

Table of Contents

	PAGE
<i>Preface</i>	iii
<i>Biographies</i>	v
<i>Table of Cases</i>	xv
Chapter 1 The Shifting Framework of Aboriginal Law: From Jurisdiction to Rights	1
<i>Robert Janes, QC</i>	
Introduction	1
The Jurisdictional Framework	2
Indigenous Peoples Use the Jurisdictional Framework to Advance their Rights	4
Section 35 and the Honour of the Crown	6
The Move to the Rights and Duties Framework	8
Chapter 2 Indian Status and the Crisis of Missing and Murdered Women	13
<i>Renée Pelletier and Krista Nerland</i>	
Introduction	13
What is Indian Status	15
A Brief History of How Everything went Wrong	16
Colonialism, Patriarchy and Indian Status – The Law Prior to 1985	16
Struggles to Address the Discrimination in the Status Provisions	18
The 1985 Indian Act – The “Second Generation Cut-off”	18
Rooting Out the Discrimination in the New Act	20
Sharon McIvor	20
Stephane Descheneaux	21
Dr. Lynn Gehl	23
Links Between Discrimination in Status Under the Indian Act and Violence Against Indigenous Women	23
Bill S-3: What it Does, and What it Doesn’t Do	27
What Could be Done?	30
Section 6(1)(a) All the Way	30
Addressing Additional Gaps – Unstated Paternity	31

The Crown's Responsibility in Addressing Impacts of Amendments	32
The Nation-to-Nation Conversation	33
Conclusion	33
Chapter 3 Let's Be Clear: SCC Guidance on Effective Consultation	35
<i>Arend J.A. Hoekstra</i>	
A Need for Greater Clarity	35
Providing Clarity	37
Delegation of the Crown's Duty to Consult	39
The Definition of Aboriginal and Treaty Rights	40
The Process of Engagement	42
Initiating Consultation	42
Framing Matters for Consultation	43
Resourcing Consultation	44
Submissions and Responses	45
The Content and Process of Crown Deliberations	46
Providing Reasons	47
Considering the Adequacy of the Consultation Process	47
Expressly Acknowledging the Right and Potential Negative Impacts on the Right	48
Identifying Accommodation Measures and Concluding if the Decision is Justified	48
Ongoing Uncertainty	50
Managing the Unknown	51
Indigenous Consultation on Technical Elements	51
Will Jumbo Valley Happen Again?	52
Chapter 4 Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?	53
<i>Dwight Newman</i>	
Abstract	53
Introduction	53
Reasons for Arguing Under Religious Freedom Rather than Under Section 35	56
Reasons for the Claim's Lack of Success	59
Future Prospects for Indigenous Religious Freedom Claims	61
Conclusions	64

Chapter 5 Increasing Clarity on the Role of Regulatory Decision Makers in Fulfilling the Crown’s Duty to Consult Aboriginal Peoples 67

Thomas Isaac

Introduction	67
The <i>Carrier Sekani</i> Decision	69
The Implications of <i>Carrier Sekani</i>	73
Regulatory Procedures and the Crown’s Duty to Consult	73
Crown Proponents and the Duty to Consult	74
The Supreme Court of Canada Clarifies the Role of Regulatory Boards in Satisfying the Crown’s Duty to Consult	75
<i>Clyde River (Hamlet) v. Petroleum Geo-Services Inc.</i>	75
<i>Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.</i>	80
Implications of <i>Clyde River</i> and <i>Chippewas of the Thames</i> for Regulatory Boards	83

Chapter 6 Daniels v. Canada: Understanding the Inkblot from a Métis Nation Perspective 85

Jason Madden

Introduction	85
Background and Overview of the Case	86
The Parties and Procedural History	86
The Declarations Sought	88
The Métis Nation and the Litigation	89
The Court Decisions in Daniels	94
Understanding Section 91(24)	94
The Trial Decision	96
The Federal Court of Appeal Decision	98
The Supreme Court of Canada Decision	101
The Implications of the Daniels Case	106
The Legal Implications of Daniels	106
The Practical Implications of Daniels to Date	110
Conclusion	113

Chapter 7 Reconciling the United Nations Declaration on the Rights of Indigenous Peoples with Canadian Law: If Necessary Consultation, but not Necessarily Consultation	115
<i>Tony Knox</i>	
Introduction.	115
Reconciliation: Common Truth, Regret and Forgiveness – Ideas, Minds and Culture.	118
Legal and Social Reconciliation in Canadian Law	120
Consultation and Legal Reconciliation with the Code	123
Legal Reconciliation in History	124
The Development of Canadian Cultures in the Changing Ideas About Each Other of Indigenous and Non-Indigenous Canadians	127
Understanding the Code	133
Free, Prior and Informed Consent – The Six Articles.	134
The GOC and Rendering the Code “Consistent” with Canadian Law	137
If Necessary Consultation but Not Necessarily Consultation	145
<i>Index</i>	147