

TERMS OF COEXISTENCE

Indigenous Peoples and Canadian Law

Sébastien Grammond

LL.B., LL.M. (Montréal), M.Stud., D.Phil. (Oxon.), Ad.E.
Dean, Civil Law Section, University of Ottawa
Of the Quebec and Ontario Bars

Translated by Jodi Lazare, B.A., LL.L., J.D., LL.M.

CARSWELL®

© 2013 Thomson Reuters Canada Limited

NOTICE AND DISCLAIMER: All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written consent of the publisher (Carswell).

Carswell and all persons involved in the preparation and sale of this publication disclaim any warranty as to accuracy or currency of the publication. This publication is provided on the understanding and basis that none of Carswell, the author/s or other persons involved in the creation of this publication shall be responsible for the accuracy or currency of the contents, or for the results of any action taken on the basis of the information contained in this publication, or for any errors or omissions contained herein.

No one involved in this publication is attempting herein to render legal, accounting or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The analysis contained herein should in no way be construed as being either official or unofficial policy of any governmental body.

Library and Archives Canada Cataloguing in Publication

Grammond, Sébastien, 1970-

[Aménager la coexistence. English]

Terms of coexistence: Indigenous peoples and Canadian law / by Sébastien Grammond; translated by Jodi Lazare.

Translation and revision of: Aménager la coexistence.

Includes bibliographical references and index.

ISBN 978-0-7798-5410-3

1. Native peoples – Legal status, laws, etc. – Canada. 2. Native peoples – Canada – Government relations. 3. Native peoples – Canada – Politics and government. I. Title. II. Title: Aménager la coexistence. English.

KE7709.G72313 2013
KF8205.G72313 2013

342.7108'72

C2013-905730-7

We acknowledge the financial support of the Government of Canada through the Book Publishing Industry Development Program (BPIDP) for our publishing activities.

Legal Deposit: 3rd trimester 2013
Bibliothèque et Archives nationales du Québec
Library and Archives Canada
ISBN: 978-0-7798-5410-3



THOMSON REUTERS

CARSWELL, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto (Ontario)
M1T 3V4

Customer Relations:
In Quebec: 1-800-363-3047
Elsewhere in Canada/U.S.: 1-800-387-5164
Fax: 1-450-263-9256
www.carswell.com

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