

# O CANADA, OUR HOME ON NATIVE LAND: ABORIGINAL SELF GOVERNMENT, NOT THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, MAY BE THE KEY TO EDUCATIONAL REFORM

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## **Abstract/Résumé**

Changes in Aboriginal education will evolve mainly through future constitutional negotiations. Specifically, significant reform for Aboriginal peoples (within education) rides on the success of attaining self-government. Until that time, issues of equality will continue to be politically contentious. The purpose of this article is to report research findings from an extensive study regarding the impact of the *Canadian Charter of Rights and Freedoms* on education for Aboriginal peoples in Canada. This socio-legal study focuses on case law, legal jurisprudence and interview data from constitutional and educational experts engaged in Aboriginal issues. In particular, it examines the impact of the *Charter of Rights and Freedoms* on the education of Aboriginal peoples in Canada between 1982 and 1992.

Les changements d'éducation aborigène développeront en grande partie au moyen de futures négociations constitutionnelles. Explicitement, la réforme considérable pour les aborigènes (dans l'éducation) dépend de la réussite à atteindre l'autonomie. Jusque-là, des questions d'égalité continueront à être contestées politiquement. Le but de cet article est à rendre compte de l'état des recherches d'une étude approfondie en ce qui concerne l'impact de la Charte canadienne des droits et des libertés sur l'éducation pour les aborigènes au Canada. Cette étude socio-juridique concentre sur la législation de procès, la jurisprudence légale et les données des entrevues de experts constitutionnels et d'éducation, qui sont engagés dans les sujets aborigènes. En particulier, elle examine l'impact de la Charte canadienne des droits et des libertés sur l'éducation des aborigènes au Canada entre 1982 et 1992.

## Signing the Charter into Law

Amid the fanfare, pomp and circumstance owing to the signing of the *Canada Act 1982*, Queen Elizabeth II and then Prime Minister Pierre Elliot Trudeau ushered in a new era for Canadians. For the first time in history Canadians would be guaranteed basic rights and fundamental freedoms under constitutional law.

The *Canadian Charter of Rights and Freedoms* is superior to all federal and provincial statutes. It changes the role of the judiciary. Courts now have the power to go beyond simply interpreting legislation; they now have the power to judge the laws themselves to insure compliance with the rights and freedoms enshrined in the *Charter*. In essence, the entrenchment of rights and freedoms precipitated changes within most sectors of society, including education (Black-Branch, 1993; Foster, 1992; Manley-Casimir and Sussel, 1986).

## The Charter in Education

The principles entrenched in the *Charter of Rights and Freedoms* carry with them legal repercussions for most schools and school systems throughout Canada (Black-Branch, 1993; Dickinson and MacKay, 1989; Foster, 1992; MacKay and Sutherland, 1992; Manley-Casimir and Sussel, 1986). In fact, many academics and legal practitioners say that the legal implications will impinge upon all levels of educational policy and practice (Black-Branch, 1993).

For the first time in Canadian history, education would be held to the scrutiny of courts to protect individuals and groups from the power of wrongs by the state. The *Charter* is seen as the peoples' *Charter* and will protect what the Supreme Court of Canada has since called the most "insular" of minorities.

While the impact of the *Charter* on education has been clear in reference to certain individuals, such as those belonging to minority religions, and certain groups of people, such as French and English minority language populations, the impact of the *Charter* on education for Aboriginal peoples is largely unknown.

## Purpose and Objectives of the Research

The purpose of this research was to examine the impact of the *Charter of Rights and Freedoms* on education for Aboriginal peoples throughout Canada. In particular, the main objectives were:

1. to formulate a body of case law regarding the *Charter of Rights and Freedoms* and education relating to Aboriginal peoples in Canada;
- and
2. to identify how academics and legal practitioners believe the *Charter* has influenced, and may continue to influence, education for Aboriginal peoples in Canada.

## Research Design and Methodology

A two phase socio-legal research methodology was employed to complete this study (Black-Branch, 1993). The conceptualization of this study was based on traditional legal research methodology (Chambers, 1939; Gall, 1990; Harvard, 1989) and widely accepted methods of qualitative inquiry (Bogdan and Biklen, 1982; Eisner, 1990; Hammersly, 1990; Lincoln and Guba, 1985; Miles and Huberman, 1984; Taylor and Bogdan, 1984). These varied approaches were designed to elicit different sets of data for the same area of inquiry. The results of each strand (phase) were analyzed individually and then juxtaposed to enhance the understanding of issues relating to Aboriginal education.

The research included firstly, an examination of all legal cases heard by the Canadian judiciary to build a body of case law and a synthesis of legal jurisprudence regarding Aboriginal issues and education (1982-93), and secondly, interviews with a selection of 15 academic and legal experts to develop a broader understanding of Aboriginal issues and education under the *Charter of Rights and Freedoms*.

Once again, the data from both these phases were analyzed individually and then collectively as one large pool of data. Conclusions were verified in accordance with Miles and Huberman's (1984) twelve tactics for drawing and verifying conclusions.

## **Charter Case Law: No Findings is in Itself a Finding**

The *Charter of Rights and Freedoms* undoubtedly opens the school house gate to legal scrutiny. Well over 100 education-related cases have been heard by the courts since the institution of the *Charter* in 1982. Legal arguments typically involve issues of fundamental freedoms, legal rights, equality rights, minority language education rights, and denominational and separate schools rights (Black-Branch, 1993). These judicial decisions are not likely to have any direct impact on Aboriginal education, however.

These cases did not involve Aboriginal peoples or Aboriginal issues. In sum, Aboriginal individuals and activists wanting educational change are not using the *Charter*, within judicial fora, as a means to challenge

school policies and practices. At first glance, this finding may not appear significant, but it is an important one. It raises many important questions as to why Aboriginal individuals and groups have not used the *Charter* as a vehicle for educational reform as have so many others. To answer this question it is fitting to turn to the experts, those who act as legal counsel and those who conduct research and lecture in educational, constitutional and First Nations issues.

### **Opinions of Academics and Legal Practitioners: Probability, Problems and Possibilities**

Without hesitation, all 15 academic and legal experts interviewed regard Aboriginal issues as extremely important within the Canadian educational context. Nevertheless, only five of the 15 would comment extensively on these issues. In general, those who would not largely felt the issues were politically too sensitive. Conversely, the ones who did offer their professional opinions were not very optimistic. They report that the *Charter* has done very little regarding change in the area of Aboriginal education. In essence, they feel the Charter maintains the political *status quo*.

Nonetheless, they did offer some alternative interpretations of how the *Charter* might possibly be used for moderate educational reform within limited settings. Realistically speaking, however, all those responding report that changes of any significance will come with Aboriginal self-government, and not as a result of the *Charter of Rights and Freedoms*. These issues will be examined in the following discussion.

### **Section 25 Maintains the *Status Quo***

Generally speaking, the experts believe the *Charter* has done very little to improve the conditions of education for Aboriginal peoples. Many see a marked irony that many individuals and groups have benefited from the Charter (within the educational context) while Aboriginal peoples, whom they say have obvious legal arguments, have not. The experts find this particularly disheartening in view of the fact that one section of the *Charter* is intended specifically for Aboriginal peoples. Section 25 of the *Charter* states:

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 and 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 may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

The experts say that section 25 has done, and will do, little to expand or even protect the rights of Aboriginal peoples, in any sector of society. They say this was a symbolic inclusion and means nothing. As a result, Aboriginal peoples do not even bother to try to use section 25, or any other provisions enshrined in the *Charter*, as a vehicle to achieve educational change.

Most experts believe that the Government of the day in 1982 did not want Aboriginal participation in the constitutional process. In essence, it intended the *Charter* to maintain the *status quo* for Aboriginal peoples. The experts concur that is essentially what has happened.

## Group Rights

Although section 25 is not regarded in a favourable light, there may be an ever-so-slight glimmer of hope. Academics and legal practitioners say that theoretically speaking, section 25 may have inadvertently established group rights for Aboriginal peoples. Whether this can, or will, amount to making any difference, in education or in any other sector of society for that matter, is yet to be seen. One legal practitioner states:

It has to do with group rights under the *Charter*. In an awkward sort of way, the *Charter* does recognize Natives as a group. I don't think it was intentional though...because as you very well know the federal government did everything in its power to ensure that Natives didn't get a piece of the pie...so they threw in this meaningless little phrase stating that nothing would abrogate or derogate what Natives already have .... but that in itself was abrogating them because it recognized them as a group under the *Charter*...it was unintentional but done just the same (Black-Branch, 1993:182).

Although most agree that this argument does not hold strong legal clout for Aboriginal peoples, it may be a starting point for certain educational rights. One constitutional expert speaks of how section 25 may be used to protect the existing educational interests of some Aboriginal groups:

One example might be if a school had a special program of instruction, say in an Aboriginal language, to which only Aboriginal children were permitted. The non-Aboriginal parents

or pupils would not be able to claim that that was a violation of their equality rights because it could be argued that some degree of racial distinction in the matter of Aboriginal languages was protected by section 25 from the impact of the *Charter*. You might be able to make distinctions based on Aboriginal origin or race which, provided that they were beneficial to the Aboriginal group, that you might not be able to make if you were dealing with a group defined by race or language or ethnic origin. I could imagine something like that. Section 25 is only saying that the *Charter of Rights* does not derogate from Aboriginal rights. So in effect it narrows the application of the *Charter of Rights* when it comes into conflict with aboriginal rights. So I would expect that to have a rather limited, not have a very extensive, effect on school systems (Black-Branch, 1993:182-183).

The experts note, however, that these types of arguments would be most effective, if at all, in boards of education in the Northwest Territories where school programs, particularly in the early years, are offered in languages other than English or French.

### **Other Charter Arguments**

Examining section 25, the experts feel that Aboriginal peoples would be better off securing their rights under other sections of the *Charter*. Section 15, for example is the equality rights provision. This will provide the basis for a number of arguments aimed at achieving equality. Section 15(1) specifically states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

These equality provisions aim to promote equality, in the broadest sense of the term. That is to say, they expand beyond the concept of non-discrimination, endeavouring to ensure equity. In particular, four very different arguments can be mounted under section 15: equality before the law (meaning every individual is equal, regardless of position or privilege—this was taken from the *Canadian Bill of Rights*); equality under the law (meaning that one can challenge both the application and the content of law); equal protection of the law (as borrowed from the U.S. Fourteenth Amendment, thus encouraging the use of American jurisprudence, which is much more developed than Canadian jurisprudence); and, equal benefit of the law (meaning the outcomes of law are to be equally distributed and

equally shared). Evidently, a number of creative arguments could be forwarded under these provisions regarding educational funding, governance and administration, to name but a few.

Alternatively, arguments may be launched under section 2 which guarantees fundamental freedoms, including:

freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

One lawyer explains such implications, particularly regarding freedom of religion, belief or conscience. He states:

Speaking theoretically, if there is going to be some difficulty about promoting spiritual value or particular spiritual values in public schools, it could cause some difficulty for Aboriginal peoples because I don't think the constitution, well, the constitution does not guarantee them any particular denominational rights.

They [Aboriginal peoples] have become very vocal about promoting their own cultural values and spiritual ones are very central to that so I would think they would want to see as much flexibility in a public school system as you can but given the way courts have recently been interpreting what can be done in the public schools there could be a real conflict there (Black-Branch, 1993:183).

This lawyer stresses that Aboriginal peoples could mount a legal argument contending a violation of their freedom of religion, belief and conscience based on the spiritual stand (be it denominational or secular in nature) promoted by schools.

In addition, some experts say that section 27, the multiculturalism clause, may strengthen Aboriginal arguments. The clause states that

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It should be noted, however, that others disagree with this, stating that Aboriginal issues are separate and distinct from multiculturalism and must be treated accordingly. First Nations leaders categorically reject the term "cultural minority" (Turpel, 1990). But, beyond this particular disagreement, most agree that the *Charter* is not the real answer to issues relating to Aboriginal educational reform.

## Self Government and Educational Governance

Beyond theoretical arguments and academic analyses, the experts believe that "changes" in Aboriginal education will evolve mainly through future constitutional negotiations. One legal expert observes, "If they [Aboriginal peoples] achieve self-government under a new constitutional package, we are sure to see massive changes in education, in all areas of Native issues" (Black-Branch, 1993:183).

Specifically, educational governance for Aboriginal peoples will have to be negotiated as part of Aboriginal self-government. One lawyer recounts her recent experience to this effect, and the potential for educational change for Aboriginal peoples with the advent of self-government and the settling of land claims.

I just recently completed a very major work with one of the Aboriginal groups in British Columbia where we put together a self-government proposal for education for their group (Black-Branch, 1993:183).

Like this expert, most agree that educational reform must be part and parcel to self-governance talks.

Further, most agree that the political will is now here to resolve some of the long-standing issues pertaining to Aboriginal self-governance, unlike a decade ago with the signing of the *Canada Act*. The *Charlottetown Accord*, 1992, for example, was to offer Aboriginal self-government. Most importantly, it was drafted with participation from the governments of Canada and delegations representing Aboriginal peoples, including the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada and the Métis National Council.

Specifically, the draft legal text of the failed *Accord* recognized that

the Aboriginal peoples of Canada have the inherent right to self government within Canada (section 35.1).

Included in this right was the right

to safeguard and develop their languages, cultures, economies, identities, institutions and traditions (section 35.1[3a]).

The constitutional entrenchment of these rights would have had profound implications regarding the management, control and governance of education within the scope of Aboriginal self-governance.

Despite the optimism, the cold reality that the *Charlottetown Accord* is dead is not easily ignored. Although some remain optimistic that a similar type of agreement will be reached soon, at the end of the day the experts

remain skeptical as to how long it will take before change really evolves. Moreover, they are hesitant to predict how long it will take before real and tangible improvements can be measured in education for Aboriginal peoples.

### **Summary and Conclusion: The Impact of the *Canadian Charter of Rights and Freedoms***

The experts offering commentary on issues concerning education and Aboriginal peoples say that the *Charter* itself has done very little to bring forth change. Similarly, it is highly unlikely that education-related Charter case law will expand the rights of Aboriginal peoples. In fact, the experts responding in this study agree that the *Charter* maintains the *status quo* for Aboriginal peoples in most sectors of society and education is no different. They typically feel that changes of any magnitude are tied to future constitutional negotiations regarding self-government and the settling of land claims.

The *Charlottetown Accord* gave promise of change. As a result, many Aboriginal leaders, and politicians alike, were gravely disappointed with the "No" vote on the constitutional referendum and thus the failure of the *Charlottetown Accord*. Many hopes for change in all sectors of Aboriginal affairs, including education, rode on the *Accord*.

While many would argue that the *Charlottetown Accord* is a missed opportunity for Aboriginal peoples in Canada, others remain optimistic that a similar agreement will be reached in short order. They say that the popular political will is present to institute change and to recognize the inherent right of Aboriginal people to self-government. Prime Minister Chretien, for example, made it clear in his 1993 election platform that he supports the settlement of Aboriginal issues.

Experts say that significant change within education for Aboriginal peoples rides on the success of attaining self-government. In the mean time, issues of equality and the education of Aboriginal peoples will continue to be politically contentious.

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