A Treaty Right to Education

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In the 1870s, representatives of the Crown and First Nations negotiated Treaties 1 to 7. Each included provision for education. This study focuses on the intent and expectations of education as a treaty right by the original signatories and the current divergent understandings. Today First Nations demand the fulfilment of their treaty right to education while Canada, despite constitutional authority and recent court decisions on treaties, administers educational services within the boundaries of its own legislation: the Indian Act. Honouring treaty commitments offers hope for educational opportunities and equity within the context of First Nation governance, traditions, and cultural milieu.

L'article porte sur les droits des Premières nations en matière d'éducation, tels qu'ils ont été reconnus par les traités 1 à 7 conclus dans les années 1870. Les Premières nations exigent les respect des dispositions des traités dans ce domaine. Mais en dépit des décisions récentes des tribunaux, le Canada administre les services d'éducation selon sa Loi sur les Indiens. Le respect des obligations nées d'un traité offre de l'espoir pour l'enseignement et l'équité dans le contexte de la gouvernance, des traditions et du milieu culturel des Premières nations.

From the time of early contact, representatives of First Nations and European sovereigns entered into peace and friendship treaties. In 1752, Grand Chief Cope of the Mi'kmaq and His Excellency Peregrine Thomas Hopson, on behalf of the British Sovereign, agreed to articles of peace and friendship outlined in the Mi'kmaq Compact. The Compact or Treaty stipulated "the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government" and in exchange the Mi'kmaq agreed to protect his Majesty's subjects from harm and "use their utmost Endeavours to bring in the other Indians to Renew and Ratify this Peace" (as cited in Cummings & Mickenberg, 1970, p. 307). Henderson, Benson, and Findlay (2000) stated the "Mi'kmaq Compact created boundaries for communities that respected their autonomous political and legal systems. The compact constituted an integrated legal order based on mutual obligations recognizing sharing, autonomy, and freedom of association" (p. 137).

The early treaties and specifically the 1763 Royal Proclamation formed the basis of Britain's treating with First Nations[1], and although the British

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North America Act united the British colonies as the Dominion of Canada in 1867, the treaties continued to be recognized in Imperial law. In 1982, Canada's Constitution Act ensured "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (as cited in Isaac, 1995, p. 310). Thus when Canada, with the aid of a loan from the British government, purchased the Hudson's Bay Company's territory in 1869, the Imperial Crown required Canada to ensure that

> the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. (Rupert's Land Order-in-Council, as cited in Cumming & Mickenberg, 1970, p. 148)

Between 1870 and 1877, Canada, on behalf of the Imperial Crown, met and negotiated Treaties 1 to 7 with First Nations from western Ontario to the foothills of the Rocky Mountains. Both Canada and First Nations entered into negotiations with specific goals. The treaty commissioners wanted to negotiate the transfer of land ownership to facilitate the construction of the railroad and the settlement of European and Canadian farmers and entrepreneurs in exchange for specific services (Morris, 1991/1880, p. 194). First Nations representatives, particularly during the Treaty 4 to 7 negotiations, wished to negotiate the peaceful sharing of their land in exchange for services that would enable them not only to survive the loss of their traditional lifestyle but also to participate fully in the new economy (Treaty 7 Elders & Tribal Council, 1996, p. xi).

I argue in this article that the First Nation representatives who negotiated the numbered treaties had an understanding of formal education and expected their members and future generations to benefit from such services. Formal education would enable First Nation communities to supplement traditional educational practices with western teaching so they could "live and prosper and provide" (Morris, 1991/1880, p. 28). The Crown, however, did not fulfil its constitutional obligations and, from the outset, chose to provide limited educational services not as a treaty right, but as an assimilationist mechanism through its own criteria, the Indian Act.

METHOD

The research methodology focuses on the human or social action within an historical setting and "begins from the point of view that inquiry is a matter of perception of qualities and an appraisal of value" (Schwandt,

documentation relating to the provision of education within the context of the negotiations and signing of Treaty 7. Treaty 7 Elders were interviewed and while their comments are specific to Treaty 7, these comments have general applicability to the numbered treaties. I have centred my research on the rule of law, constitutional supremacy, and the legal precedents relating to treaty rights that are applicable to the treaty right to education.

TREATY PARTNERS

Two distinct societies, each with its own language and culture, met and negotiated treaties, each believing that the other had fully understood the intent and purpose of the negotiations (Treaty 7 Elders & Tribal Council, 1996, pp. 126–127). The treaties would, however, be as much a symbol of misunderstanding as of mutual agreement. Over the next century the two signatories debated the spirit and intent of the treaties and found little consensus in their understanding of the treaty negotiations and specifically what the treaty right to education entailed. The issue caused frequent dissension and at times conflict. The disparity solidified as First Nations continued to maintain their right to education stemmed from reference in the numbered treaties, while the Crown chose to make no reference to its treaty commitment and instead, relied upon the Indian Act, its own legislation, to provide educational services, which were often subservient to the Crown's financial priorities and national issues.

The Indian Act, which came into force in 1876, consolidated previous colonial legislation and "impose[d] Euro-Canadian social organization and cultural values, [or] English common law" on First Nations (Carter, 1999, p. 116). Subsequent amendments to the Indian Act formalized educational practices of the dominant society in order to "civilize . . . protect and cherish this helpless Race" (Dickason, 1996, p. 225). In this way, Canada established its own policy parameters and resource levels relating to the provision of educational services for First Nations.

Circumventing the treaties and its constitutional responsibility, Canada defined educational services in the Indian Act Section 114 to 122. Section 114 (1) states:

> 114. (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children with
> (a) the government of a province,
> (b) the Commissioner of the Northwest Territories,
> (c) the Commissioner of the Yukon Territory,

(d) the Commissioner of Nunavut,
(e) a public or separate school board, and
(f) a religious or charitable organization. (Imai, 1998, pp. 106-107).

The act further states that "the Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children" (Imai, 1998, p. 107). Thus the Department of Indian Affairs administers, directly or indirectly, elementary and secondary educational services as a statutory right. Because the Indian Act does not reference post-secondary education, the federal government argues that its support for post-secondary education is only a policy initiative within the parameters of a capped financial allocation. This arbitrary separation of educational services further emphasizes the division between the Crown and First Nations who negotiated the treaty right to education within their belief of life-long learning. Treaty 7 Elders "believe[d] that the education rights negotiated at the treaties assured them free education at all levels and in perpetuity in return for the use of the land by the newcomers" (Treaty 7 Elders & Tribal Council, 1996, p. 302).

THE TREATY EDUCATION CLAUSE

Treaties 1 to 7 vary little from each other in the written form. In reference to education, school, schools for instruction, and teachers to instruct, the treaties give similar meaning in each statement relating to the treaty right to education. The Crown's education commitment in Treaty 1, 1871, states, "Her Majesty agrees to maintain a school on each reserve hereby made, whenever the Indians of the reserve should desire it" (Morris, 1991/1880, p. 315). From the outset, Treaties 1 and 2 established both the treaty right to and policy context for the provision of educational services when First Nations requested them. As well, the treaties established the Crown's fiduciary obligation for First Nation education. The treaties gave the First Nations responsibility for the implementation and control of education, and when and where educational services were to be provided. Treaty 3 (1873), and subsequently Treaty 5 (1875) and Treaty 6 (1876), state: "Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her Government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it" (Morris, 1991/1880, p. 323). Although Treaties 3, 5, and 6 included the words *schools* and *instruction*, the written treaty documents decreased the Crown's commitment to First Nations education because education was to be provided only when "Canada may seem advisable," not as the earlier

treaties had stated, when "Indians of the reserve should desire" education (Morris, 1991/1880, p. 323). In 1874, the educational clause for Treaty 4 stated: "Her Majesty agrees to maintain a school in the reserve, allotted to each band, as soon as they settle on said reserve, and are prepared for a teacher" (Morris, 1991/1880, p. 333). Similar to Treaties 3, 5, and 6, Treaty 4 committed Canada to maintain a school specifically on each reserve; however, Treaty 4 contained the proviso that First Nations would define when they were prepared or wanted formal education for their people. Treaty 7, negotiated in 1877, did not mention schools; rather the Crown agreed "to pay the salary of such teachers to instruct the children of said Indians" (Morris, 1991/1880, p. 371).

Although the educational clauses in Treaties 1 to 7 are terse, they clearly identify the Crown's responsibility to provide both a physical building and teachers to instruct "Indians." Furthermore, the Treaty educational clauses establish educational policy—the availability of educational services whenever "Indians" desired such services—and emphasize the Crown's fiduciary obligation to provide educational services.

At the treaty negotiations, both the Crown and First Nations made reference to the fact that education would be for the future prosperity of First Nations. Adams G. Archibald, Treaty Commissioner for Treaty 1 and 2, believed that the commitment to education opened "up to [First Nations] . . . a future of promise, based upon the foundations of instruction" (Morris, 1991/1880, preface). Furthermore, Archibald believed that education would enable First Nations to "live in comfort . . . [so] you can live and prosper and provide" (Morris, 1991/1880, p. 28). In order to do so, the Chief of Lac Seul requested a "school-master to be sent them to teach their children" (Morris, 1991/1880, p. 49).

The oral and written accounts of the treaty negotiations add to an understanding of the Crown's fiduciary responsibility to provide educational services. At the North West Angle treaty meeting, Archibald's successor, Alexander Morris, told the people gathered for the signing of Treaty 3, "I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man" (Morris, 1991/1880, p. 58). Clarifying his statement, Morris added, "Whenever you go to a Reserve, the Queen will be ready to give you a school and schoolmaster" (p. 93). At the Treaty 6 negotiations, Morris stated, "[Y]our children will be taught, and then they will be as well able to take care of themselves as the whites around them" (p. 213). At this same meeting, the Crees showed the influence of the Christian missionaries by listing among their demands "a school teacher of whatever denomination we

themselves as the whites around them" (p. 213). At this same meeting, the Crees showed the influence of the Christian missionaries by listing among their demands "a school teacher of whatever denomination we belong to" (p. 215). Morris replied to this request, "You ask for school teachers. . . . I had already promised you that when you settle down, and there were enough children, schools would be maintained" (p. 217). In reference to the Treaty 6 negotiations, Morris wrote that "the universal demand for teachers" was "encouraging," and furthermore that "the Government can supply" (p. 194) such a demand. At the Treaty 4 gathering, as the Crown's chief negotiator, Morris stated: "You are the subjects of the Queen . . . [S]he is always just and true. What she promises never changes" (p. 94). Promises that Morris reiterated were

> not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean. (Morris, 1991/1880, p. 96)

Morris clearly stated the Crown's treaty commitments were not limited by time, and the quality of educational opportunity would be equitable with non-Aboriginal educational services. The passage of time limited the Crown's commitment; however, First Nations did not forget. Oral history kept alive the Crown's treaty commitment. A Treaty 7 Elder in 2000 stated, "The [Treaty] Commissioners said education would always be available to all our people. . . . All people would learn to speak English: all people would be provided with an alternative [because] our traditional livelihood was taken away" (Carr-Stewart, 2001, p. 233). To the chiefs and headmen who negotiated the treaties, education was a holistic, life-long process. The Elders I interviewed for another study (Carr-Stewart, 2001) stated that their ancestors who signed the numbered treaties believed "the whiteman's education was for life" (p. 233). Providing further context for the education clause, one Elder in my study stated, "The missionaries taught everyone [adults and children]; that is what our People understood formal education to be" (p. 233). The Crown's commitment to provide formal education (schools and instruction) built upon community educational practices of life-long education and added western formal instruction to traditional educational practices.

> Our ancestors taught their children how to hunt, snare . . . [which] were our traditional means of survival. Our [means of] survival were taken away from us and the government promised us education for future success. The government is obliged to provide education as the treaty said. (Carr-Stewart, 2001, p. 233)

CANADIAN GOVERNMENT INDIAN POLICY

David Laird, who replaced Morris as treaty commissioner, travelled in September, 1877, to Blackfoot Crossing for the Treaty 7 negotiations. Previously, minister of the interior from 1873 to 1876, he had been deeply involved in Canadian Indian policy. He championed the Indian Act through Parliament, legislation that created a uniform approach "in control and management of the reserves, lands, moneys and property of Indians in Canada" (*Indian Act*, 1876, sec. 2, as cited in De Brou & Waiser, 1992, p. 96). The act negotiated after the signing of Treaties 1 to 5 made no reference to treaty commitments nor did it refer to schools or education, other than in relation to the authority of Chief and Councils to establish rules and regulations for "the construction and repair of school houses" (*Indian Act*, 1876, sec. 63 [6], as cited in De Brou & Waiser, 1992, p. 99). Was this simply an oversight or intentional omission in the legislation by the Imperial government? Was the reference in the Indian Act to the Chief and Councils' authority to determine where and when to construct schools a recognition of First Nations' control and involvement in formal education?

The written treaties clearly stipulated the Imperial government's responsibility to construct schools on each reserve when First Nations requested it; however, when the Broken Head River First Nation, a member of Treaty 1, requested a school, Laird's response indicated the government's intent to minimize its commitment to the treaty provisions and clarified the government's policy regarding school construction: "[T]he Government is not bound under the Treaty to erect a schoolhouse on each Reserve, and that the Government consider their obligation in this respect discharged by the payment of a school teacher on each Reserve" (Provincial Archives of Manitoba, MG.12.B2, box 2/4.934). Laird's written statement contradicts the Crown's commitment in Treaties 1 to 5 to construct schools on each reserve. As minister of the interior, Laird spoke on behalf of the government of Canada when he responded to the Broken Head River First Nation. His response indicated the government's policy decision to evade its obligation to implement the Treaty commitment to school construction.

Laird was subsequently appointed governor of the North-West Territories and the Crown's chief negotiator for Treaty 7. The wording relating to education in Treaty 7 is very similar to that in his letter of February 19, 1875. Treaty 7 states, "Her Majesty agrees to pay the salary of such teachers to instruct the children of said Indians as to her Government of Canada may seem advisable" (Morris, 1991/1880, p. 371). The Treaty 7 education clause makes no reference to school construction, only of the

provision for teachers. Thirty years later, however, in his booklet *Our Indian Treaties*, Laird commented, "the terms granted under the Treaties were [that] schools were also to be established" (Laird, 1905, p. 6).

NUMBERED TREATIES IN ABEYANCE

As the 19th century drew to a close, the solemn treaty promises faded from the government's agenda. With its emerging statehood, 19th century liberalism, and the belief in both the individual and in progress, Canada did not appreciate "the essential nature of the differences between his own society and outlook" (Carr, 1961, pp. 53–54) and prairie First Nations. Focused on nation building, Canada failed to honour Imperial treaty commitments and, in so doing, it failed to comply with the rule of law. The Supreme Court of Canada has "affirmed that the principles of constitutionalism and the rule of law . . . [are] a fundamental postulate of our constitutional structure" (as cited in Henderson, Benson, & Findlay, 2000, p. 335). Furthermore, Henderson et al. (2000) in *Aboriginal Tenure in the Constitution of Canada* argued that the Court in reference "to the rule of law 'vouchsafes' to the citizens and residents of the country a stable, predictable, and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action" (p. 335). By enacting the Indian Act, and by defining (within its own parameters) its relationship with and program support of First Nations, the Crown failed to protect First Nations from "arbitrary state action" (p. 335).

A FUNDAMENTAL RIGHT TO EDUCATION

The 1867 *Constitution Act*, section 91 (24), vested all legislative authority for Indians and Indian lands in the federal government. As a result, First Nations education was defined as a federal responsibility and separate from provincial responsibility for education (sec. 93). By the late 19th century, law in Britain and Canada recognized the right of all children to education within the context of English common law tradition: the state's "obligation to individuals to educate children" was entrenched (Foley, 1973, p.1). The right of all non-Aboriginal children to education was surely applicable to First Nations children as a part of their treaty and constitutional rights and Canada was required to act in the children's best interest. Although the Constitution identified the federal responsibility for First Nations education, separate from provincial educational responsibility, First Nations educational services arguably ought to be

equitable with those provided under the auspices of various provincial education acts and policy documents. However, Canada did not create any specific educational legislation; rather, the government administered all matters relating to education under the umbrella of the Indian Act. From time to time, Canada established educational policies and procedures in the form of directives and circulars but failed to provide both educational services and educational resources — staff, schools, and material resources — equitable with those provided by provincial educational systems. First Nations students were denied the educational programming and opportunities which facilitated similar achievement levels as their non-Aboriginal peers. The separate educational system and lack of educational attainment was identified in a study of the 1921 Canada Census: "The Indians are only very slightly connected with the education efforts of the different provinces, the responsibility for their education lying with the Dominion and private denominational institutions (Dominion Bureau of Statistics, 1926, p. 38). Furthermore, the study stated the inclusion of literacy statistics for the First Nations population in Canadian statistics as a whole was "most misleading" (p. 38), particularly when Canada's educational attainments were compared to other countries. Little changed over the decades. McMurtry (1985) in a study of the 1946–1948 Joint Committee of the Senate and House of Commons on the Indian Acts summarized the general tone of the submissions on the state of First Nations schools:

> Notoriously underfunded, poorly equipped and constructed, [and teachers were] paid less than their colleagues in neighbouring public schools. The residential schools attracted great criticism because of the half-day labor system [which] obliged the children to work in the fields, sew, clean, etc. for several hours each day, thereby greatly restricting classroom time. (McMurtry, 1985, p. 61)

The failure of the federal government to fulfil its constitutional and treaty responsibility for First Nations education was raised in the House of Commons:

> While there are 130,000 Indians in the country, our education and training of these people take care of only about 16,000. Of this number enrolled, only 883 reach grade 7, 324 reach grade 8, and seventy-one reach grade 9. I notice in three of the provinces there are no grade 9 students. (*House of Commons Debates*, 1946, p. 5489)

Two decades later, the gloomy picture of educational services and levels were relatively unchanged. The demand for change was to erupt from First Nations in part as a reaction to federal Liberal policy. In 1969, the Liberal government, in search of a "just society," introduced a policy paper

that proposed transfer of responsibility for First Nations education to the provinces. First Nations viewed this as an attempt to eradicate their special status and an example of the failure by Canada "to honour commitments for treaties signed with the Indians" (Cardinal, 1969, pp. 16–17). First Nations joined together to protest the 1969 White Paper and espoused their allegiance to and defence of their specific treaties with the Crown.

LEGAL REMEDIES

The Chief of the Blood Tribe, the late Jim Shot on Both Sides, addressed the 1960-1961 Parliamentary Joint Committee on Indian Affairs and reminded his audience of the Crown's treaty commitments: "Many moons ago your forefathers and mine took each other by the hand and entered into a treaty" (Joint Committee, 1960, p. 970). It was two decades later, however, as a consequence of court rulings, before Canada paid heed to the treaties. It was ultimately the Supreme Court of Canada that brought to the forefront the treaty agreements. Although the Court decisions have, for the most part, dealt with the treaty right to hunt and fish, the courts have looked at the totality of the event of treaty-making, not simply the specific words, and in so doing have established a more complete understanding of the treaty-making process. Isaac (1995) wrote, "In addition to actual terms of a treaty, the minutes of meetings at which negotiations took place and events leading up to the signing of a treaty have been interpreted to convey rights" (p. 236). To support his argument, Isaac used the example of *R.* v. *Taylor*, 1981, in which the Ontario Court of Appeal found that

> [A]lthough the written terms of an 1818 treaty did not contain a guarantee of hunting and fishing rights, the minutes of the council meeting between the Deputy Superintendent of Indian Affairs and the chiefs of the six tribes who were parties to the treaty reveal that hunting and fishing rights on Crown lands in areas covered by the treaty were retained by the tribes. (p. 236)

The *Sioui* ruling by the Supreme Court of Canada in 1990 also looked at the totality of treaty-making. In making its judgement, the Supreme Court referenced General Murray's 1760 letter to the Hurons in which the Crown's representative assured them of the "free Exercise of their Religion, [and] their Customs" (as cited in Isaac, p. 130). The *Sioui* decision upheld the rights of the Huron descendants to practise their religion and customs in their traditional locale because the intention of Murray's letter was to create mutually binding obligations of primary importance. The Supreme Court's

decision is significant in relation to education as a treaty right, for *Sioui*

> strengthen[ed] the value of treaty rights, writing into Canadian jurisprudence the words "the treaty must . . . be construed, not according to the technical meaning of its words by learned lawyers, but in the sense in which they would naturally be understood by the Indians." (Kulchyski, 1994, p. 183)

In 1996, in *R.* v. *Badger*, "the Supreme Court addressed the relationship between treaty rights and rights in privately-owned land; between treaty rights on the Prairies and the Natural Resources Transfer Agreement [N.R.T.A.] of 1930; between N.R.T.A. and s. 35(1) of the *Constitution Act*, 1982; and between treaty rights and section 35(1)" (Elliott, 1994, p. 45). The case arose when three Treaty 8 members were charged and convicted under the Alberta Wildlife Act for shooting a moose out of season. The Supreme Court ruled that one of the hunters had an existing treaty right to hunt, a right to which Section 35 of the Constitution Act applied. In its ruling, the Supreme Court stated:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. . . . It is always assumed that the Crown intends to fulfil its promises. . . . Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. (as cited in Elliott, 1994, p. 45)

During the numbered treaty negotiations, the treaty commissioners specified that the Canadian government, in the right of Queen Victoria, would provide education/instruction for First Nations as evidenced in Morris' report of the Treaty 4 negotiations: "I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man" (Morris, 1991/1880, p. 58). Judge Berstein wrote in *R.* v. *Battisse* that

> The courts must not assume that His Majesty's [Treaty] Commissioners were attempting to trick or fool the Indians into signing an agreement under false pretences. . . . Ambiguity should be resolved in favour of the Indians. (as cited in Isaac, 1995, p. 102)

In 1982, the Canadian Constitution was repatriated and amended. The Constitution, Section 35 (1) recognized and affirmed existing aboriginal treaty rights as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (*Constitution Act*, Schedule B of the *Canada Act*, 1982, as cited in Isaac,

1995, p. 306).

Although the Constitution Act did not define treaty rights, the recognition of treaty rights solidified the government's fiduciary relationship with First Nations dating back to the Mi'kmaq treaties and the Royal Proclamation of 1763 and subsequent special relationships, whether historical, political, legal, or socioeconomic which developed between the Crown and First Nations people (Isaac, 1995, p. 167). The Constitution Act gave "explicit protection for existing Aboriginal and treaty rights" (Henderson et al., 2000, p. 337). Furthermore, Henderson et al. argued that

> The "promise" of section 35, as it was termed in *R. v. Sparrow*, recognized not only the ancient occupation of land by Aboriginal peoples, but also their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights reflects an important underlying constitutional value. (p. 337)

In 1982 Slattery (as cited in Isaac, 1995), wrote, "the Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights" (pp. 167–168). The courts in *R.* v. *Guerin* brought the fiduciary responsibility of Canada in Aboriginal matters to the forefront. The Supreme Court of Canada held that "the federal Crown must act in the best interests of Indian peoples when dealing with Indian property and lands" (Isaac, 1995, p. 167). Five years later, *R.* v. *Sparrow* further defined the Crown's fiduciary responsibility. In his decision Judge Dickson wrote:

> The Government has the responsibility to act in a fiduciary capacity with the respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. (as cited in Isaac, 1995, p. 169)

In December, 1997, the Supreme Court of Canada rendered one of the most important legal decisions of the century in its ruling on the Gitksan and Wet'suwet'en Aboriginal title in the *Delgamuukw* decision. The ruling dealt with the issue of land title; however, various points of the Chief Justice's statements are applicable in relation to education as a treaty right. The *Delgamuukw* decision stated:

> The Crown is under a moral, if not a legal duty, to enter into and conduct . . . negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court that we will achieve . . . a basic purpose of s. 35 (1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." (as cited in Pape & Salter, 1998, p. 8)

The aspect of the *Delgamuukw* decision relating to oral history is significant when considering education as a treaty right. Although the ruling relates to the oral history of the Gitksan and Wet'suwet'en, it serves as a precedent for matters relating to oral history: the very essence of the conflict between Canada and treaty First Nations. The *Delgamuukw* decision noted:

> Notwithstanding the challenges created by the use of oral history as proof of historical fact, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of documentary evidence. (Pape & Salter, 1998, p. 3)

The Supreme Court decision placed the oral history of First Nations people parallel to the written word. The use of oral history was also upheld in the 1999 Supreme Court's decision in *R.* v. *Marshall*. By acquitting Donald Marshall Jr. of charges relating to fishing eels, the Court supported the treaty right to hunt, fish, and gather as negotiated by the Mi'kmaq and the Crown in 1752. The Court stated it "would allow this appeal [acquittal] because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship" (Aboriginal Rights Coalition of British Columbia, 2002, p. 1). The oral history of the people of the numbered treaties regarding what was said and negotiated at the treaty meetings gained legal force as a result of the *Badger* and *Delgamuukw* decisions, while the *Marshall* decision reinforced the Crown's responsibility to ensure that negotiated treaty rights are upheld and dealt with consistently, "even if it meant disregarding federal regulations" (Aboriginal Rights Coalition of British Columbia, 2002, p. 1).

THE DICHOTOMY

Two nations purposely entered treaty making, each to secure a mutually acceptable agreement, which resulted in the surrender of traditional land in exchange for reserve lands, one-time provisions, treaty payments, and services including the provision of education. The treaty right to education was an incumbrance on the land transfer "for as long as the sun shines above and the water flows in the ocean" (Morris, 1991/1880, p. 96).

The Supreme Court of Canada has recognized "the autonomy and independence of Aboriginal peoples in early North American relations and has provided contemporary protection for treaties formed in the

period" (Borrows & Rotman, 1998, p. 677). The rulings respecting treaty and Aboriginal rights, however, did not occur until the late 20th century. Legal decisions that decreed that "the language used in treaties cannot be construed to prejudice First Nations and furthermore that treaty rights are not only *sui generis* (a unique right) but cannot be described by reducing them to Anglo-Canadian legal terminology" (Reiter, 1995, p. 5). In the *Sparrow* decision, the Supreme Court reminded the Canadian government of its responsibility to act in a fiduciary capacity with respect to aboriginal peoples. "The relationship between the Government and aboriginals is trust-like, rather than adversarial, and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship" (as cited in Henderson, Benson & Findlay, 2000, p. 314).

IMPLEMENTATION OF THE TREATY RIGHT TO EDUCATION

For First Nations, the treaties embody their solemn agreement and relationship with the Crown. During Canada's century of avoidance of the treaties, First Nations people kept the treaties alive and continued to press, from time to time, for the fulfilment of the treaty promises, particularly the treaty right to education. The chiefs and headmen who signed the numbered treaties negotiated an educational right complementary to their own Aboriginal teachings. Aware of the instructional practices of the newcomers, they sought to supplement their community educational practices with the linguistic and literacy skills of the settlers. They were, however, dragged into an abyss and forced into an educational system that sought to eliminate their traditional educational practices, languages, culture, and customs, something that had not been a part of the treaty negotiations.

Canada failed to implement the treaty commitment to education. The government left the establishment of day schools to the initiatives of various religious organizations. Canada's policy was to fund schools only after they were constructed, usually by First Nations and missionary groups, with the building materials acquired from the natural resources on the reserves. In the late 1880s, Canada provided limited financial assistance to religious entities towards the establishment of Industrial schools and later Residential schools. These buildings, however, were usually located on isolated areas of the reserve or off-reserve. Such schools not only denied First Nations input into the schools but ignored the treaty commitment that schools would be constructed on reserve whenever First Nations desired.

The treaties promised a system of education equitable with the provincial

system and education was to enable First Nations to secure a "a living for themselves and their children" (Morris, 1991/1880, p. 232). To do so necessitated a federal commitment to First Nations education—including school programming, teacher specialization, and school construction—that, even if based on different constitutional sections and differing organizational format, was equitable with that provided by provincial school systems. Provincial educational rights including denominational schooling are entrenched constitutional rights; however, the treaty right to education has not received the same commitment. As various parliamentary committees during the 20th century and specifically the 1996 Royal Commission on Aboriginal Peoples (RCAP) documented, the level and type of education provided for First Nations students over the past century failed to provide equitable educational opportunities and consequently failed to foster economic prospects for First Nations people (Royal Commission on Aboriginal Peoples, 1996a, p. 38).

In 1894, amendments to clause 11 of the Indian Act empowered the governor-general-in-council to make regulations to enforce the attendance of Indian children at school; however, the government did not officially incorporate the compulsory school attendance clause into the Indian Act until 1920. Despite the government's own legislation requiring compulsory attendance of all Indian children at school, it is clear from the minutes of parliamentary commissions (McMurtry, 1985) that, as late as 1960, school facilities did not exist on numerous reserves across Canada. Schools that did exist were often considered inferior to non-aboriginal schools; programming lacked financial resources; and, similarly, teachers' salaries were below provincial levels (McMurtry, 1985).

The 1970s marked a resurgence of the involvement of First Nations people across Canada in the education of their children. First Nations demanded appropriate quality educational services and "Aboriginal peoples . . . explicitly question[ed] the existing educational system" (Abele, Dittburner & Graham, 2000, p. 6). Although the Canadian government accepted in principle *Indian Control of Indian Education* (1972), it did not change its mode of administering education under the Indian Act. The promise of a treaty right to education, the opportunity not only to gain quality formal education but also at the same time to maintain their own linguistic and cultural identity, remained elusive, as did the opportunity for many First Nations people to participate meaningfully in the Canadian economy.

In the later part of the 20th century, treaty First Nations began to assume administrative control of educational services and schools on reserve; however, in receiving funding from the department of Indian Affairs, they

were required to follow the appropriate provincial curriculum and federal policy guidelines with little opportunity or financial capacity to address community needs. Local control, however, gave a degree of freedom from the external, centralized administration of the federal department.

Despite local control, the rule of law, the supremacy of the Constitution, and court rulings on treaty rights, implementation of education as a treaty right remains unfulfilled. Administrative and financial arrangements between First Nations and the Department of Indian Affairs for band-operated schools and post-secondary education funding are itemized within the policy and governance framework of the Indian Act, the Financial, Administrative Act, and procedures of the Department of Indian Affairs. Only at the insistence of First Nations do funding arrangements and other agreements between First Nations and various federal government departments include a reference that such administrative arrangements do not affect in any manner their treaty right to education. The statement is a reminder of First Nations' constitutionally protected treaty rights; however, it does not give the treaty nations a voice in education equal to or greater than the federal bureaucracy. In 1988, the Assembly of First Nations in *Tradition and Education: Towards a Vision of Our Future,* stated there

> is a need for formal national level guarantees of First Nation jurisdiction over First Nations education with full acknowledgment of the federal responsibilities for providing stable and adequate levels of resources for First Nations on a government-to-government basis. First Nations jurisdiction over education must not only be recognized but firmly guaranteed to First Nations as a legal right and responsibility in order for the First Nations to exercise true and meaningful jurisdiction over education at the local level. (Assembly of First Nations, 1988, p. 78)

First Nations continued to demand the provision of education services as a treaty right, a demand that was supported by the 1996 Royal Commission on Aboriginal Peoples [RCAP]. Recommendation 3.5.2 called for significant changes in First Nation education:

> Federal, provincial and territorial governments collaborate with Aboriginal government, organizations or education authorities, as appropriate, to support the development of Aboriginally controlled educational systems. (RCAP, 1996b, vol. 3, p. 684)

In relation to education as a treaty right, the Royal Commission [RCAP] recommendation 3.5.20 stated:

> The government of Canada recognize and fulfil its obligations to treaty nations by

supporting a full range of education services including post-secondary education, for members of treaty nations where a promise of education appears in treaty texts, related documents or oral histories of the parties involved. (RCAP, 1996b, vol. 3, p. 689)

CONCLUSION

Reflecting recent rulings of the Supreme Court of Canada, the Royal Commission on Aboriginal Peoples recommended the recognition of education as a treaty right. Furthermore, the Royal Commission stated First Nations "want two things from education . . . the skills they need to participate fully in the economy . . . [along] with the knowledge of their languages and traditions necessary for cultural continuity" (RCAP, 1996a, p. 82), a goal similar to that the chiefs and headmen believed they had negotiated as a treaty right to education. To rebalance the political and economic power between aboriginal nations and other Canadian governments, RCAP recommended educational reforms must be implemented immediately to remedy the gap between current educational attainment and community needs (RCAP, 1996a, p. 82). Education must reflect the structure, practices, and vision of First Nations communities. Education is a treaty and constitutional right to be treasured and a process that enables First Nations to blend traditional purposes of education, language, and culture with the skills necessary for collaboration in today's global society.

The issue of the demand for the recognition of education as a treaty right will not dissipate until profound educational changes occur: including appropriate funding and effective control beyond merely administrative responsibility for a poorly funded and externally directed education services. First Nations education must reflect the language, traditions, and culture of their communities and receive the resources necessary to ensure quality educational programming, and to ensure educational attainment and foster the "crucial skills for governance and economic self-reliance" (RCAP, 1996b, vol. 5, p.3). Only profound change, financial commitment, and local control of education can eradicate a century of educational neglect. It is time to honour the treaty commitment to education.

NOTES

1 Although the term *Indian* was used at the time the treaties were being negotiated, I use the term *First Nations* interchangeably for purpose of this paper.

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