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What the Constitution says about aboriginal peoples



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**Revision of
Amending our Constitution
The rights of the aboriginal peoples**

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All Canadians have a stake in their Constitution as the basic law that spells out the powers of governments and the rights of people.

But the Constitution also addresses the special concerns of many distinct groups, for it is the legal cornerstone of the minority rights that are a cherished part of the Canadian heritage.

Because of the unique place that aboriginal peoples have in Canadian history and society, they are among those who get special attention in the Constitution.

A long history

As far back as 1763, the rights of aboriginal peoples in vast reaches of what is now Canada were recognized in the *Royal Proclamation* that established governments in Britain's new American colonies.

At the birth of Confederation, "Indians, and Lands reserved for the Indians" were among the classes of subject placed under federal jurisdiction by section 91 of the *Constitution Act, 1867* (then called the *British North America Act*). The Supreme Court of Canada later ruled that this jurisdiction also encompassed the Inuit.

Constitutional recognition

On April 17, 1982, the *Constitution Act, 1982* came into force. The best known features of this constitutional enactment are the *Canadian Charter of Rights and Freedoms* and the new

constitutional amending formula. In addition, the *Constitution Act, 1982*:

- Affirmed and recognized the existing aboriginal and treaty rights of the aboriginal peoples of Canada.
- Provided for the convening of a First Ministers Conference on aboriginal matters, to which aboriginal representatives would be invited as participants.

A first accord

When the promised conference met in Ottawa on March 15-16, 1983, it reached a constitutional accord, signed by the federal government and nine provinces* and concurred in by the four aboriginal associations and both territorial governments. Its terms included:

- Provision for three more conferences — one before March 16, 1984, one before April 17, 1985, and the third before April 17, 1987 (the latter two guaranteed by the Constitution).
- Constitutional commitment that before any further amendments to provisions of the Constitution dealing with aboriginal people, aboriginal leaders would be invited to participate in a constitutional conference with First Ministers to discuss the proposed change.
- Equal guarantee in the constitution of existing aboriginal and treaty rights to women and men.
- Constitutional recognition of rights acquired through both future and existing land claims agreements.

*The government of Quebec did not sign the accord because of its position on the *Constitution Act, 1982*.

After ratification by Parliament and the legislatures of the nine provinces, the constitutional changes agreed to in the accord were proclaimed on June 21, 1984, as the *Constitution Amendment Proclamation, 1983*, becoming the first "made-in-Canada" amendments under the new amendment formula set out in the *Constitution Act, 1982*.

Canadian Charter of Rights and Freedoms

As amended, Part I of the *Constitution Act, 1982* (that is, the *Canadian Charter of Rights and Freedoms*) now provides:

Aboriginal
rights and
freedoms not
affected by
Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Before amendment, subsection 25(b) read: "any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement."

Rights of the aboriginal peoples of Canada

As amended, Part II of the *Constitution Act, 1982* now reads:

Recognition of existing aboriginal and treaty rights **35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**

Definition of "aboriginal peoples of Canada" **(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.**

Land claims agreements **(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.**

Aboriginal and treaty rights are guaranteed equally to both sexes **(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.**

Commitment to participation in constitutional conference **35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,**

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Subsections 35(3) and 35(4) and section 35.1 were added by the amendments.

Constitutional conferences

A new part added to the *Constitution Act, 1982* by the amendments reads:

PART IV.1

CONSTITUTIONAL CONFERENCES

Constitutional conferences

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

Participation of aboriginal peoples

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

Participation of territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Subsection 35(1) not affected

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

The former Part IV, which provided for the 1983 constitutional conference, was automatically repealed on April 17, 1983.

General provisions

New sections added to the *Constitution Act, 1982* read:

Repeal of Part **54.1** Part IV.1 and this section are repealed on April
IV.1 and this section 18, 1987.

References **61.** A reference to the *Constitution Acts, 1867 to*
1982 shall be deemed to include a reference to the
Constitution Amendment Proclamation, 1983.

March 1985