

2018 - 12 - 10

## **Native Law**

Publisher's Note

2018-1

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#### **2018-5**

Woodward

**Native Law**

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**Consultation by the Federal Cabinet — Transmountain Pipeline decision** — The Federal Court of Appeal struck down the Federal Cabinet's approval of the Trans Mountain pipeline project for failure of consultation. The Court said that even when consultation is with the Governor in Council, the consultation team must have an adequate mandate to engage in meaningful dialogue, and must not limit itself to listening to and recording the concerns of Indigenous peoples before transmitting those concerns to Cabinet: [Tsleil-Waututh Nation v. Canada \(Attorney General\)](#), [2018 FCA 153](#), [2018 CarswellNat 4685](#) (F.C.A.). See Chapter 5, paragraphs 5§1890.

**Preventing systemic discrimination in the Corrections system** — The Supreme Court of Canada held that s. 4(g) of the federal *Corrections and Conditional Release Act* is a requirement by Parliament to the Corrections Service of Canada to advance substantive equality in correctional outcomes for Indigenous offenders. Section 4(g) represents an acknowledgment of the systemic discrimination faced by Indigenous persons in the Canadian correctional system: [Ewert v. Canada](#), [2018 SCC 30](#), [2018 CarswellNat 2804](#). See Chapter 17, pages 378.21-378.22.

**Updated Words and Phrases** — The Index to Words and Phrases has been substantially updated with this release.

#### **2018-4**

Woodward

**Native Law**

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**Whether sacred places are protected by Freedom of Religion** — The Supreme Court of Canada held that s. 2(a) of the *Charter* does not protect the object of religious beliefs, only the claimant's freedom to hold such beliefs and manifest them through worship, practice, or teaching and dissemination. Therefore, the wilderness area where the Grizzly Bear Spirit resides was not protected from development into a ski resort: [Ktunaxa Nation v. British Columbia \(Forests, Lands and Natural Resource Operations\)](#), [2017 CSC 54](#), [2017 SCC 54](#), [2017 CarswellBC 3020](#), [2017 CarswellBC 3021](#), [\[2017\] 2 S.C.R. 386](#) (S.C.C.). See Chapter 14, paragraph 14§240.

**Section 35: The first justification decision in a civil context** — The B.C. Supreme Court said: "The only cases where the principles of justification have been discussed are regulatory prosecutions...Thus, the present case is unique in that it is a civil case...": [Ahousht Indian Band and Nation v. Canada \(Attorney General\)](#), [2018 BCSC 633](#), [2018 CarswellBC 961](#) (B.C. S.C.) at para. 60, Humphries J. See Chapter 5, paragraphs 5§870, 5§1075 and 5§1110.

**The Criminal Code sentencing provisions for Aboriginal offenders requires a court to determine if offender is Aboriginal** — A sentencing judge has a statutory duty to determine whether the offender is Aboriginal, even when neither the Crown nor the defence bring this to the sentencing judge's attention. A failure to make inquiries as to whether the offender being sentenced is an Aboriginal person, and thus to properly address *Gladue* factors when sentencing an Aboriginal offender, is an error of law that renders the decision open to appellate review. This is particularly so when evidence presented during sentencing submissions, (such as that the offender resided at Thunderchild First Nation), should reasonably have caused the sentencing judge to make enquiries to determine whether the offender was of Aboriginal ancestry. However, the duty to determine the offender's Aboriginal ancestry applies even in the absence of such clues: [R. v. Whitstone](#), [2018 SKQB 83](#), [2018 CarswellSask 114](#) (Sask. Q.B.). See Chapter 17.

### 2018-3

Woodward

Native Law

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**Chapter 11: Personal Property (and off-reserve real estate)** is fully replaced in this release. This revised chapter is the most recent, comprehensive and authoritative writing about the legal status of the personal property and off-reserve real estate of Indians in Canada. Topics include:

- Constitutional and historical fundamentals.
- The protection from seizure and execution
- Remedies of lenders; rights of Indians
- The complex scheme of the *Indian Act* in this regard
- Constitutional and historical fundamentals.
- Special cases

Instances where courts have relied upon the text of this chapter are noted.

### 2018-2

Woodward

Native Law

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**Chapter 10: Individual Possession and Development of Reserves** is fully replaced in this release. This revised chapter is the most recent, comprehensive and authoritative writing on the subject of individual interests on reserves in Canada. The chapter begins with fundamental principles, and continues with a discussion of the legal basis for economic development of individually possessed lands. 100 years of case law about the Indian Act provisions is reviewed. The framework for interests under the *First Nations Land Management Act* is included, plus several special topics such as the rights of children and spouses.

**Conflict of laws — systems of First Nations Law.** An important new contribution to legal thinking about aboriginal rights is found in the decision of Madam Justice Chappel of the Ontario Superior Court of Justice in *Beaver v. Hill*. The Court points out that when there is a challenge to the fundamental jurisdiction of the court based on an independent system of First Nations law, certain of the Conflict of Laws principles may apply. The court goes on to set out a framework for analyzing such a situation. See Chapter 2, paragraphs 2§855 and following.

**The Fiduciary Obligation.** Canada's fiduciary obligation was further clarified by the Supreme Court of Canada in [Williams Lake Indian Band v. Canada \(Aboriginal Affairs and Northern Development\)](#), [2018 SCC 4](#), [2018 CarswellNat 158](#) (S.C.C.). Canada was the exclusive intermediary between B.C. and First Nations in relation to reserve creation, a situation which conferred a degree of control that left a cognizable Aboriginal interest "vulnerable" to the adverse exercise of Canada's discretion, and was therefore sufficient to ground a sui generis fiduciary obligation. See Chapter 3, paragraphs 3§1361 and 3§1480 and Chapter 8, paragraph 8§660.

**Colonial obligations.** The *Specific Claims Tribunal Act* creates a special, extended meaning of "Crown" for the purposes of Crown legal obligations, beyond what can be found in the Terms of Union between Canada and British Columbia. The *Williams Lake* decision, see Chapter 8, paragraph 8§664.

## 2018-1

Woodward

Native Law

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**Reliance on this text by the courts.** The Federal Court of Appeal, the Specific Claims Tribunal of Canada, the Yukon Territory Supreme Court, British Columbia Supreme Court, Ontario Superior Court of Justice, and Quebec Superior Court of Justice, have all recently quoted or relied on passages in this text. Please see the Judicial Commentary tab, and references throughout the text.

**Interpretation of the Rupert's Land Order.** A little-known part of the Constitution, the Rupert's Land Order, was interpreted by the Yukon Territory Supreme Court. The Order gives rise to a legally binding constitutional obligation that Canada enter into treaty negotiations. See Chapter 2, paragraph 2§730.

**Scope of Canada's powers under s. 91(24).** An aggressive challenge to federal power by a mining company was unsuccessful. Taseko Mines Limited argued that s. 91(24) only conferred jurisdiction on Canada to respond to substantial risks of harm to interests "unique to aboriginal peoples", and would not empower Parliament to give special consideration to impacts on First Nations that are also shared by other Canadians. The

Federal Court doubted, but did not need to decide the point. See Chapter 3, paragraph 3§175.

**Whether the protection from seizure under s. 89 is discriminatory.** The Federal Court of Appeal considered the question of whether the protections afforded by s. 89 of the *Indian Act* may present a disadvantage to some status Indians, and is therefore discriminatory under s. 15 of the *Charter*. Relying on a passage in this text, the Federal Court of Appeal concluded that the protection can be waived, and is therefore not discriminatory. See Chapter 6, paragraph 6§540.