SELF-GOVERNMENT AGREEMENTS

AND

JURISDICTION IN EDUCATION

Harvey McCue
Harvey McCue & Associates
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PART 1

INTRODUCTION

Several recently negotiated Self-Government Agreements (SGAs) address the transfer of jurisdiction in education from the federal government to First Nations governments. The details of these SGAs indicate that First Nations are using SGAs to negotiate and acquire jurisdiction, not just in education but in many other program and policy areas such as housing, justice and the environment. In January 1999, the AFN Director of Education, Dr. Paulette Tremblay, contracted Harvey McCue to analyze the jurisdiction and education sections of several SGAs.

This paper includes a two-part examination of six SGAs and their references to jurisdiction in education. Resourcing sections in some of these SGAs will also be examined in relation to education.

Part 1 consists of a brief analysis of each SGA regarding jurisdiction in education. Part 2 focuses on the issues around jurisdiction in education that emerge from the analysis and includes some recommendations on jurisdiction and education for future negotiations.

The six documents (SGAs) selected for the analysis are:

- The Federal Framework for Transferring Programs and Services to Self-Governing Yukon First Nations, 1998 (YFN);
- An Agreement with respect to Mi'kmaq Education in Nova Scotia (ME);
- The Manitoba Framework Agreement: 7/12/94 (MFA);
- Nisga'a Treaty Negotiations: Agreement in Principle, February 15, 1996; (NTN);
- The James Bay and Northern Quebec Agreement (JBNQA);
- The United Anishnaabeg Councils Government Agreement-In-Principle, March 6, 1998 (UAC)

PURPOSE

The purpose of this paper is to heighten the awareness in First Nations leaders and educators about the differences between their expectations and assumptions regarding jurisdiction in education and what the SGAs actually reflect. A brief analysis of the six SGAs reveals that the jurisdiction in education that has been agreed to by the parties to the negotiations is limited and conditional. If the First Nations negotiators of the SGAs selected for this examination intended to constrain and limit the jurisdiction in education that the First Nations governments would exercise, then those objectives have been achieved and no problem exists. On the other hand, if the negotiators for the affected First Nations and the First Nations, themselves, intended to attain a fuller and broader-based jurisdiction in education for their governments, then difficulties in the exercise of jurisdiction in education will emerge when the jurisdiction is implemented.

Most First Nations assume that jurisdiction in education will confer upon their governments the legal authority and power to educate their children in any way, by any means, for whatever purpose they so choose. This is a fair and reasonable assumption. Jurisdiction in education or in any other area enables people through their representatives to decide the what, how, why and where of every facet of the program, within the limits imposed by budgets and other resources.

But if costs are reasonable and other resources, especially human resources, are available, then any government, including First Nations governments, can and should exercise their jurisdiction in education constrained only by the demands and expectations of their constituents over what they believe to be a good, responsible and appropriate education for their children. Anything less falls short of what most First Nations want when they seek jurisdiction in education.

Before the analysis of each SGA begins, it may be useful to ask what is the definition of jurisdiction? According to the Funk and Wagnell Standard College Dictionary (Canadian Edition), jurisdiction means:

1. A lawful right to exercise official authority (executive, legislative, judicial);

2. The territory within or the matter over which such authority may be lawfully exercised;
3. Power of those in authority; control

ANALYSIS

The Federal Framework for Transferring Programs and Services to Self-Governing Yukon First Nations (YFN)

The agreement acknowledges that each Yukon First Nation can enact laws in the exercise of their authority (jurisdiction) in three specific areas: the administration of its own affairs and internal management; programs and services; and issues related to Settlement Land.

In the area of the administration of its affairs and matters related to its operation and internal management and its land claim settlements, the Yukon First Nations have exclusive jurisdiction, i.e., the lawful right to exercise official authority.

For the other two categories (programs and services for their citizens and matters of a local or private nature on Settlement Land), Yukon First Nations may also enact laws but their jurisdiction is limited because federal laws in these two categories will prevail in any inconsistency with Yukon First Nations laws. This means that in the area of education, for example, Yukon First Nations may pass laws but if any of their education laws are inconsistent with a federal law the federal law will prevail.

What is unclear in these provisions is the distinction between the exclusive law-making authority the First Nations possess in the 1st area and the power to enact laws in the 2nd and 3rd areas. The distinctions created by the restricted use of the term "exclusive lawmaking power" for one area and not the other two strongly suggests that there are

limits to the authority of the Yukon First Nations to exercise their jurisdiction as a First Nations government, especially in the area of education.

Although the YFN envisions a change in the status quo regarding the power and authority of Yukon First Nations, the language of the agreement conveys restraint and limits on the definition of their jurisdiction. For example, "an *expanded* capacity to provide good governance" (p. 2) and "*increased* responsibility" (p. 3) implies that the Yukon First Nations will enjoy only partial authority and power to govern themselves rather than full jurisdiction (italics added).

Like the other SGAs in this analysis, one of the features of the YFN that is identified in the setting out of the long term federal relationship with the Yukon First Nations is an insistence on their capacity to deliver education programs and services at levels *comparable* to those elsewhere in the Yukon (italics added). The use of *comparable* to describe the levels by which the Yukon First Nations deliver the federal programs and services, i.e., education, that are transferred to them is subject to an interpretation that reflects pejoratively on their ability to identify, develop and deliver programs and services.

"Comparable" means equal to or similar. It does not mean different, improved or culturally appropriate. Its appearance in this and other SGAs provokes two additional responses.

First, the term conveys a qualification or pre-condition on the authority of Yukon First Nations to exercise their jurisdiction in education. The First Nations will be *obliged* to meet the standards and content of the education system/program in effect in Yukon, not the standards and content they may seek or desire in education, according to their needs and cultural values.

Second, the term may motivate the Yukon First Nations governments to retain in their entirety the Yukon education program/system. *Comparability* as a measurement or definition of Yukon First Nations education will make it difficult for them to set aside or ignore the status quo. If the First Nations are required by the agreement to deliver an education program that is comparable to

the territorial system, there will be persuasive reasons to retain the status quo with only a few minor changes.
The net effect of this term in this and other SGAs is the diminution of: (a) the authority of the First Nations to exercise the jurisdiction in education they seek and (b) their ability to identify, develop and deliver education for their children that is intrinsic to their governments and constituents as Yukon First Nations.

The question one must ask is: Will the Yukon First Nations have the jurisdiction to create and deliver an education for their children that is consistent with their needs, interests and cultures or will the need for comparability with other systems, i.e., the territorial system of education, have a higher priority?

At the end of day, when all is said and done, some or all of the affected Yukon First Nations may indeed identify, develop and deliver education programs and services that are comparable to the Yukon department of education, but that situation should neither be anticipated nor imposed in any SGA for any First Nations regime or body that is negotiating self-government and jurisdiction in education.

The YFN does not identify the means by which the authority of the Yukon First Nations to exercise their jurisdiction in education can be enforced. In the absence of an enforcement clause, their ability to uphold the education laws they pass is questionable. Which leads to an additional question: What authority/jurisdiction will the Yukon First Nations be exercising when the transfer of jurisdiction is completed?

A partial answer is found on page 3 of the agreement under the section titled "Accountability". In paragraph two, the agreement states, "when a PSTA (Program Service Transfer Agreement) is concluded, for example in education, and becomes effective, Yukon First Nations assume *full responsibility for the management, administration and delivery of those programs and services identified*" (italics added). What this means is that the Yukon First Nations will have the **full**

responsibility to manage and administer their own affairs, but in the exercise of their jurisdiction, they must pay attention to the comparability of their programs and services to those elsewhere.

In effect, the Yukon First Nations governments will be held accountable for the good and responsible management of education and other federally transferred programs but without a full jurisdiction to govern them. In education, the First Nations will be constrained by the need to ensure comparability with other education programs and existing federal laws.

Arguably, the jurisdiction that is envisioned in the YFN for all three categories is no more and no less than the jurisdiction that is currently situated with First Nations Band Councils, whether it is being exercised or not. The YFN speaks more to the transfer of the delivery of programs and services from the federal government to Yukon First Nations than to the transfer of jurisdiction.

An Agreement with respect to Mi'kmaq Education in Nova Scotia (ME)

There are two objectives in the ME: to specify the procedures and instruments through which jurisdiction and administrative structures in education will be realized and to identify the governance and administrative structures for exercising jurisdiction in education.

For the latter objective, the ME identifies two principal structures: a body corporate that will deliver and manage education programs and services (the Mi'kmaw Kina'masuti) and the Band Council. Jurisdiction in education will be situated with Mi'kmaq Band Councils as a result of federal legislation. Each Band Council has the option of delegating its jurisdiction in education to a Community Education Board (CEB) that will be created for that purpose.

For the first objective, the agreement states that federal legislation will be prepared to enable the Mi'kmaq Band Councils or the CEBs to exercise jurisdiction in education.

The ME also includes a definition of jurisdiction. Section 5.1 of the agreement states that the First Nations will have the power to make and administer laws for primary, elementary and secondary education for on-reserve residents and the power to enter into education agreements with whomever they choose.

The agreement resembles the YFN in its imposition of a condition on the jurisdiction of the Band Councils or the CEB's. Section 5.4 of the agreement states, "The participating communities shall provide primary, elementary and secondary education programs and services *comparable* to those provided by other education systems in Canada, so as to permit the transfer of students between education systems without academic penalty…. (italics added). Restated, this section means that the ME confers upon the Mi'maq governments the power over education in their communities so long as the results of their jurisdiction are comparable to the education programs and services offered elsewhere in Canada.

The ME includes a Community Constitution (Schedule D) that will govern the exercise of jurisdiction in education. The Constitution includes a list of enumerated matters on which the Mi'kmaq Band Councils or the CEB's have the power to make laws in education. A review of the list reveals that with the possible exception of clause (q) which is an enforcement clause, the education issues/matters that are itemized are currently part of the existing jurisdiction of most, if not all, the Band Councils in Canada, including Nova Scotia. The Constitution of the ME comes very close to legitimizing the status quo in Mi'kmaq education. A detailed examination reveals that a range of education issues/matters that speaks to the complete jurisdiction in education more concretely and substantively than the issues that are enumerated has been either omitted or overlooked.

For example, the determination of the language of instruction in Mi'kmaq schools; standards for the evaluation and promotion of students; the establishment of appropriate qualifications for teachers and school administrators and support staff; the purpose and objectives of Mi'kmaq education; the school calendar and other more fundamental elements of an education program than some of those that are identified in the Constitution have been ignored and omitted.

That these and other basic matters that speak to jurisdiction in education are absent from the ME raises questions about the content of the jurisdiction that is being transferred. It is not at all clear that the jurisdiction in education that is being transferred extends beyond simple management and administration issues to education matters that are essential to the Mi'kmaq First Nations to have and to exercise full jurisdiction in education.

The agreement does recognize two vital elements of jurisdiction: the paramountcy of Mi'kmaq education laws over federal and provincial laws and the power of the Mi'kmaq governments of enforce its jurisdiction. At first glance, this would suggest that the authority of the Mi'kmaq in education matters is quite complete and thorough but the Constitution in schedule D clearly frames the matters on which the First Nations may make laws. Although the Constitution does not strictly confine the jurisdiction of Mi'kmaq governments to the enumerated items, there is a strong presumption fuelled by the absence of more substantive items that speak to full jurisdiction that the jurisdiction in education that Mi'kmaq governments will be implementing will be a limited jurisdiction.

Manitoba Framework Agreement: 7/12/94 (MFA)

The MFA acknowledges that First Nation governments will have the jurisdiction to undertake legislative, executive, administrative and judicial functions consistent with the inherent right of self-government but few details are provided. The Workplan dated November 22, 1994 which is part of the MFA includes two objectives: to restore First Nations governments the jurisdiction consistent with the inherent right to self-government and to develop and recognize First Nations governments in Manitoba that are legally empowered to exercise the authorities required to meet the needs of First Nations.

The Workplan identifies issues around jurisdiction such as the range of powers, the structural relationships, the division of powers and the legal arrangements of First Nation governments in

Manitoba but, again, few details are included. Three program areas (education, capital and fire/safety) are included in the Workplan as specific areas where the transfer of jurisdiction will be initiated in the development of self-government in Manitoba.

In a General Education Assembly of Manitoba Chiefs on January 21-23, 1997 further details about the direction about governance and education were revealed in several resolutions passed by the Assembly. One resolution spoke to the need to achieve a comprehensive education agreement that would include existing and future components of education. Additional references during the Assembly included the need for a First Nations education infrastructure for the whole province and the importance of acquiring full and exclusive jurisdiction in education with the appropriate resourcing.

Nisga'a Treaty Negotiations (NTN)

The NTN is a detailed and complex agreement that addresses the transfer of a range of jurisdiction and programs and services from the provincial and federal governments to the Nisga'a governments. The jurisdiction that will be transferred is of two kinds: exclusive and non-exclusive. The exclusive jurisdiction of Nisga'a governments is restricted to the authority to make laws respecting the administration, management and operation of their governments, their culture and language and their lands and assets.

All other Nisga'a jurisdiction including education is non-exclusive, i.e., any exercise of jurisdiction by Nisga'a governments in education and other program areas are subject to applicable federal and provincial laws. For example, clause 52 of the agreement identifies the jurisdiction that the Nisga'a governments will exercise in education. Jurisdiction will extend over pre-school, primary, elementary and secondary education but the jurisdiction that the Nisga'a governments will implement must ensure the "articulation", i.e., movement, of Nisga'a students between the Nisga'a education programs and the provincial education system and their admissibility to provincial universities and colleges.

The same section indicates that the Nisga'a standards of teacher certification for Nisga'a schools must be *comparable* to the provincial standards *except* for Nisga'a culture and language teachers (italics added).

In other words, the Nisga'a can make education laws as long as they meet the appropriate federal and provincial standards. What this conveys is a notion that only provincial and federal education standards are appropriate, regardless of Nisga'a jurisdiction and that these standards are the only appropriate measurements of the quality of Nisga'a programs and services, except for Nisga'a culture and language.

Implicit in these conditions is that what the Nisga'a decide to do for their culture and language in education programs is of no concern for provincial or federal authorities but when the topic is the over-all education of Nisga'a students, this is too important to leave unattended and undefined to the Nisga'a governments.

Finally, the agreement is similar to the YFN in its use of *comparable* to define the ways in which the Nisga'a governments exercise their jurisdiction in post-secondary education. Nisga'a laws in post-secondary education must be comparable to provincial standards in such areas as admission and curriculum standards and the qualifications of instructors. Comparability to existing provincial post-secondary education standards, not Nisga'a needs, interests and culture, in effect, defines the limits of Nisga'a jurisdiction in post-secondary education.

United Anishnaabeg Councils Government AIP, March 6, 1998 (UAC)

There are several clauses in the UAC that deal with jurisdiction in education. Clause 5.4.1 indicates that the jurisdiction that is considered in this agreement extends only to elementary and secondary education. Clause 5.0.2 provides for the Anishnaabeg governments to enforce their

jurisdiction in education and Clause 5.4.3 provides for the paramountcy of Anishnaabeg education laws over federal laws.

Jurisdiction in education will be exercised by either the local band government or the united councils acting as a central government for the eight First Nations that are signatory to the UAC.

There are few additional details in the UAC on jurisdiction in education other than a specific condition or qualification that is placed on the Anishnaabeg jurisdiction. In this regard, the UAC is similar to the other agreements in this analysis in their treatment of education jurisdiction. Although "comparability" with other education systems is not used in the UAC as a qualification for any Anishnaabeg education program, the agreement states that the education that is designed by the Anishnaabeg governments should permit transfers of First Nations students between systems, i.e., the Anishnaabeg system and the provincial system, without academic penalty. The effect, however, is the same. The jurisdiction in education that the UAC identifies is limited. The Anishnaabeg governments will not be at liberty to define, develop and implement an education that is culturally, politically and socially appropriate for their children. Whatever they do in the area of education must be done with the objective of ensuring transfers from their system to the provincial system without academic penalties imposed on their children.

The James Bay and Northern Quebec Agreement, 1975 (JBNQA)

As one of the very first SGAs in Canada, the JBNQA has been considered by many First Nations as a comprehensive blueprint for First Nations governance. It is a four-party agreement that involved two Aboriginal parties, the Cree of James Bay, Quebec, and the Inuit of northern Quebec and two levels of government, the government of Canada and the government of Quebec. The agreement signaled for the first time in Canada the definition, implementation and exercise of jurisdiction by Aboriginal governments within their own self-governing regimes.

Sections 16 and 17 confer the jurisdiction for education for the Cree and the Inuit, respectively. The jurisdiction in education includes elementary, secondary and adult education and extends to all residents on Cree and Inuit lands in northern Quebec.

For both Aboriginal parties, the jurisdiction in education was situated in two regional school boards, the Cree School Board and the Kativik School Board. The boards were empowered by the Quebec *Education Act* (1964, R. S. Q., c. 235 as amended) and they included special powers and duties above and beyond the normal powers conferred upon the other Quebec school boards. Section 16.0.9 offers the most complete list of special powers and duties and it includes, among other things, the power of the Cree School Board to build and maintain residences for its teachers and "to select courses, textbooks and materials appropriate for Native people". In the case of the Cree, the membership of the School Board consists of one Commissioner from each of the nine Cree bands. Each Commissioner is elected by the band under election rules that are established in the provincial *Education Act.*

Because the jurisdiction is exercised by the Cree and Kativik School Boards, the jurisdiction in education is a shared jurisdiction between the Cree, on one hand, and the Inuit, on the other, with the Quebec government. As provincial school boards, both are subject to the provincial *Education Act* and are constrained in their exercise of jurisdiction, as a result. The level of constraint is nowhere more revealing than in the area of labour relations. As provincial boards, their teachers are members of the provincial teachers union, the Centrale Enseignment de Quebec (CEQ) and their professional duties and responsibilities are governed not by the needs of the Cree and Inuit but by the contract that the CEQ negotiates regularly with the two boards.

In this one area alone, a great deal of jurisdiction in education is surrendered by the Aboriginal parties to an institution (the CEQ) that is as external and foreign to their cultures and interests as any previous federal regime.

The review of the five SGAs reveals that the resourcing of the jurisdiction in education will be a problem for the new First Nations governments (the same concern does not apply strictly to the JBNQA because the jurisdiction that the Cree and Inuit exercise in education is and has been funded by the federal and provincial governments since 1976).

For example, the YFN states on p. 11 that the recognition of jurisdiction does not imply a funding obligation by the federal or territorial governments.

In Nova Scotia, Schedule A (An Agreement with respect to Funding for Mi'kmaq Education) of the ME provides for financial adjustments to the funding of Mi'kmaq jurisdiction in education that are based only on annual price and volume calculations. Funding for jurisdiction in education is restricted to the areas that are currently funded under the existing DIAND education budget in elementary, secondary and post-secondary education. The A-base and annual adjustments exclude any new capital costs and funding for education matters not covered under the Constitution in Schedule D of the agreement. The ME does recognize the need to fund the new structures that will exercise jurisdiction, the Community Education Boards and the corporate body that will coordinate the delivery of education services to the Mi'kmaq bands, the Mikmaw Kina'masuti.

In Manitoba, the MFA identifies several criteria on which the funding of jurisdiction will be based. They include the historical levels of funding provided to the First Nations in Manitoba, the scope of the new institutions, structures and responsibilities and the federal fiscal and budgetary management requirements. The criteria suggest that the fiscal and financial arrangements for First Nation governments in Manitoba and those of programs and services delivery may be determined more by federal constraints than First Nations aspirations.

While it would appear that the identification of new institutions, structures and responsibilities that are associated with jurisdiction may be a factor in asserting the fiscal needs of the First Nations governments, the agreement speaks only to their *scope*. In practice, the other criteria

will be easier to define (historical funding levels and the federal fiscal and budgetary requirements) than “scope” and one assumes that they will weigh heavier in the calculations in the end.

In the NTN, the financing of the delivery of programs and services by Nisga'a governments are limited to levels of funding that are reasonably comparable to those public programs and services generally prevailing in northwest British Columbia. Furthermore, in the negotiation of fiscal financing agreements, only one clause out of total of twelve addresses the jurisdictions of, and the programs and services delivered by, Nisga'a government (clause i.).

The UAC indicates that financial resources will be provided to the First Nations governments to establish and operate themselves but that the exercise of jurisdiction by the First Nations does not create or imply any financial obligation on the federal or provincial governments.
On the other hand, the JBNQA sets out quite clearly several important resourcing distinctions. First, the costs of Cree and Inuit education will be shared unequally by the federal and provincial governments. In the case of the James Bay Cree, the federal obligation amounts to 75% with the remaining 25% paid by Quebec. Second, the Agreement identifies several areas in education that will receive special financial attention from both governments. They include:

- the geography of the Cree School Board and of its student population
- the development of curricula, textbooks and teaching materials appropriate to the Cree
- physical education and sports programs
- the provision of adult education
- the development of courses, textbooks and teaching materials to preserve and transmit Cree culture and language

As a result of these and other sections of the education portion of the JBNQA, the Cree School Board receives an annual budget that is substantially larger on a per capita basis than any other First Nations education program in Canada.

Given the limited jurisdiction in education that is contemplated in the six SGAs and the lack of certainty for resourcing jurisdiction in five of them, questions emerge about the autonomy of the anticipated First Nations governments and their ability to exceed the status quo of band councils to exercise and implement jurisdiction in education.

CONCLUSION

The SGAs examined here reflect a concept of limited jurisdiction for First Nations governments. Although the substance and content of what is being transferred is often clearly stated in the agreements, the ability of the First Nations to exercise jurisdiction is confined to three areas:

- the structure, management and administration of their governing institutions;
- the negotiated lists that identify or enumerate the education matters on which they will exercise jurisdiction;
- education programs and services that are either comparable in content and standards to those that already exist or that allow students to move or transfer from one system to another without academic penalty.

Furthermore, the five of the six SGAs include financing details that in and of themselves will affect the exercise of jurisdiction by the participating First Nations.

These issues challenge the notion of self-government for participating First Nations. At best, they suggest that the jurisdiction of self-government amounts to the jurisdiction to self-regulate and to self-administer. At worst, they effect a definition of self-government that is as narrow, albeit more refined, as the current model of Indian Act band governments.

PART 2

JURISDICTION AND SELF-GOVERNMENT

Most, if not all, First Nations are negotiating SGAs that will provide their governments with the jurisdiction that will enable them to provide good government to its members and to act as the authority for their lands and constituents. Their ability to achieve these objectives depends on a number of factors, but, initially, the critical factor is how jurisdiction for First Nations governments is defined. It is vital to the development of self-government that SGAs include a basic and fundamental definition of jurisdiction that is clear and unequivocal. First Nations governments require the authority and power to make laws on behalf of its constituents and to act as the local government. Their jurisdiction as a First Nations government is essential to their ability to govern themselves.

There are essentially three kinds of jurisdiction that First Nations should be concerned with in their SGAs:

1. **Total and exclusive jurisdiction where the only constraints are costs and the expectations and demands of constituents;**

2. **Shared jurisdiction between the First Nations government and another government, i.e., a province, territory or the federal government;**

3. **Partial jurisdiction where the exercise and implementation of jurisdiction is limited by the conditions and qualifications that have been imposed by another government.**

Numerous examples of Type 2 and 3 jurisdiction currently exist in First Nations education. The Cree and Kativik School Boards in northern Quebec are the best-known examples of Type 2 and the jurisdiction that Band Councils presently exercise in education fits Type 3. The analysis of the six SGAs indicates that, with the possible exception of the Assembly of Manitoba Chiefs, the jurisdiction that the affected First Nations will receive once their self-governing status is acquired will be either Type 2 or Type 3. Although the AMC is not clear in its details on the kind of jurisdiction that is sought, there is evidence from meetings and other assemblies that they are seeking total and exclusive jurisdiction in education.

How realistic is Type 1 jurisdiction for First Nations? There is no evident legal or constitutional impediments that would prevent First Nations from acquiring and exercising total and exclusive control over the education of their children in their own communities. What would total and exclusive jurisdiction in education mean for First Nations? Essentially, it would mean that the First Nations would be legally empowered to:

- define the goals of the education of their children;
- identify and establish how education will be delivered in their communities;
- decide how their children will be educated;
- define and determine the curriculum in their schools, as well as the teaching and learning materials;
- define and set standards for every facet of the education program, including:
    - the qualifications of teachers and administrators
    - the promotion of students
    - the curriculum, including courses, subjects and teaching materials

Most if not all countries in the world enjoy the full and exclusive jurisdiction in the education of their children. Each country, and in Canada, each province and territory, decides the what, how, where and why of education of its citizens free from any constraints or expectations of neighboring or distant countries or provinces and territories. Interestingly enough, in spite of the

exclusive jurisdiction that each country exercises in education there is relatively free and unimpeded movement of students from one country to another, or in Canada's case, from one provincial system to another. In the majority of cases, there are few if any academic penalties imposed on students who do transfer from one education system to another.

For example, every year thousands of students around the world graduate from their nations' secondary school systems and register successfully in a foreign university, usually without any academic penalty, except possibly, a language requirement. The same situation applies in Canada where thousands of provincial high school graduates attend universities outside of their home province without any academic penalty of any kind.

One wonders, in light of these examples and the desire of many First Nations to actually control the education of their children, why the jurisdiction in education that is identified in SGAs continues to be a qualified or conditional jurisdiction. What is the point of insisting upon the transferability of students from a First Nations school to another system without academic penalty or identifying *comparability* of a First Nations education to a provincial or territorial system as a condition of the jurisdiction of First Nations education when there are countless examples of students from one education jurisdiction transferring half way around the world to another education institution in a different jurisdiction without academic penalties?

It indeed seems perverse that SGAs insist that First Nations students must transfer between a First Nations education system or program and another system without academic penalty when, in reality, over 75% of First Nations students who leave First Nations schools now, drop out within two to four years after completing only one or two grades. It is true that the present system of First Nations education, if one can use that term, does permit easy articulation or movement of First Nations from the reserve to provincial or territorial schools. But the status quo in First Nations education which seems to place a higher priority on ensuring the easy transfer of students from the reserve to off-reserve schools than a successful education is hardly worth preserving or protecting.

In the drive for governmental autonomy, First Nations should not restrict their expectations of jurisdiction or consent to conditions and qualifications on their jurisdiction in those program areas such as education when there is neither a compelling nor legal need to do so.

If the transfer of jurisdiction from the federal government to First Nations is to meet the needs of First Nations governments, rigorous attention to the definition of jurisdiction is both critical and necessary. Furthermore, if First Nations want to create an education for their children that is First Nations in content, structure, values and philosophy, how their jurisdiction in education is defined will be critical.

For example, if the jurisdiction in the SGA applies to education, the extent of the jurisdiction should be clearly and fully defined. This may require a statement in the SGA to the effect that the First Nation(s) will have *complete and total control* over education within its territory or government. The agreements should indicate clearly that the jurisdiction is inclusive and includes such things as the power and authority of the First Nations government or its agent to define education; to set standards for curricula, student promotions and teacher/principal qualifications; and to take the appropriate measures to remedy problems when they occur.

In the context and application of self-government, jurisdiction in education can be summarized in the following way: Jurisdiction encompasses the power and authority of First Nations governments and their constituents to, among other things:

- determine objectives
- identify the principles of its jurisdiction
- set standards
- define and select delivery methods

Jurisdiction also includes enforceability. If a First Nations government is unable to enforce its jurisdiction in education, then the jurisdiction is meaningless.

IMPLEMENTING JURISDICTION

When jurisdiction in education is finally acquired, First Nations governments will require an administrative infrastructure through which the jurisdiction can be implemented and exercised. Only two of the SGAs examined, the ME and the JBNQA identify a governance structure for jurisdiction. In the former, either the Band Council or its delegate, the Community Education Board, will exercise jurisdiction in education and in the latter, two provincially-mandated School Boards exercise jurisdiction for Cree and Inuit education.

Several models for a First Nations education governance infrastructure are possible. They include the following:

1. The jurisdiction could be exercised by a community/local government structure, i.e., a Band Council. Or, it could be situated with the local government and be delegated to another local body, such as a Community Education Board as in the case of the Mi'kmaq communities in Nova Scotia, that has been created for the sole purpose of exercising jurisdiction in education. In this model, the exercise of education jurisdiction does not extend beyond the individual communities.

2. In the second model, jurisdiction is shared between a community/local structure, either the Band Council or something else, and a regional education structure, i.e., a regional education Council or Board. Each structure would govern education according to its proximity to the school and students. For example, the local structure would govern the operation and administration of the school and details such as student behaviour, the school calendar and other items of a local nature. The regional structure would govern those aspects of an education system that are more broad and over-arching than local issues and concerns. Details such as the curriculum development, the evaluation of teachers and administrators, the development of standards and a wide range of issues related to education planning,

good and efficient management of education and resourcing would be included at this level.

An essential element in this model is the relationship between the local and regional governance structures. The relationship would require careful thought and planning to ensure that the operation of a broader-based governance system includes meaningful access by parents and community leaders in the jurisdiction of education. Jurisdiction in education would be exercised both in and outside the community.

3. A third model consists of a First Nations education system that is built on a comprehensive education governance infrastructure. It would encompass governing structures in education at the community/local level, the regional level, the provincial/territorial level and, finally, the national level. Model three represents a complete and total First Nations education system with jurisdiction being exercised at different levels throughout the system. Each governing structure in the system would have jurisdiction in education that is appropriate to its proximity and place in relation to the schools and students. In both model two and three, an essential feature would be the inter-relationships, from one governing structure to another, of members and of responsibilities.

For many parents and educators the third model represents the best opportunity for a responsible and accountable exercise of jurisdiction in First Nations education. Not only would this model enable jurisdiction to be exercised and implemented at different levels, it would ensure accountability. Accountability and jurisdiction in education are equally important in any mature and responsible system of education. In this model, each governing structure in a First Nations education system would be:

- responsible to parents and leaders;
- responsible to each other;
- required to defend their decisions and policies;

- required to account for failures or inadequacies of any aspect of First Nations education under its jurisdiction.

Model three increases the potential for vital changes and important reforms in First Nations education. The outcomes would lead directly to improved education achievements of First Nations students.

With the exception of the JBNQA and the possible exception of the AMC, none of the other four SGAs in this review contemplates placing jurisdiction in education in a structure or structures outside of the First Nations community. While it may be understandably external to the mandates of First Nations negotiators of SGAs to consider how jurisdiction in education at the community/local level might fit into a broader education governance infrastructure, people should not lose sight of the larger vision that extends beyond the community and includes the potential for significant and much-needed reforms and changes.

CONCLUSION

The issue of jurisdiction in education and how it is reflected in SGAs should be treated in a straightforward manner as possible. First, indicate the range and scope, i.e., overview, of the jurisdiction of the First Nations government. Second, define jurisdiction clearly and unequivocally and in such a way that it encompasses the necessary power and authority for the government to exercise and enforce its jurisdiction. Third, ensure that the jurisdiction is inclusive and comprehensive. And finally, a process for appeals to the exercise of jurisdiction by any First Nations government should be identified.

The emphasis in previous SGAs to secure a kind of conditional jurisdiction for First Nations governments in the area of education is flawed and worthy of reconsideration. An insistence on comparability as a precondition to the exercise of jurisdiction by a First Nations government is unnecessary and retrogressive.

Harvey McCue & Associates
5 April, 1999

If jurisdiction means the power and authority of a First Nations government to set its own standards and select its own governing principles, then it should be free to do so without any preconditions or qualifications. To exercise its jurisdiction a First Nations government need only be restrained by two conditions: costs and the needs of its constituents. Both will impact on the outcome more than any effort in SGAs to prescribe quality or levels of service.

Governments and programs and services that are too elaborate or too "rich" will simply prove too costly for administrations to afford and those that are inadequate for whatever reason to other administrations or programs will not be accepted by constituents.

Insistence by negotiators on comparability in programs and services that are transferred as a test that "mature" First Nations governments must meet before jurisdictions are established comes very close to prejudging the integrity and accountability of First Nations governments and the abilities of its members to recognize when they are being shortchanged and to demand changes.

The following points may assist First Nations in any future and on-going SGA negotiations:

- Define clearly and unequivocally the jurisdiction in education that First Nations governments will exercise.

- The use of the term "comparable" in the identification of the education system or education programs that will be delivered by First Nations not only limits the exercise of jurisdiction; it prejudges the ability of the First Nations to exercise their jurisdiction. If jurisdiction for the delivery of education programs and services is situated with First Nations governments, they must have the authority to identify, design, develop and deliver those programs and services consistent with their jurisdiction *and* their needs, interests and cultures. If these are found wanting for any reason, including a comparison of pre-existing education programs and services or

those that are available elsewhere, it is the responsibility of their constituents to seek and to demand changes.

- Words such as “expanded” as in “expanded capacity” or “increased” as in “increased responsibility” should be eliminated in any discussion of First Nations governments and jurisdiction in SGAs. These and similar words convey the notion that First Nations governments will exercise only partial as opposed to full and complete jurisdiction.

- In education, First Nations governments need, as part of their jurisdiction, the authority to address and change, if required, such basic and fundamental issues as definitions, objectives and evaluations of any programs and services that are transferred in addition to their content and delivery. A simple phrase such as “complete jurisdiction “, “exclusive jurisdiction” or something similar in reference to the education jurisdiction that will be exercised by the First Nations governments is preferable to any attempt to define it, i.e., by enumerated lists, or to qualify it, i.e., through the use of terms such as “comparable” or “free movement of students”.

- All SGAs should include enforcement clauses that define how First Nations governments will uphold and enforce their education jurisdiction and the laws that emerge from them.

- The financing of jurisdiction in the SGAs should reflect the costs associated with jurisdiction and its exercise as well as historical levels of funding or the federal fiscal situation. The JBNQA includes funding requirements that reflect the unique jurisdiction and culture of the James Bay Cree. As a result, the Cree School Board enjoys funding levels that are consistently higher than those of other First Nations in education. As difficult as it is to determine the costs of jurisdiction and First Nations governments, the efforts of federal negotiators to contain these costs should be tempered by an understanding that jurisdiction and its exercise by First Nations

governments will evolve, as they must. So should the financing. The primary SGAs that have been examined reduce this possibility and some consideration should be given to identify a sliding scale of costs that reflect the evolution of the exercise of jurisdiction by First Nations governments.

RECOMMENDATIONS

The following recommendations are designed to assist discussions on the development of a strategy on jurisdiction in education.

1. Increase awareness among First Nations about jurisdiction in education, what it means and why it is important to First Nations education.

2. Facilitate a national dialogue on the different kinds of jurisdiction in education and their benefits and disadvantages for First Nations governments and First Nations education.

3. Attention to how jurisdiction in education will be exercised and implemented by First Nations governments should be included as part of the national dialogue on jurisdiction in education. The dialogue should include several models of governance.