

Index to Essentials of Canadian Aboriginal Law

(All references are to paragraph numbers.)

Aboriginal law, definition, 1

Aboriginal rights

- Aboriginal title, 321–326
- adoption, customary, 335
- appellate review, 319, 320
- burial sites, 335
- characterization of, 304–311
- communal nature of, 313
- Constitution Act, 1982, s. 35 protection, 263–289
- contemporary rights, 302
- continuity, 301, 312–315
- definition, 1
- evidence of, 316–318
- extinguishment of, 399–401
- harvesting rights, 327–332
- incidental rights, 337, 338
- infringement, 126, 129, 407–411
- justification for infringement, 412–424
- marriage, customary, 335
- Métis, 313
- natural resources, 741–745
- nature of, 290–302
- pleadings, 306
- proof of, 303–320
- prosecutorial context, 307–311
- provincial authority, 53–55
- recognition of, 269
- remedies for infringement, 425–428
- self-government, 333, 334

- sui generis, 294
- teaching practices, customs, 337
- tobacco, use and acquisition of, 335
- trade, evidence of, 336

Aboriginal title

- characteristics of, 612–615
- communal rights, 322, 616
- definition, 1
- enforcement of, 634
- establishment of, 323
- exclusivity, 235
- interest in land, 321
- legal recognition of, 627–633
- natural resources, 737–740
- occupancy, sufficiency of, 323–326
- proof of, 617–625
- territorial conceptions of, 626

bands, *see also* self-government

- appeals regarding band lists, 503, 504
- band lists, 493–504
- candidates for leadership, eligibility of, 536–538
- chief, 520
- chief and council, 520
- community election codes, 552
- council meetings, procedural requirements, 557–559
- criteria, 491
- customs, leadership selection, 520–528

- bands (*cont'd*)
- departmental band lists, rules for, 500–502
 - departmental responsibilities, 496–499
 - elector of, 493
 - fiduciary obligation of council, 560
 - First Nations Elections Act, 546–551
 - First Nations Land Management Act, 488, 489, 553, 554
 - First Nations Oil and Gas and Moneys Management Act, 488, 553, 554
 - general, 486–490
 - Indian Act, election requirements of, 529–545
 - Indian Act, ministerial authority under, 530–532
 - leadership selection, 519–552
 - legal capacity of, 553–556
 - legislative authority of, 561–602
 - member of, 492, 493
 - membership, band rules for, 509–513
 - membership, control of, 505–508
 - membership, determining, 492–518
 - protests regarding band lists, 503, 504
 - review of band membership decisions, 514–518
- Canadian Charter of Rights and Freedoms, s. 25**, 430–432
- Constitution Act, 1867, s. 91¶24**, 7–14, *see also* federal authority
- Constitution Act, 1867, s. 109**, 20–26, *see also* federal authority, reserves
- Constitution Act, 1982, s. 35**, *see also* Aboriginal rights, federal authority, treaty rights
- application of, 282–286
 - existing Aboriginal rights, 263, 264, 269
 - extinguished rights, 264
 - extinguishment, protection from, 272–274
 - general, 36, 263
 - historical Crown policy, 265
 - jurisdiction to hear claims, 287–289
 - justification, test of, 275–281
 - purpose of, 267–271
 - reconciliation, 267, 268
 - treaty rights, 263, 264, 266
- Constitution Act, 1982, s. 35.1**, 429
- court, jurisdiction of**, 4–6
- Crown**, *see also* duty to consult, federal authority, fiduciary obligation, provincial authority
- conduct of, 159, 160
 - fiduciary obligation of, 99–143
 - honour of, 95–98
 - knowledge of, 150–158
 - sovereignty, 3–6, 470–472
 - spending power, 91–94
- duty to consult**, *see also* Crown, fiduciary obligation
- accommodation, 192, 203–210
 - acknowledgement by Crown, 215
 - adverse effects, 161–169
 - constructive knowledge of Crown, 158
 - contemporary treaties, 170
 - Crown conduct, 159, 160

INDEX

- duty to consult (*cont'd*)
- Crown corporations, actions of, 160, 175
 - Crown, delegates of, 231
 - Crown, duty of, 172–182
 - damages, 252
 - declaration of, 250
 - degree of likelihood, 163
 - degree of severity, 165
 - enforcement, 245–248
 - expressly excluded, 170
 - financial compensation for harm, 236
 - financial support for Indigenous participation, 235
 - general, 144–146
 - Indigenous communities, duty owed to, 183–189
 - Indigenous communities, representatives of, 187
 - interlocutory injunctions, 253–257
 - judicial supervision, 251, 252
 - jurisprudence, lower courts, 168
 - justification for failure to consult, 242–244
 - knowledge of Crown, 150–158
 - Métis, duty owed to, 186
 - municipalities, duty of, 181
 - preliminary assessment, 216–218
 - prosecutorial discretion of Crown, 171
 - provincial Crown, 233
 - quashing decision, 258–261
 - reciprocal obligations of good faith, 237–241
 - remedies for breach, 249–262
 - source of, 147–149
 - spectrum of consultation, 193–202
 - standard of care, 190–202
 - standard of review, 211–214
 - statutory review procedures, 224–234
 - third parties, duty of, 182
 - third parties, transfer of rights to, 232
 - timeliness, 219–223
 - treaty rights, 151
 - tribunals, decisions of, 177–180
- Eskimos, see Inuit**
- estates**
- appeal of minister's decision, 1002
 - child, definition, 1007, 1045
 - children, property of, 1044–1048
 - common law partner, 1005
 - exclusive occupation order, 1024–1045
 - family homes on reserves, 1015–1020
 - First Nations Land Management Act, 1012–1014
 - First Nations' laws, 1035–1040
 - Indian Act, 991, 992, 1010, 1011
 - Indians resident on reserve, 992
 - intestacy, 1003–1009
 - land code, 1012–1014
 - matrimonial property rules, 1016
 - mental incompetency, 1041–1043
 - minister, powers of, 993–996, 998, 999
 - provisional federal rules, 1021–1034
 - reserve land, interest in, 1010, 1011
 - survivors' entitlements, 1027–1033
 - wills, 997–1001
- extinguishment**
- Aboriginal rights, 399–401

extinguishment (*cont'd*)

- burden of proof, 395
- general, 394–398
- provincial authority, 397, 398
- treaty rights, 402–406

federal authority

- core of, 11, 12
- Indianness, definition, 12
- Indians, definition, 9, 10
- Inuit, 9
- limits on, 19–36
- Métis peoples, 10
- non-status Indians, 10
- provincial authority, encroachment on, 13
- reach of, 13, 14
- reserves, definition of, 15–17
- reserves, parliament's authority over, 18
- spending power, 91, 93, 94

federal department and minister, name changes, 2

fiduciary obligation, see also Crown, duty to consult

- breach of, 104
- categories of, 101
- constructive trust, 138, 139
- federal Crown as fiduciary, 107–115
- general, 99–106
- interest in land, 109, 110, 122
- limits on, 116–118
- provincial Crown, 128–132
- remedies for breach, 133–143
- scope of, 119–127
- standard of care, 105
- transfer of assets, 127

finances, see also reserve, self-government

- administration of band moneys by minister, 883
- borrowing members, 876–878
- businesses on reserve, 972–987
- by-laws authorizing federal payments, 890, 891
- capacity, 972
- capital moneys, 882, 884–887
- co-management of moneys, 911–937
- corporations, use by First Nations, 874
- creditors' remedies, statutory exemptions from, 949–957
- development proposals, 873
- federal Consolidated Revenue Fund, 881
- federal excise tax, exemption from, 849
- federal management of Indian moneys, 879–900
- federal management, relinquishing, 892–900
- First Nations Financial Transparency Act, 902–905
- First Nations Fiscal Management Act, 850–858, 876–878, 906–925
- First Nations management of moneys, 901–937
- goods and services taxes, 859–865
- Indian Act, taxation by-laws under, 834–848
- Indian moneys, definition, 879
- Indian moneys, transferred from Crown, 901
- loans to First Nations, 875
- modern treaties, taxation powers under, 866

INDEX

- finances (*cont'd*)
- property deemed on reserve, 959–963
 - property situated on reserve, 958, 964–971
 - reserve lands, revenue from, 872
 - revenue moneys, 882, 888, 889
 - Sechelt Indian Band, 867
 - taxation, powers of, 843–867
 - taxation, statutory exemptions from, 938–948
 - third party management of moneys, 911–937
 - treaties, payments under, 868–871
 - wealth, sources of, 842
- First Nations**, *see* bands
- harvesting rights**, *see also* Aboriginal rights, natural resources
- Aboriginal title, dependence on, 328
 - domestic use and consumption, 329
 - food, social, ceremonial purposes, 746, 747
 - geographic specificity, 327, 328
 - limitations on, 391–393
 - sale and trade, 330–332
 - trade purposes, 748–751
 - treaties, 373–375
- Indian Act**, s. 88, 78–90
- Indians**, *see also* Inuit, Métis
- Constitution Act, 1867, 433–435
 - Constitution Act, 1982, 438
 - corporations, 435, 444
 - Natural Resources Transfer Agreements, 436, 437
 - power to define, 439, 440
 - registration of, 445–453
 - registration process, 454–458
 - statutory definition of, 441–444
- Indigenous law, definition**, 1
- infringement of rights**
- general, 407–411
 - internal limitations on rights, 414
 - justification for, 412–424
 - means, proportionality of, 413, 420–424
 - objective, validity of, 413, 415–419
 - remedies, 425–428
- interjurisdictional immunity**, *see also* provincial authority
- Aboriginal rights, 53–55
 - general, 46–52
 - highway traffic legislation, 62
 - human rights legislation, 66
 - Indian lands, 57–60
 - labour relations legislation, 66
 - land cession treaties, 71
 - liquor legislation, 64
 - medicine, practice of, 63
 - Métis, 70
 - Natural Resources Transfer Agreements, 67–69
 - treaty rights, 56
 - validity of legislation, 46, 47
 - wildlife legislation, 61, 67–69, 71
 - workers' compensation legislation, 65
- interlocutory injunctions**
- balance of convenience, 253, 254
 - injunctive relief against Indigenous communities, 257
 - irreparable harm, 253, 254
 - jurisprudence, 255, 256
 - stay of Crown decision, 256

Inuit, definition, 9

land, Indigenous interest in, *see*

also Aboriginal title, reserves

- Aboriginal title, 611-634
- functional equivalence, 611
- reserves, 611
- sui generis, 610

Métis, *see also* Indians, Inuit

- by-laws, 607-609
- Constitution Act, 1867, 459
- Constitution Act, 1982, 460-464
- definition, 10
- Indian Act, s. 88, 468-469
- lands, 732-736
- membership in settlement, 604
- Métis Settlements General Council, 605, 606
- Natural Resources Transfer Agreements, 465-467
- settlements, 603-609

natural resources, *see also*

Aboriginal rights, Aboriginal title, harvesting rights, treaty rights

- Aboriginal rights, 741-745
- Aboriginal title, 737-740
- council by-laws, 839-841
- federal laws, application on reserve, 837
- federal management of resources, 785-797
- First Nations' management of resources, 798-811
- game and fish, 746-750
- Indian Mining Regulations, 818
- mineral leases and permits, 819-823
- mineral rights, 756, 757, 812-823

- minerals, Nova Scotia, New Brunswick, 816
- oil and gas on reserve, 782-811
- private resources development, 775, 776
- provincial laws, application on reserve, 838
- roots, berries, 755
- surrender of mineral, subsurface rights, 817
- timber, usable plants, 752-755, 824-835
- tobacco, 754
- treaty rights, constraints on, 763-774
- treaty rights, general, 758
- treaty rights, implied, 759, 760
- treaty rights, trade-related, 761, 762
- water, 836

provincial authority, *see also* interjurisdictional immunity

- applicability, 40-71
- extinguishment, 397, 398
- general, 37, 38
- Indian Act, s. 88, 78-90
- legislation by reference, 75-77
- paramountcy, 72-74
- spending power, 92-94
- validity, 39-45

registration

- appeals, 458
- criteria for, 445-453
- enfranchisement, 448
- Indian Register, 454
- process, 454-458
- registrar, 454
- restoration of status, 449

INDEX

reserves

- absolute surrender for sale, 675–680
- allotment, 652
- authorization to use, 658
- British Columbia, lands agreements with, 28
- business, operation on reserve land, 973–975
- Constitution Act, 1867, s. 109, 20–26
- corporations owned by Indians, First Nations, 980
- creation of, 640–646
- Crown, representative of, 646
- definition, 635–638
- designation for lease or license, 681–687
- disposition, involuntary, 669–673
- disposition, voluntary, 674–698
- federal business laws, application on, 980, 981
- First Nations Commercial and Industrial Development Act, 717, 987–990
- First Nations Land Management Act, 657, 699–716, 719
- general, 19
- improvements to land, 650
- Indian Act, disposition under, 674
- Indian Lands Agreement, 1924, 27
- Indian Lands Agreement, 1986, 29
- infrastructure, 648
- labour relations on, 976–979
- land code, 701–716
- leases, section 58, 693, 694
- management of designated land, 689–692
- management of surrendered land, 688, 690–692
- matrimonial property, 718–731
- Métis settlements, Alberta, 732–736
- natural resources, 30–35
- New Brunswick, lands agreements with, 28
- Nova Scotia, lands agreements with, 28
- occupation by non-member, 654
- occupation of, 649
- permits, section 28, 695–698
- possessory interest, 651
- proprietary interest in lands reserved, 19–26
- provincial authority, 57–60
- provincial business laws, application, 982–986
- provisional federal rules, 723–728, 731
- Reserve Land Register, 653
- resolution by council, 652
- special reserves, 639
- surveys and zoning, 647
- transfer of reserve lands, 655
- treaty rights to, 369–372
- trespass, definition of, 659, 660
- trespass, law of, 661–665
- trespass, right to sue for, 666–668
- use of, 656–658

self-government, *see also* bands

- by-laws about intoxicants on reserve, 579, 580
- constitutional right to, 480–485
- family homes on reserves, 601
- First Nations Fiscal Management Act, 586–596
- First Nations Goods and Services Tax Act, 597–600

- self-government (*cont'd*)
- First Nations Land Management Act, 581–585
 - general, 333, 334
 - general by-laws, 566–570
 - Indian Act, 562–580
 - international instruments, 477–479
 - Métis settlements, Alberta, 603–609
 - money by-laws, 571–578
 - oil and gas exploration on reserve, 602
 - oil and gas management, 798–811
 - self-determination, 473–476
 - sovereignty of Crown, 470–472
 - statutory powers, 486–609
 - treaty rights, 376
- taxation**, *see* finances
- treaty**
- basket clause, 365
 - capacity to treat, 353
 - contract law, application of, 347, 348, 367
 - Crown, integrity of, 361
 - Crown, superior bargaining position of, 360
 - historical, 360–365
 - identification of, 349–353
 - international law, application of, 349
 - interpretation of, 359–368
 - land, surrender of, 358
 - modern, 366–368
 - nature of, 346–348
 - oral agreements, reflection of, 363
 - *sui generis*, 349
- treaty rights**
- analogous rights, 343
 - annuity payments, 377
 - Constitution Act, 1982, s. 35 protection, 263–289, 339
 - constraints on, 763, 764
 - disease and famine, relief from, 377
 - education, 377
 - exercise by individual, 345
 - extinguishment of, 402–406
 - geographic limitations, 383–390
 - “government of the country” clauses, 391–393
 - harvesting rights, 373–375
 - incidental rights, 378–380, 759, 760
 - infringement, 407–411
 - international treaties, 340
 - justification for infringement, 412–424
 - limits on, 381–393, 763–774
 - natural resources, 758–774
 - Natural Resources Transfer Agreements, 778–781
 - nature of, 339–345
 - oil and gas on reserve, 782–811
 - private resource development, 775–777
 - provincial authority, 56
 - religion and customs, 377
 - remedies for infringement, 425–428
 - reserves, 369–372
 - self-government, 376
 - specificity of, 341–343
 - trade-related, 761, 762
 - treaty, 346–358