had been dismissed as "the courts should be cautious (at a minimum) about interfering in the internal affairs of, or political conflicts within, First Nations, especially where they relate to self-government for the purpose of engaging in the Treaty Process" (at para 27). This concept infused much of the analysis in this case and led to the Court taking a hands-off role and concluding that the matter needed to be resolved internally within the Gitxsan Nation.
Evidence Considered	Not described
Treatment	Cited with approval in the BC Courts
Comments	

Thomas v Norris, 1992 CanLII 354 (BCSC)

Judge	The Honourable Mr. Justice S. W. Hood
Legal Context	Civil action for damages
Canadian Legal Concepts	Tort; defenses; Aboriginal right
Overview	The plaintiff alleges having been assaulted, battered and falsely imprisoned by the defendants, which the latter deny (at 3). This conduct would have taken place while the defendants were initiating the plaintiff into the Coast Salish Big House Tradition, without his consent—as most witnesses recognized. The defendants also assert three alternative defenses: first, lack of intention on their part to inflict harm on the plaintiff, second, consent or acquiescence on the part of the plaintiff, and third, a constitutional defense that they had the legal right to initiate the plaintiff into the Coast Salish Big House Tradition, pursuant to their constitutionally protected right to exercise an existing Aboriginal right within the meaning of subsection 35(1) of the Constitution Act, 1982 (at 3-4). The Aboriginal right claimed by the defendants is their right to carry on and exercise the Tradition, which is called the Coast Salish Spirit Dance (Spirit Dancing). Justice Hood concludes that the defendants have assaulted, battered and falsely imprisoned the plaintiff. He also concludes that the evidence provided is insufficient to demonstrate that Spirit Dancing is an Aboriginal right (at 36-37). He then writes that even assuming that Spirit Dancing was an Aboriginal right prior to the assertion of British sovereignty and to the imposition of English law on Vancouver Island, the aspects of Spirit Dancing that were contrary to English common law did not survive to the latter's coming into force (at 47). Justice Hood finally writes that even if he had found that the Spirit Dance was constitutionally protected by subsection 35(1), such a protection does not provide "freedom from compliance" with the *Criminal Code* or grant civil immunity for tortious conduct like that that is the object of the action (at 50).
Indigenous Laws and Legal Orders	Justice Hood considers the nature and origin of Spirit Dancing as a tradition and a religion (at 33-35) in order to determine whether the evidence demonstrates that it qualifies as an Aboriginal right and if tit survived to the assertion of British sovereignty and to the imposition of English common law at 36-47).
Evidence considered	Testimony of defense witnesses regarding the nature of Spirit Dancing, but no expert testimony.

	Justice Hood refused to admit into evidence this publication, tendered by the defendants: Pamela Amoss, *Coast Salish Spirit Dancing, the Survival of an Ancestral Religion* (University of Washington Press, 1978).
Treatment	Followed in *Moulton Contracting Ltd. v British Columbia*, 2010 BCSC 506. Considered in *Quebec (Procureur general) c Paul*, 1999 CanLII 11034 (Qc Sup Ct); *Runcer v Gould*, 2000 ABQB 25. Referred to in *Chopra v T Eaton Co*, 1999 ABQB 201. Treatment by 19 secondary sources, according to Westlaw.
Comments	Docket: No. 88/412, Victoria Registry

Tsilhqot'in Nation v British Columbia, 2014 SCC 44

Judge	McLachlin CJ (LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ concurring)
Legal Context	Aboriginal Title
Canadian Legal Concepts	Aboriginal Title Aboriginal/Treaty Rights
Overview	People of the Tsilhqot'in Nation lived for centuries in a remote mountainous valley in central British Columbia (the Territory). They lived in villages, managed lands for foraging, hunted, and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the Territory has always been theirs. (para 3) In 1983, a forestry licence was granted in part of the Territory. The Xeni Gwet'in First Nations government (one of the six Tsilhqot'in bands) objected to the use of the land for commercial logging, and sought a declaration prohibiting commercial logging on the territory. The claim was amended in 1998 to include a claim for Aboriginal Title on behalf of all Tsilhqot'in people (para 5). The trial judge, after hearing 339 trial days of evidence, spending time in the Territory and hearing from Tsilhqot'in elders, concluded that the Tsilhqot'in had demonstrated sufficient exclusive pre-sovereignty occupation over not only the village sites and areas maintained for harvesting and foraging, but also over larger territories used regularly by the Tsilhqot'in for hunting, fishing, and other activities. The Court of Appeal, in reversing the trial judge's decision, applied a stricter test for Aboriginal Title that required intensive and site-specific occupation over lands with reasonably defined boundaries. The Supreme Court re-instated the trial judge's decision, finding that the Tsilhqot'in had established a claim for Aboriginal Title, and deferring to the trial judge's factual assessment as to the boundaries over which the Tsilhqot'in could claim title.
Indigenous Laws and Legal Orders	Determining an Aboriginal Title claim requires a culturally sensitive approach, blending the perspectives of the Aboriginal group in question (its laws, practices, size, technological ability, and the character of the land claimed) along with the common law notion of possession as the basis for title. (paras 35, 41) Aboriginal groups (depending on their size and manner of living) might conceive of possession of land in a somewhat different manner than did the common law. (para 41) Aboriginal groups need not demonstrate that they used the lands in ways that would be recognizable to Europeans as possession. (paras 41, 44)
Treatment	
Comments	

Whalen v Fort McMurray No. 468 First Nation, 2019 FC 732

Judge	Grammond J
Legal Context	Self-government of Indigenous people – councils
Canadian Legal Concepts	Aboriginal and Indigenous law
Overview	First Nation (FN) adopted Customary Election Regulations that provided for council with chief and two councillors — Councillor W and chief's son were current councillors — W filed action against chief, son, and FN's chief executive officer seeking reimbursement of sums of money they allegedly misappropriated — After escalation of dispute, W was presented with draft band council resolution suspending her temporarily with pay, and chief and son signed it after W left meeting — Councillor brought application for judicial review — Application granted; resolution quashed — Prematurity argument was rejected since suspension was not authorized, suspension was part of larger dispute that would benefit from early review, council's process had been sufficiently problematic to warrant early review, and it was in public interest to rule on powers of councils in similar circumstances — Council had no power under regulations to suspend councillor except in limited circumstances that did not apply here — Council had no authority to act beyond regulations since they were meant to be exhaustive statement of rules governing election, removal, and suspension of leaders — FN's membership had decided to reserve to itself power to remove and suspend councillors and to deny council power to act alone in those matters, save in certain specific circumstances that did not apply here — FN did not discharge burden of proving unwritten custom that provided council with power to suspend, and other proposed sources of alleged power could not overturn deliberate choice of FN's members not to empower council to suspend councillors — Having developed governance framework outside Indian Act, FN's council could not use by-law powers in s. 81 of Act to alter that framework in manner that was not contemplated when that framework was established, and resolution was not by-law in any event
Indigenous Laws and Legal Orders	Self-governance framework – considerable analysis regarding the interaction between Indigenous laws and unwritten custom (paras 31-41). Custom must be formalized in a by-law or similar document to demonstrate that it reflects the broad consensus of the membership of the First Nation *i.e.*

	exercise of power should be determined by the relevant Indigenous legal system
Evidence Considered	One of the issues in this case appears to be a lack of evidence such as council resolutions, letters, etc.
Treatment	Cited considerably regarding similar issues of exercises of power by self-governance structures of First Nations
Comments	