

THE CONSTITUTIONAL RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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Canada's aboriginal peoples have always enjoyed special status and unique rights under Canadian law as a result of their original occupation and use of the land that now makes up this country.¹ Prior to the enactment of the *Constitution Act, 1982*² (hereinafter referred to as "the Act"), however, the constitutional protection afforded those rights was at best limited.³ The purpose of this paper is to examine the effect of the Act on the rights of the aboriginal peoples, and specifically to analyze the three sections in which those rights are expressly mentioned.

I. RECOGNITION AND AFFIRMATION OF ABORIGINAL AND TREATY RIGHTS: SECTION 35(1)

Part II of the Act, entitled "Rights of the Aboriginal Peoples of Canada," includes only section 35. Section 35(1) provides that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Since section 35 is not contained in the *Canadian Charter of Rights and Freedoms*⁴ *per se*, the rights referred to are not limited by section 1, which provides that the rights and freedoms set out in the Charter are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and

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¹See Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev.* 513.

²*Canada Act 1982*, c. 11 (U.K.), Schedule B (*Constitution Act, 1982*). See Appendix, *infra*.

³See generally McNeil, "Native People and the Canadian Constitution" in *Legal Information Service*, Report No. 3 (1980).

⁴*Supra*, note 2, Part I, ss. 1-34. (Hereinafter referred to as "The Charter.")

democratic society." For the same reason, however, aboriginal and treaty rights are not expressly guaranteed in the way that the Charter's rights and freedoms are.⁵ What then is the effect of section 35(1) on the status of the rights that it recognizes and affirms?

The supremacy of the constitution of Canada over other laws is provided by section 52(1) of the *Constitution Act, 1982*. Notwithstanding this provision, however, it has been suggested by some commentators that, although section 35(1) itself may be altered only by constitutional amendment, the rights described therein are not entrenched and therefore continue to be subject to ordinary legislation to the extent that they were before the Act came into force — in other words, section 35(1) provides for judicial notice to be taken of those rights but does not grant them constitutional protection.⁶ In my view, this analysis fails to appreciate the effect of section 52(1). If a law is inconsistent with existing aboriginal and treaty rights, it must be inconsistent with the recognition and affirmation of those rights in section 35(1). To hold otherwise would mean that section 35(1) has no effect whatever, because judges are obliged to take notice of existing aboriginal and treaty rights in any case. There would be no reason to recognize and affirm those rights in the constitution unless it was intended to protect them from infringement or abrogation by other laws. Furthermore, the aboriginal peoples have been led to believe that section 35(1) does provide such protection for their rights; if this was not the intention, the politicians of this country have cynically misrepresented the situation. This regrettable conclusion can be avoided by adopting the view of Lord Denning, expressed in the recent decision of the English Court of Appeal respecting the obligations of the British Crown to the Indians of Canada, that the Act "entrenches [the rights and freedoms of the aboriginal peoples of Canada] as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities,"⁷ that is, by constitutional amendment.

Prior to the enactment of section 35(1), the treaty and aboriginal rights⁸ of the aboriginal peoples of Canada were subject to federal leg-

⁵Section 1 provides that the Charter "guarantees the rights and freedoms set out in it," subject to the above-quoted proviso. By contrast, aboriginal and treaty rights are "recognized and affirmed" by s. 35(1).

⁶Federation of Saskatchewan Indians, *The Abrogation of Indian Treaty and Aboriginal Rights by the Canada Bill* (Feb. 16, 1982), at 14-15. See also Soonais, "An Analysis of the Canada Act" in *Saskatchewan Indian* (April 1982), at 38.

⁷*R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86, at 99, [1982] 2 All E.R. 118, at 129.

⁸Aboriginal title stemming from original occupation and use of the land by the aboriginal peoples was recognized in *Calder v. A.G. B.C.*, [1973] S.C.R. 313, [1973] 4 W.W.R.

islation.⁹ Provincial laws, on the other hand, could not limit treaty rights,¹⁰ but they could restrict aboriginal hunting rights.¹¹ If my submission that section 35(1) entrenches existing aboriginal and treaty rights is correct, the effect is to protect those rights from legislative infringement, at least from the time the Act was proclaimed on April 17, 1982. A question then arises with regard to those rights that had already been taken away by legislation prior to that time. Are these rights revived and given constitutional protection by section 35(1), or are they gone forever?

When section 35(1) was reinstated in the proposed Act on November 23, 1981, after being dropped earlier in the month, the word "existing" was inserted before "aboriginal and treaty rights." Without this change, it might have been argued that any law inconsistent with those rights, whether enacted before or after April 17, 1982, would be inoperative to the extent of the inconsistency. The word "existing" was probably added to prevent this argument from being used to breathe new life into lost rights. While it may be conceded that section 35(1) probably does not revive rights previously abrogated by legislation,¹² it is suggested that different considerations apply to rights that were merely restricted but not extinguished.¹³ Thus, where aboriginal

1, 34 D.L.R. (3d) 145. However, the courts have consistently avoided defining the extent of the rights that flow from that title.

⁹With respect to the paramountcy of federal legislation over aboriginal rights, see *R. v. Derriksan*, [1976] 6 W.W.R. 480, 71 D.L.R. (3d) 159, 31 C.C.C. (2d) 575 (S.C.C.), and *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518, [1980] 5 W.W.R. 193, 107 D.L.R. (3d) 513 (T.D.). With respect to treaty rights, see *R. v. Sikyea* (1964), 46 W.W.R. 65, 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 43 C.R. 83 (N.W.T. C.A.), affirmed [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266; and *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, 47 C.R. 382.

¹⁰Section 88 of the *Indian Act*, R.S.C. 1970, c. I-6, provides that provincial laws of general application apply to Indians subject, *inter alia*, to the terms of any treaty: see *R. v. White and Bob* (1964), 52 W.W.R. 193, 50 D.L.R. (2d) 613 (B.C. C.A.), affirmed (1965), 52 D.L.R. (2d) 481n (S.C.C.).

¹¹In *Kruger and Manuel v. R.*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 75 D.L.R. (3d) 434, 14 N.R. 498, 34 C.C.C. (2d) 377, the Supreme Court, on the basis of s. 88 of the *Indian Act*, *supra*, note 10, held that hunting rights stemming from aboriginal title (as distinct from treaty) were subject to provincial game laws. Whether provincial laws can limit other aboriginal rights, such as aboriginal title to land, has not yet been authoritatively determined by the courts. But see *A.G. Ont. v. Bear Island Foundation* (Temagami land claim case), now pending in the Supreme Court of Ontario.

¹²Section 35(1) would probably not have revived such rights in any case, because if a right had been abrogated there would be nothing left to recognize and affirm.

¹³This distinction is suggested in "A Little Closer Look" (1982), 5 Ontario Indian (No. 1) 26, at 27 where the author states that the section arguably "protects 'sleeping' rights, but does not revive 'dead' rights."

title to land had been extinguished by legislation, that title would no longer have been in existence on April 17, 1982 and therefore would not have been revived by section 35(1). Aboriginal or treaty rights to hunt, trap and fish that have been limited by federal or provincial legislation, on the other hand, continue to exist even though their exercise has been restricted.¹⁴ A workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it was repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist and therefore is entitled to constitutional protection under section 35(1).

Pursuing this analysis, the potential effect of section 35(1) on legislation enacted prior to April 17, 1982 may be illustrated by taking the federal *Migratory Birds Convention Act*¹⁵ as an example. It has been authoritatively decided that treaty rights to hunt have been restricted by that Act.¹⁶ There can also be no doubt that aboriginal hunting rights are subject to the same restrictions.¹⁷ It is nonetheless suggested that, although aboriginal and treaty rights to hunt have been limited by this enactment, they have not been extinguished. If the *Migratory Birds Convention Act* was repealed they would be revived because their aboriginal and treaty bases are still there. For this reason these rights continue to exist within the meaning of section 35(1), and the *Migratory Birds Convention Act* is therefore of no force or effect to the extent that it is inconsistent with them.¹⁸

It is possible, however, to interpret "existing" as excluding from the protection of section 35 those rights which, although unextinguished, were legally unexercisable at the time the Act was proclaimed. In other words, the extent of the rights protected would, on this approach, be limited by any restricting legislation in force at the time.

¹⁴*Id.*

¹⁵R.S.C. 1970, c. M-12.

¹⁶See *R. v. Sikyea* and *R. v. George*, *supra*, note 9.

¹⁷In *R. v. Derriksan*, *supra*, note 9, it was held that aboriginal fishing rights are subject to the *Fisheries Act*, R.S.C. 1970, c. F-14. Aboriginal hunting rights would be subject to the *Migratory Birds Convention Act*, *supra*, note 15, for the same reasons.

¹⁸This conclusion would apply equally to other federal legislation, such as the *Fisheries Act* and the *Canada Mining Regulations*, C.R.C. 1978, c. 1516 (see the *Baker Lake* case, *supra*, note 9, where it was held that the aboriginal rights of the Inuit, while diminished to the extent that they were interfered with by those regulations, were not extinguished), and to provincial legislation (other than provincial game laws in Manitoba, Saskatchewan and Alberta, which have their own constitutional basis with respect to Indians due to the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.)).

What then would be the effect of repeal of the restricting legislation? Taking the *Migratory Birds Convention Act* again as an example, I have concluded that repeal of that Act would mean that treaty and aboriginal hunting rights would be freed of the restrictions it imposes. However, to the extent that those rights were previously unexercisable with respect to migratory birds, they were not in existence on April 17, 1982, and therefore they would not be protected by section 35(1).¹⁹ This approach could thus result in an intricate patchwork of constitutionally protected and unprotected rights, thus complicating an area of the law that is already sufficiently confusing. To avoid this result, I have argued that section 35(1) should be interpreted as protecting all aboriginal and treaty rights that have not been actually extinguished.

A question also arises with respect to the effect of the insertion of the word "existing" on rights that had not been recognized when section 35(1) became law. It may be, for example, that some aboriginal peoples in Canada have a right in international law to self-determination. Should this right, if valid, be denied constitutional protection under section 35(1) because it had not been given judicial recognition prior to April 17, 1982? In my view, it should not. In this context, judges do not create rights — they simply determine whether or not rights exist. The existence of any given right dates from the time it was created, not from the time a court decides to recognize and enforce it.²⁰

The effect of entrenching aboriginal and treaty rights on future negotiations to settle outstanding claims also needs to be considered. Before entrenchment, aboriginal title to land, for example, could be voluntarily surrendered to the Crown in return for treaty or other rights.²¹ There is no reason why section 35(1) should interfere with this process. The rights described therein are only protected against inconsistent laws — they are not made unalterable by negotiated settlement. This conclusion is supported by section 25 (to be examined below) which envisages the acquisition of new rights and freedoms by

¹⁹On the basis of the rule of interpretation that statutes are to be read as always speaking (see the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 10), it might be argued that "existing" means at the time s. 35(1) is applied in any given case, not at the time it was enacted. However, this interpretation is unlikely to be adopted because it would render the term virtually meaningless.

²⁰For example, in the *Baker Lake* case, *supra*, note 9, Mahoney J. found that the aboriginal title of the Inuit existed from the time England asserted sovereignty over their lands.

²¹The James Bay Agreement, signed in November, 1975 by the Cree and Inuit of northern Quebec, is a recent example.

the aboriginal peoples by way of land claims settlements.²² However, it is questionable whether future settlements of this kind are protected by section 35(1). Even if they can be classified as treaty rights, the problem is that they could not have been recognized and affirmed by that section because they were not in existence at the time the Act was proclaimed.²³ If this is correct, the result is that aboriginal peoples who negotiate settlements will be giving up entrenched rights for rights that do not have the benefit of constitutional protection. It is thus in the aboriginal peoples' interest to insist that future rights of this kind be given the same protection as existing rights before they agree to any settlements.

It may be asked whether the entrenchment of treaty rights will prevent the validity of a treaty from being challenged on the basis of fraud, misrepresentation, lack of common understanding and intention,²⁴ or failure to comply with constitutional obligations in settling aboriginal claims.²⁵ It is suggested that it should not — first, because an invalid treaty is probably null and void, and therefore unprotected by section 35(1); and second, because arguably the section only recognizes and affirms the treaty rights of the aboriginal peoples, not those of the Crown, and therefore can only be used in favour of, and not against, the interests of the aboriginal peoples. If a treaty were held to be invalid, presumably the aboriginal rights of the signatories would be restored and, to the extent that they had not been otherwise extinguished by legislation, they would be protected by section 35(1).

II. THE ABORIGINAL PEOPLES OF CANADA: SECTION 35(2)

Section 35(2) defines the "aboriginal peoples of Canada" for the purposes of the *Constitution Act, 1982* in a very general way: included are "the Indian, Inuit and Métis peoples of Canada." This definition does

²²Section 25 also protects any rights or freedoms recognized by the *Royal Proclamation of 1763*, R.S.C. 1970, App. II, No. 1, from abrogation or derogation by the Charter. Since the Royal Proclamation expressly provided for the voluntary surrender of Indian land rights, interference with that process cannot have been intended by s. 35(1).

²³See *supra*, note 19.

²⁴See *Re Paulette and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T. S.C.), where the validity of treaties 8 and 11 was questioned because the Indians may not have understood their effect or intended to give up their aboriginal title. This decision was reversed on other grounds: [1976] 2 W.W.R. 193, 63 D.L.R. (3d) 1 (N.W.T. C.A.), affirmed [1977] 2 S.C.R. 628, [1977] 1 W.W.R. 321, 72 D.L.R. (3d) 161, 12 N.R. 420.

²⁵*The Rupert's Land and North-Western Territory Order*, R.S.C. 1970, App. II, No. 9, for example, imposed certain obligations on the Canadian government with respect to aboriginal claims: see generally McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (1982).

not provide any criteria for determining who belongs to each of the three groups mentioned. It is therefore uncertain whether this determination is to be made on the basis of race, kinship, culture (including language and lifestyle), community acceptance, or a combination of these factors. Nor are previous constitutional documents of much assistance. The *Royal Proclamation of 1763*²⁶ and section 91(24) of the *Constitution Act, 1867*²⁷ both refer to "Indian," and the Supreme Court of Canada has determined that this term as used in these documents includes Inuit,²⁸ but no more precise definition has been given and it remains uncertain whether the term includes Métis.²⁹ Furthermore, the very fact that the term has been held to include the Inuit shows that it does not have the same meaning as "Indians" in section 35(2) where the two groups are referred to separately. The term "Indians" also appears in the Natural Resources Transfer Agreements, which were given constitutional status by the *Constitution Act, 1930*,³⁰ and it has been held by the Saskatchewan Court of Appeal that its meaning in that context is limited to the *Indian Act* definition of "Indian."³¹ With respect, in my view this decision is questionable and should not be applied to section 35(2) because it is clearly beyond the competence of Parliament to define terms used in the constitution.³² Furthermore, Indians who have lost their status through marriage or enfranchisement are still Indians and should not be denied their constitutional rights simply because they do not qualify for registration under the federal *Indian Act*.

The inclusion of the Indian, Inuit and Métis peoples in the definition of "aboriginal peoples of Canada" implies that each of these groups has (or at least had) aboriginal or treaty rights. This is particularly significant for the Métis, whose rights have tended to be ignored in the past. When the numbered treaties were signed in Western Canada after

²⁶R.S.C. 1970, App. II, No. 1.

²⁷30-31 Vict., c. 3 (U.K.) (formerly *The British North America Act, 1867*).

²⁸*Reference re "Indians"*, [1939] S.C.R. 104, (*sub nom. Re Eskimos*) [1939] 2 D.L.R. 417, and *Sigaveak El-53 v. R.*, [1966] S.C.R. 645, 56 W.W.R. 478, 57 D.L.R. (2d) 536, [1966] 4 C.C.C. 393, 49 C.R. 271.

²⁹See Chartier, " 'Indian': An Analysis of the Term as used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 Sask. Law Rev. 37, and McNeil, *supra*, note 25, at 15-18.

³⁰20-21 Geo. V, c. 26 (U.K.) (formerly *The British North America Act, 1930*).

³¹*R. v. Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.). See also *R. v. Pritchard* (1972), 32 D.L.R. (3d) 617 (Sask. Dist. Ct.), and *R. v. Budd*; *R. v. Crane*, [1979] 6 W.W.R. 450 (Sask. Q.B.), reversed Nov. 14, 1979, unreported (Sask. C.A.), apparently for procedural reasons.

³²See Jordan, "Who is an Indian?", [1977] 1 C.N.L.B. (No. 1) 22, and McNeil, "Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada" (forthcoming).

1870, it is clear that some persons of mixed blood were included.³³ If these persons are classed as Métis, their descendants presumably would have existing treaty rights. Métis (or "half-breeds," as they were then called) who were not included in the treaties were granted land or money scrip in recognition of their claim to "Indian title."³⁴ The federal government has maintained that this distribution of scrip extinguished any aboriginal rights the Métis may have had. This is a highly debatable proposition and is open to challenge on several grounds.³⁵ It is therefore quite possible that the Métis have existing aboriginal rights that are now protected under section 35.

III. PROTECTION OF THE RIGHTS OF THE ABORIGINAL PEOPLES FROM THE CHARTER: SECTION 25

Section 25 of the Act provides that "[t]he 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 the October 7, 1763; and (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement."

Unlike section 35, this provision is included in the *Canadian Charter of Rights and Freedoms*. Its obvious purpose is to prevent the Charter from being interpreted in a way that infringes on any rights or freedoms the aboriginal peoples may have. It would, for example, prevent section 15, which guarantees every individual equality before and under the law without discrimination on the basis, *inter alia*, of race, national or ethnic origin, or colour, from being used to override the special status and rights of the aboriginal peoples. Beyond this, however, the section does not provide any additional protection for those rights.

Although the only rights and freedoms expressly included in section 25 (beyond aboriginal and treaty rights generally) are those that have been recognized by the Royal Proclamation or that may be acquired by way of land claims settlement, it is clear that these are only examples

³³See Morris, *The Treaties of Canada with the Indians* (1880), at 41, 222, 228, and 294-95.

³⁴Pursuant to s. 31 of the *Manitoba Act*, S.C. 1870, c. 3, and s. 125(e) of the *Dominion Lands Act*, S.C. 1879, c. 31.

³⁵Fraud, misrepresentation, and non-compliance with the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, and the *Manitoba Act* are examples.

of the rights and freedoms protected. They should not be read as limiting the generality of the preceding words. With respect to the Royal Proclamation, it is of interest that the section refers to any rights or freedoms that have been *recognized* by that document. This would seem to imply that the Proclamation merely confirmed existing rights rather than creating new ones, thus affirming recent judicial pronouncements on this issue.³⁶ This may be significant because the Proclamation is not included in the constitution of Canada as defined in section 52(2), and is probably not given constitutional protection under section 35(1). Since it could presumably be repealed by Parliament at any time, it is important that the rights contained in it are protected as aboriginal rights under section 35(1) in any case. Section 25 probably expressly mentions rights or freedoms that may be acquired by land claims settlement to make it clear that future settlements of this kind are not to be invalidated by the Charter. Without this provision, the section may have been interpreted as applying only to settlements reached before the Charter came into force.

IV. OTHER CONSTITUTIONAL GUARANTEES

Section 52(2) of the Act defines the constitution of Canada as including, *inter alia*, "the Acts and orders referred to in Schedule I." We have already noted that the *Royal Proclamation of 1763* is not contained in that list. However, there are a number of other constitutional documents included in Schedule I that contain significant guarantees of the rights of the aboriginal peoples. Section 91(24) of the *Constitution Act, 1867*, for example, recognizes the special status of the "Indians" by assigning Parliament exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians."³⁷ Section 31 of the *Manitoba Act, 1870*³⁸ recognizes the aboriginal land claims of the Métis. The *Rupert's Land and North-Western Territory Order* imposes an obligation on the Canadian government to settle Indian claims to compensation for lands required for settlement "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines" and "in communication with the Imperial Government."³⁹ The British Columbia Terms of Union provide that the Dominion Government shall assume the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit," and shall continue "a policy

³⁶See the *Calder* case, *supra*, note 8, and the *Baker Lake* case, *supra*, note 9.

³⁷30-31 Vict., c. 3, s. 91(24) (U.K.).

³⁸S.C. 1870, c. 3.

³⁹*Supra*, note 25.

as liberal as that hitherto pursued by the British Columbia Government."⁴⁰ The *Constitution Act, 1930* assures the treaty land entitlement and the hunting, trapping and fishing rights of the "Indians" of the prairie provinces.⁴¹ Each of these documents is part of the constitution of Canada, and the rights guaranteed are thus protected against infringement other than by constitutional amendment.⁴²

V. THE CONSTITUTIONAL CONFERENCE: SECTION 37

Section 37(1) provides that a constitutional conference composed of the Prime Minister and the ten provincial premiers shall be held within one year after the Part of the Act containing that section comes into force, that is, within one year of April 17, 1982. Subsection (2) provides that the conference convened under subsection (1) shall have included in its agenda "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada," and further that "the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item." No provision, however, is made for choosing the representatives of the aboriginal peoples to be invited to the conference. This could present a problem, given the variety and divergence of the aboriginal organizations in this country, and the fact that the Indian, Inuit and Métis peoples referred to in section 35(2) are undefined.

The matters affecting the aboriginal peoples to be discussed at the constitutional conference are to include "the identification and definition of the rights of those peoples to be included in the Constitution of Canada."⁴³ The provision thus recognizes the need for a more detailed description of those rights than that provided by the general terms "aboriginal and treaty rights" contained in section 35(1), and envisages that this is to be accomplished through negotiations involving the Prime Minister, the provincial premiers, and representatives of the aboriginal peoples. Considering the complexity of the issues involved, and the short time the participants have to do the extensive legal and historical research necessary to prepare for these discussions, it is unlikely that very much will be accomplished at this conference.

Unfortunately, the Act provides no further mechanism for participation by the aboriginal peoples in future discussions involving their rights. They could thus be entirely shut out of the process after the initial conference, and the Prime Minister and the provincial premiers could get together and decide on constitutional amendments affecting their rights without any consultation with the aboriginal peoples.

CONCLUSION

The inadequacy of the provision for consultation with the aboriginal peoples highlights the major weakness of the constitutional entrenchment of their rights. Although now protected against infringement by Parliament or by a provincial legislature acting unilaterally, they can still be taken away at any time by a constitutional amendment authorized by resolutions of the Senate, the House of Commons, and the legislatures of two-thirds of the provinces having a combined population of at least fifty percent of the population of all the provinces.⁴⁴ The consent of the aboriginal peoples is not required, and after the initial constitutional conference provided for in section 37 they would not even have to be consulted. Given the power the other participants have over their rights, the weakness of the bargaining position of the aboriginal peoples at the conference is obvious. Ultimately, therefore, the fate of their rights will depend on the level of public awareness of the legal and historical bases of those rights, and the degree to which the people of Canada expect their elected representatives to deal justly and fairly with the aboriginal peoples.

⁴⁰R.S.C. 1970, Appendix II, No. 10.

⁴¹20-21 Geo V, c. 26 (U.K.).

⁴²It should be noted, however, that this means that these Acts and Orders can now be amended or repealed in Canada, whereas previously only the British Parliament had this power. As a result, the rights they contain are probably more vulnerable than they were in the past.

⁴³*Constitution Act, 1982*, s. 37(2).

⁴⁴*Id.*, s. 38.