



Case Study 2: Aboriginal and Treaty Rights in Canada's Constitution

✘ Background information

Introduction

This case study examines a moment in Canada's history when the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms* were being created. The focus is on some of the civic actions taken to attain constitutional recognition of Aboriginal and Treaty Rights.

Note: This lesson does not cover the larger story of Indigenous rights, governance and law.

Begin by acknowledging that First Nations, Métis and Inuit have their own ways of governing themselves: Indigenous governance is distinct from the mainstream federal political system.

Historical Context for this Case Study

When the federation that we know today as Canada was formed in 1867 through Confederation, its highest law (or Constitution) was under the control of the British Parliament. In the 1970s, the federal government decided it was time to bring this law back from Great Britain and create a new Canadian Constitution.

From 1978 to 1982, First Nations, Métis and Inuit leaders and groups took action nationally and internationally to fight for affirmation of their rights.

This case study has been selected as a compelling example of civic action, rather than as a study in constitutional history.

Terminology

Terminology relating to Indigenous people in Canada is evolving. There is not always a simple answer when it comes to which term to use. Here are some guidelines:

- First Nations, Métis and Inuit are distinct and separate peoples. In fact, there are more than 600 First Nations. Whenever you can be specific, that is the best choice.
- When you want to refer to First Nations, Métis and Inuit collectively, use the term "Indigenous peoples or Aboriginal peoples." While both are correct, "Indigenous peoples" is the preferred term at the present time.
- However, when it comes to the question of rights, it is important to use accurate wording. When referring to the Constitution, the proper legal term is "Aboriginal Rights."

For the purposes of this lesson, to respect the historical context of the 1980s, when these events took place, and to avoid confusing students by using the terms “Aboriginal” and “Indigenous” interchangeably, we use “Aboriginal” throughout. In the 1980s, the most common term for First Nations individuals was “Indian.” That term is also used in this resource where appropriate historically.

What are Treaty, Aboriginal and Indigenous Rights?

- **Treaty Rights**

Agreements between specific groups of First Nations, Métis or Inuit and the Crown (government) that recognize certain rights, such as rights to land and resources.

Some treaties were signed before Confederation, while others are very recent, but all of them are still in effect.

These Nation-to-Nation agreements create binding obligations on both parties. These obligations have been interpreted differently by the parties involved and continue to be discussed today.

- **Aboriginal Rights**

Rights that apply to all First Nations, Métis and Inuit in Canada and are affirmed in the Constitution.

- **Indigenous Rights**

Rights outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and inherent to Indigenous people everywhere in the world. Canada has signed the declaration.

In brief: The Story of Aboriginal Rights in the Constitution

When the Government of Canada decided to patriate, or bring home, the Constitution from the control of the British Parliament in the late 1970s, Aboriginal peoples expected to be consulted and be part of the development. Would there be recognition of existing Aboriginal land title and Treaty Rights? Would they have a say in future amendments or changes to the Canadian Constitution? These concerns mobilized Aboriginal groups into action across the country to ensure that a new Canadian Constitution affirmed their rights.

The main national Aboriginal groups involved at the time were:

- National Indian Brotherhood (now Assembly of First Nations), representing the status Indians
- Inuit Tapirisat of Canada (now Inuit Tapiriit Kanatami), representing Inuit
- Native Council of Canada (now Congress of Aboriginal Peoples), representing Métis and non-status Indians
- Native Women’s Association of Canada

First Nations, Métis and Inuit leaders used a number of strategies to seek constitutional recognition of their rights. They organized action groups, lobbied politicians, launched petitions, prepared written submissions, made presentations, and sought national and international support. An office was set up in London, England, as a base for lobbying support from British parliamentarians to delay transferring the Constitution back to Canada.

One of the largest grassroots efforts within Canada was the “Constitution Express,” organized by the Union of British Columbia Indian Chiefs. These two trains left Vancouver in November 1980 to head to Ottawa, picking up passengers along the way. Around a thousand people, mostly First Nations, arrived in Canada’s capital to publicize their cause to all Canadians and to parliamentarians.

Throughout 1980 and 1981, the federal government held a number of constitutional meetings and First Ministers’ conferences (meetings between the prime minister and the provincial premiers) on its plan to patriate the Constitution and introduce a new *Charter of Rights and Freedoms*. The plan required a certain level of agreement between the federal government and the premiers. This was not easy to obtain, as various provinces opposed the idea. Amid all the federal–provincial negotiations, it was difficult for Aboriginal peoples to make themselves heard. In November 1981, the federal and provincial governments came to a tentative agreement on the Constitution that did not include Aboriginal or Treaty Rights.

This news spurred Aboriginal leaders to organize demonstrations across Canada. They demanded further rounds of discussion with government leaders. Finally, they persuaded the federal government and the provinces to provide the constitutional recognition that Aboriginal peoples had fought for.

In the end, actions taken by First Nations, Métis and Inuit individuals and groups bore results. On July 1, 1982, the *Constitution Act* was enacted: it included the *Canadian Charter of Rights and Freedoms*. Section 35 of the *Constitution Act* legally guaranteed that “existing Aboriginal and Treaty Rights of the Aboriginal people of Canada are hereby recognized and affirmed.” The Constitution defines “Aboriginal” as including Indian, Inuit and Métis.

The affirmation of Aboriginal and Treaty Rights in the Constitution was an important step, but it is not the end of the story. Since 1982, First Nations, Métis and Inuit have taken many more actions to affirm their rights. Conversations continue to this day.

Some Key Concepts Relating Canada's Constitution and Aboriginal Rights

The Constitution

A constitution outlines the principles by which a country is governed. Canada's Constitution had its roots prior to 1867, but the *British North America Act* (BNA Act) of 1867 was the written foundation of the country's laws and governance. The BNA Act, which was passed by the British Parliament, created Confederation and set out the responsibilities and powers of each level of government and the rights of the nation's inhabitants.

From 1867 to 1982, Great Britain retained the power, or authority, to amend Canada's Constitution. For many years, but intensifying in the 1970s, the federal government sought ways to transfer (or "patriate") the Constitution from Great Britain and have the ability to amend or change it. Lengthy rounds of discussions took place between the federal government and the provinces to define the content of the new Constitution and the proposed creation of a Canadian charter of rights and freedoms.

After the federal government came to an agreement with nine provincial premiers (Quebec was the only exception) on the content of the *Constitution Act* and the *Charter of Canadian Rights and Freedoms*, Canada's Parliament asked the British Parliament to pass an Act to patriate Canada's Constitution. The *Constitution Act, 1982* ended the need for the British Parliament to be involved in Canada's constitutional affairs.

Aboriginal Peoples and the Constitution

Agreements between the Crown and Aboriginal Peoples existed before Confederation and the BNA Act. Aspects of the agreements are written down in the Royal Proclamation of 1763 and in treaties.

The BNA Act stated that the federal government had jurisdiction over "Indians and Lands reserved for Indians." There was no explicit mention of Inuit or Métis in the BNA Act, as Canada's territory at the time was much smaller and did not include the west or the north.

As Canada grew after Confederation, relationships between the Crown and First Nations, Inuit and Métis were negotiated and governed through treaties, the 1876 *Indian Act*, land claims, and other laws and policies. But there was no national constitutional acknowledgement of Aboriginal and Treaty Rights until the Constitution Act, 1982.