

INDEX

Numbers refer to paragraph numbers.

-A -

Aboriginal individuals

Definition, 396
Individual self-identification,
396
Urban indigenous communi-
ties, 13, 185, 386

See also **Membership and sta-
tus, Non-status Indians**

Aboriginal law

See **Indigenous peoples' law**

Aboriginal rights, 3, 15, 16,
18, 33, 66, 237

Allocation of property-like
land rights by the courts,
83, 141, 175, 237

Basis

- Doctrine of continuity, 176,
183
- Pre-existing legal systems,
174
- Prior presence of indige-
nous peoples in America,
190, 194, 199

Constitutional, 15, 82, 112,
113, 116, 125, 175, 180,
212, 320

- Expropriation, 166
- Protection, 180, 183, 200,
212-226, 260, 264, 280

Definition, 174, 189, 263

Duty to consult and to accom-
modate, 174, 237, 294

Exercise

- Regulation and restriction,
212-215

Extinguishment, 201-209

Generic, 183

- Indigenous legal traditions,
320

Heart of indigeneity, 247

Historical approach of courts,
23

- Disconnection between
knowledge in law and
history, 24
- Freezing in distant past, 23
- Reconstruction of colonial
law with today's values, 22
- Stereotypical vision of indi-
genous peoples, 174, 237

Holders, 297

- Impacts and benefits agreements, 227-237
- Intellectual property rights, 193
- Legal recognition, 113-120
- Linguistic rights, 178
- Positive obligation of State, 193
- Origin of concept, 174
- Part of indianness, 406
- Recognition of indigenous laws, 320
- Reconciliation, 237
- Remedy to historical injustice, 237
- Reserves, 148
- Right to self-determination, 20
- Rights related to activities independently of aboriginal title
- Hunting and fishing, 174
 - Territorial aspect, 191
- Royal Proclamation of 1763*, 59
- Self-government, 178, 376
- Inherent right, 183, 298, 296, 331
- Statutory protection, 210, 211
- Sui generis*, 118, 180, 189
- Fiduciary duties, 168
 - Restriction, 118
- Surrender by treaty, 82
- Tax exemption, 193, 417
- See also* **Aboriginal title, Burden of proof, Theory of Aboriginal rights**
- Aboriginal title**, 15, 64, 173, 237
- British Columbia, 78
 - Definition, 189
 - Inalienability, 54, 160, 189
 - Inherent limit, 189-191, 218
 - Royal Proclamation of 1763*, 58, 59, 189
 - Surrender to provinces by means of a treaty, 76
 - Sui generis* right, 189, 190
 - Distinction from proprietary right, 226
- American Convention on Human Rights***, 132
- Recognition of territorial rights of indigenous peoples, 132
- American Declaration of the Rights of Indigenous Peoples***, 128, 132
- Right to consultation, 135
- Application and adaptation of legislation**, 3, 4, 377-455
- Child welfare and custody of indigenous children, 431-437, 455
 - Creation of indigenous institutions to apply laws, 380
 - Criminal justice, 438-455

Division of powers, 398-416
 Identification of indigenous persons, 388
 – Beneficiary status of modern treaties, 394, 395
 – Indian status, 390-393
 – Self-identification, 396, 397
 Indigenization, 388
 Judicial discretion, 397, 426, 432, 434
 – Culturally-sensitive decisions, 381
 Justifications, 378
 – Overrepresentation of indigenous peoples in criminal justice or child welfare systems, 378, 431, 439, 441, 442, 447
 Limits, 455
 Right to equality, 382-387

- B -

Band, 15

Chief and council, 300
 Creation, 297
 – Discretionary decision of government, 300
 – Right to equality, 300
 Definition, 300
 Ethnic government, 300
 Exclusive right to use reserve, 147, 148
 Inherent authority, 299
 Powers
 – Exercise with approval of majority, 335

Sui generis entity
 – Power to sue and be sued, 335
 Tool of colonization, 299, 332
See also **Landless band, Modern band, Reserve**

Band council, 13, 335

Adoption of membership code, 187
 Checks and balances, 361
 Custom band
 – Chosen according to band custom, 185, 300, 316, 322, 332, 333
 Imposition of elective system, 72, 96, 97, 300, 316, 332, 333
 – Majority vote, 185
 – Power of federal government to depose chiefs or councillors, 97
 Power to adopt by-laws, 27, 96, 97, 142, 143, 146, 147, 159, 299, 300, 310, 331, 346, 348-352, 359, 365, 367, 371, 373-375, 445
 – Non-exclusivity and paramountcy, 356, 413
 – Procedure, 336
 – Territorial powers, 348
 – Veto power of minister of Indian Affairs, 97, 299, 350, 351

Band member

See **Rights of members**

Band membership

See **Membership and status**

Beneficiary status, 394-396

See also *Cree-Naskapi (of Quebec) Act, James Bay and Northern Quebec Agreement*

Burden of proof, 194-199

Aboriginal rights related to activities, 188, 191, 196, 198, 199, 264

– Characterization, 192

– Criteria, 195

• Continuity, 195

• Integral part of a distinctive culture, 193

• Relevant time frame, 194

Aboriginal title, 188, 199, 264

– Occupation at time of assertion of British sovereignty, 196-198

– Exclusivity of occupation, 196

Relevant time frame, 199

– Adaptation to Métis case, 197

– Arbitrary character, 197

Types of evidence

– Archives, 198

– Expert testimony of historians and anthropologists, 23-24, 198

– Oral history of indigenous peoples, 198

- C -**Canadian Bill of Rights, 383, 384**

Discrimination against Indian women who married non-Indians, 99, 130, 338, 341, 387, 393

Prohibition to possess alcohol on reserve or to sell alcohol to Indians, 101, 383

Canadian Charter of Rights and Freedoms, 4

Aboriginal rights, 15, 82, 112, 113, 116, 125, 175, 180, 212, 320

– Equally guaranteed to persons of both sexes, 187, 364, 383

Degrees of scrutiny of justification factors of infringement, 218

Immunity of indigenous governments from —, 363-366

Indigenous feminism, 31, 32, 363

Individualist values, 363

Judicial review of indigenous government action, 363-366

Notwithstanding clause, 330

Prohibition of discrimination, 341

Right to equality

– Substantive, 17, 18, 383, 384, 386, 387

- Recognition of indigenous law, 320
- Section 25, 364, 365, 384
- Teleological interpretation by Supreme Court, 179
- See also* **Equality**
- Canadian Human Rights Act***
 - Gender equality, 341
 - Judicial review of indigenous government action, 372
 - Section 67 exemption, 384
- Cession**
- See* **Surrender**
- Charlottetown Accord (1992)**
 - Recognition of the right to self-government, 112
 - Rejection, 112
- Charter of the United Nations***
 - Self-determination of peoples, 124
- Child welfare and custody of indigenous children, 1, 3, 431-437**
 - Application of provincial regimes
 - Overrepresentation of indigenous peoples, 431
 - Systemic discrimination, 431
- Best interests of child, 357, 431
 - Bonding theory, 432, 434
 - Cultural factor, 433, 436
 - Judicial assessment, 432, 434
 - Socio-economic factors, 431, 434
- Conflict between collective and individual interests, 435, 436
- Indigenous child welfare agencies
 - Application of provincial legislation and standards, 437
 - Inappropriate human and financial funding, 437
 - Indigenization, 437
- Placement within extended family or community, 433
- Values of Western society, 378, 432
- See also* ***Convention on the Rights of the Child, Nisga'a Final Agreement***
- Citizenship**
- See* **Membership and status**
- Colonization**
 - Application of criminal law to indigenous peoples, 70, 139
 - Definition, 10
 - Denial of sovereignty and independence, 70, 73, 104
 - Indian Act*, 91-104, 106, 139

- Land treaties, 87-90, 238, 244
- Legal positivism, 104
- Loss of military significance of indigenous peoples, 68, 139
- Paternalism, 34, 36, 71, 104, 114, 295, 296, 350
- Tutorship, 67, 71, 114
- See also* **Covenant of the League of Nations, Enfranchisement, Reserves**
- Comprehensive land claims agreements**
- See* **Modern treaties**
- Constitution Act, 1867***
- Continuation of laws existing immediately prior to Confederation, 331
- Federal jurisdiction over Indians and land reserved to Indians, 75, 205, 383, 398, 400, 401, 407, 412
- Application of provincial laws, 75, 247, 403, 404, 410
 - Provincial property of public lands, 109, 145, 205, 406
 - Surrender of aboriginal title, 76
 - Lands reserved for Indians, 76, 78, 400
 - Protection of indigenous peoples, 75, 76, 404, 416
- See also* **Division of powers, Land treaties, Territorial expansion of Canada**
- Constitution Act, 1930***, 200, 403, 409
- Large and liberal interpretation, 115
- See also* ***Natural Resources Transfer Agreement***
- Constitution Act, 1982***, 86
- Section 35, 82, 112, 116, 125, 175, 180, 320
- Aboriginal title, 15
 - Application to First Nations, Inuit and Métis, 13, 268, 344
 - Collective, 184, 268
 - Justiciability, 113
 - Reference to the past, 197
 - Role of courts, 113, 212
- Duty to consult and to accommodate, 267, 268, 270
- Special procedure of amendment, 112
- Treaty, 241, 242
- See also* ***Charlottetown Accord (1992), Canadian Charter of Rights and Freedoms, Constitutional protection of aboriginal rights, Constitutional protection of treaties, Meech Lake Accord (1987)***

- Constitution of indigenous governments**, 3, 295, 326-360
- Conflict of laws, 356-358
 - Governing bodies, 332-336
 - Indian Act*, 329, 367
 - Judicial review of indigenous government action, 367
 - Membership and status, 295, 328, 337-345
 - Modern self-government legislation, 328, 334, 335
 - Modern treaties, 334
 - Minimal contents set out by federal legislation, 297, 327, 376
 - Powers, 346-360
- See also Yukon First Nations Self-Government Act*
- Constitutional protection of aboriginal rights**, 1, 180, 183, 212-226, 297
- Criminal trial
 - Frequent but inconvenient way, 223
 - Existing rights, 200, 264
 - Expropriation, 166
 - Funding for litigation, 222
 - Jurisdiction, 221
 - Justification test, 320
 - Burden of proof of State, 216
 - Consultation and compensation, 220
 - Impacts and benefits agreements, 228
 - Degrees of scrutiny, 218
 - Honour of the Crown and fiduciary duties, 216, 218
 - Priority of use, 219
 - Sufficiently important purpose, 216, 218
 - Purpose specifically related to infringement, 217
 - Limitation periods, 226
 - Prima facie* infringement, 212, 215, 216, 222, 260
 - Burden of proof, 213, 264, 280
 - Exclusions, 214
 - Remedies, 264
 - Crown immunity, 221
 - Damages, 225
 - Inapplicability of legislation or regulations, 223
 - Injunctions, 221
 - Criteria, 224
 - Discretionary remedy, 224
 - Interlocutory, 224
 - Permanent, 224
 - *Mandamus*, 221
- Constitutional protection of treaties**, 1, 256
- Duty to consult and to accommodate, 262
 - Same as for aboriginal rights, 212, 262
 - Greater severity for modern treaties, 263

***Convention No. 169 on
Indigenous and Tribal
Peoples***, 127, 128

- Colonization, 10
- Definition of « common core »
of rights of indigenous peo-
ples, 133
- Duty to consult and to accom-
modate, 228, 267, 269
- Right to ownership or posses-
sion of traditional lands,
135
- International status and
self-determination, 123,
134

***Convention on the
Elimination of
Discrimination Against
Women***

- Substantive equality, 17

***Convention on the
Elimination of Racial
Discrimination***, 131

- Substantive equality, 17

***Convention on the
Prevention and Punishment
of the Crime of Genocide***

- Definition of genocide, 136

***Convention on the Rights of
the Child***, 137

- Right to share in the cultural
life, 433

Courts

- Role of —, 32, 108, 113, 120,
174, 265, 294
- Assessing culture, 195, 325,
366, 381, 426, 434
- Reconciliation, 116, 237,
266

***Covenant of the League of
Nations***

- Just treatment of native
inhabitants, 71

***Cree-Naskapi (of Quebec)
Act***

- Application of provincial
laws, 415
- Band council, 332, 335
- Beneficiary status, 394
- Category IA lands, 143
- Absence of acquisitive pres-
cription, 155
- Family, 153
- Constitution, 329
- Governing bodies, 335
- Expropriation, 165
- Granting of rights to mem-
bers and non-members
- Referendum for land
concessions for non-resi-
dential purposes, 155
- Implementation, 261
- Modern band, 301, 302
- Regional government, 302
- Territorial powers, 351

Criminal justice, 1, 3, 376, 438-455

Healing circles and justice committees, 442

Indigenous courts, 445

Indigenous police forces, 444

Offences, 453, 454

Overrepresentation of indigenous peoples in prisons, 447

– Incompatibility of system with indigenous conception of crime, 378, 439, 441

– Socio-economic explanation, 439, 441

– Systemic bias, 439-442

Restorative justice, 442

Sentencing

– Banishment, 450

– Flexibility, 446

– *Gladue* decision, 447, 448

– Sentencing circle, 442, 451

- Criteria, 452

Traveling courts, 443

Values of Western society, 378

Culture, 10, 366, 378, 432, 441 and legal systems, 307

Definition, 9

Distinctive culture test, 195

Dynamism

– Acculturation, 9

Essentialism, 9

Language, 9, 14, 193

Transmission, 9, 11, 389

See also Courts (Role of)

Custom, 331

Definition, 313, 322, 332

Proof, 332

Custom band

See Band council

- D -

Declaration on Rights of Indigenous Peoples (of the United Nations)

Best practices in terms of the rights granted to indigenous peoples, 128

Definition of the « common core » of the rights of the indigenous peoples, 133

Free, prior and informed consent, 135, 265, 267

Land rights and resources, 135, 285

Review of indigenous government action, 361

Right to self-determination, 123, 126, 134, 295

– Development of indigenous legal systems, 307

– Membership, 338

Decolonization of law, 32

Definitions

Aboriginal individuals, 396

Aboriginal peoples, 396

- Aboriginal rights, 174, 189, 263
- *Convention No. 169 on Indigenous and Tribal Peoples*, 133
 - *Declaration on Rights of Indigenous Peoples*, 133
- Aboriginal title, 189
- Band, 300
- Colonization, 10
- Constitution, 326
- Culture, 9
- Custom, 313, 322, 332
- Genocide
- *Convention on the Prevention and Punishment of the Crime of Genocide*, 136
- Indian settlement, 142
- Indigenization, 380
- Inherent right, 331
- Interjurisdictional immunity, 404
- Inuit, 27
- Landless band, 142
- Métis, 185, 187, 344
- People, 125
- Public government, 306
- Reserve, 142, 144
- Sovereignty, 38
- Surrender, 161
- Treaty
- *Indian Act*, 24
 - International law, 238
 - Judicial, 241, 242
- Division of powers**, 3, 295, 320, 356, 398-416
- Enclave theory, 408, 411
 - Federal jurisdiction
 - Lands reserved, 400
 - Paramountcy, 410, 413
 - Persons concerned, 401, 403
 - Interjurisdictional immunity, 320, 411, 412
 - Aboriginal rights and treaty rights, 406
 - Definition, 404
 - Labour relations, 405
 - Regulation of leases, 407
 - Provincial legislation
 - Aimed directly at Indians, invalid, 403
 - Application *ex proprio vigore*, 408, 409
 - Application through section 88 of the *Indian Act*, 411-415
- See also* **Cree-Naskapi (of Quebec) Act, Northwest Territories Act, Indian-ness, Nunavut Act**
- Doctrine of continuity**, 55
- Common law, 181
 - Distinction between colony of conquest or cession and colony of settlement
 - Determination of law applicable to colonists of European origin, 176

-
- Foundation for aboriginal rights
 - Lands and resources, 176, 183
 - Self-government, 176, 183
 - Land Purchase Policy, 54
 - Legal pluralism, 176
 - Recognition of indigenous law, 313
 - Supreme Court, 181

 - Doctrine of discovery**, 29, 39, 47, 295

 - Duty to consult and to accommodate**, 1, 3, 4, 183, 264-294
 - Accommodation, 266, 284, 285
 - Compensation and benefit sharing, 290
 - Consultation costs, 289
 - Factors, 288
 - Further consultation, 289
 - Purpose, 288
 - Administrative tribunals, 277
 - Collective aspect, 268
 - Complex decision-making processes, 174, 293
 - Cumulative effects and severance, 274, 291
 - Land use and allocation, 270
 - Non-delegation of the Crown, 275
 - Municipalities, 275
 - Role of decision-makers, 276
 - Environmental assessment and —, 286, 293
 - Forestry, 272, 290
 - General duty, 267
 - Impacts and benefits agreements, 228, 265, 290
 - International law, 264, 265, 267, 285, 293
 - Mining, 270, 273 290
 - Modern treaties, 173, 237, 245, 265, 294
 - Non-application to past wrongs, 269
 - Reciprocal duty of the indigenous peoples to collaborate, 287
 - Remedies, 264, 291
 - Scope, 279, 282, 283, 293
 - Sources, 265
 - Honour of the Crown, 265
 - Practice of indigenous peoples and the resource extraction industry, 264, 288
 - Reconciliation and negotiation, 174, 183, 266, 288, 293
 - Standards of review, 292
 - Trigger, 220, 264, 267, 279
 - Knowledge of claim by the Crown, 281
 - *Prima facie* infringement, 264, 282

– *Prima facie* proof of potential aboriginal right, 280

Veto, 285, 294

See also Convention No. 169 on Indigenous and Tribal Peoples, International Covenant on Civil and Political Rights, Declaration on the Rights of Indigenous Peoples of the United Nations

- E -

Enclave theory, 408, 411

Enfranchisement, 100

Equality, 382-387

Central value of liberal democratic State, 17

Equality and indigenous values, 341, 363, 366, 372

Equality between indigenous groups, 383

– Disparate treatment of various indigenous groups, 386

Equality within indigenous groups, 383

– Indian women who married non-Indians, 99, 130, 338, 341, 387, 393

Formal equality, 382, 383

– Assimilation, 17

– White Paper (1969), 107

Equal respect of cultures, 18

Equality of peoples, 20

Human rights codes and legislation, 383

Immunity from equality guarantees, 364, 365, 384

Substantive equality, 17, 382

– Difference between prejudicial and beneficial legislation, 383

– Positive discrimination, 383

– Recognition of cultural difference, 18

– Systemic discrimination, 378

See also Canadian Bill of Rights, Canadian Charter of Rights and Freedoms, Canadian Human Rights Act

Ethnicity, 7, 8, 9, 12, 17

Ethnic government, 300, 306

Expropriation

Approbation by federal government, 165

Constitutional protection, 166

– Justification, 165

Fiduciary duties, 170-172

Reserves, 143, 145, 165, 166

Rights of non-members, 165, 166

Scope, 166

See also Cree-Naskapi (of Quebec) Act, First Nations Land Management Act

Extinguishment of**aboriginal rights**, 201-209

- Abandonment, 208, 226
- Burden of proof, 201, 209
- Clear and plain intention, 202, 209
- Distinction with regulation, 203
- Exclusive federal power, 403
 - Legislation, 206, 212
 - Treaty or surrender, 205, 245
- Non-extinguishment
 - Agreements with provinces, 210
 - French colonization, 207
 - Interruption of exercise, 208
 - Limitation periods, 208, 226
- Partial, 204

See also James Bay and Northern Quebec Agreement

- F -

Feminism, 31, 32, 363

Fiduciary duties

- Common law doctrine, 168, 169
- Constitutional protection of aboriginal rights, 216, 218
- Criteria, 168
- Expropriation, 170-172
- In Quebec, 169
- Limitation by statute, 171

- Limitation periods, 173
- Management of moneys, 172
- Obligation to act in the best interests of indigenous peoples, 114, 168, 170, 172
- Reserves, 143
 - Creation, 172
- Sui generis* aboriginal rights, 168
- Surrender, 167, 170, 172
 - Management of surrendered lands, 171

First Nations Land Management Act

- Expropriation, 165
- Land code, 143
- Matrimonial property, 153
- Territorial powers, 351

- H -**Honour of the Crown**, 114

- Constitutional principle, 114, 265
- Constitutional protection of aboriginal rights, 216, 218
- Duty to consult and to accommodate, 265

- I -**Impacts and benefits agreements (IBAs)**, 4, 237

- Compensation and profit-sharing, 235
- Duty to consult and to accommodate, 290

- Consent to projects, 230
- Contracts to indigenous businesses, 232
- Dispute resolution, 236
- Environmental protection, 234
- Good neighbours, 233
- Implementation committee, 236
- Nature, 227, 229
- Obligation to negotiate
- Constitutional protection of aboriginal rights
 - Duty to consult and to accommodate, 228, 265
 - Norms of international law, 228
 - Provisions of modern treaties, 228, 229, 245
- Protection by general law of contracts, 248
- Warrantees, 236
- Workforce training and employment, 231
- See also Convention No. 169 on Indigenous and Tribal Peoples, Declaration on the Rights of Indigenous Peoples of the United Nations*
- Indian Act**, 33, 139
- Applicability to Indians of provincial laws of general application, 411-416
- Bagot Commission
- Integration of indigenous peoples, 91
- Bands and band councils, 96-97, 299-302, 329, 332-333, 335-336, 340-342, 346-350, 356, 359
- Discrimination on basis of race, 383
- Evolution, 92
- Exclusive application to First Nations, 13, 15, 187, 386
- Indian status, 98-101, 390-393
- Purchase of indigenous land in the name of the Crown only, 58
- Reserves, 93-95, 142-166
- Section 88, 260, 411-415
- Tax exemption, 417-430
- Tutorship role of State, 114
- Wills and inheritance, 151, 353
- See also Band, Band council, Reserves, Membership and status, Powers of indigenous governments*
- Indian band**
- See Band, Band council, Indian Act, Powers of indigenous governments*
- Indian Bill of Rights**
- See Royal Proclamation of 1763*
- Indian Civil Rights Act**, 361

Indianness

Core of federal jurisdiction,
75, 247, 403, 404, 406-408,
410, 412, 415

Components

- Aboriginal rights, 406, 416
- Legal entitlements, 320,
404

Exclusions

- Aspects of indigenous culture,
404
- Child welfare and custody,
431

Indians

See **Membership and status,
Non-status Indians**

***Indian Self-Government
Enabling Act (British
Columbia)***, 358

Indian settlement, 300

Absence of tax exemption,
146

Definition, 142

Ownership, 146

See also **Reserves, Powers of
indigenous governments**

Indian status

See **Membership and status**

Indian territory

Royal Proclamation of 1763,
56, 59-61

Indigeneity, 5-15

See also **Ethnicity, Membership and status**

Indigenization

Criminal justice, 442

Child welfare and custody of
indigenous children, 442

Definition, 380

Indigenous governance

See **Constitution of indigenous governments, Indigenous law-making, Indigenous political organization, Judicial review of indigenous government action**

Indigenous identity

See **Indigeneity, Membership and status**

Indigenous law-making, 1, 3

Dimensions, 307

Recognition of indigenous
law, 307, 313-325

Self-determination, 295, 307

Sources of indigenous law,
308-312

See also **Powers of indigenous governments**

Indigenous legal traditions,

4, 17, 21, 177, 295, 296

Aboriginal land rights, 176

- Absence of separation between legal norms and other kinds of norms, 26
- Community over individual, 308
- Conflict resolution process, 308
- Core of indianness, 320
- Generic aboriginal right, 320
- Ignorance by Canadian legal system, 27
- Interjurisdictional immunity, 320
- Legal pluralism, 26
- Oral transmission, 312
- Sources, 308-312
- Suppression by Canadian legal system, 27
- Values rather than specific rules, 308
- See also* **Indigenous law-making, Legal pluralism, Recognition of indigenous law**
- Indigenous Nations**, 13
- Absence of recognition, 300
- Characteristics, 185
- Holder of aboriginal rights, 302
- Non-profit association, 300
- Indigenous peoples**
- Cohesive cultural groups, 19
- Connection to land, 19
- Diversity
- Language, 13
- Racialized groups, 8
- Self-government, 8
- Socio-economic conditions, 14
- Specific rights, 8
- Indigenous peoples' law**, 17-15
- Evolution, 5, 92
- From past paternalistic and colonialist ideologies to self-government, 1, 34, 92, 295
- Internationalization, 139
- Interpretation, 16
- Justifications
- Equality, 16, 17
 - Re-establishment and preservation of sacred relationship with land, 140
 - Redressing historical injustice, 1, 19, 20, 33, 140
- Making and remodeling of indigeneity, 7
- Protection of culture, 9
- Reserves, 93-95
- Tool of decolonization, 1
- See also* **Aboriginal rights, Critical approaches, Dispossession, Indian Act, Legal pluralism, Legal positivism**
- Indigenous political organization**, 295, 296
- Local governments, 299-301
- Public governments, 306

- Regional governments,
302-305
- Traditional, 297
- Indigenous persons**
See **Aboriginal individuals,
Non-status Indians, Mem-
bership and status**
- Initial period (1500-1815),
36-66**
- Appropriation of land by
colonizers, 63
- Land Purchase Policy, 54,
55, 139
- *Royal Proclamation of
1763*, 56-82
- Equality and independence,
33, 36, 38, 41, 47, 48, 50,
53, 63, 65, 66
- Doctrine of discovery, 39, 47,
295
- Explorers' commissions
- Acknowledgment of exis-
tence of indigenous peoples
as nations, 47, 139
- Overlap of French and indi-
genous legal orders, 34
- Peace and trade treaties,
41-52, 139, 238, 244
- Sovereignty of the first inha-
bitants, 38, 40, 47, 50, 52,
64, 295, 296
- United States Supreme Court
- Attempt to reconcile inde-
pendence of indigenous
peoples with acquisition of
their lands, 63-66
- Injunctions**, 224
- Interjurisdictional
immunity**, 320, 405-407, 431
- Definition, 404
- International Covenant on
Civil and Political Rights***,
361
- Duty to consult and to accom-
modate, 265
- Prohibition of discrimination,
341, 393
- Rights of minorities, 130
- Rights of the child, 137
- Right to self-determination,
341
- Substantive equality, 17
- International Covenant on
Economic, Social and
Cultural Rights***
- Right to self-determination,
124
- International indigenous
rights**, 133
- Environment, 138
- Lands and resources, 135
- Legal and political status,
134
- Prohibition of genocide, 136
- Rights of child, 137
- International law**
- Convention No. 169, 123,
127, 128 133, 134, 135,
228, 267, 269

- Declaration on the rights of indigenous peoples, 123, 126, 128, 133, 135, 265, 267, 285, 295, 361
- Human rights, 129-132, 136
- Legal positivism
- 19th century, 71
 - Rules enacted by European States, 38, 67, 104, 105
- Natural law, 67, 71
- Initial period (1500-1815)
 - Principles of justice, 71, 105
- Self-determination, 20, 105, 123-126, 341
- Sovereignty
- Acquisition of – by Europeans, 29, 39, 40, 52, 64, 70, 71
 - Original sovereignty of indigenous peoples, 38, 47, 48, 50, 52, 65, 66, 72
- United Nations bodies, 122
- See also* **Doctrine of discovery, International indigenous rights**
- Interpretation**
- Goal, 249
- Legislation
- Intention of legislature, 115
- Treaties, 249, 250
- Modern treaties, 255
 - Contextual interpretation, 251, 254
 - Unequal bargaining power, 115
 - Meaning understood by indigenous peoples, 252
 - Oral promises, 253
 - Presumed intention, 254
- Inuit, 13**
- Federal jurisdiction, 401
- Inuit legal traditions, 27, 317, 318
- Membership in Inuit communities, 395
- Public governments, 306
- See also* **James Bay and Northern Quebec Agreement, Labrador Inuit Land Claims Agreement, Nunavut Land Claims Agreement**
- J -
- James Bay and Northern Quebec Agreement, 143**
- Assistance program for trappers, 109
- Hunting and fishing rights, 109
- Implementation, 261
- Innovative environmental assessment, 109
- Institutions destined to favour self-government, 109, 204
- Interpretation, 255
- Membership
- Beneficiary status, 343, 394

- Modern band, 301
- Modern treaty, 245
- Negotiations
- Unequality of parties, 240
- Ownership over limited territories, 109
- Public government, 306
- Provision of extinguishment of aboriginal rights, 202, 204, 245
- Ratification
- Disagreement of three Inuit communities, 240
- Recognition of indigenous law, 316
- Regional government, 302
- Renunciation to territorial rights in exchange for money compensation, 109
- See also Cree-Naskapi (of Quebec) Act*
- Judicial review of indigenous government action**, 3, 295, 330, 361-376
- Aboriginal constitutions, 297
 - Paramountcy, 367
 - Absence of countervailing powers to powers of band council, 361
 - Indigenous feminism against discrimination, 31, 32, 363
 - Administrative law, 361
 - Application of general rules, 369
 - Assimilation of indigenous governments to other governments, 368
 - *Canadian Human Rights Act*, 361, 372
 - Inadequation for indigenous governments, 370
 - Standards of review, 371
- Canadian Charter of Rights and Freedoms*, 361, 363-366
- International review
- *Declaration on the Rights of Indigenous Peoples* of the United Nations, 361
 - *International Covenant on Civil and Political Rights*, 361
- Jurisdiction of the courts
- Federal Court, 373
 - Indigenous courts, 375
 - Provincial courts, 374
- Tribal courts
- *Indian Civil Rights Act*, 361
- See also Immunity of indigenous governments from the Canadian Charter*
- Jus gentium***
- See International law*
- L -
- Labrador Inuit Land Claims Agreement***
- Recognition of indigenous law, 316

- System, 317
- Landless band**
 - Definition, 142
- Land claim agreements**
 - See* **Modern treaties**
- Land Purchase Policy**
 - Indigenous peoples' right to their land, 54
 - Inalienability of aboriginal title
 - Doctrine of continuity, 54
 - Purchase by colonizers before appropriation of indigenous land, 54, 139
- See also* **Land treaties**
- Land treaties**, 87, 245
 - Maintain way of life, 331
 - Oral negotiations, 240, 244
 - Difficulties of interpretation, 87
 - Sharing of lands, 238, 242
 - Permission to hunt and fish, 88
 - Right to hunt and fish, 244
 - Surrender clause, 88, 89, 238, 244
 - Territories omitted, 90
- Legal pluralism**, 25-28, 296, 307-325
 - Adaptation of law to cultural difference, 28
 - Criminal justice, 442
 - Doctrine of continuity, 176
 - Effectiveness, 25
 - Better governance, 28
 - Inclusive definitions of law, 26
 - Internormativity, 26, 27, 34, 313
 - Legality of norms outside of the State, 25
 - Indigenous legal traditions, 26
 - See also* **Recognition of indigenous law**
- Legal positivism**, 21
 - Definition of law
 - Sanction by the State, 25, 26
 - Instrument of colonial power, 25, 104
- Legal protection of treaties**, 256
 - Constitutional protection, 212, 256, 262, 263
 - General contract law
 - Limits
 - Supremacy of Parliament, 258
 - Undertaking seeking to constrain legislative or regulatory power of State, 258, 259
 - Rescission for non-performance, 257
 - Theory of defects of consent, 257

Indian Act

- Priority in case of conflict with provincial legislation, 242, 259, 260

Statutes implementing modern treaties, 261

Local governments

- Band, 299-300
- Modern band, 301

- M -**Meech Lake Accord (1987)**, 356, 363

- Silence on the rights of indigenous peoples, 112

Membership and status

- Aboriginal rights, 187
- Ancestry, 11, 337, 389
- Band membership
 - Distinction between Indian status and membership in a band, 340, 389, 390
 - Membership code, 187, 297, 329, 341, 343, 365, 390
 - Procedure, 341
 - Prohibition of discrimination, 341
 - Rights of reinstated persons, 341
- Beneficiaries of modern treaties, 394-396
- Discrimination against Indian women who married

non-Indians, 99, 130, 338, 341, 387

- Repeal, 393

Division of powers and status, 401

Enfranchisement, 100

Indian status, 15, 98-104, 390-393

- Benefits and subsidies, 389
- Incapacities and prohibitions
 - Alcohol, 101
 - Right to vote in federal and provincial elections, 103
- Registration, 98, 391, 395, 396

– Tax and seizure exemptions, 389

– Transmission, 11, 392

Inuit groups, 343, 395

Métis groups, 187, 344, 345

Modern treaties, 343, 394-396

Non-status Indians, 13, 98, 187, 305, 396-397, 401

Self-government and definition of membership, 338

See also **Ethnicity, Indigeneity, Race**

Métis, 13

Aboriginal rights, 185, 187

- Proof, 187, 197

Constitution Act, 1982, 13, 268, 344

- Definition, 185, 187, 344
 Ethnogenesis, 81
Manitoba Act, 83
 Membership rules, 187, 344, 345
 Non-application of the *Indian Act*, 13, 142, 187, 386
 Representative associations, 305, 344
 Settlements in Alberta, 345, 387, 403
 Territorial expansion of Canada, 81-83, 344
- Minority rights**, 17, 18, 123
- nathalie
- See also* **Indigenous peoples' law**
- Modern band**
- Legal personhood, 301
 Self-government, 301
- Modern treaties**, 1, 220
- Application of Canadian Charter, 363
 Beneficiary status, 394
 Categories of land, 199, 245, 294
 Extinguishment of aboriginal rights, 238
 Constitution, 297, 327, 334
 Constitutional protection, 212, 256, 262, 263
 Content
 - Co-management of resources, 237
 - Self-government, 237, 245, 306
- Duty to consult and to accommodate, 237, 245, 267, 294
 Exclusion of tax exemption, 417
 Impacts and benefits agreements, 220, 245
 Interpretation, 255
 Legal effect
 - Incorporation into legislation, 261, 263
- Membership code, 343
 Modern band, 301
 Proof, 199
 Public government, 306
 Regional government, 302
 - Shared governance, 304
- Right to fish, hunt and trap, 245
- See also* ***Cree-Naskapi (of Quebec) Act, James Bay and Northern Quebec Agreement, Nisga'a Final Agreement, Nunavut Land Claims Agreement***
- N -
- National indigenous associations**
- Absence of statutory powers, 305, 344
 Assembly of First Nations, 305
 Congress of Aboriginal Peoples, 305

- Inuit Tapiriit Kanatami, 305
 Métis National Council, 305, 344
- Native**
See **Indigenous peoples**
- Native law**
See **Indigenous peoples' law**
- Natural Resources Transfer Agreement***
 Respect of obligations contracted in treaties, 85
 Right to hunt and fish, 86, 409
 – Limitations, 85
- Nisga'a Final Agreement***
 Child welfare and custody of indigenous children
 – Pre-eminence of interests of the child, 437
 Payment of taxes, 417
 Restrictions of powers, 356
 – Content of laws, 357
 – Mode of exercise, 357
- Non-member**
See **Rights of non-members**
- Non-status Indians**, 13, 98, 187, 396, 397, 401
- Northwest Territories Act***
 Application of provincial laws, 415
- Numbered treaties**
See **Land treaties**
- Nunavut Act***
 Application of provincial laws, 415
- Nunavut Land Claims Agreement*, 257**
 Benefits, 261
 Co-management, 284
 Membership
 – Beneficiary status, 343, 394
 Public government, 306
 Recognition of indigenous law, 316
- O -
- Occupation permit**
 Consequences, 157
 Distinction from designation, 163
 Lands held by band, 157
 Land possessed by a member, 158
- P -
- Peace and trade treaties**, 41-52, 65, 66, 139, 238, 243
 Absence of surrender of land rights, 43, 238
 Equality and independence, 33, 36-38, 41, 47, 48, 50, 53, 63, 65, 66
 Freedom to hunt and fish, 43

Military dimension, 33, 41, 42
 – French-English rivalry, 43
 Necessities of fur trade, 33, 41, 42, 47

People, 33

Definition, 125
 Right of secession, 125
 Right of self-determination, 105, 123
 State which has already acquired sovereignty, 125

Powers of indigenous governments, 3, 295

Financial
 – Property tax, 359
 – Sales tax, 360
 Judicial review, 361-372
 – Limited autonomy, 331
 Non-exclusivity and paramountcy, 356
 Personal powers, 352, 353
 Public services, 354
 Regulation by contract, 355
 Territorial
 – Band council, 348
 – Delegation of powers, 352
 – Discretionary ministerial veto, 350
 – Generous interpretation, 349, 351

See also **Cree-Naskapi Act, Indian Self Government Enabling Act of British**

Columbia, *First Nations Land Management Act, Nisga'a Final Agreement, Yukon First Nations Self-Government Act*

Public governments, 306, 339

- R -

Race, 338, 383, 389

Scientific invalidity, 8, 11

Racial discrimination, 12

Indian Act, 383

Skin colour or physical characteristics, 8

Racism

See **Racial discrimination**

Reception of indigenous legal norms by Canadian law

See **Recognition of indigenous law**

Recognition of indigenous law, 1, 26, 27, 176, 296

Administrative, 319

Custom band, 332

Constitutional, 320

Culture and —, 325

Doctrine of continuity, 313

Exercise of power, 321

– Authorized enunciators, 322, 323

- Power to enunciate a contested custom, 323
 - Democratic values, 322
 - Priority to written norms, 312, 322
- Judicial, 297, 320, 331
 - Bands' electoral custom, 322-324
 - Marriage and adoption, 313, 314, 322-324
 - Non-recognition, 315, 320
 - Proof of existence of custom, 314, 322
 - Risk of deforming indigenous law, 323
- Modern treaties, 316
 - Constitution, 297
 - Identification of beneficiaries, 395
- Self-government and —, 320
- Statutory, 316, 318, 320
 - Adoption, 298, 316
 - Elections, 316
- See also James Bay and Northern Quebec Agreement, Labrador Inuit Land Claims Agreement, Nunavut Land Claims Agreement*
- Reconciliation, 237**
 - Balancing of rights and interests, 183
 - Duty to consult and to accommodate, 183, 266, 288, 293
 - Land use, 116
 - Sharing scarce resources, 116
- Negotiation, 183
 - Culture of dialogue and mutual respect, 117
 - Deliberate democracy, 266
 - Judicial capacity, 117, 266
 - Judicial legitimacy, 117
 - Self-government, 331
- Sovereignty, 119
- See also Courts (role)*
- Regional governments, 302-304**
- See also National indigenous associations*
- Reserves, 3, 13, 93-95, 142-174, 335**
 - Aboriginal rights, 106, 148
 - Collective possession, 142, 143
 - Granting of rights to band members or third parties, 147, 150
 - Creation
 - Evangelization, 93, 142
 - Initiation to agriculture, 94, 142
 - Land treaties, 87-89, 238, 244
 - Method of creation, 144
 - Policy of sedentarization, 299
 - Definition, 142, 144

- Exclusive use by Indian bands, 142, 143, 147, 148, 184, 185, 337
- Family, 153
 - Offences, 156
 - Preservation of integrity of reserve, 153
- Expropriation, 143, 145, 165, 166
- Federal administration, 95, 145
- Federal jurisdiction, 143, 145, 400, 404, 407, 408
- Fiduciary duties, 143, 170-172
- Inalienability, 142, 143
- Modernization
- *Cree-Naskapi (of Quebec) Act*, 143
 - *First Nations Land Management Act*, 143
- Natural resources located inside reserve, 149
- Non-application of provincial laws, 142
- Matrimonial property, 153
 - Residential tenancies legislation, 407
- Ownership, 145
- Self-government, 143
- Surrender, 142, 143, 145, 246
- Tax exemption, 142
- See also* **Band, Band council, Fiduciary duties, Indian settlement, Landless band, Occupation permis,**
- Rights of members, Rights of non-members**
- Residential schools**
- Assimilation, 10, 102, 111
 - Destruction of indigenous families and communities, 111
 - Injustice, 10, 19, 389
 - Physical and sexual abuse against children, 102, 111
 - Refusal of parents
 - Penalties, 102
 - Residential schools settlement, 111
 - Truth and Reconciliation Commission, 32
- Residual sovereignty**
- See* **Self-government (Inherent right)**
- Resolutions 1514 and 2625 of the United Nations General Assembly**
- Decolonization, 125
 - Right to self-determination, 124
- Rights of members**
- Certificate of possession, 151, 407
 - Absence of —, 152
 - Rights likened to those of an owner, 151
 - Transfer, 151
 - Will, 151
 - Family, 153

- Prohibition of securities in favour of a non-Indian, 154
- Rights of non-members,** 142, 143
- Expropriation, 165, 166
 - Occupation permit, 157-159
 - Power of the Indian band to impose a property tax, 156, 339
 - Public utility companies, 156
 - Surrender, 160-164
- Right to equality**
- See* **Equality**
- Right to vote**
- Band council elections, 300, 387, 393
 - Federal and provincial elections, 103
- Royal Commission on Aboriginal Peoples**
- Recommendations
 - Acknowledgement of the Métis as Indians covered by the *Constitution Act, 1867*, 401
 - Application of Canadian Charter to indigenous governments, 363
 - Constitution of indigenous nations
 - Membership code, 297, 338
 - Extinguishment of aboriginal rights, 245
 - Interpretation of treaties, 249
 - Shared or merged sovereignty, 119
- Royal Proclamation of 1763**
- Aboriginal title, 58, 59, 189
 - Application to Tribes or Nations of Indians, 185, 331
 - Centralizing control of Indian affairs
 - Commissioners of Indian affairs, 62
 - Collective consent, 60, 160, 164
 - Constitutional force until *Statute of Westminster of 1931*, 200
 - Large and liberal interpretation, 115
 - Prohibition of private transactions, 185, 189
 - Fiduciary duties, 168
 - Requirement that all purchases of indigenous land be made in the name of the Crown, 55, 56, 58, 59, 64, 160, 165
 - Self-government, 60, 96, 313, 331
 - Territorial expansion of Canada, 84, 86
 - Territorial rights of the indigenous peoples, 59, 60, 65, 66
 - Protective goal, 56

Temporary freezing of extension of colonization toward west, 55

- Application to province of Quebec, 59
- Reserve of a territory for indigenous peoples, 56, 59-61

Source of aboriginal rights, 59, 177, 180

- S -

Self-determination, 20, 295

Content, 124

Decolonization, 105, 125

External and internal, 20, 123, 126

International law sources, 124, 134

See also **International Covenant on Civil and Political rights, International Covenant on Economic, Social and Cultural Rights**

Self-government, 3, 8, 65, 178, 295

Application and adaptation of legislation

- Separate laws, procedures or standards, 380

Capacity to make laws, 307

Charlottetown Accord (1992), 112

Collective right, 184

Constitutional conference, 112

- and definition of membership, 338

Doctrine of continuity, 176, 183

Indian Act, 1, 313

Inherent right, 296, 298, 331, 376

International law, 134

Modern self-government legislation, 328, 334, 35

Modern treaties, 237, 245, 306

Recognition, 320, 331

Reconciliation, 331

Reserves, 143

Right to self-determination, 123

Royal Proclamation of 1763, 60, 96, 313, 331

See also **Powers of indigenous governments**

Settlement of indigenous claims

Modern treaties

- Aboriginal title, 109
- Duty to consult and to accommodate, 280, 283

Residential schools, 111

Specific claims, 110

- Indian Claims Commission, 110
- Specific Claims Tribunal, 110

Sovereignty

- Aboriginal rights and —, 295, 376
- Acquisition of – by Europeans, 29, 39, 40, 52, 64, 70, 71
- Definition, 38
- Denial by Canadian judiciary, 52, 70, 119
- Original sovereignty of indigenous peoples, 38, 47, 48, 50, 52, 65, 66, 72
- Residual sovereignty, 64, 65, 66

Sources of indigenous law, 308-311**Surrender**

- Aboriginal title, 76
- Absolute, 161-163
- Consent of a majority of members, 160, 164
- Definition, 161
- Distinction from designation, 162, 163
- Extinguishment of aboriginal rights, 82, 205, 245
- Fiduciary duties, 167, 170-172
- Land treaties, 88, 89, 238, 244, 246
- Leasing or partial rights, 162
- Procedure, 164
- Reserve land, 142, 143, 145, 246

- Rights of non-members, 160-164
- Royal Proclamation of 1763*
 - Crown as intermediary, 160
 - Necessity of consent, 160, 164

- T -**Tax and seizure**

- exemptions, 3, 377, 409, 417-430**
 - Application to status Indians, 419
 - Commercial mainstream, 418, 426
 - Direct and indirect taxation, 421
 - Distinction between fees and taxes, 420
 - Interpretation, 418, 430
 - Property belonging to an Indian or a band, 419
 - Purposes, 418, 429
 - Reform, 429, 430
 - Seizure, 423
 - Situs* on reserve, 419
 - Bank accounts, 427
 - Business and investment income, 424, 426
 - Connecting factors test, 424, 425, 427
 - Employment income, 425
 - Motor vehicle, 427
 - Presumption, 428

- Single factor approach, 424
 - Tangible property, 427
 - Waiver in modern treaties, 417
 - See also Nisga'a Final Agreement*
- Territorial expansion of Canada, 77-86**
- British Columbia, 78
 - Manitoba, 87
 - *Manitoba Act*, 83
 - Métis, 83
 - Natural Resources Transfer Agreement*, 85
 - Newfoundland and Labrador, 79
 - Quebec and Ontario boundaries, 84
 - Renewal of principles of *Royal Proclamation of 1763*, 84, 86
 - Rupert's land, 80, 344
 - Métis, 81, 82, 344
- See also Land treaties*
- Theory of aboriginal rights, 3, 175-187**
- Collective rights, 175, 184, 186, 187, 268
 - Crown grant, 180
 - *Royal Proclamation of 1763*, 177
 - Doctrine of continuity, 176, 180, 181, 183
 - Individual rights, 185, 186, 187, 264
 - Property law concepts, 178, 182
 - Supreme Court's approach, 179-183
- Treaty, 3**
- Analogy with contracts, 242, 257, 258
 - Constitutional protection, 256, 262, 263
 - Definition, 24
 - Comprehensive definition, 241, 242
 - Different meaning in Western and indigenous legal traditions, 240
 - Exclusions
 - Agreements with provincial governments, 247
 - Impacts and benefits agreements, 248
 - Surrenders of reserve lands, 246
 - Families of treaties, 41-46, 87-90, 109, 243-245
 - International law, 238
 - Interpretation, 115, 249-255
 - Legal protection, 256-261
 - Unequality of bargaining power, 240, 249
- See also Land treaties, Modern treaties, Peace and trade treaties*
- Treaty federalism, 20**

Treaty interpretation*See* **Interpretation (Treaties)****Tribal council**, 13, 302**- U -*****Universal Declaration of Human Rights***, 105, 130

Silence on minority rights, 17

See also **International Covenant on Civil and Political Rights****- W -**

White Paper (1969), 107, 384

- Y -***Yukon First Nations Self-Government Act***, 328

Minimum standards, 330

Non-exclusivity and paramountcy of indigenous laws, 356

Paramountcy, 367

Personal powers, 352, 353

