

TABLE OF CONTENTS

Introduction	1
Chapter I – Concepts, Aims and Methods	5
I. Understanding Indigeneity	5
II. Aims of Indigenous Peoples' Law	17
III. Beyond Legal Positivism	25
A. History	25
B. Legal Pluralism	30
C. Critical Approaches.....	36
Chapter II – Indigenous Peoples and the Law Throughout History	41
I. The Initial Period (1500-1815)	44
A. Jurists and the New World.....	46
B. Treaties of Alliance and Peace	50
1. The Alliance Networks of the American Northeast.....	51
2. Legal Relationships of Equality.....	57
C. The Appropriation of Land by the Colonizer.....	65
1. The Emergence of the Land Purchase Policy	65

2. The Royal Proclamation of 1763	67
D. Chief Justice Marshall's Synthesis	77
II. "Pupils of the Crown" (1815-1960).....	82
A. From "Nations" to "Subjects" to "Pupils"	83
B. Confederation and the Indigenous Peoples	89
1. The 1867 Division of Responsibilities and its Political Consequences	90
2. The Territorial Expansion of Canada	92
C. Large-Scale Treaties	104
D. The Framework of the <i>Indian Act</i>	109
1. Reserves.....	111
2. Band Councils	113
3. Indian Status	114
III. A New Dawn (1960-).....	120
A. The Evolution of Canadian Law.....	121
1. The Settlement of Indigenous Claims.....	123
2. The <i>Constitution Act, 1982</i>	128
3. The Legal Recognition of Aboriginal Rights	131
B. The Evolution of International Law.....	143
1. International Status and Self-determination	147
2. Instruments Concerning the Indigenous Peoples Specifically	153
3. General Human Rights Instruments	155

4. The Substance of International Indigenous Rights.	160
5. Other Protections	166
Chapter III – Land and Resources	171
I. Reserves	172
A. Legal Regime	174
1. Creation of Reserves.....	174
2. Rights of the Band	178
3. Rights of Band Members	180
B. Rights of Non-Members.....	184
1. Occupation Permits	185
2. Surrenders.....	187
3. Expropriation	191
C. Fiduciary Duties	194
II. Aboriginal Rights	203
A. Theory of Aboriginal Rights	204
1. Possible Sources	205
2. The Supreme Court’s Approach.....	211
3. Who Holds Aboriginal Rights?.....	217
B. Content of Aboriginal Rights	226
C. Burden of Proof	235
D. Protection of Aboriginal Rights	246
1. Extinguishment of Aboriginal Rights	247

2. Statutory Protection of Aboriginal Rights	253
3. Constitutional Protection of Aboriginal Rights	255
a) <i>Prima Facie</i> Infringement.....	256
b) Justification Factors	259
c) Remedies	264
4. Impacts and Benefits Agreements.....	275
III. Treaty Rights	283
A. The Main Categories of Treaties	286
B. Treaty Interpretation Techniques	297
C. Legal Protection of Treaties	305
1. General Contract Law	305
2. Legislation.....	307
3. Constitutional Protection.....	312
IV. The Duty to Consult and Accommodate.....	314
A. Decision-Making Processes and the Scope of the Duty to Consult	321
B. Triggering the Duty.....	333
C. Scope of the Duty.....	336
D. Substantive Aspects of the Duty	342
E. Remedies	345
Chapter IV – Indigenous Governance	351
I. Indigenous Political Organization	355

A.	Local Governments	357
B.	Regional Governments	362
C.	Public Governments	365
II.	Indigenous Law-Making	367
A.	Sources of Indigenous Law	368
B.	Recognition of Indigenous Law.....	374
1.	Concept and Legal Basis	374
2.	Challenges of Recognition	385
III.	Constitution of Indigenous Governments.....	391
A.	Sources of Constitutions	392
B.	Governing Bodies.....	399
C.	Membership and Status	404
1.	Band Membership or Citizenship	407
2.	Membership in Métis Communities	410
D.	Powers of Indigenous Governments.....	413
1.	Territorial Powers.....	415
2.	Personal Powers	417
3.	Conflicts of Laws.....	419
4.	Fiscal Powers	424
IV.	Judicial Review of Indigenous Government Action.....	426
A.	<i>The Canadian Charter of Rights and Freedoms</i>	428

B. Aboriginal Constitutions.....	438
C. Administrative Law.....	439
D. Jurisdiction of the Courts	444
Chapter V – Applying and Adapting Legislation.....	449
I. Adapting Legislation to Difference: Recurring Themes ..	450
A. Indigenous Peoples and the Right to Equality	455
B. Identifying Indigenous Persons	464
1. Indian Status	465
2. Modern Treaty Beneficiary Status	471
3. “Aboriginal Persons”	473
II. Indigenous Peoples and the Division of Powers.....	475
A. Scope of Federal Jurisdiction	477
B. Effect on Provincial Laws	480
1. Invalidity of Laws Aimed Directly at Indians ..	480
2. Interjurisdictional Immunity.....	482
3. Applicability of Other Laws.....	488
C. Section 88 of the <i>Indian Act</i>	491
III. Tax and Seizure Exemptions.....	496
A. Scope of the Exemption.....	501
B. Situs of Taxed or Seized Property	503
C. Reform	510
IV. Child Welfare and Custody of Indigenous Children	511

V. Criminal Justice	522
A. Institutions	526
B. Sentencing	530
C. Definition of Offences	538
Table of legislation	541
Table of cases	569
Index	615