

## **Table of Contents**

*(All references are to paragraph numbers.)*

### **Table of Cases**

|  |           |
|--|-----------|
| <b>I. Preliminaries: Terminology .....</b>                         | <b>§1</b> |
| <b>II. The Canadian Legal Framework .....</b>                      | <b>§3</b> |
| 1. The Sovereignty of the Crown .....                              | §3        |
| 2. The Division of Legislative Authority .....                     | §7        |
| (a) Federal Authority: Constitution Act, 1867, Section 91¶24 ..... | §7        |
| (i) General .....  | §7        |
| (ii) “Indians” .....   | §9        |
| A. Section 91¶24 ‘Indians’ .....                                   | §9        |
| B. Core of the Power .....   | §11       |
| C. Reach of the Power .....  | §13       |
| (iii) “Lands Reserved for the Indians” .....                       | §15       |
| A. Which Lands are “Reserved”? .....                               | §15       |
| B. Core and Scope of Power .....                                   | §18       |
| (iv) Limits on Federal Authority .....                             | §19       |
| A. No Proprietary Interest in “Lands Reserved” .....               | §19       |
| 1. General .....   | §19       |
| 2. Constitution Act, 1867, Section 109 .....                       | §20       |
| 3. Indian Lands Agreements, 1924 and 1986 .....                    | §27       |
| 4. Natural Resources Transfer Agreements .....                     | §30       |
| B. Constitution Act, 1982, Section 35 .....                        | §36       |
| (b) Provincial Legislative Authority and Indigenous Peoples .....  | §37       |
| (i) General .....  | §37       |
| (ii) Validity .....  | §39       |
| A. General Principles .....  | §39       |
| B. Specific Restrictions .....                                     | §42       |
| (iii) Applicability: Interjurisdictional Immunity .....            | §46       |
| A. General Principles .....  | §46       |
| B. Some Examples .....   | §53       |

## ESSENTIALS OF CANADIAN ABORIGINAL LAW

|   |      |
|---|------|
| 1. Aboriginal Rights .....                                      | §53  |
| 2. Treaty Rights .....  | §56  |
| 3. Indian Lands .....   | §57  |
| 4. Other .....  | §61  |
| C. Exceptions .....   | §67  |
| 1. Natural Resources Transfer Agreements .....                  | §67  |
| 2. Other .....  | §70  |
| (iv) Paramountcy: Compatibility with Valid Federal Law .....    | §72  |
| (v) Provincial Standards as Federal Law .....                   | §75  |
| A. General .....  | §75  |
| B. Section 88 of the Indian Act .....                           | §78  |
| 1. General Principle .....                                      | §78  |
| 2. Exceptions .....   | §85  |
| 3. Other Legal Means of Achieving Results .....                 | §91  |
| 4. Obligations to Indigenous Peoples: Honour of the Crown ..... | §95  |
| (a) General .....   | §95  |
| (b) The Fiduciary Obligation Toward Aboriginal Peoples .....    | §99  |
| (i) General Principles .....                                    | §99  |
| (ii) The Federal Crown as Fiduciary .....                       | §107 |
| A. When is the Crown a Fiduciary? .....                         | §107 |
| B. Limits on the Federal Fiduciary Obligation .....             | §116 |
| C. Scope of the Federal Fiduciary Obligation .....              | §119 |
| (iii) Fiduciary Obligation and the Provincial Crown .....       | §128 |
| (iv) Remedy .....   | §133 |
| A. Reasons not to Give a Remedy .....                           | §133 |
| B. What Remedy When .....                                       | §136 |
| (c) The Duty to Consult .....                                   | §144 |
| (i) General .....   | §144 |
| (ii) Source and Anchorage of the Duty .....                     | §147 |
| (iii) When the Duty Arises .....                                | §150 |
| A. General .....  | §150 |
| B. Crown Knowledge .....  | §152 |
| C. Crown Conduct .....  | §159 |
| D. “Might Adversely Affect” .....                               | §161 |
| (iv) When the Duty Does not Arise .....                         | §170 |
| (v) Who Owes the Duty .....                                     | §172 |
| (vi) To Whom the Duty is Owed .....                             | §183 |

## TABLE OF CONTENTS

|   |      |
|---|------|
| (vii) Scope of the Duty: “The Standard of Care” .....     | §190 |
| A. General .....  | §190 |
| B. The Low End of the Consultation Spectrum .....         | §194 |
| C. The Midrange of the Consultation Spectrum .....        | §198 |
| D. The Upper End of the Consultation Spectrum .....       | §200 |
| (viii) The Duty to Accommodate .....                      | §203 |
| (ix) Appraising the Crown’s Consultation Efforts .....    | §211 |
| A. The Standard of Review .....                           | §211 |
| B. Acknowledging the Obligation .....                     | §215 |
| C. Preliminary Assessment .....                           | §216 |
| D. Timeliness of the Consultation .....                   | §219 |
| E. Resort to Established Decision-making Procedures ..... | §224 |
| F. Some Essential Features of a Consultation Regime ..... | §231 |
| G. Financial Support for Indigenous Participation? .....  | §235 |
| H. Is the Alleged Harm Compensable by Money?.....         | §236 |
| I. Reciprocal Obligations of Good Faith .....             | §237 |
| J. Can Failure to Consult be Justified? .....             | §242 |
| (x) Jurisdiction to Enforce the Duty .....                | §245 |
| (xi) Remedy .....   | §249 |
| A. General .....  | §249 |
| B. Declaration .....                                      | §250 |
| C. Ongoing Judicial Supervision .....                     | §251 |
| D. Interlocutory Injunction .....                         | §253 |
| 1. At Behest of Aboriginal Community .....                | §253 |
| 2. At Behest of Non-aboriginal Third Party .....          | §257 |
| E. Quashing or Setting Aside the Impugned Decision .....  | §258 |
| F. Damages .....  | §262 |
| 5. Constitutional Protection for Aboriginal Peoples ..... | §263 |
| (a) Section 35 of the Constitution Act, 1982 .....        | §263 |
| (i) Overview .....  | §263 |
| A. What Section 35 Protects.....                          | §263 |
| B. Why? .....   | §267 |
| C. What Protection it Affords .....                       | §272 |
| D. For Whom .....   | §282 |

## ESSENTIALS OF CANADIAN ABORIGINAL LAW

|  |      |
|--|------|
| E. Jurisdiction to Entertain Section 35 Claims ..... | §287 |
| (ii) Aboriginal Rights .....                         | §290 |
| A. Nature of Aboriginal Rights .....                 | §290 |
| B. Proof of Aboriginal Rights .....                  | §303 |
| 1. General .....                                     | §303 |
| 2. Characterizing the Right Claimed .....            | §304 |
| 3. Continuity .....                                  | §312 |
| 4. Evidentiary Issues .....                          | §316 |
| 5. Standard of Appellate Review .....                | §319 |
| C. Kinds of Aboriginal Rights .....                  | §321 |
| 1. Aboriginal Title .....                            | §321 |
| 2. Harvesting Rights .....                           | §327 |
| 3. Self-government Rights .....                      | §333 |
| 4. Other Aboriginal Rights .....                     | §335 |
| 5. Implied and Incidental Rights .....               | §337 |
| (iii) Treaty Rights .....                            | §339 |
| A. Nature of Treaty Rights .....                     | §339 |
| B. What is a Treaty? .....                           | §346 |
| 1. Nature of a Treaty .....                          | §346 |
| 2. Identifying Treaties .....                        | §349 |
| 3. Capacity to Treat .....                           | §354 |
| C. Principles of Treaty Interpretation .....         | §359 |
| 1. General .....                                     | §359 |
| 2. Historical Treaties .....                         | §360 |
| 3. Modern Treaties .....                             | §366 |
| D. Kinds of Treaty Rights .....                      | §369 |
| 1. Reserves .....                                    | §369 |
| 2. Harvesting .....                                  | §373 |
| 3. Self-government .....                             | §376 |
| 4. Other Explicit Rights .....                       | §377 |
| 5. Implied and Incidental Rights .....               | §378 |
| E. Internal Limits on Treaty Rights .....            | §381 |
| 1. Safety Constraints .....                          | §381 |
| 2. Geographic Limitations .....                      | §383 |
| 3. “Government of the Country” Clauses .....         | §391 |
| (iv) Extinguishment .....                            | §394 |
| A. General .....                                     | §394 |

## TABLE OF CONTENTS

|  |          |
|--|----------|
| B. Aboriginal Rights .....                               | §399     |
| C. Treaty Rights.....                                    | §402     |
| (v) Infringement .....                                   | §407     |
| (vi) Justification .....                                 | §412     |
| A. General .....   | §412     |
| B. Valid Legislative or Governmental Objectives .....    | §415     |
| C. Permissible Means of Realizing Valid Objectives ..... | §420     |
| (vii) Remedy .....                                       | §425     |
| (b) Section 35.1 of the Constitution Act, 1982 .....     | §429     |
| (c) Protection from the Charter: Section 25 .....        | §430     |
| <br><b>III. Some Specific Subjects .....</b>             | <br>§433 |
| 1. Indigenous Identity in Canadian Law .....             | §433     |
| (a) “Indian” .....                                       | §433     |
| (i) Constitution Act, 1867 .....                         | §433     |
| (ii) Natural Resources Transfer Agreements .....         | §436     |
| (iii) Constitution Act, 1982 .....                       | §438     |
| (iv) Legislation .....                                   | §439     |
| A. Power to Define “Indian” .....                        | §439     |
| B. “Indian” in Federal Legislation .....                 | §441     |
| 1. General .....   | §441     |
| 2. Registration Criteria .....                           | §445     |
| 3. Registration Process and Appeals .....                | §454     |
| (b) “Métis” .....  | §459     |
| (i) Constitution Act, 1867 .....                         | §459     |
| (ii) Constitution Act, 1982 .....                        | §460     |
| (iii) Natural Resources Transfer Agreements .....        | §465     |
| (iv) Section 88 of the Indian Act .....                  | §468     |
| 2. Affiliation and Governance.....                       | §470     |
| (a) The Question of Indigenous Sovereignty .....         | §470     |
| (i) Justiciability .....                                 | §470     |
| (ii) Self-Determination .....                            | §473     |
| (iii) International Instruments .....                    | §477     |
| (b) Constitutional Rights of Self-Government .....       | §480     |
| (c) Statutory Powers of Self-Government.....             | §486     |
| (i) General .....  | §486     |
| (ii) Constituting Indian Bands .....                     | §491     |

## ESSENTIALS OF CANADIAN ABORIGINAL LAW

|  |      |
|--|------|
| (iii) Determining Band Membership .....                                      | §492 |
| A. General .....   | §492 |
| B. Band Lists Maintained by Department .....                                 | §496 |
| 1. General Departmental Responsibilities .....                               | §496 |
| 2. Membership Rules for Departmental Lists .....                             | §500 |
| 3. Protests and Appeals .....  | §503 |
| C. Band Membership Under Band Control .....                                  | §505 |
| 1. Acquiring Control of Band Membership .....                                | §505 |
| 2. Band Rules for Band Membership .....                                      | §509 |
| 3. Reviewing Band Membership Decisions .....                                 | §514 |
| (iv) Choosing Band Leadership .....  | §519 |
| A. General .....   | §519 |
| B. Band Custom .....   | §520 |
| C. Indian Act Rules .....  | §529 |
| D. First Nations Elections Act Rules .....                                   | §546 |
| E. Statutory Community Election Codes .....                                  | §552 |
| (v) Executive Powers of Band Governance .....                                | §553 |
| A. Basic Legal Capacity and Personality .....                                | §553 |
| B. Procedural Requirements .....   | §557 |
| C. Councils' Obligations to Band Members .....                               | §560 |
| (vi) Band Councils' Legislative Authority .....                              | §561 |
| A. General .....   | §561 |
| B. Indian Act .....  | §562 |
| 1. Overview .....  | §562 |
| 2. General By-laws .....   | §566 |
| 3. Money By-laws .....   | §571 |
| 4. By-laws About Intoxicants on Reserve .....                                | §579 |
| C. First Nations Land Management Act .....                                   | §581 |
| D. First Nations Fiscal Management Act .....                                 | §586 |
| E. First Nations Goods and Services Tax Act .....                            | §597 |
| F. Family Homes on Reserves and Matrimonial Interests<br>or Rights Act ..... | §601 |
| G. First Nations Oil and Gas and Moneys Management<br>Act .....              | §602 |
| (vii) Métis Settlements in Alberta .....                                     | §603 |
| 3. Lands .....   | §610 |
| (a) Nature of the Indigenous Interest .....                                  | §610 |

## TABLE OF CONTENTS

|   |      |
|---|------|
| (i) Defining Features .....                                       | §610 |
| (ii) Functional Equivalence .....                                 | §611 |
| (b) Aboriginal Title .....  | §612 |
| (i) What It Is .....  | §612 |
| (ii) To Whom It Belongs .....                                     | §616 |
| (iii) Proof of Aboriginal Title .....                             | §617 |
| (iv) Territorial Extent .....                                     | §626 |
| (v) Status in Canadian Law .....                                  | §627 |
| (vi) Enforcing Aboriginal Title .....                             | §634 |
| (c) Reserves .....  | §635 |
| (i) Defining “Reserve” .....                                      | §635 |
| (ii) Special Reserves .....                                       | §639 |
| (iii) Reserve Creation .....                                      | §640 |
| (iv) Preparation of Reserve Lands for Use .....                   | §647 |
| (v) Lawful Occupation of Reserve Lands .....                      | §649 |
| (vi) Use of Reserve Lands .....                                   | §656 |
| (vii) Trespass on Reserve Lands .....                             | §659 |
| A. Definition of “Trespass” .....                                 | §659 |
| B. Applying the Law of Trespass on Reserve .....                  | §661 |
| C. Consequences of Trespass on Reserve .....                      | §665 |
| D. Who May Sue for Trespass on Reserve .....                      | §666 |
| (viii) Disposition of Reserve Lands and Interests .....           | §669 |
| A. Involuntary Disposition .....                                  | §669 |
| B. Voluntary Disposition .....                                    | §674 |
| 1. General .....  | §674 |
| 2. Absolute Surrender, for Sale .....                             | §675 |
| 3. Designation, for Lease or Licence .....                        | §681 |
| 4. Management of Surrendered and Designated<br>Lands .....        | §688 |
| 5. Section 58 Leases .....  | §693 |
| 6. Section 28 Permits .....                                       | §695 |
| (ix) First Nations Land Management Act .....                      | §699 |
| (x) First Nations Commercial and Industrial Development Act ..... | §717 |
| (xi) Matrimonial Property on Reserve .....                        | §718 |
| (d) Métis Settlements in Alberta .....                            | §732 |
| 4. Natural Resources .....  | §737 |

## ESSENTIALS OF CANADIAN ABORIGINAL LAW

|   |      |
|---|------|
| (a) Aboriginal Rights .....                                     | §737 |
| (i) Aboriginal Title .....                                      | §737 |
| (ii) Other Aboriginal Rights .....                              | §741 |
| A. General .....  | §741 |
| B. Game and Fish .....  | §746 |
| 1. Food, Social and Ceremonial Purposes .....                   | §746 |
| 2. Rights to Harvest for Trade .....                            | §748 |
| C. Timber and Other Usable Plants .....                         | §752 |
| D. Mineral Rights .....   | §756 |
| (b) Treaty Rights .....   | §758 |
| (i) Dimensions .....  | §758 |
| A. General .....  | §758 |
| B. Implied and Incidental Rights .....                          | §759 |
| C. Trade-related Treaty Rights .....                            | §761 |
| (ii) Constraints .....  | §763 |
| A. General .....  | §763 |
| B. Safety .....   | §765 |
| C. “Taking up” .....  | §766 |
| D. “Government of the Country” Clauses .....                    | §772 |
| (c) Indigenous Interests and Private Resource Development ..... | §775 |
| (d) Natural Resources Transfer Agreements .....                 | §778 |
| (e) Natural Resources on Reserve .....                          | §782 |
| (i) Oil and Gas .....   | §782 |
| A. General .....  | §782 |
| B. Under Federal Management .....                               | §785 |
| C. Under First Nations’ Management .....                        | §798 |
| (ii) Minerals .....   | §812 |
| (iii) Timber .....  | §824 |
| (iv) Drinking Water .....                                       | §836 |
| (v) Other .....   | §837 |
| A. Federal Rules and Regulations .....                          | §837 |
| B. Provincial Rules and Regulations .....                       | §838 |
| C. Band Council By-laws .....                                   | §839 |
| 5. Fiscal Management and Economic Development .....             | §842 |
| (a) Sources of First Nation Wealth .....                        | §842 |
| (i) General .....   | §842 |
| (ii) Taxation and Licensing Powers .....                        | §843 |

## TABLE OF CONTENTS

|  |      |
|--|------|
| A. Indian Act .....  | §843 |
| B. Budget Implementation Act, 2000 .....                     | §849 |
| C. First Nations Fiscal Management Act .....                 | §850 |
| D. First Nations Goods and Services Tax Act .....            | §859 |
| E. Modern Treaties and Special Statutes .....                | §866 |
| (iii) Treaty Entitlements .....                              | §868 |
| (iv) Revenues from Interests in Reserve Lands .....          | §872 |
| (v) Other .....  | §873 |
| (b) Management of Indian Moneys .....                        | §879 |
| (i) Moneys under Federal Management .....                    | §879 |
| A. General .....   | §879 |
| B. Capital Moneys .....                                      | §884 |
| C. Revenue Moneys .....                                      | §888 |
| D. By-law-dependent Provisions .....                         | §890 |
| E. Relinquishing Federal Management .....                    | §892 |
| 1. Indian Act .....  | §892 |
| 2. First Nations Land Management Act .....                   | §894 |
| 3. First Nations Oil and Gas and Moneys Management Act ..... | §895 |
| (ii) Moneys under First Nation Management .....              | §901 |
| A. Indian Moneys Transferred from Canada .....               | §901 |
| B. First Nations Financial Transparency Act .....            | §902 |
| C. First Nations Fiscal Management Act .....                 | §906 |
| D. Co-management and Third Party Management .....            | §911 |
| 1. First Nations Fiscal Management Act .....                 | §911 |
| 2. More Generally .....                                      | §926 |
| (c) Statutory Exemptions for Indians .....                   | §938 |
| (i) From Taxation .....                                      | §938 |
| (ii) From Creditors' Remedies .....                          | §949 |
| A. Indian Act, Section 29 .....                              | §949 |
| B. Indian Act, Section 89 .....                              | §950 |
| (iii) "Situated on a Reserve" .....                          | §958 |
| A. Why it Matters .....                                      | §958 |
| B. Indian Act, Section 90 .....                              | §959 |
| C. General .....   | §964 |
| (d) Conducting Business on Reserve .....                     | §972 |
| (i) Basic Legal Capacity .....                               | §972 |

## ESSENTIALS OF CANADIAN ABORIGINAL LAW

|  |       |
|--|-------|
| (ii) Lawful Operation on Reserve Land .....                                  | §973  |
| (iii) Labour Relations on Reserve.....                                       | §976  |
| (iv) Application of General Laws Regulating Business .....                   | §980  |
| A. Federal .....   | §980  |
| B. Provincial .....  | §982  |
| C. First Nations Commercial and Industrial Development<br>Act.....           | §987  |
| 6. Indians' Estates .....  | §991  |
| (a) Federal and Provincial Authority .....                                   | §991  |
| (b) Descent of Property on Death .....                                       | §993  |
| (i) General .....  | §993  |
| A. Powers of the Minister .....  | §993  |
| B. Wills .....   | §997  |
| C. Appeals .....   | §1002 |
| D. Intestacy .....   | §1003 |
| (ii) Interests in Reserve Land .....   | §1010 |
| A. Indian Act .....  | §1010 |
| B. First Nations Land Management Act .....                                   | §1012 |
| C. Family Homes on Reserves and Matrimonial Interests<br>or Rights Act ..... | §1015 |
| 1. The Scheme of the Act .....   | §1015 |
| 2. Provisional Federal Rules .....   | §1021 |
| 3. First Nation laws .....   | §1035 |
| (c) Estates of Mentally Incompetent Indians .....                            | §1041 |
| (d) Property of Children of Indians .....                                    | §1044 |

## Index