

## **SOVEREIGNTY, JURISDICTION AND GUIDING PRINCIPLES IN ABORIGINAL EDUCATION IN CANADA**

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### **ABSTRACT/RESUME**

The claim of First Nations to sovereignty is rooted in the political, legal and historical relationship between the First Nations and Canada. Today, many land claims and court cases have stemmed from the unextinguished aboriginal title and jurisdiction concerning those lands. By similar power and authority - by right of their sovereign title - First Nations wish to exercise jurisdiction over education.

La revendication d'indépendance par les Premières Nations est enracinée dans le rapport politique, légal et historique entre les Premières Nations et le Canada. Aujourd'hui, beaucoup de revendications de terres et beaucoup de procès proviennent du droit et de la juridiction autochtones qui n'ont pas encore été décidés à l'égard de ces terres. A travers un pouvoir et une autorité semblables - suivant leur droit de souveraineté - les Premières Nations veulent exercer la juridiction sur l'éducation.

## SOVEREIGNTY

The extent and origin of aboriginal sovereignty has, in the past few years, become an issue of much debate between the Canadian government and those Indian Nations situated within Canada's boundaries. Briefly stated, the degrees of sovereignty and the constitutionalization of aboriginal rights in section 35 of the Canada Act, are all implications of Canada asking Indian Nations in Canada, the not-so-simple question "*What is your relationship to us?*" This is the point where both non-Native and Native groups are obliged to look at their past relationship. It is also the point when problems of interpretation arise. For Indian Nations and other aboriginal peoples, however, there is only one interpretation of that relationship with which they are concerned, namely that which reflects and supports their claim to sovereignty. This claim to sovereignty, is, to many Indian people a very real and valid claim with a variety of strong supporting facts evident within the Indian Nations/Canadian political, legal and historical interrelationship.

Those early relationships and the circumstances under which they were formed make up facts and the ultimate truths about who and what Indians are today. Although the interpretation of history has been lopsided ever since the arrival of non-Natives, there are certain circumstances and events that serve to outline a consistent pattern of the interrelationships established since the arrival of Europeans.

When Europeans first arrived in North America they were entirely dependent upon the political and social goodwill of the indigenous nations and societies living here. Any intended occupation of lands and economic or military alliances was necessarily done through the meeting of the international representatives of those nations concerned. During those times, Indian Nations were in a much stronger position because of their numbers and independence. Early land transactions were carried out to keep peace and maintain alliances between Nations, both European and Native. In the following centuries, due to the depletion of those natural resources which to a large degree composed the economic base governing the indigenous life style, indigenous influence and control over European expansionism diminished in varying degrees. In short, the exploitation of aboriginal peoples and lands was an event that occurred hand-in-hand with white expansion. However, although expansion was occurring, the aboriginal influence and jurisdiction never diminished to the point where the ideas and terms of "a voluntary surrender of sovereignty", or, "conquered peoples" could be applied. In fact, the opposite is true of aboriginal influence and jurisdiction in Canada's affairs in that these powers were exercised when they were most crucial to the survival of the Indian Nations of these lands. Two examples can be noted here:

- i) Between 1750 and 1763, the Odawa war chief Pontiac and his allies defeated the British forces in a war over land rights. This led to the enactment of the Royal Proclamation of 1763.

- ii) In 1812, the Shawnee war chief Tecumseh summoned a large amount of First Nations military support against the invading U.S. forces. This occurred after years of fighting against U.S. expansionist forces in the Ohio valley, and has been recognized as a deciding factor in the War of 1812.

Such examples, together with their surrounding circumstances, clearly demonstrate the fact that not only were the political, military and social alliances of the First Nations a prime factor necessary to the development of "Canada", but the benefits of friendly international relationships were quite openly sought and accommodated by the colonizing foreign nations. The treaty and other international relationships that were formed both before and after those significant wars reflect a recognized need for peace and alliance between the military powers. They also serve to underline the historical fact that many First Nations were approached with offers of international relationships and agreements because they were seen as holding legal rights which made their consent necessary in order to legitimize transactions concerning the surrender of lands and resources. It is within this perspective that our aboriginal title, jurisdiction and sovereignty are seen.

Certain rights were granted through these treaties. Other powers and rights however have been retained by the Indian Nations because those rights were never included in those agreements. Among those unceded rights are the rights of Indian Nations to determine their own citizenship, forms of government, administration of justice, law enforcement, taxation, domestic relations of citizens, property use and education. Many lands have been settled by non-Indian people without the procedures of treaty making and today the Canadian government is faced with many land claims and court cases stemming from the unextinguished aboriginal title and jurisdiction concerning those lands. These developments, viewed in the light of the previously outlined context, emphasize the viewpoint that all of the original Indian sovereignty and legal interests over lands and resources that have not been properly surrendered or extinguished remain intact and available to the Indian Nations.

It is now necessary however to seek political solutions to the many problems which have been introduced by the often haphazard imposition of alien laws and systems on the Indian Nations of this land. Indian peoples, through their own methods of transmitting their histories, know that there was never a time of saying "We will henceforth stop being Mohawks, Sioux, Cree and Ojibways, and become Canadians". The fact that Indians exist as distinct, identifiable groups having cultures, languages, territories and governments, supports their efforts and claims to be recognized and dealt with as *nations* within the context of international laws and procedures.

There are many instances where the Canadian government has haphazardly imposed its laws and influence on the Indian Nations, resulting in unwarranted interference in the natural growth and development of Indian communities. There has been external exploitation and interference, all of which is aimed at either the assimilation of citizens of Indian Nations or the undermining of their sovereignty. Although the many attempts made by Canada with that aim in

mind range from the socio-economic suppression of Indian Nations to the attempted re-socialization of Indian children in the infamous Canadian residential schools, the citizens of the Indian Nations have never crossed that final line of international, Canadian or provincial laws in order to change their identities and status from Indians to that of Canadians. Today, and in real sense, Indian sovereignty is only as strong as the individual. For some, sovereignty has become a life-long and relentless belief and pursuit of an acceptable process through which Indian people can and will be seen as members of a sovereign nation. For others, the opportunities to fully develop a clear understanding of the issues involved have not yet occurred. For still others, certain considerations may have inhibited those individuals from stepping forward and contributing to this endeavor.

If tomorrow, we were asked by what power or authority we exercise our jurisdiction over education, hopefully our answer will be that it is through the same power by which we lay rightful claim to our ancestral lands and governments - by right of our sovereign title and authority. Many Canadians would argue that Indians are domestic and dependent nations, and that our view is only supported by a vague and one-sided perception of our domestic reality. It must be stated unequivocally that those arguments do not even begin to answer the question of the sovereignty of Indian Nations. Those arguments become shallow in that they are based on certain theories of a political economy, and the simple fact of a dependence on Canadian goods and other resources does not in any way negate the sovereignty of the Indian Nations any more than the same dependence on the part of Canadians vis-a-vis the U.S. affects their sovereignty.

The idea of sovereignty at this point is perhaps best broken down into two choices which take in two lines of arguments. These are:

i) The Indian Nations will one day have to admit that the past and present colonial governments have taken away all of the Indians' lands and resources, and therefore, will have to look after them.

or;

ii) We continue to lay claim to our sovereignty as nations and peoples within the context of international law and history with a view towards self-reliance and self-determination.

Both of the above choices entail various ways of looking at ourselves, our treaties, aboriginal rights and other factors - all of which translate into two different futures for Indian people, depending upon how they approach this question.

The greatest challenge in making those choices between continued dependency or self-determination is the inescapable fact that each citizen of the future generations of Indian Nations who will be affected by that decision will have to be able to both believe in it, and also, to live with it.

## JURISDICTION

Aboriginal sovereignty and jurisdiction have always existed and can be expected to be directly affected and drawn into the present on-going debate surrounding those issues. Aboriginal efforts in trying to reassert jurisdiction are pursued with much support from historical facts, and from within both the international and the Canadian domestic legal systems. Today, Indian Nations are attempting to reassert jurisdiction over a precious resource, the development of which is crucial if we are to secure our future as nations and as identifiable and distinct peoples. That resource is, of course, our own children. Thus far, those efforts, within the context of "Indian education", may draw support from both Canadian legislation, (see further: *The Canadian Charter of Rights and Freedoms*) and, also from purely international sources such as the *Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights*.

The *Universal Declaration of Human Rights* states, in Article 26:

1. Every one has the right to education. Education shall be free, at least in the elementary and fundamental states. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

*The International Covenant on Economic, Social, and Cultural Rights* states in Article 13 that:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - a. Primary education shall be compulsory and available free to all;
  - b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - e. The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their own children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The entire story of the impact of colonization and assimilation is neither well known nor fully appreciated by Canadians and other nations of the global community. The final results of the destructive legislation and policies which have been imposed on Indian Nations by the settler governments are, simply put: a loss of economic base; a loss of legislative jurisdiction (means for social control) through the unwarranted imposition of foreign legislation; enforced assimilation of Indian children in residential schools; low standards of health and reduced life expectancy; disproportionate number of Indians in Canadian criminal detention centers. The objective of the past and present colonial legisla-

## GUIDING PRINCIPLES FOR ABORIGINAL EDUCATION

- a) The right to education is a basic human right. The Universal Declaration of Human Rights of the United Nations confirms this right.
- b) Indian Nations are part of the aboriginal peoples of Canada. Indian Nations are "peoples" by definition in international law.
- c) "Peoples" have specific rights in this world which are separate from the rights of individuals.
- d) Each "people" has the right to determine the education of its children.
- e) Each Indian Nation is different. We have different languages, social and governmental structures and cultures. A system of aboriginal education would respect diversity and would have the flexibility to allow each Indian Government to determine the education of its children.
- f) The liberty of Indian Nations must be maintained to choose for children the type of schooling which is in keeping with their religious, cultural and linguistic convictions.
- g) The Government of Canada has the obligation to pay for aboriginal education as a responsibility established through Parliament's legislative jurisdiction under the B.N.A. Act of 1867 and the treaties. *The obligation to fund education for the children of Indian Nations is not identical to the right to control that education.*
- h) Educational equity requires that Indian Nations have funding to supply pupils with the services they require so that they have a realistic chance of equality of educational attainment with Canadians.
- i) Aboriginal education programs should be compatible with self-determination so that the pride and self-reliance of Indian Nations are enhanced by the experience in school.
- j) Each Indian Nation has the right to determine the composition of its education and must be exempt from provincial and federal legislation that affects any aspect of Indian control over education.