

Constitutional Reconciliation of Education for Aboriginal Peoples

Marie Battiste, Ed.D., D.H.L, LL.D.

About the Author: Marie Battiste, Ed.D., D.H.L, LL.D.

Marie Battiste is Mi'kmaq from the Potlo'tek First Nation of Unama'ki, Nova Scotia. She is full professor in the Department of Educational Foundations at University of Saskatchewan, since 1993. More recently she has been appointed Academic Director of the Aboriginal Education Research Centre in the College of Education and Co-Director of the national Aboriginal Learning Knowledge Centre of the Canadian Council on Learning.

Abstract: 100 words

Treaties were negotiated in good faith to provide, among other services, an education that would enable First Nations to enrich their new livelihood. This transformative education has not been delivered. Instead policies built on supremacy of European heritages have left a legacy of trauma a product of an education system meant to "kill the Indian in the child." In 1982, the Constitution of Canada affirmed Aboriginal and treaty rights, and in so doing generates the shared competency of the federal and provincial/territorial governments and First Nations to take action to preserve and promote the distinct knowledge, traditions, and distinctive cultures that underlay these rights.

Foundations of Indigenous Knowledge

Prior to formal schooling, Indigenous learning was responsive to the needs of families within an ecology that cultivated holistic lifelong processes that were the foundations of Indigenous knowledge and culture (IK). These educational processes of the Aboriginal peoples of Canada created vast learning civilizations based on multiple competencies in Aboriginal languages and knowledge, facilitating Indigenous peoples connections with their own communities and with large Aboriginal confederacies and alliances. The success of these holistic processes for lifelong learning created a collective sustainable lifestyle that contributed sufficiently to the needs of the present and took into consideration the needs of the future seven generations (Battiste & Semegani, 2002). These educational processes continued as Aboriginal rights.

Aboriginal peoples' enthusiasm for learning is revealed in their many treaties with European Crowns. In them and in the records of their negotiation, the future education of First Nations students was a prime concern of our ancestors in the treaties, as they transferred jurisdictions of vast territories to fund the promised educational and livelihood obligations (Henderson, 2007). Treaty education provided both a shared vision of their future and an enriched livelihood of First Nations, since the transmission of European knowledge would effectively give the families competencies to negotiate the enriched livelihoods of the new relationships. Under the written terms of the treaties, parental choice would

sustain the education in the families and in the communities the selection of teachers. Parents did not give up their rights to control the education of their families, but treaties gave the Crown different levels of discretion in the funding and establishing of schools and educational programs that would benefit their families (Henderson, 1995).

Canadian educators have not been able to implement either the Indigenous vision of education nor the treaty commitments due to systemic discrimination of the federal government and provinces and territories that have instead chosen to use education as a tool of forced assimilation (RCAP, 1996). Colonial Eurocentric attitudes of superiority and the assumption that Aboriginal languages, cultures, and livelihood are inferior, have led to the legacy of federal residential and day schools and later provincial schools that failed to fulfill the Aboriginal theory of lifelong learning and the educational commitments of treaties. The legacy of education began with the Canadian residential school system that comprised of a number of schools for First Nation children, operated during the 19th and 20th centuries by churches of various denominations (about sixty per cent by Roman Catholics, and thirty per cent by the Protestants) funded under the *Indian Act* by Indian and Northern Affairs Canada (INAC), a branch of the federal government. The schools' purpose was, according to the *Indian Act*, to "civilize" First Nation children, teach them English or French, convert them to Christianity, and end their traditional ways of life (Barman & Hébert, 1986). The legacy of federal education policy has been a systemic and human tragedy that has denied Aboriginal peoples their dignity. This human experiment in cultural erosion and destruction unfolded, sapping them of the opportunities that a healthy collective society and a transformative and responsive education could provide. Thus federal education policy became a distrusted concept associated with traumatic educational processes.

Healing and Reconciliation

In 2008, Canadian Prime Minister Stephen Harper apologized to Aboriginal peoples who were forced to attend Canada's residential schools, not only for the known excesses of the residential school system, but for the creation of the system that was meant to "kill the Indian in the child".(Harper 2008) Canada's apology to Aboriginal peoples for the destruction of their lives, their parenting, and jeopardizing their continued livelihood based on their rich cultures and heritages comes as a welcomed first step in creating a responsive approach for Aboriginal peoples, yet the translation of this apology into concerted action has not emerged. Furthermore, an apology cannot erase the damage suffered by thousands of Aboriginal peoples and their descendents who have experienced

cycles of abuses. A new consciousness of their past trauma can be one aspect of healing and reconciliation.

The next step required is a constitutional reconciliation with Aboriginal peoples' constitutional rights to education supported by constitutional power from federal, territorial, and provincial education systems. To initiate such a step educators have to first understand how aboriginal and treaty rights of the Aboriginal peoples in regard to education has reorientated the constitutional framework of education in Canada. Then, educators have to understand the mandatory force of constitutional reconciliation that the Court has created to converge these different constitutional sources of power, creating a complex intersection of interrelated issues that should be addressed in transforming current and future educational outcomes.

Constitutional Framework for Education

Constitutional law of Canada creates the education systems. Section 35 of the *Constitution Act, 1982* affirms and recognizes the education rights of First Nations in the treaties with the Crown. In the absence of an imperial treaty, Aboriginal rights continue to empower Indigenous education, which is based on IK and the choices of Indigenous parents. The Court has declared that these constitutional rights to education have to be read together with the other constitutional provisions (*Paul v. British Columbia*, 2003, para. 24). It has held that no part of the Constitution can abrogate another, as no power or right is absolute. Under this constitutional framework, the federal Crown under s. 91(24) and the provincial Crown under s. 92 and s. 93 of the *Constitution Act, 1867* must be read with Aboriginal peoples' rights in s. 35 of the *Constitution Act, 1982* to allow each level of constitutional governance to fulfill the honour of the Crown within their receptive fields of competence (Henderson 2007).

The existence of educational rights in aboriginal and treaty rights cannot negate the constitutional law-making powers under section 91(24) *Constitution Act, 1867* toward Indians. Conversely, federal legislation, like the Indian Act, cannot negate the constitutional rights of education to Aboriginal nations or peoples. All legislation and policy enacted pursuant to a valid constitutional power has to be consistent with all the parts of the constitution to be legitimate. This recast federal legislation and policy toward education that is consistent with aboriginal and treaty rights generates the shared competency of the federal government and First Nations to take action to preserve and promote the distinct knowledge, traditions, and distinctive cultures that underlay these rights.

The province has jurisdiction over education in s. 93 of the *Constitution Act, 1867*. The provincial Crown and its local governments provide funding and

oversee formal education in Canada to all other students, including Métis students. Education (elementary, secondary, and post-secondary) is within provincial Crown's jurisdiction and the ten provincial legislatures and educational departments oversee their curriculum. Territorial education in the North is under the jurisdiction of INAC that funds education for Inuit students.

The same constitutional convergence principles apply to provincial constitutional authority over education and aboriginal and treaty rights involved with education. Provincial powers under s. 93 do not give the provinces any original power to deal with Aboriginal peoples' constitutional rights. Any direct or incidental exercise of educational authority under contract with federal authorities has to be consistent with the educational rights contained in aboriginal and treaty rights in s. 35. Under its legitimate constitutional powers, the provincial Crown has the ability to take action to preserve, promote, and implement aboriginal and treaty rights in regards to education and the distinct knowledge and distinctive cultures that underpin these rights. Moreover, any provincial legislation, agreement, or policy that negatively affects constitutional rights of Aboriginal people will be judged by the constitutional standards of consistency, honour of the Crown, fiduciary obligations, division of powers, interjurisdictional immunity, paramountcy, and the justification on any infringements on Aboriginal peoples rights.

The concepts of convergence and consistency establish the framework of constitutional reconciliation. The Court has stated that the fundamental objective of the modern law of aboriginal and treaty rights is to attempt the constitutional reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests, and ambitions (*Haida Nation*, 2004; *Mikisew*, 2005). This would include constitutional reconciliation about the education of Aboriginal peoples with the federal and provincial Crowns.

Need for Constitutional reconciliation

The need for a constitutional reconciliation is rooted in the failure of existing federal and provincial systems to recognize the needs of Aboriginal peoples, both parents and children. The Auditor General of Canada (2000) has estimated that First Nations students will require more than twenty years of accelerated and restorative education to catch up to the national average for high school graduation. Despite the termination of federal residential schools, the contractual transfer of education authority over First Nations to the province, and the restoration of some educational policy to First Nations, none has resulted in significant changes. The result has been consistently a failure with only 40% of Aboriginal students aged 20-24 having graduated from secondary schools through the last three censuses (Howe, 2008). Only about 8% of Aboriginal students have

graduated from post-secondary schools (RCAP, 1996). This negative legacy of policies represents a significant educational challenge and a crucial test and resolve of many educators, policymakers, and Aboriginal peoples that they must be part of this dialogue and action to affect different outcomes from the past. Understanding and remedying this failure of education has been challenging for many agencies, federal and provincial.

Constitutional reconciliation is an important critical educational response in patriated Canada. The reconciliation of educational rights in the constitution is central to a responsive and non-discriminatory Canadian education system. Reconciliation is rooted in the educational choice of First Nations parents in aboriginal and treaty rights and the transfer of jurisdiction of land to the Crown provides the means and framework for implementing educational rights for the benefit of First Nations, Inuit, and Métis peoples. The Supreme Court of Canada has identified several constitutional purposes that include: determining the historical rights of Aboriginal peoples and giving aboriginal and treaty rights constitutional force to protect them against legislative powers (*R. v. Sparrow*, 1990 para. 65); sanctioning challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal and treaty rights are affected, (*ibid.*, para. 64) and a commitment to recognize, value, protect, and enhance their distinctive cultures (*R. v. Powley*, 2002, paras. 13 & 18). To ensure the continuity of Aboriginal customs and traditions, the Supreme Court has determined that every substantive constitutional right will normally include the incidental constitutional right to teach such a practice, custom and tradition to a younger generation (*R. v. Côté*). Current education systems have not implemented these constitutional reforms in the education of Aboriginal peoples. The constitutional framework and court decisions generate an emerging reconciliation of IK and culture in learning and pedagogy that must be translated into policy, practice and impact on all public forms of education. It creates the context for systemic educational reform to include Indigenous science, humanities, visual arts, and languages as well as existing education philosophy, pedagogy, teacher education, and practice.

To some degree under the emerging Indigenous renaissance, Aboriginal educators have begun the reconciliation in their academic and social justice activist agendas now growing with new avenues, empowering Aboriginal people to realize their educational goals and join various professions. However, this is not the responsibility of Aboriginal peoples alone. The federal and the provincial Crown must reconcile these constitutional rights to education. At present, they have not done so as evidenced in the lack of negotiation of these Constitutional rights with provincial and territorial education systems. Thus the task is great to sensitize the Canadian politicians, policy makers, and educators to be more responsive and proactive to reconcile the national and provincial curricula and to displace the

continuing education failures of Aboriginal peoples in the diverse educational systems across Canada.

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