

TABLE OF CONTENTS

Preface	iii
Table of Cases	xiii

Aboriginal Rights

1.1	Introduction	2
1.2	Reconciliation	5
1.3	Section 35	8
1.4	History	8
	1.4.1 Subsection 35(1)	10
	1.4.2 Subsection 35(2) — Aboriginal Peoples of Canada	13
	1.4.3 Subsection 35(3) — Modern Treaty Rights and Land Claims Agreements	13
1.5	Aboriginal Rights	14
	1.5.1 Definition	14
	1.5.2 Establishing an Aboriginal Right — The <i>Van der Peet</i> Test	14
	1.5.3 Proof and Evidentiary Issues	18
	1.5.4 Extinguishment	25
	1.5.5 Infringement	26
	1.5.5.1 Unreasonable Lmitation	27
	1.5.5.2 Undue Hardship	29
	1.5.5.3 Preferred Means	30
	1.5.6 Justification of Infringement	31
	1.5.6.1 Compelling and Substantial Objective	31
	1.5.6.2 Honour of the Crown	33
	1.5.7 Injunctive Relief	38
1.6	Section 25, Canadian Charter of Rights and Freedoms	39
1.7	Individual and Collective Rights	43
1.8	Self Government	45
	1.8.1.1 <i>R. v. Pamajewon</i>	46
	1.8.1.2 <i>Campbell v. B.C.</i>	47
	1.8.1.3 <i>Mitchell v. Canada (Min. of National Revenue)</i>	48
	1.8.2 Implementing Self-Government	49
	1.8.2.1 Dogrib Treaty 11 Council	50
	1.8.2.2 Mohawks of Kanesatake	50
	1.8.2.3 <i>Sechelt Indian Band Self-Government Act</i>	51

1.8.2.4	<i>Cree-Naskapi (of Quebec) Act</i>	52
1.8.2.5	Yukon Territory	54
1.8.2.6	<i>Westbank First Nation Self-Government Act</i>	54
1.8.2.7	Deline Final Self-Government Agreement	55
1.8.2.8	<i>First Nations Jurisdiction over Education in British Columbia Act</i>	56
1.8.3	<i>Indian Act</i>	56
1.8.3.1	Legal Status of Indian Band Councils	57
1.9	International Law	59
1.9.1	United Nations Declaration on the Rights of Indigenous Peoples	59

Aboriginal Title

2.1	Introduction	65
2.2	Historical Aspects of Aboriginal Title	66
2.2.1	Royal Proclamation of 1763	66
2.2.2	Early United States Case Law	67
2.2.3	Pre- <i>Delgamuukw</i> Canadian Case Law	70
2.3	Aboriginal Title	72
2.3.1	<i>Delgamuukw</i> (1997), <i>Marshall/Bernard</i> (2005) and <i>Tsilhqot'in</i> (2014)	72
2.3.2	Nature and Scope of Aboriginal Title	74
2.3.2.1	General Features	74
2.3.2.2	The Content of Aboriginal Title — Exclusive, but Limited Use	75
2.3.3	Establishing Aboriginal Title	78
2.3.3.1	Pre-Sovereignty, Continuous, and Exclusive Occupation	78
2.3.3.2	Negotiated Solutions	84
2.3.4	Justifying Infringements of Aboriginal Title	85
2.3.5	Extinguishing Aboriginal Title	88
2.3.6	Conclusion	89
2.4	Fee Simple Title and Aboriginal Title	91
2.5	Remedies	95
2.5.1	Crown Land Remedies	97
2.5.2	Fee Simple Land Remedies	103

Treaty Rights — Historic

3.1	Introduction	109
3.2	Treaties Generally	110
	3.2.1.1 Definition of a Treaty	110
	3.2.1.2 Interpretation	112
	3.2.1.3 Evidence	117
	3.2.1.4 Geographic Limitations on Treaty Rights	119
	3.2.1.5 Visible, Incompatible Use	121
	3.2.1.6 Treaty Beneficiaries	122
3.2.2	Treaty Rights	124
	3.2.2.1 Section 88, Indian Act — Application of Provincial Laws	124
	3.2.2.2 <i>Grassy Narrows First Nation v. Ontario (Sub. Nom.- Keewatin v. Minister of Natural Resources)</i>	126
	3.2.2.3 Extinguishment	129
	3.2.2.4 Infringement	130
	3.2.2.5 Justification of Infringement	133
	3.2.2.6 Crown's Duty to Consult and Treaty Rights	134
	3.2.2.7 Good Faith Negotiations	134
	3.2.2.8 Interlocutory Injunctions	136
3.2.3	Treaty Rights Claims	136
	3.2.3.1 Specific Land Claims	136
	3.2.3.2 Treaty Land Entitlement	138
3.2.4	Judicial Decisions Regarding Treaty Rights	141
	3.2.4.1 Pre-1982 Treaty Rights Decisions	141
	3.2.4.2 Post-1982 Treaty Rights Decisions	143
3.2.5	Particular Treaties	149
	3.2.5.1 Maritime Peace and Friendship Treaties	149
	3.2.5.2 Pre-Confederation Treaties	150
	3.2.5.3 Post-Confederation Treaties	156

Modern Treaties and Land Claims Agreements

4.1	Introduction	165
4.2	Canada's Comprehensive Land Claims Policy	166
4.3	British Columbia Treaty Commission Process	167
4.4	Interpreting Modern Treaties	170
	4.4.1 Government's Desire for Certainty	179
4.5	Specific Claim Agreements and Modern Treaties or Comprehensive Land Claim Agreements	182
	4.5.1 James Bay and Northern Quebec Agreement (1975)	182
	4.5.2 Northeastern Quebec Agreement (1978)	183
	4.5.3 Inuvialuit Final Agreement (1984)	184

4.5.4	Gwich'in Final Agreement (1992)	184
4.5.5	Sahtu Dene and Métis Land Claim Agreement (1993)	185
4.5.6	Tlicho Agreement (2003)	185
4.5.7	Nunavut Land Claims Agreement (1993)	186
4.5.8	Council for Yukon Indians Umbrella Final Agreement (1993)	190
4.5.9	Nisga'a Final Agreement (1999)	192
4.5.10	Labrador Inuit Land Claims Agreement (2003)	195
4.5.11	Nunavik Inuit Land Claims Agreement (2008)	197
4.5.12	Tsawwassen First Nation Final Agreement (2009)	198
4.5.13	Maa-nulth First Nations Final Agreement (2011)	199
4.5.14	Eeyou Marine Region Land Claims Agreement (2010)	199
4.5.15	Yale First Nation Final Agreement (2013)	199
4.5.16	Tla'amin (Sliammon) Final Agreement (2014)	200
4.5.17	Other Claims	200

Federal Authority

5.1	Introduction	202
5.2	Subsection 91(24), <i>Constitution Act, 1867</i>	202
5.3	“Indians” and “Aboriginal Peoples”	203
5.4	“Lands Reserved for the Indians”	205
5.5	Inuit	206
5.6	Section 35 of the <i>Constitution Act, 1982</i> and its Effect on Federal Legislative Authority	207
5.7	<i>Indian Act</i>	209
	5.7.1 General	209
	5.7.2 The <i>Indian Act</i> and Reserve Lands	210
	5.7.3 Discrimination under the <i>Indian Act</i>	212
5.8	Other Federal Legislation	221
	5.8.1 <i>First Nations Land Management Act</i>	222
	5.8.2 <i>First Nations Commercial and Industrial Development Act</i>	224
	5.8.3 <i>First Nations Financial Transparency Act</i>	224
	5.8.4 <i>First Nations Fiscal Management Act</i>	224
	5.8.5 <i>First Nations Goods and Services Tax Act</i>	225
	5.8.6 <i>First Nations Oil and Gas Money Management Act</i>	225
	5.8.7 <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>	256
5.9	Anti-Corruption Initiatives	226
5.10	Fiduciary Relationship and fiduciary duties	228
	5.10.1 Introduction	228
	5.10.2 Early Case Law	230

5.10.2.1 <i>Guerin v. The Queen</i> (1984)	230
5.10.2.2 <i>Quebec (A.G.) v. Canada (National Energy Board)</i> (1994)	230
5.10.3 Other Fiduciary-Related Case Law	232
5.10.4 Current Law	235
5.10.4.1 <i>Wewaykum Indian Band v. Canada</i> (2002)	235
5.10.4.2 <i>Manitoba Métis Federation v. Canada</i> (AG) (2013)	239

Indian Reserve Land And Related Tax Matters

6.1 Introduction	243
6.2 Creation of Reserves	245
6.2.1 Application of Laws on Reserves	250
6.3 Indian Band Interests in Reserves	251
6.3.1 Crown Duties in Relation to Reserves	253
6.4 Surface and Subsurface Rights	255
6.4.1 Mining	256
6.4.2 Timber	258
6.4.3 Oil and Gas	259
6.5 Water Rights	262
6.6 Granting Interests in, and Disposition of, Reserve Lands	264
6.6.1 Expropriation	264
6.6.2 <i>Osoyoos Indian Band v. Oliver (Town)</i> (2001)	266
6.6.3 Permits or Leases	268
6.6.4 Surrenders and Designations	269
6.6.5 Individual Possession	272
6.7 Security on Reserves	272
6.8 Taxation and Indian Reserve Land	275
6.8.1 Indian Tax Exemption — Section 87, <i>Indian Act</i>	275
6.8.2 <i>Williams v. R.</i> (1992) — Connecting Factors Test	277
6.8.3 Application of <i>Williams</i>	278
6.8.4 Paramount Location Test	281
6.8.5 GST and Other Federal Taxes	284
6.9 Indian Band Taxation Authority	285
6.10 Subsection 90(1), <i>Indian Act</i>	288
6.11 Provincial Taxes	291
6.12 Treaties and Land Claims Agreements	294

Provincial And Territorial Authority

7.1	Introduction	299
7.2	Provincial Authority	300
	7.2.1 Indian Reserves are not Federal Enclaves	300
	7.2.2 Valid Provincial Legislation	301
	7.2.3 Laws of General Application — No “Singling Out”	303
	7.2.4 “ <i>ex proprio vigore</i> ” — “Indianness”	306
7.3	Section 88, <i>Indian Act</i>	309
	7.3.1 Paramouncy	310
	7.3.2 Treaties	311
7.4	Application of Provincial Laws to Treaty Rights	312
7.5	Application of Provincial Laws to Aboriginal Rights	314
7.6	Extinguishment	317
7.7	Natural Resources Transfer Agreements (1930)	321
7.8	Provincial Adjudicative Bodies	323
7.9	Municipalities	325
7.10	Territorial Authority	326

Crown’s Duty to Consult Aboriginal Peoples

8.1	Introduction	330
	8.1.1 <i>Haida Nation v. B.C.</i> (2004)	331
	8.1.2 <i>Taku River Tlingit v. B.C. (Project Assessment Director)</i> (2004)	332
	8.1.3 <i>Mikisew Cree First Nation v. Canada</i> (2005)	334
	8.1.4 <i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council</i> (2010)	335
	8.1.5 <i>Beckman v. Little Salmon/Carmacks First Nation</i> (2010)	336
	8.1.6 <i>Behn v. Moulton Contracting Ltd.</i> (2013)	338
	8.1.7 Sources of Consultation	338
8.2	Honour of the Crown	340
	8.2.1 Introduction	340
	8.2.2 Historical Use in Canada	341
	8.2.3 Modern Development	343
	8.2.4 Engaging the Honour of the Crown — <i>Manitoba Métis Federation Inc. v. Canada (A.G.)</i> (2013)	354
8.3	Crown’s Duty to Consult Aboriginal Peoples	356
	8.3.1 Development of Consultation in <i>Sparrow</i> and <i>Delgamuukw</i>	356
	8.3.2 Duty Rests with the Crown	357
	8.3.3 What is the “Crown” for the Purposes of the Duty?	359

8.3.3.1	Regulatory Boards and Tribunals	359
8.3.3.2	Municipal Governments	362
8.3.4	Triggering the Duty	367
8.3.5	Causal Connection and Potential Adverse Effects	371
8.3.6	Content, Scope and Spectrum of the Duty	375
8.3.7	To Whom is the Duty Owed?	380
8.3.7.1	Métis	383
8.3.8	Duty of Procedural Fairness	385
8.3.9	Legal Standard of Review for Consultation — Consultation as a <i>Procedural Right</i>	386
8.3.10	Obligations of Aboriginal Peoples Regarding Consultation	391
8.3.11	Accommodation	394
8.3.12	Remedies	401
8.3.12.1	Injunctive Relief	402
8.3.12.2	Damages	406
8.3.12.3	Declaratory Relief	407
8.4	Industry and Third Parties	408
8.4.1	Delegation of Consultation to Third Parties	408
8.4.2	The Duty to Consult with Respect to Private Property	410
8.5	Reconciliation	411
8.5.1	Balancing of Aboriginal and Non-Aboriginal Interests	413

Métis Rights

9.1	Who is Métis?	419
9.1.1	Métis for Purposes of Section 35	421
9.1.2	<i>R. v. Powley</i> (2003)	423
9.1.3	Subsection 91(24), <i>Constitution Act, 1867</i>	427
9.2	Métis Rights	429
9.2.1	Métis Aboriginal Rights	429
9.3	Aboriginal Title and the Métis	434
9.3.1	Historic Occupation	435
9.3.2	Continuous Occupation	435
9.3.3	Exclusive Occupation	436
9.4	Métis Land Claims Based on Legislative Instruments	437
9.4.1	<i>Manitoba Act</i> and <i>Dominion Lands Act</i>	437
9.4.2	<i>Manitoba Métis Federation Inc. v. Canada (A.G.)</i> — Lower Court Decisions	439
9.4.3	<i>Manitoba Métis Federation Inc. v. Canada (A.G.)</i> — Supreme Court of Canada (2013)	441
9.4.4	Métis Land Claims Outside Manitoba	444
9.5	The Crown's Duty to Consult Métis Peoples	445

9.6	Federal Developments	445
9.7	Provincial and Territorial Developments	446
9.7.1	British Columbia	446
9.7.2	Alberta	447
9.7.3	Saskatchewan	450
9.7.4	Manitoba	454
9.7.5	Ontario	454
9.7.6	Quebec and the Maritimes	456
9.7.7	Northwest Territories and the Yukon Territory	457
	Maps	
	Modern Treaties and Self-Government Agreements	460
	Historical Treaties of Canada	461
	Index	463
	About the Author	482