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ABORIGINAL LAW IN CANADA

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What's New in this Update:

This release includes updates to case law and commentary in Chapters 3 (Federal Powers and Responsibilities), 5 (Aboriginal and Treaty Rights), 7 (First Nation Governance under Legislation and Treaties), 8 (Aboriginal Titles and Indian Lands), 17 (Offences, Criminal Law), 20 (Practice Matters) and 21 (Treaties).

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Highlights

In this release the text has been updated in multiple places due to the impact of the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, 2024 CarswellOnt 11020 (S.C.C.). In this release we review the multiple clarifications and additions to the law from that case (referred to simply as "*Restoule*") as follows:

- **Whether the fiduciary obligation is only a description of a general relationship.** The Supreme Court of Canada clarified that the law will enforce specific fiduciary duties owed by the Crown in respect of cognizable Aboriginal interests: *Restoule*, at paras. 241-243. See **Chapter 3, paragraph 3.1290, and 3.1361**.
- **The test for *ad hoc* fiduciary duties upheld.** The Supreme Court of Canada reinforced that "Not every undertaking will ground an ad hoc fiduciary duty", referring with approval to this sentence in *Aboriginal Law in Canada*: *Restoule*, at para. 231. See **Chapter 3, paragraph 3.1362**.
- **The duty of diligent implementation clarified.** The Supreme Court of Canada said that the duty of diligent implementation speaks to how Crown obligations must be fulfilled, rather than specifying a particular result in a given case: *Restoule*, at para. 261. See **Chapter 3, paragraph 3.1870**.
- **Benefits of declaratory relief.** The Supreme Court of Canada confirmed that where the Crown breaches treaty obligations or the duties arising from the honour of the Crown (such as the duty of diligent implementation), the full range of remedies, including damages and other coercive relief, is available to remedy that breach: *Restoule*, at para. 276. See **Chapter 3, paragraph 3.1895**.

A by-law can be valid even if it is not called a "by-law". If an enactment of the band council is described as a "resolution" and not a "by-law", but it otherwise conforms to ss. 2(3)(b) and 81(1)(g) of the *Indian Act* it will be upheld as a valid by-law: *Hiawatha First Nation v. Shearer*, 2022 ONSC 3276, 2022 CarswellOnt 7590 (Ont. S.C.J.), at paras. 30-31, reversed Hiawatha First Nation v. Cowie, 2023 ONCA 524, 2023 CarswellOnt 11880 (Ont. C.A.), additional reasons 2024 ONCA 590 (Ont. C.A.). See **Chapter 7, paragraph 7.1417**.