

“IF NOT NOW, THEN WHEN?”

**FIRST NATIONS JURISDICTION OVER EDUCATION:
A LITERATURE REVIEW**

**A REPORT TO
THE MINISTER’S NATIONAL WORKING GROUP
ON FIRST NATIONS EDUCATION**

**Prepared by Nancy A. Morgan
Barrister & Solicitor
for the First Nations Education Steering Committee**

November 19, 2002

TABLE OF CONTENTS

I. INTRODUCTION	3
II. BACKGROUND	5
1. Pre-1970	5
2. <i>Indian Control over Indian Education (1972)</i>	6
3. Enactment of section 35 of the <i>Constitution Act, 1982</i>	7
4. <i>Tradition and Education: Towards a Vision of our Future (1988)</i>	7
5. Charlottetown Accord (1992)	8
6. Federal Government's Inherent Right Policy	9
7. Report of the Royal Commission on Aboriginal Peoples (1996)	11
8. Gathering Strength: Federal Response to RCAP (1998)	13
9. Current Status of First Nations Education	15
III. KEY CONCEPTS	17
1. Jurisdiction	17
2. Control	20
3. Self-Government	20
4. Fiduciary Duty	21
5. Constitutional Protection of Jurisdiction	22
6. Exclusive vs. Shared Jurisdiction	23
7. Paramountcy	24
8. Bilateral vs. Trilateral Arrangements	24
IV. LEGAL BASIS FOR EXERCISING JURISDICTION	26
1. Federal, Provincial and Territorial Jurisdiction over Education	26
2. Aboriginal and Treaty Rights	28
3. International Law Support	28
V. CONCEPTUAL MODELS	30
1. Unilateral Exercise of Jurisdiction	30
2. Modern Treaties and Land Claims Agreements	33
3. Implementation of Treaties Model	34
4. Other Models	35
VI. EXISTING MODELS	38
1. James Bay and Northern Quebec Agreement	38
2. Yukon First Nations Self-Government Agreements	39
3. Sechelt Self-Government Agreement	40
4. Nunavut	40
5. Nisga'a Final Agreement	41
6. Mi'kmaq Education in Nova Scotia	42
7. Tlicho First Nation Land Claims and Self-Government Agreement	44
VII. ONGOING EDUCATION INITIATIVES	46
1. Nova Scotia and Newfoundland	46
2. New Brunswick	47
3. Quebec	47
4. Ontario	48
5. Manitoba	49

6. Saskatchewan	51
7. Alberta	52
8. British Columbia	54
9. Yukon	56
VIII. CONCLUSION	58
1. Recognition of Jurisdiction	60
2. Support Capacity-Building	62
3. Increase Availability and Flexibility of Funding	63
4. Strengthen First Nations vis-à-vis Provinces and Territories	63
IX. BIBLIOGRAPHY	66

I. INTRODUCTION

The purpose of this literature review is to provide the Minister's National Working Group on Education with background information regarding existing and potential models for the exercise by First Nations of jurisdiction over education.

A review of the material on First Nations jurisdiction over education is literally dizzying. The same points are made over and over again in reports that span decades from the early 1970s to the new millennium and come from First Nations communities across the wide expanse of Canada from north to south and east to west. It was this thought that suggested the title of the report "If not now, then when?" This report includes a review of existing literature on the subject of First Nations jurisdiction over education and recommended strategies for implementing this jurisdiction. While more detailed recommendations are included in the conclusion at the end of this report, the principal recommendation is for the Government of Canada to recognize First Nations' inherent jurisdiction over education **now**. Too many initiatives are stymied from the start by this simple lack of recognition. This recognition would be entirely consistent with the federal government's own inherent right policy and could be implemented by simply directing federal bureaucrats and negotiators to begin discussions and negotiations with this recognition at the forefront. This would help set in motion the attitudinal shift that is required to make the implementation of First Nations' jurisdiction over education a reality.

Any discussion on First Nations jurisdiction over education must have as its focus the fundamental reason for exercising jurisdiction – delivering quality and relevant education to First Nations students. This basic principle, along with the need to recognize the Aboriginal and treaty rights of First Nations to exercise jurisdiction over education, informs the review of the various models discussed in this paper.

First Nations have made it clear that it is time for Canada to implement the recognition of First Nations' inherent right of self-government, including First Nations' inherent jurisdiction over education. This inherent jurisdiction carries with it the right of First Nations to develop laws and establish policies in relation to the education of their citizens. The principal legal mechanism for safeguarding First Nations' inherent jurisdiction over education is to recognize it in a treaty, land claims agreement or stand-alone self-government agreement protected by section 35 of the *Constitution Act, 1982*. Only the Nisga'a Final Agreement and the recently initialed Tlicho First Nation Land Claims and Self-Government Agreement explicitly provide section 35-protection for First Nations' jurisdiction.

This paper will begin with a brief history of First Nations education, starting with exclusive First Nations jurisdiction and moving on to describe key milestones along the path to the recognition of First Nations jurisdiction over education. The paper will then discuss the key concepts related to First Nations jurisdiction over education. This will be followed by a discussion of the legal basis upon which each of the governments with an interest in First Nations education relies to exercise jurisdiction and control. The paper will then set out a description of conceptual models for the exercise of jurisdiction over education by First Nations, followed by a section that includes a brief summary of the key aspects of each of the existing models of First Nations jurisdiction over education and a chart comparing the key elements of each of these agreements. The paper will wrap up with an update on ongoing initiatives across the country and a conclusion that highlights recurring themes in the literature, as well as recommendations and strategies for moving forward with the implementation of First Nations' jurisdiction over education.

Note: Legal cases that are referred to in this paper are italicized. Please see the list of cases in the bibliography for their full citations.

II. BACKGROUND

Over the last 30 years, there has been an increasing focus on First Nations reasserting jurisdiction and control over education. This section of the paper presents a brief overview of the history of First Nations education policy in Canada, followed by a description of the major initiatives that have taken place since the 1970s to advance First Nations jurisdiction and control over education.

1. Pre-1970

Prior to the arrival of Europeans, First Nations exercised exclusive authority over the education of their citizens. In the early days of contact, the missionaries played a central role in First Nations education. The missionaries' goals were usually to Christianize First Nations people and provide them with a "European education".

Between 1871 and 1921, the Government of Canada entered into eleven treaties, often referred to as the numbered treaties, with First Nations. Each of these treaties made provision for education. The spirit and intent of these provisions and the obligations they represent have yet to be fully implemented by the Government of Canada.

In 1867, the federal government assumed jurisdiction over "Indians and lands reserved for the Indians" through section 91(24) of the *British North America Act* (now the *Constitution Act, 1867*). The federal government exercised its jurisdiction over First Nations education by forcing First Nations children to attend residential schools. These schools were usually run by the churches and paid for by the federal government. The principal philosophies underlying the residential schools system were assimilation and segregation. Many of the First Nations people who attended residential schools were subjected to physical, emotional and sexual abuse. The impact of this abuse on the victims, their families and communities is still felt today.

In 1950, the federal government began the process of dismantling the residential school system, which continued until the last residential school was closed in 1986. In doing so, the federal government was, to some extent, responding to criticism of the system by First Nations. The federal government probably also hoped its new integration policy would be a more effective means of bringing First Nations people into the mainstream. Under this new policy, the federal government began sending First Nations students to local public schools under the control of the provincial or territorial governments. With this change of policy, financial arrangements had to be worked out with the provinces and territories, through arrangements such as Master Tuition Agreements.

2. Indian Control over Indian Education (1972)

The current trend towards increasing jurisdiction and control over education was best articulated in, and perhaps initiated with, the National Indian Brotherhood's (now the Assembly of First Nations) 1972 report, *Indian Control of Indian Education*. The basic goals of this report were accepted in 1973 by then-Minister of Indian Affairs, Jean Chrétien. This report was, in part, a response to the federal government's White Paper of 1969, entitled "Statement of the Government of Canada on Indian Policy 1969", which sought to end all discrimination against First Nations people, but in so doing ignored the historical injustices towards First Nations and their distinctiveness. The White Paper, which was vehemently opposed by First Nations, was eventually withdrawn.

Indian Control of Indian Education clearly states that First Nations, not the federal government, should control First Nations education programs. It also states that local First Nations control and parental responsibility are the cornerstones of First Nations education jurisdiction. Among other recommendations, it called for First Nations parents to "have full responsibility and control of education" (p. 27). Other recommendations included: control by First Nations of education on reserves with provisions for eventual complete autonomy; prohibition of transfer of jurisdiction from the federal to provincial or territorial governments without First Nations' consent; and representation on local

school boards. While the policy of First Nations control over First Nations education was adopted in principle, it still has not been fully realized. Instead of implementing policies enabling First Nations to assume control over education, the federal government has in most regions only been prepared to delegate partial control over education to First Nations. Moreover, the Department of Indian Affairs has continued to retain control over the process by establishing program guidelines, determining when First Nations are ready to assume control, and retaining financial responsibility.

3. Enactment of section 35 of the *Constitution Act, 1982*

In 1982, the Canadian Constitution was repatriated to Canada from Great Britain. The *British North America Act*, as it had been known, became the *Constitution Act, 1867* and a new *Constitution Act, 1982* was enacted. The *Constitution Act, 1982* attempted to pick up where the century old Constitution left off. This new Act included the *Canadian Charter of Rights and Freedoms* and, most importantly from First Nations' perspectives, a provision – section 35 – which recognized and affirmed Aboriginal and treaty rights.

Although the federal and provincial governments agreed to recognize Aboriginal and treaty rights in 1982, they were unable at that time to agree on how to deal with self-government. As a result, they agreed to hold a series of "First Ministers Conferences on Aboriginal Constitutional Matters" to deal, among other things, with self-government. These negotiations took place, but no settlement was reached. In the meantime, while Canada agreed to negotiate self-government at the same table as negotiations on lands and resources, it continued to refuse to include a comprehensive self-government component within section 35-protected land claims agreements, pending a constitutional amendment recognizing the right of self-government.

4. *Tradition and Education: Towards a Vision of our Future (1988)*

In 1984, the National Indian Brotherhood/Assembly of First Nations began a four year national review of First Nations education. This massive undertaking resulted in a four volume report entitled *Tradition and Education: Towards a Vision of our Future* (1988). In the area of jurisdiction, this report called for the recognition and protection of Aboriginal rights through a constitutional amendment. In the absence of or pending a constitutional amendment, the report recommended the enactment of federal legislation which explicitly recognizes the First Nations' inherent right of self-government, as follows:

This legislation would recognize the right of First Nations to exercise jurisdiction over their education and mandate federal, provincial and territorial governments to vacate the field of First Nations education. No delegation of authority over education to First Nations governments is acceptable as a substitute for First Nations jurisdiction recognized and affirmed in the Constitution of Canada. (National Indian Brotherhood/Assembly of First Nations, 1988: Vol. 1, p. 67)

The Charlottetown Accord, had it not been defeated, would have implemented the report's recommendation to amend the Constitution. However, in the ten years since the Accord's defeat, little has been done to implement the report's alternative recommendation – to formally recognize First Nations' inherent right of self-government and jurisdiction over education through legislation.

5. Charlottetown Accord (1992)

In 1992, the federal government, the ten provinces, two territories and four national Aboriginal organizations reached an agreement on amendments to the Constitution. This agreement, known as the Charlottetown Accord, was defeated in referenda later that year. As a result, the constitutional amendments proposed by the Accord were never enacted. The proposed Charlottetown Accord amendments explicitly declared that the Aboriginal peoples of Canada "have the inherent right of self-government within Canada". Self-government agreements negotiated pursuant to the new constitutional provisions would have created treaty rights protected by section 35.

6. Federal Government's Inherent Right Policy

In August 1995, the federal Minister of Indian Affairs officially announced the government's new policy on the inherent right of self-government, entitled *Federal Policy Guide: Aboriginal Self-Government*. Under this policy, the main objective of negotiations is to reach agreements on self-government, rather than to focus on legal definitions of the inherent right. The federal government outlined three categories of subject-matters for negotiations.

The first category deals with matters that are internal to the group, integral to its distinctive culture, and essential to its operation as a government. These are matters over which Aboriginal governments could assume jurisdiction. This category includes education, language and culture, police services, health care and social services, housing, property rights, the enforcement of Aboriginal laws, adoption, and child welfare.

The second category deals with subjects that go beyond matters that are integral to the Aboriginal culture or that are strictly internal to the group (e.g. divorce, fisheries co-management, gaming). The federal government indicated that it is prepared to negotiate limited Aboriginal jurisdiction or authority in such areas.

The last category deals with matters where there is, in the federal government's view, no compelling reason for Aboriginal governments to exercise law-making power. This category includes Canadian sovereignty, national defence, external relations. However, the federal government is prepared to consider the development of administrative arrangements with First Nations with respect to these matters.

The federal government outlined a number of principles upon which its policy of inherent Aboriginal self-government is based. These include:

- The inherent right of self-government is an existing Aboriginal right recognized and affirmed under section 35 of the *Constitution Act, 1982*.
- Self-government will be exercised within the existing Canadian Constitution. The inherent right of self-government does not include a right of sovereignty in the international law sense.
- The *Canadian Charter of Rights and Freedoms* will apply fully to Aboriginal governments as it does to all other governments in Canada. Section 25 of the *Charter*, which requires the *Charter* to be interpreted in a manner that respects Aboriginal and treaty rights, will continue to apply.
- Where all parties agree, rights in self-government agreements may be protected in new treaties under section 35 of the *Constitution Act, 1982*. They may also be protected through additions to existing treaties, or as part of comprehensive land claims agreements.
- Federal, provincial, territorial and Aboriginal laws must work in harmony. Certain laws of overriding importance, such as the *Criminal Code*, will prevail.
- The interests of all Canadians will be taken into account as agreements are negotiated.

In terms of implementing self-government agreements, the federal government noted that a variety of mechanisms will be considered, such as treaties, legislation, contracts, and non-binding memoranda of understanding.

The federal government indicated that it prefers to proceed in tripartite negotiations, but is prepared to proceed with double-bilateral negotiations or sectoral approaches if the

parties agree. It stated it would only proceed with bilateral negotiations in very exceptional circumstances, such as where a province refuses to participate.

Finally, the federal government stated it would be prepared to deal with the implementation of the inherent right of self-government in conjunction with other processes, such as the negotiation of comprehensive land claims settlements and processes already established through existing treaties.

7. Report of the Royal Commission on Aboriginal Peoples (1996)

The Royal Commission on Aboriginal Peoples (RCAP) was established in 1991 to examine a broad range of issues related to the relationship between Aboriginal and non-Aboriginal peoples in Canada. RCAP's final report, which was released in 1996, contains 440 recommendations.

In RCAP's view, the inherent right of self-government has two parts: a "core" and a "periphery". The core of Aboriginal jurisdiction consists of matters that are of vital concern to the life, welfare, culture and identity of a particular Aboriginal people, but do not have a major impact on neighbouring communities and are not otherwise the object of vital federal, provincial or territorial concern. It concluded that nothing legally prevents Aboriginal governments from unilaterally taking over core issues. However, practically they are tied into existing program arrangements with other levels of government. Before they can reasonably be expected to assume jurisdiction, agreements about new funding formulas and many other issues are needed.

RCAP recognized that Aboriginal nations have two basic options for addressing education. The first option is to assert and exercise their inherent right of self-government and treat education as a core matter. The second is to improve existing public education systems, increasing their effective control over Aboriginal education in those systems.

With respect to the first option of exercising Aboriginal governance, RCAP concluded that education would likely be considered a matter falling within the “core” of Aboriginal jurisdiction. It stated that Aboriginal nations must be able to exercise their inherent right of self-government in the area of education, passing their own laws and regulating all aspects of education, including policies on education goals and standards, administration of community schools, tuition agreements, and the purchase of provincial or territorial services. In its opinion, Aboriginal governments could establish their own educational institutions under their own jurisdiction, which could include elementary and high schools, colleges and universities, all of which would function as part of an integrated system of lifelong education. With respect to urban areas, RCAP was of the view that Aboriginal people from various nations may choose to combine their efforts and exercise a measure of governance through collective structures such as Aboriginal school authorities, deriving their mandate from Aboriginal "community of interest governments” or provincial or territorial governments.

RCAP expected that the assumption of jurisdiction over education by Aboriginal nations would proceed along three stages. The first stage would entail the introduction of self-starting initiatives by Aboriginal nations for which they would negotiate financial support within existing legislation. The second stage would be a transitional phase during which Aboriginal nations would exercise law-making power on their existing territories, with appropriate financing from the federal government. Once the Aboriginal government is established as a third order of government, the nation would receive its revenue from within the nation and through intergovernmental transfers. The third stage of Aboriginal assumption of jurisdiction would be the conclusion of treaties between Aboriginal nations and government defining the scope of self-government and the role of Aboriginal governments as a third order of government in Canada. With respect to Aboriginal nations that already have treaties, RCAP recommended that the federal government 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.

To ensure that First Nations successfully assume jurisdiction over education, RCAP recommended the establishment of a multi-nation organization for negotiating a policy framework with provinces and territories. That framework could include tuition agreements, access to provincial or territorial services, and transfers between Aboriginal and provincial or territorial academic programs (e.g. accreditation). RCAP envisaged that the multi-nation organization would develop curriculum, monitor academic standards in Aboriginal education systems, advise provincial and territorial ministers of education, colleges and universities, provide training, and represent "community of interest governments" administering education in urban centres.

With respect to option two – improving existing public education systems – RCAP concluded that many issues surrounding Aboriginal education could be resolved quickly if Aboriginal people had effective control of education. RCAP was of the view that Aboriginal control and parental involvement would be mechanisms to help identify and resolve problems and implement culturally-based curriculum.

RCAP was also of the view that increased participation by Aboriginal people in the public school system should not relieve provincial and territorial governments of responsibilities, such as taking a stance against discrimination and barriers to the achievement of equitable outcomes in education for Aboriginal peoples, consulting with Aboriginal communities, and engaging Aboriginal representatives in governance and decision-making in public institutions. RCAP indicated that the provinces must ensure their fiduciary obligations are fulfilled and that support is available for building the capacity of local institutions to deliver culturally appropriate Aboriginal services.

8. Gathering Strength: Federal Response to RCAP (1998)

The federal government issued its response to RCAP's final report, entitled *Gathering Strength: Canada's Aboriginal Action Plan*, in 1998. In this response, the federal government re-confirmed its commitment to its policy on the inherent right of self-government and pledged to strengthen Aboriginal governance. It re-iterated that it recognizes that the inherent right of self-government for Aboriginal peoples is an existing Aboriginal right within section 35 of the *Constitution Act, 1982*. However, the federal government has somewhat narrowed its commitment on the constitutional protection of self-government agreements by stating that only "certain provisions" in self-government agreements with First Nations may be constitutionally-protected as treaty rights under section 35. The response goes on to detail how federal departments are continuing to devolve program responsibility and resources to Aboriginal organizations. Finally, the federal government committed to consult with Aboriginal organizations and the provincial and territorial governments on appropriate instruments to recognize Aboriginal governments and to provide a framework of principles to guide jurisdictional and inter-governmental relations.

Gathering Strength identified four main objectives: (1) renewing the partnership; (2) strengthening Aboriginal governance; (3) developing a new fiscal relationship; and (4) supporting strong communities, people and economies.

The federal government indicated that with respect to the fourth objective, supporting strong communities, people and economies, there needs to be a concentrated framework for action to be pursued with Aboriginal people and other partners in three main areas: improving health and public safety; investing in people; and strengthening economic development. Investing in people means assisting individuals to acquire the education, skills and training necessary for individual self-reliance. The government acknowledged that far too many Aboriginal youth do not complete high school, and that, as a result, they leave the school system without the necessary skills for employment and without the language and cultural knowledge of their people. The federal government also stated that by working with First Nations, it will support education reform on reserves, with the

objective of improving the quality and cultural relevance of education for First Nations students, improving the classroom effectiveness of teachers, supporting community and parental involvement in schools, improving the management and support capacity of First Nations systems, and enhancing learning by providing greater access to technology for First Nations schools. It cited the introduction of Industry Canada's SCHOOLNET and Computers for Schools Initiative as examples of providing greater access to technology.

The federal government continued by saying it will work with First Nations to encourage youth to stay in school by improving the quality of education. Initiatives will focus on increasing high-school graduation rates and ensuring that First Nations youth leave school feeling optimistic about their future.

9. Current Status of First Nations Education

The three basic models of First Nations education currently available throughout most of Canada are:

1. federal schools controlled by the Department of Indian Affairs;
2. the provincial/territorial public school system; and
3. local schools operated by First Nations (generally under the administration of a local school board or education authority).

According to Indian and Northern Affairs Canada, of the 120,000 eligible on-reserve First Nation students, 65% attend the 487 band-operated schools, while about 35% attend provincial schools and less than 2% attend one of the remaining seven federal schools or private/independent schools. The band-operated schools must ensure that their teachers are certified to teach in the band's province and that the school follow the provincial curriculum adjusted to reflect the First Nation's culture and language.

None of the current arrangements is completely satisfactory from a legal perspective, as they do not address First Nations' fundamental requirements – **recognition** of their inherent jurisdiction in relation to First Nations education and constitutional **protection** for their jurisdiction. Some of the concerns that have been identified by First Nations include:

- forced adherence of First Nations by the federal government to provincial or territorial guidelines and curriculum;
- exclusion of First Nations citizens who do not live on reserve or are not “recognized” under the *Indian Act*;
- difficulties in hiring appropriate teachers and having First Nations teachers recognized and accredited (due in part to collective agreements);
- unwillingness on the part of, and lack of incentives for, public school boards to enter into Local Education Agreements with First Nations; and
- inadequate and misdirected funding.

The balance of this paper will consider the key underlying concepts and jurisdictional models that would enable First Nations to assume greater jurisdiction and control over education.

III. KEY CONCEPTS

This section will review the key concepts that are related to the issue of First Nations jurisdiction and control over education.

1. Jurisdiction

Jurisdiction is a concept that refers to legal power or authority, and includes the right to make laws. In the 1988 AFN Declaration of First Nations Jurisdiction Over Education, which accompanied *Tradition and Education*, jurisdiction was defined as follows:

Jurisdiction means the inherent right of each sovereign First Nation to exercise its authority, develop its policies and laws, and control financial and other resources for its citizens. (p. 46)

Jurisdiction, in its more general sense, can be inherent, constitutionally-based or delegated.

(a) Inherent jurisdiction

Inherent jurisdiction is an original source of authority that is not derived from an outside constitutional or statutory authority. Consequently, inherent jurisdiction cannot be withdrawn. Inherent jurisdiction is a critical component of a First Nation's inherent right of self-government. A First Nation's inherent right to govern itself is not granted by any other government; rather the authority is derived from the First Nation's existence as a self-governing entity at the time of contact. There are two principal ways of exercising inherent jurisdiction. Firstly, a First Nation can enter into an agreement with the federal, provincial or territorial government that recognizes and facilitates the exercise of the First Nation's inherent jurisdiction. Secondly, a First Nation may unilaterally assume jurisdiction by, for example, enacting laws, implementing unwritten customary law or simply taking control.

(b) *Constitutionally-based jurisdiction*

Constitutionally-based jurisdiction is authority that is derived from a constitutional document. In the case of Canada, both the federal and provincial governments have constitutionally-based jurisdiction. As discussed above, the scope of their respective jurisdictions is principally set out in sections 91 and 92 of the *Constitution Act, 1867*. The provincial jurisdiction over education is set out in section 93. Constitutionally-based jurisdiction cannot be withdrawn or altered except through a constitutional amendment.

(c) *Delegated jurisdiction*

Delegated jurisdiction is authority that has been granted by another level of government. For example, the provincial governments were given exclusive responsibility for “Municipal Institutions” in section 92 of the *Constitution Act, 1867*. Consequently, municipalities are considered “creatures” of the provinces. As the provincial governments could potentially restrict or withdraw the authority of municipalities to make laws, etc., a municipality’s authority is referred to as delegated jurisdiction. Similarly, the three territorial governments fall under the authority of the federal government and consequently can only exercise delegated jurisdiction. The bylaw-making power of First Nations under the *Indian Act* is also generally characterized as delegated jurisdiction, especially given the Minister's power to disallow bylaws.

(d) *Inherent vs. delegated jurisdiction*

While the distinction between inherent and delegated authority is of tremendous legal significance, it may have little or no day-to-day impact on the delivery of First Nations education in a community. The essential difference between delegated and inherent models of jurisdiction lies in the legal and political foundations of the model. If a First

Nation is otherwise satisfied with the education model it has developed pursuant to delegated jurisdiction, a transition to inherent jurisdiction might only require a re-definition of the basis of the relationship set out in a legal instrument, such as an agreement or a statute; in all other respects, the education model might remain unchanged.

The principal reason to move from a model of delegated jurisdiction to inherent jurisdiction is to prevent the delegating government from restricting, withdrawing or otherwise interfering with the jurisdiction that it has granted. For instance, under a delegated model, the delegating government has a greater ability to influence a First Nation because, if it does not agree with the way in which the First Nation is exercising its jurisdiction, it may limit the First Nation's authority.

Despite the clear distinction between inherent and delegated jurisdiction, many of the agreements between First Nations and Canada or First Nations and a province have traditionally been ambiguous as to the parties' respective sources of authority. This came about because First Nations did not want to acknowledge something that they do not believe to be true – namely, that the authority to govern themselves can be granted to them by another government – and because Canada and the provinces were reluctant to recognize First Nations' inherent right of self-government and corresponding inherent authorities. As a consequence of this jurisdictional stalemate, the parties often avoided dealing with this issue directly and left agreements silent. Each party was then free to interpret the agreement as it chose. The disadvantage of this approach was that it did not provide either party with certainty as to the First Nation's right to freely exercise its jurisdiction or the delegating government's right to restrict the exercise of that jurisdiction.

The situation changed in August 1995, when the federal government officially launched a new policy which recognized the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.

2. Control

Control is, in some ways, a more difficult term to define than jurisdiction because it is a commonly used word with several different meanings. For example, control can refer to legal responsibility for a specific matter (“de jure” control) or to the practical or effective ability to make decisions in relation to something (“de facto” control). For the purposes of this paper, “control” will be used in the more limited sense of practical control, while “jurisdiction” will be used to refer to the concept of legal authority or control. In the context of education, practical control relates to issues such as administration, financing, educational personnel, and curriculum development and delivery, while jurisdiction relates to the nature and source of the authority to exercise that control and, in particular, to the right to make laws.

3. Self-Government

Self-government generally refers to the right of a people or society to govern itself. It includes the right to establish institutions of governance (including a law-making body, a bureaucracy and an administration of justice system). Self-government is also linked to and flows from the concept of self-determination. As the Royal Commission on Aboriginal Peoples noted:

In summary, while Aboriginal people use a variety of terms to describe their fundamental rights, they are unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples. This right entitles them to determine their own governmental arrangements and the character of their relations with other people in Canada. (RCAP, Volume 2, Part 1, p. 114)

The right of self-government is an Aboriginal right protected under section 35(1) of the *Constitution Act, 1982*. This view, which has been held by First Nations since it was first

enacted, was confirmed in 2000 by the British Columbia Supreme Court in the *Campbell* decision.

4. Fiduciary Duty

Fiduciary duty is defined as the responsibility that arises when one party (the fiduciary) undertakes to act for the benefit of another party (the beneficiary). This duty is founded on the resulting dependence of the beneficiary on the fiduciary. Canadian law imposes a high standard of conduct so as to limit ways the fiduciary can exercise his or her discretion in relation to the beneficiary's interest.

The Canadian courts have held, in a number of landmark cases, including the Supreme Court of Canada's decisions in *Sparrow* (1990) and *Delgamuukw* (1997), that both the federal and provincial governments owe a fiduciary duty to First Nations. According to the Supreme Court of Canada, section 35 incorporates the fiduciary relationship and consequently places limits on the ability of the federal and provincial governments to legislate in relation to First Nations (*Sparrow*). The sources of the fiduciary obligation of the Crown to First Nations are the unique nature of Aboriginal title and the historic responsibilities assumed by the Crown in relation to First Nations. It is beyond the scope of this paper to address the significant issue of the nature and extent of the federal and provincial governments' fiduciary duty to First Nations in relation to education. Instead, this section of the paper will consider the more limited issue of whether the governments' fiduciary duty is altered through treaty-making or the assumption of the inherent right of self-government by First Nations. This issue is the subject of considerable controversy and debate.

First Nations frequently express the concern that non-Aboriginal governments should not use treaty-making as a means to evade their fiduciary duty. This is in part because an argument can be made in favour of non-Aboriginal governments that, as First Nations become increasingly autonomous, their dependence – the basis for the fiduciary duty –

will diminish. The exercise by First Nations of their inherent right of self-government may alter the nature of the fiduciary duty, but it is unlikely to eliminate it. The Supreme Court of Canada has held that section 35 incorporates the fiduciary relationship. This suggests the fiduciary duty is a component of “existing Aboriginal and treaty rights” and would not be eliminated through the exercise of those rights.

While the courts have held that both the federal and provincial governments owe a fiduciary duty to First Nations, it would likely be unlawful for the federal government to transfer its fiduciary duty to the provincial government. The only way the federal government could likely eliminate its fiduciary duty is with the express and fully informed consent of First Nations.

5. Constitutional Protection of Jurisdiction

As discussed above, subsection 35(1) of the *Constitution Act, 1982* states that existing Aboriginal and treaty rights are recognized and affirmed. For greater clarity, subsection 35(3) was introduced in 1983 to confirm that the term “treaty rights” includes rights set out in existing and future land claims agreements. As a result of section 35, treaties and land claims agreements are constitutionally-protected. This means that the rights set out in these agreements can only be overridden or infringed by the federal or provincial governments if they can meet the high justification standard imposed by the courts (see *Sparrow* and *Delgamuukw*). The Supreme Court of Canada indicated in the 1996 *Badger* case that the justification test applies to both Aboriginal and treaty rights, but the standard may be higher for infringements of treaty rights than it is for undefined Aboriginal rights.

Constitutional protection will not provide treaty rights with absolute protection; however, it is likely that treaty rights could only be altered by a federal or provincial law in extremely limited circumstances. Rights set out in agreements that are not protected by section 35 can be more easily restricted by subsequent unilateral federal or provincial legislation. For example, the federal government can legislate, as it did in the case of the

Pearson Airport deal in Toronto, to cancel an otherwise binding agreement and abolish the right of the affected parties to sue the government. However, it is very unlikely that a court would uphold similar federal legislation that attempted to rescind a provision contained within a section 35-protected agreement.

At present, the only agreements between First Nations and other governments that are without doubt protected by section 35 are the original treaties between Canada and First Nations and the modern treaties and land claims agreements between Canada, First Nations, and provincial or territorial governments. The thousands of other agreements signed by First Nations with other governments, including interim measures agreements, are probably not protected by section 35. To date, the only agreements with section 35 protected broad powers of self-government and jurisdiction are the Nisga'a Final Agreement and the recently concluded (but not yet ratified) Tlicho First Nation Land Claims and Self-Government Agreement.

6. Exclusive vs. Shared Jurisdiction

In the context of a First Nation's jurisdiction, the distinction between exclusive and shared jurisdiction is essentially a question of whether the First Nation alone has the authority to pass laws in a particular area or whether another government (federal, provincial or territorial) also has such authority. An example of exclusive jurisdiction is set out in the Yukon First Nations' Self-Government Agreements. Those agreements confirm that Yukon First Nations have the exclusive power to enact laws in relation to:

1. the administration of the First Nation's affairs and operation and internal management of the First Nation; and
2. management and administration of rights of benefits under their land claims agreements. (See, for example, section 13.1 of the Vuntut Gwitchin First Nation Final Agreement.)

Those same agreements provide many examples of shared jurisdiction. Included among these is the power to enact laws relating to the “provision of education programs and services...” (See, for example, section 13.2.8 of the Vuntut Gwitchin First Nation Final Agreement.)

7. Paramountcy

The critical question that arises in the context of shared jurisdiction is which government’s laws are paramount (i.e. take precedence) in the case of a conflict or inconsistency between two or more governments’ laws. Paramountcy is generally addressed in one of three ways:

1. By agreement among the governments with shared jurisdiction in a constitution, treaty or other agreement;
2. Through an agreed-upon process set out in a treaty or other agreement; or
3. Left to be resolved by the courts, which will in turn rely on principles developed over the course of centuries.

The issue of paramountcy also arises in the case of treaties and land claims agreements. Many of the recently concluded agreements contain an explicit provision stating that the land claims agreement and the legislation bringing it into force prevail over the provisions of any other law. (See, for example, section 3.2.22 of the Sahtu Dene and Metis Comprehensive Land Claim Agreement.)

8. Bilateral vs. Trilateral Arrangements

Canada indicated, in its policy on the inherent right of self-government, that it prefers to proceed with negotiations on a tripartite basis. However, some First Nations are reluctant to enter into trilateral agreements with Canada and provincial or territorial governments out of concern that such agreements pave the way for the eventual transfer of jurisdiction and fiduciary duty from Canada to the provinces or territories. This issue can be addressed in at least two ways. First of all, agreements can explicitly state that the federal government retains its jurisdiction and fiduciary duty. Secondly, “double bilateral” agreements can be established between First Nations and Canada, and First Nations and provinces or territories. This would allow Canada to transfer responsibility and funding to First Nations who could then transfer all or part of these to the provinces or territories. Some First Nations are of the view that trilateral arrangements are preferable to bilateral or “double bilateral” arrangements as they bring all the parties to the same table thereby ensuring that all issues can be addressed and nothing falls between the jurisdictional or other cracks.

IV. LEGAL BASIS FOR EXERCISING JURISDICTION

This section will set out the legal basis that each of the federal, provincial and territorial governments relies upon to exercise jurisdiction and control in the area of education. It will also look at Aboriginal and treaty rights to education and jurisdiction over education. Finally, it will briefly review international law sources supporting First Nations' exercise of jurisdiction over education.

1. Federal, Provincial and Territorial Jurisdiction over Education

The Canadian Constitution is made up of both written documents and unwritten conventions. The written documents include the following:

- The Royal Proclamation of 1763;
- The *Constitution Act, 1867* (formerly known as the *British North America Act*);
and
- The *Constitution Act, 1982*.

Sections 91, 92 and 93 of the Constitution Act, 1867 and section 35 of the Constitution Act, 1982 are the constitutional provisions of greatest relevance to the issues discussed in this paper.

(a) Sections 91, 92 and 93 of the Constitution Act, 1867

Sections 91 and 92 list the exclusive “heads of power” (or jurisdictions) of the federal and provincial governments respectively. Section 91(24) gives the federal government “the exclusive Legislative Authority” over “Indians, and Lands reserved for the Indians”. Section 92 provides the provinces with jurisdiction over matters such as property and

civil rights, municipal institutions and “all matters of a merely local or private nature”. Section 93 provides the provinces with the exclusive right to make laws in relation to education. The reason for these separate exclusive areas of jurisdiction is that Canada was established as a federal state. In a federal state, governmental power is distributed between the federal and provincial governments, with neither one being subordinate to the other. In the event of any inconsistency between otherwise valid federal and provincial laws, the federal government’s laws prevail. However, as the powers of the provinces are not granted by the federal government, they cannot be taken away, altered or controlled by the federal government. Consequently, the federal government does not have the right to withdraw or restrict the provincial government’s jurisdiction over education.

The federal government assumes jurisdiction over First Nations education through the *Indian Act*, which includes a number of provisions directly related to education. Under the current *Indian Act*, sections 114 to 122 specifically address the issue of “education”. Pursuant to these provisions and section 4, the Minister of Indian Affairs may enter into agreements with respect to the education of Indian children living on reserve. The Minister may also establish, operate and maintain schools for Indian children.

Because Canada has exclusive jurisdiction over “Indians, and Lands reserved for the Indians”, while the provinces have exclusive jurisdiction over education under the Canadian Constitution, it is difficult to determine conclusively which of them has jurisdiction over “First Nations education”. This issue was considered in the *MacPherson Report on Tradition and Education: Towards a Vision of our Future* (MacPherson, 1991). That report concluded that the federal government has jurisdiction over First Nations education, and that the provincial governments would face serious constitutional obstacles if they tried to deal directly with First Nations education by, for example, enacting a provincial “First Nations Education Act”. The provincial governments, nevertheless, maintain the right to enact education laws of general application that affect First Nations students in the provincial school system. As well,

both the federal and provincial governments would likely have the jurisdiction to enact an enabling law to support the implementation of education agreements with First Nations.

2. Aboriginal and Treaty Rights

Section 35 of the *Constitution Act, 1982* provides a foundation for the constitutional recognition of Aboriginal rights. Section 35 is not designed to create new rights, but to provide new constitutional protection for existing Aboriginal rights. Section 35 states that:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

One of the most significant aspects of section 35 is that it protects Aboriginal and treaty rights from being extinguished by federal legislation (the provincial governments have not been able to extinguish Aboriginal or treaty rights since 1867). Since the enactment of section 35 in 1982, the only way a First Nation’s Aboriginal or treaty rights can be extinguished is through constitutional amendment or with the consent of the First Nation through voluntary surrender.

As noted above, the recent *Campbell* case provides support for First Nations’ views that section 35 provides an independent source of jurisdiction for First Nations. In answer to the question “does section 35 protect Aboriginal self-government?” the court concluded that it does. (para. 137) This means that, even in the eyes of the Canadian legal system, First Nations do not have to rely on other governments to delegate jurisdiction to them.

3. International Law Support

The right of First Nations to exercise jurisdiction with respect to education is further supported by international law. The 1948 *Universal Declaration of Human Rights*

established some of the early foundations for the link between education and human rights. Article 26 of that Declaration states:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Furthermore, the *Charter of the United Nations*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* all affirm the fundamental importance of the right of self-determination of all peoples.

Finally, article 15 of the 1994 version of the Draft United Nations Declaration on the Rights of Indigenous Peoples, which is still under development, states that:

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

V. CONCEPTUAL MODELS

This section will describe the various existing and potential conceptual models for the exercise of jurisdiction over education by First Nations. With respect to each of these models, we will provide any examples where they exist or are being developed and describe their potential legal or practical advantages and limitations. These models are not necessarily mutually exclusive and there may be some overlap among them.

1. Unilateral Exercise of Jurisdiction

The most direct way for a First Nation to assume jurisdiction and control is through the unilateral assumption of jurisdiction by passing its own laws, implementing unwritten customary law or simply taking control. This is to be distinguished from passing a bylaw under the *Indian Act* that may be disallowed by the Minister of Indian Affairs. In the field of education, the major impediment to First Nations assuming jurisdiction is funding. Education is an expensive undertaking that few First Nations can presently afford on their own. Consequently, although a First Nation may be willing and able to assume jurisdiction in the area of education, it may be reluctant to do so until it has developed an alternative mechanism to fund the process.

Another potential impediment to the unilateral assumption of jurisdiction is the possibility of a court challenge. A First Nation's unilateral assumption of jurisdiction is most likely to be challenged when it attempts to enforce its laws. For example, if a First Nation unilaterally assumed jurisdiction in education by passing First Nations education legislation and special taxation legislation to fund the education program, it would likely face a court challenge. Although the issue is far from being conclusively resolved, the courts have shown considerable reluctance to address self-government as a broad, general right of Aboriginal peoples and have managed to avoid making a definitive ruling on this matter. Instead, they have indicated their preference for it to be negotiated, rather than litigated.

The Charlottetown Accord contemplated the unilateral assumption of jurisdiction as a means to implement the inherent right of self-government, although the agreement was consciously structured to provide incentives to all sides to negotiate agreements. It is possible that a court might hold that a First Nation may only exercise the right to unilaterally assume jurisdiction if it has made sincere efforts to first reach a negotiated agreement, as was contemplated in the Charlottetown Accord.

Despite the courts' reluctance to rule on self-government, they have provided some general guidance on the issue of self-government. The courts' statements to date illustrate the difficulties a First Nation would face in a court challenge to a unilateral assumption of jurisdiction.

The Supreme Court of Canada, in its 1997 decision in *Delgamuukw*, explicitly refused to rule on the issue of self-government. However, the court did recognize that systems of Aboriginal law existed before the arrival of Europeans to North America. For example, the court referred to "traditional laws" as "elements of the practices, customs and traditions of Aboriginal peoples". Having accepted that First Nations have traditional laws, which indicates a recognition of First Nations' governance, it is possible that the courts will accept a broad right of self-government if it is clearly rooted in the practices, customs and traditions of a First Nation.

Another noteworthy case is the 1996 decision of the Supreme Court of Canada in *Pamajewon*. In that case, the court held that Aboriginal rights, including any right of self-government, must be looked at in light of the specific facts of the case and the history and culture of the group claiming the right. The Court also held that the claim must not be characterized in a broad, general manner. The Court applied the *Van der Peet* test for Aboriginal rights (which requires that an Aboriginal right be an element of a practice, custom or tradition that is integral to the distinctive culture of the Aboriginal group claiming the right) and narrowed down the right claimed in this case from a

general right of "self-government" to the more specific right to "regulate high-stakes gambling".

It seems fairly clear from the decision in *Pamajewon* that, when a court is faced with a broad claim of "self-government" without the level of specificity required by the *Van der Peet* test, the court itself will likely attempt to narrow down the right claimed to a particular element of the broader category of self-government.

The *Campbell* case confirmed that the right of self-government is a protected right under section 35 and went on to set out a number of points that must be taken into account in considering the continued existence of rights of self-government:

1. the indigenous nations of North America were recognized as political communities;
2. the assertion of sovereignty diminished but did not extinguish Aboriginal powers and rights;
3. among the powers retained by Aboriginal nations was the authority to make treaties binding upon their people; and
4. any interference with the diminished rights which remained with Aboriginal peoples was to be "minimal". (para. 95)

Generally speaking, First Nations have made greater inroads in cases where the right being claimed is less controversial. In this regard, the courts have upheld the validity of a customary marriage, a customary adoption and a curfew law (see *Casimel*, *Connelly* and *Eastmain Band*). These matters, while less daunting to the courts, are nevertheless fundamental components of self-government. It is possible that other rights, such as control over education, health and housing could be treated similarly.

In the case involving customary adoption, the court held that these laws were an integral part of the distinctive culture of the Aboriginal group claiming the right. In the case involving the curfew laws, the court held that the Aboriginal group, which had

established a municipal-style government, held some sort of "residual sovereignty" which was recognized, not created, by Parliament and with which Parliament could not interfere. These cases illustrate that there are areas of First Nations governance that the courts are prepared to recognize and that may provide a better starting point for establishing a more general right of self-government.

2. Modern Treaties and Land Claims Agreements

Over the last 20 years, modern land claims agreements have been negotiated in northern parts of Canada. The earliest of these agreements, the James Bay and Northern Quebec Agreement signed in 1975 and the Northeastern Quebec Agreement signed in 1978, are the only agreements that contain detailed provisions on education. The other agreements entered into later include: the Inuvialuit Final Agreement (1984); the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada (1992); the Gwich'in Comprehensive Land Claim Agreement (1992); the Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993); and eight Yukon First Nations' Final Agreements (four in 1993, two in 1997, one in 1998 and one in 2002). These later agreements do not contain comprehensive provisions on education. The reason for this was the federal government's strict policy of keeping detailed provisions on self-government issues, including education, separate from land claims agreements.

The more recent land claims agreements all contain a chapter on self-government calling for a separate self-government agreement that is not to be interpreted as an agreement protected by section 35. The Yukon First Nations' Self-Government Agreements contain provisions that enable First Nations to exercise jurisdiction in the area of education. While the Sahtu Dene and Metis and the Gwich'in do not have finalized self-government agreements, the self-government framework agreements appended to their land claims agreements contemplate that self-government agreements will include jurisdiction in relation to education. While it is difficult to characterize the nature of the First Nations'

jurisdiction described in these agreements, it is probably fair to say that they are not explicitly “inherent”, nor are they explicitly protected by section 35.

The education provisions of three of these First Nations’ agreements (James Bay Cree, Yukon First Nations, and Sahtu Dene and Metis) are briefly described in the next chapter.

The most recent generation of modern treaties, including the Nisga’a Final Agreement and the Tlicho First Nation’s Land Claims and Self Government Agreement (initialed on September 4, 2002 and not yet ratified) include specific law-making powers in relation to education. As these provisions are set out in the treaties themselves they are protected by section 35 of the *Constitution Act, 1982*. The education provisions of these agreements are briefly described in the next chapter.

To date, none of the First Nations with modern land claims agreements, apart from those in Quebec, have implemented the education component of their self-government agreements. This is to be expected given that most of these agreements were signed quite recently.

3. Implementation of Treaties Model

Education jurisdiction models can also be developed in the context of treaty implementation. These models build on the spirit and intent of the treaties. In the case of the numbered treaties, each of them included specific provisions relating to First Nations education. A treaty implementation initiative is currently underway in Saskatchewan pursuant to the Common Table process. A similar approach was commenced in Alberta in 1996. These initiatives are described in greater detail in Chapter VII below.

4. Other Models

There are several potential mechanisms that may enable a First Nation to assume greater jurisdiction and control over education, outside the treaty or treaty implementation process or pending the finalization of treaties. It is important to recognize that the models described are not mutually exclusive and arrangements between First Nations and other governments may borrow elements from several of these models.

Delegation of control over a school or program

The First Nation can assume greater control over an individual school or particular program through an agreement which delegates control over decision-making or program delivery to the First Nation. The benefits of such agreements are that they provide First Nations with a voice in how a particular school or program is run. The primary disadvantage is that the body that delegated control may restrict how that control can be exercised or may withdraw the delegation. Nevertheless, such an agreement can provide a First Nation with an effective way to improve the quality of education delivered to its members.

Delegation of jurisdiction

The First Nation can assume greater jurisdiction through a delegation of jurisdiction over a school, schools within an area or a school board from Canada (or a province or territory). The First Nation would then have the authority to determine the laws and rules that would apply within the parameters of the delegation. Because the jurisdiction is delegated, the federal (or provincial/territorial) government will usually set the legal parameters in advance and retain the ability to rescind the delegation. This arrangement has many of the same advantages and disadvantages as the delegation of control model. The major difference between the two is by receiving

law-making powers in relation to education rather than just control, the First Nation may have a broader range of powers that it can exercise.

Recognition of jurisdiction

The First Nation could enter into an agreement that is silent as to whether it grants delegated jurisdiction or recognizes inherent jurisdiction. Alternatively, the agreement could contain parallel statements on jurisdiction that allow each of the parties to state its perspective on jurisdiction. None of the parties would be required to accept the others' statements. This approach is a practical alternative if the parties cannot come a mutual understanding regarding the existence or recognition of a First Nation's inherent right to self-government. It allows each of the parties to provide its own interpretation on this issue. A considerable number of agreements have followed this approach, including the Yukon First Nations' Self-Government Agreements and the Nisga'a Final Agreement.

Recognition of inherent jurisdiction

The position of First Nations on the issue of jurisdiction over education has been clearly stated for well over a decade. As the Assembly of First Nations has repeatedly enunciated, First Nations are seeking recognition of their inherent right of self-government, including the right to make laws with respect to the education of their members. While the federal government has since 1995 recognized the inherent right of self-government in its Inherent Right Policy, it has been reluctant to enshrine that recognition in constitutionally protected agreements with First Nations.

Enabling legislation

First Nations could work with the federal and provincial or territorial governments to develop and enact legislation that would enable them to enter into bilateral or

trilateral agreements with First Nations regarding education. Such legislation could allow the governments to overcome any current legal obstacles to the making of agreements with First Nations. Enabling legislation would provide the opportunity to create legally recognized education authorities established by First Nations, to recognize First Nation law-making authority with respect to education and to address conflict of law issues. The Nova Scotia Mi'kmaq education model, which is discussed below in Chapter VI, is an example of this approach.

Canada-wide legislation

Federal legislation that applies across Canada could be enacted that recognized First Nations jurisdiction over education. A model was developed by the AFN in 1991 known as the *First Nations Education Act*. Canada-wide legislation could be enabling in nature or very detailed and prescriptive as to the mechanisms for exercising jurisdiction.

Public government model

In areas where First Nations or other Aboriginal people clearly make up the majority of the population, the public government model can provide a mechanism for achieving self-government. In the case of the territory of Nunavut, the Inuit make up a large majority of the population so they can establish government structures that apply throughout the territory and are open to all people living in the territory without concern about being overwhelmed by a non-Aboriginal majority. The Nunavut model is discussed below in the following chapter.

VI. EXISTING MODELS

This section includes a brief summary of the key aspects of each of the existing models of First Nations jurisdiction over education set out in chronological order.

1. James Bay and Northern Quebec Agreement

In the James Bay and Northern Quebec Agreement, the Cree opted for their own school board under provincial jurisdiction. This school board is similar to others, although it has unique powers and a special mandate to ensure that education programs are culturally relevant. For example, it has jurisdiction and responsibility for elementary, secondary and adult education. The Agreement specifically provides for instruction to be carried out in Cree and gives the Cree School Board special powers regarding curriculum development, establishment of programs based on Cree culture and language, hiring of teachers, and control of administration.

In 1981, the Cree made presentations to the House of Commons Standing Committee on Indian Affairs and Northern Development. Key among their concerns in relation to education was inadequate funding which made it impossible for the School Board to fulfil certain aspects of its mandate, especially with respect to the development of curriculum and the establishment of teaching materials based on the Cree language.

In an article entitled “The Cree experience” in *Indian Education in Canada*, Billy Diamond, Chair of the Cree School Board, listed a number of very serious concerns regarding the implementation of their agreement by Canada and Quebec. However, he concluded by stating:

Indian control of Indian education is not an easy thing to bring about, even when you have signed an agreement which is designed to facilitate the process. Our

fight with Canada and the province continue, but we feel we have gained their respect because of our ability to properly operate our board. We are convinced that, in the end, Cree education will be provided to all of our people in the manner that we proposed in the agreement. (Barman, Hébert & McCaskill, 1987: Volume 2, p. 95-6)

2. Yukon First Nations Self-Government Agreements

The provisions in the Yukon First Nations' self-government agreements make it clear that each Yukon First Nation has the power to make laws with respect to:

- the provision of training programs for its citizens, subject to Government certification requirements where applicable; and
- the provision of education programs and services for its citizens choosing to participate, except licensing and regulation of facility-based services off Settlement Land.

The Yukon First Nations are currently engaged in negotiations to amend their self-government agreements so they can be protected under section 35 in accordance with the new federal policy on the inherent right of self-government. While some Yukon First Nations have begun to develop laws under their self-government agreements, none has done so in the area of education at this point in time.

To bring into effect the northern land claims agreements, the federal and provincial or territorial governments have enacted legislation. For example, in 1995 the federal government enacted the *Yukon First Nations Land Claims Settlement Act*, which gave effect to the first four Yukon First Nation Final Agreements, and the *Yukon First Nations Self-Government Act*, which gave effect to the first four First Nation Self-Government Agreements. Since then, four other Yukon First Nations' Final Agreements and Self-Government Agreements have been brought into effect by a federal order-in-council

passed pursuant to these statutes. More recently, several more agreements have been initialed, but have yet to be ratified.

3. Sechelt Self-Government Agreement

In 1986, the federal and British Columbia governments passed legislation providing the Sechelt Indian Band with self-government powers that went beyond the powers recognized in the *Indian Act*. The federal statute is called the *Sechelt Indian Band Self-Government Act* (SC 1986, c. 27). This statute does not specifically recognize the Sechelt's inherent right of self-government. While this statute is generally viewed as representing a delegated model of governance, the Sechelt's law making powers, referred to in this statute, are not expressly delegated.

Among many other powers, section 14(1) of the *Sechelt Indian Band Self-Government Act* provides that:

14. (1) The Council has, to the extent that it is authorized by the constitution of the Band to do so, the power to make laws in relation to matters coming within any of the following classes of matters:

(g) education of Band members on Sechelt lands.

4. Nunavut

The Inuit's jurisdiction over education is based on a public government model. The power to enact laws with respect to education are set out along with the territory's other law-making powers in the *Nunavut Act*, the federal statute that establishes the territory, its government and its authority. Section 23(1) of the *Nunavut Act* provides that:

Subject to any other Act of Parliament, the Legislature may make laws in relation to the following classes of subjects:

(m) education in and for Nunavut, subject to the condition that any law respecting education must provide that

(i) a majority of the ratepayers of any part of Nunavut, by whatever name called, may establish such schools in that part as they think fit, and make the necessary assessment and collection of rates for those schools, and

(ii) the minority of the ratepayers in that part of Nunavut, whether Protestant or Roman Catholic, may establish separate schools in that part and, if they do so, they are liable only to assessments of such rates as they impose on themselves in respect of those separate schools;

(n) the preservation, use and promotion of the Inuktitut language, to the extent that the laws do not diminish the legal status of, or any rights in respect of, the English and French languages;

Under this model, the Inuit share decision-making authority with all other residents of Nunavut; however, because of their numerical advantage, the Inuit have effective control over the levers of government.

5. Nisga'a Final Agreement

In the Nisga'a Final Agreement there is no differentiation between those portions of the agreement that address governance and those that address lands and resources.

Consequently, the governance provisions in the Final Agreement are protection by section 35 as "treaty rights".

Under the Final Agreement, provided that certain conditions are met, the Nisga'a Lisims Government may make laws:

1. to preserve, promote and develop Nisga'a culture and language (chapter 11, sections 41-43);
2. in respect of pre-school to grade 12 education of Nisga'a citizens on Nisga'a Lands, including the teaching of Nisga'a language and culture (chapter 11, sections 100-102); and

3. in respect of post-secondary education within Nisga'a lands (chapter 11, sections 103-107).

In the event of any inconsistency between the Nisga'a laws described above and federal or provincial laws of general application, Nisga'a laws will prevail to the extent of the inconsistency. As well, the Nisga'a Lisims Government and the village governments are described as having the "principal responsibility" for Nisga'a language, culture and government.

The Nisga'a Final Agreement suggests that some of the key issues that First Nations may choose to address in agreements with respect to education are: the power to make laws with respect to the establishment and management of educational institutions; certification of teachers; curriculum development; and the teaching of aboriginal languages and culture. While the agreement does not make reference to the "inherent" source of the Nisga'a Government's authority, the overall context of the Final Agreement suggests that Nisga'a jurisdiction over matters such as education is inherent rather than delegated. The Nisga'a Final Agreements bodes well for First Nations that are hoping to include their self-government powers in a section 35-protected agreement. However, it also indicates some of the significant restrictions that may be imposed in relation to matters such as teacher certification and comparability of standards.

Currently the Nisga'a control School District 92, which is established under provincial law. However, should they choose to exercise their authority under their Final Agreement, they could pass a law establishing a school board to replace that one under the authority of their own law-making powers.

6. Mi'kmaq Education in Nova Scotia

In 1999, the federal and Nova Scotia governments each passed a *Mi'kmaq Education Act* giving legal effect to an agreement signed in 1997 among nine of the Mi'kmaq communities in Nova Scotia and the Government of Canada, attached to which was:

1. A funding agreement;
2. An implementation plan;
3. A Tripartite Agreement including the Government of Nova Scotia;
4. Principles of the Constitutions; and
5. Band Council Resolutions for ratification purposes.

This agreement sets out the nature and scope of jurisdiction transferred over elementary and secondary education and post-secondary education support. It also sets out the powers and responsibilities of the education authority.

The federal and provincial *Mi'kmaq Education Acts* are very brief and rely on the agreement and its attachments to provide the details of the arrangement. This approach maintains the sanctity of the agreement and ensures that the key elements of the arrangement can only be amended by agreement of the parties to the agreement. This reduces the likelihood of unilateral action being taken by one of the governments.

The key provisions of the federal statute include the following:

1. The First Nations have the power to make laws – to the extent provided by the [1997] agreement – applicable on reserve in relation to primary, elementary and secondary education (section 6(1)) and support for post-secondary education for all their members, whether on or off reserve (section 6(2)).
2. The programs and services must meet the standard of comparability (section 7(2));
3. Mi'kmaw-Kina'matnewey is established as a legal entity to support the delivery of educational programs and services under the Act (section 10); and

4. The education provisions of the *Indian Act* do not apply to First Nations operating under this arrangement (section 11).

The Nova Scotia statute also sets out the First Nations' law making powers and goes even further by stating that where there is a conflict between a First Nation's and provincial law with respect to primary, elementary and secondary education, the First Nation's law prevails (section 5(2)).

The scope of law-making authority set out in the agreements is described in Schedule D and includes the following:

1. Terms and conditions of employment of teachers;
2. Maintenance and operation of school buildings and facilities;
3. Conveyance of students to and from school;
4. Payment of tuition fees for students attending schools off reserve;
5. Additional education services;
6. Agreements with respect to the delivery of education services;
7. Discipline of students and school attendance;
8. Conflict of interest;
9. Drug policies;
10. Maintenance of school records; and
11. Passage, administration and publication of laws.

The implementation of this initiative has been somewhat hampered by inadequate funding and preparation for implementation.

7. Tlicho First Nation Land Claims and Self-Government Agreement

The Tlicho First Nation that is located in the western part of the Northwest Territories is the most recent First Nation to initial a land claim agreement or treaty. The Dogrib

Treaty 11 Council represented the Tlicho in these negotiations. Like the Nisga'a Final Agreement, the Tlicho Agreement contains self-government provisions in the body of an agreement that is expressly protected by section 35 of the *Constitution Act, 1982*.

Under their agreement, the Tlicho Government has the power to enact laws relating to education (including pre-school and early childhood, but not post-secondary) of Tlicho people in Tlicho communities or on Tlicho lands, including the teaching of language, history and culture, but not including the certification of teachers (section 7.4.4.). An intergovernmental services agreement among the Tlicho, the Government of the Northwest Territories and the federal government will provide a single delivery system for education, health, welfare, family and other social programs and services to Tlicho citizens and others living in their communities (section 7.10). The first such agreement will be in effect for 10 years.

VII. ONGOING EDUCATION INITIATIVES

Most of the information contained in this chapter is based on the reports prepared for the National Symposium on First Nations Educational Jurisdiction hosted by the Assembly of First Nations (AFN) on May 30 and 31, 2001. These reports were compiled into the *Proceedings Manual: "Asserting Our Right To Be Indigenous"*, published in August 2001 by the AFN. As well, we obtained information from Indian and Northern Affairs Canada's website. In order to get a more comprehensive understanding of where each of these regional initiatives is at, it would be necessary to conduct in-depth interviews with representatives in each of the regions. It was beyond the scope of this literature review to carry out that type of research and evaluation. Please note that there is no section on the Northwest Territories, Nunavut or Prince Edward Island, as the *Proceedings Manual* did not include a report from those regions.

1. Nova Scotia and Newfoundland

Nine of the 14 First Nations communities in the region are exercising jurisdiction delegated to them through federal and provincial legislation. This model is discussed in the previous chapter (see the Mi'kmaq model). One First Nation is exercising control over education through a self-government agreement that devolves administrative control from the Indian and Northern Affairs Canada (INAC). The remaining four First Nations exercise devolved administrative control over education through First Nation Financial Agreements between themselves and INAC negotiated under the *Indian Act*.

The major focus of the First Nations in this region is on implementing their recently recognized jurisdiction and developing and improving existing arrangements. Over the longer term, the First Nations are interested in moving from delegated to self-governing treaty-based jurisdiction.

2. New Brunswick

The First Nations Education Initiative Committee in New Brunswick has focused much of its attention on the problems faced by Aboriginal students in the provincial school system. The Committee has obtained funding to establish initiatives to support these students, including cultural resource centers, computer labs, aboriginal language teachers, First Nations history teachers, district Aboriginal education coordinators, teachers' assistants and intervention workers for at-risk Aboriginal students.

The Committee is of the view that the creation of an Aboriginal Education Directorate would address many of the concerns that have been identified. The Directorate would be overseen by a Board of Directors made up of representatives from each of the eleven First Nation communities that currently make up the Committee. The Directorate would have responsibility for improving the quality of education for First Nations people and ensuring fairness and equity for all programs and services directed to First Nations students, encourage participation of all stakeholders, develop linkages and networks, facilitate and coordinate services such as professional development, increase employment opportunities in education for First Nations people and create a core group of professionals to direct the development of programs and services for First Nations people.

3. Quebec

There are a number of different jurisdictional models in Quebec. The James Bay and Northern Quebec Agreement is discussed above in Chapter VI. Some First Nations in Quebec are still subject to the education provisions in the *Indian Act*, which provides limited delegated control over administration. Others have entered into agreements with INAC pursuant to which the First Nations must meet detailed conditions and criteria. Other First Nations are subject to the provincial *Education Act*, in addition to the *Indian Act*. Some First Nations benefit from educational services funded by INAC and the First

Nations Education Council, an education body controlled by Quebec First Nations. One First Nation is currently negotiating for recognition of its ancestral rights including jurisdiction over education. Finally, some communities have signed block-funding agreements, while others have signed agreements with local school boards.

First Nations in Quebec are interested in making recognition of jurisdiction over education a priority to allow much greater local control and recognition of First Nations values. This jurisdiction must include the right to establish general educational standards, as well as standards for cultural and language programming. There is also recognition of the importance of meeting or harmonizing with provincial standards in order to facilitate First Nations students' transition into the provincial system. Two factors that are seen as critical in moving towards quality education are greater flexibility in managing budgets and programs and a clarification of rules and responsibilities of the various parties involved in First Nations education.

In May 2001, the Minister of Indian Affairs and Northern Development and the Grand Chief of the Mohawks of Kahnawake released a joint draft umbrella agreement and four draft sub-agreements for consultation with the First Nation's members. One of these sub-agreements deals with education and Mohawk language and culture on Kahnawake Territory. In particular, the agreement provides for jurisdiction over primary, secondary and special education, as well as the preservation and promotion of the Mohawk language and culture on Kahnawake Territory. In the event of a conflict, Kahnawake laws will prevail over federal laws relating to First Nation education, language and culture and the relevant provisions of the *Indian Act* will cease to apply. The other sub-agreements relate to membership, land and the policing aspect of the administration of justice.

4. Ontario

Discussions on jurisdiction over education are underway in all four of the major regions in Ontario pursuant to the federal government's Inherent Right of Self-Government

Policy. According to the March 2001 report included in the *Proceedings Manual*, the United Alliance Council's negotiations were nearing the final stages of completion, two of the three communities in the Grand Council Treaty #3 area were at the Framework Agreement Stage, the Nishnawbe-Aski Nation was at the initial stage of Agreement-in-Principle and the Union of Ontario Indians was at the final stage of Agreement-in-Principle.

According to the March 2001 report, some of the key challenges in these discussions were recognition for the inherent right, need for adequate funding for the negotiation process, the mandate of the federal negotiating team, lack of involvement of the provincial government (necessary for information purposes), changes by federal government to the negotiation process and reluctance to deal with education in a holistic manner.

In June 2002, the Anishinabek Nation and Canada initialed an "Education Agreement-in-Principle" (AIP). The Anishinabek Nation, whose corporate arm is the Union of Ontario Indians, represents approximately 30% of the total First Nation population in Ontario. The AIP sets out the groundwork for the negotiation of a final agreement through which participating First Nations will be able to implement legislative and administrative jurisdiction over primary, elementary and secondary education for members living on reserve. The purpose of the final agreement will be to enhance participating First Nations' abilities to better determine their own future and to deliver culturally relevant education programs and services through their own laws and institutions.

5. Manitoba

In December 1990, the Assembly of Manitoba Chiefs signed an "Education Framework Agreement" (EFA) with the federal government with a view to identifying educational matters that required immediate or long-term attention and resolution. The objectives of the EFA were, among others, to develop an agenda for change that would accelerate

Indian control, authority, management and jurisdiction over First Nations education, models for possible educational systems under First Nations control and management and a plan for the devolution of control and management of education institutions to First Nations people.

The EFA later became part of the broader “Framework Agreement Initiative” (FAI) signed in 1994 between the Assembly of Manitoba Chiefs and the federal government. The goals of the FAI were to develop and recognize First Nations governments with jurisdiction consistent with the inherent right and to dismantle the existing Department of Indian Affairs and Northern Development structures. Education was identified as a fast-track item in the FAI. According to March 2001 report prepared by the Manitoba Region and set out in the *Proceedings Manual*:

The negotiations for jurisdiction over education encountered a number of problems that resulted in the suspension of negotiations. One was the unwillingness of the federal government to undertake the scope of negotiations envisaged by the First Nations of Manitoba. (p. 10)

More recently, the Manitoba First Nations Education Resource Centre has been established to assist First Nations schools in improving quality and standards and to develop a framework for a First Nations education system. The Resource Centre works under the direction of the Manitoba First Nations. One of the objectives of the Centre is to adapt and implement the new provincial curriculum. The Centre has also been directed to advance the Aboriginal Language Initiative by incorporating the revitalization of First Nations languages into its long-term strategy. Many of the activities being carried out by the Centre are consistent with, and assist in implementing, the vision of First Nations educational jurisdiction under the FAI.

One of the governance structures under consideration at present is a Manitoba First Nations Education Board. The Board would assist in the development of a comprehensive education system that promotes quality education and Aboriginal self-

identity. The Board would focus on dealing with common issues faced by Manitoba First Nations on a collective basis.

In December 2000, negotiations resumed under the FAI and education was included as one of the concurrent tables. The direction received from First Nations in Manitoba continues to be that the authority over education must remain with First Nations communities at the local level. A provincial governance structure (i.e. the Board) has been proposed to assist First Nations in implementing jurisdiction. However, the provincial body would only exercise the authority delegated to it by First Nations.

6. Saskatchewan

In 1996, the Chiefs of the Federation of Saskatchewan Indian Nations (FSIN) mandated FSIN to enter into arrangements for the implementation of their treaties and the recognition of First Nations jurisdiction. This was followed by an agreement between Canada and FSIN to establish several forums: the Treaty Table (bilateral forum for treaty interpretation); the Common Table (a trilateral forum including representatives of the Minister of Indian Affairs and Northern Development and provincial Minister of Intergovernmental Relations and Aboriginal Affairs and the Chief of FSIN); the Fiscal Relations Table; and the Governance Table. Both the Fiscal Relations and Governance Tables are mandated by the Common Table to negotiate new arrangements in support of treaty-based governance.

The issue of education is one of the jurisdictional issues on the Treaty Table agenda. Context reports were prepared for each of the agenda issues. To this end, *Setting the Treaty Context for Education: A Report from the Exploratory Treaty Table* (included in the *Proceedings Manual*) was prepared and then reviewed and approved by the FSIN Legislative Assembly in 1999. In May 2000, the Common Table principals signed the “Framework for Governance of Treaty First Nations”. This agreement commits the FSIN, the Government of Canada and the Government of Saskatchewan to formally enter

into negotiations on new governance and fiscal arrangements, beginning with the areas of education and family services. The Education Working Group is charged with taking direction from the Governance Table on the issue of education.

Setting the Treaty Context for Education describes a number of education objectives of Treaty First Nations in Saskatchewan, including the following: to establish institutions for early childhood education, kindergarten, elementary, secondary and post-secondary education; to secure First Nations' jurisdiction in the area of education that is personal and territorial in nature; to attain a First Nations' legislative framework that would govern education and that would be subject to ratification by Treaty First Nations; and to have educational institutions organized under the laws of First Nations. In urban areas, jurisdiction can be achieved through First Nations-controlled institutions at the post-secondary level and First Nations-controlled or shared institutions at the primary and secondary levels. These institutions would not be restricted to Treaty First Nations and attendance would be a matter of individual choice.

The scope of jurisdictional discussions is to include: standards, curriculum, accreditation, special education, administration, languages, cultures, tuition agreements, educational level equivalencies, teaching methodologies or pedagogies, teacher certification, evaluation of First Nations education systems and complementary health, social and cultural services that support educational development. It is intended that Treaty First Nations' jurisdiction will be equivalent to provincial jurisdiction over education and protected by section 35 of the *Constitution Act, 1982*.

7. Alberta

In 1996, the Chiefs of Treaty 6, Treaty 7 and Treaty 8 (Alberta) signed a "Sub-Agreement on Education" with the federal government. The purpose of the Sub-Agreement was to conduct a comprehensive education review. The Sub-Agreement's

work plan did not proceed because of jurisdictional issues. The *Proceedings Manual* includes separate reports from each of Treaty 6, Treaty 7 and Treaty 8 (Alberta).

Treaty 6

The report from the Confederacy of Treaty Six First Nations, *Images of Persistence: Reclaiming Educational Jurisdiction in Treaty 6 Territory*, observes that recognition of treaty rights, supportive legislation and funding levels that reflect actual needs are the major elements required to support authentic and full First Nations jurisdiction over education. The report goes on to note that,

Educators in Treaty 6 view jurisdiction over education as an inherent right that affirms the entitlement of First Nations to create, manage and evaluate educational systems that honour the languages, cultures and traditions of their communities. (p. 5)

This report emphasizes how colonialism continues to present a significant impediment and that the move to First Nations jurisdiction over education is embedded within the larger and continuing struggle for self-determination.

Treaty 7

Treaty 7 prepared a report entitled *Treaty 7 Jurisdiction of Education*. This report highlights the efforts of Treaty 7 First Nations to address the issues of special education, post-secondary education and transportation. With respect to special education, the key concern is inadequate funding and the consequential inadequacy of services provided to First Nations students. In the area of post-secondary education the main issue is gaps in funding. Initiatives with respect to post-secondary education include a First Nations Accreditation Board and the development of joint Indigenous Studies Degree and the accreditation of two First Nations Post-Secondary Institutions (Red Crow Community College and Blue Quills First Nations College).

Treaty 7 First Nations have control of their own education systems. However, this control is severely restricted by the constraints imposed through the financial arrangements with INAC and the fact that INAC insists that the provincial curriculum be followed. Nevertheless, some Treaty 7 First Nations have successfully implemented a number of initiatives to address their students' needs, including immersion programs, integration of services to support students and their families, community involvement in seasonal cultural ceremonies, tuition agreements and teacher contracts.

Treaty 8

The *Educational Jurisdiction Summary Report for Treaty 8 First Nations of Alberta* reports that Alberta is taking the lead role in reviewing INAC's education policies. This review follows the report by the Auditor General on INAC's failure to meet the educational needs of First Nations children living on reserve. This report focuses on the importance of pride, role modeling and language revitalization in improving the quality of First Nations education and establishing a cultural identity.

8. British Columbia

The British Columbia First Nations Education Steering Committee's (FNESC) *Jurisdiction Project Summary* report emphasizes the relationship between education jurisdiction and the preservation and perpetuation of First Nations languages and cultures. First Nations are seeking jurisdiction over education in order to make their own laws and create educational systems that are appropriate, compatible with, and relevant to the lives of First Nations students. Because First Nations students will continue to attend both First Nations-controlled and provincial schools, educational jurisdiction will involve both the maintenance of First Nations education institutions and continuing interaction with the public education system with greater influence over decision-making. Jurisdiction would also extend to recognition of First Nations post-secondary institutes.

The key challenges related to implementation of jurisdiction include capacity building, funding and rigid and inappropriate criteria and reporting requirements. Addressing the needs of and providing services to off-reserve members was also an issue of concern.

In British Columbia, some First Nations are pursuing jurisdiction through the treaty negotiations process. Others are pursuing jurisdiction through other means. Interim measures are also seen as a potential opportunity to move forward in the short-term.

The process for achieving jurisdiction is seen as incremental. This highlights the need to establish feasible, step-by-step goals.

The report notes that a regional or provincial organization could assist First Nations in coordinating initiatives with respect to issues of common concern and developing jurisdictional models and standards frameworks for consideration by individual First Nations.

One option under consideration, at the time of the report, is a model that will recognize First Nations' jurisdiction through enabling legislation and allow First Nations to opt in or out of. Jurisdiction would be exercised by community education authorities. These authorities could, in turn, choose to delegate some of their authority to a provincial collective education authority.

In early 2002, FNEESC began negotiations with Canada and British Columbia on an agreement that would recognize First Nations jurisdiction over education, provide a legal foundation for community education authorities and First Nations schools and delineate the responsibilities of each of the parties. It is currently envisaged that this agreement would be implemented through enabling federal and provincial legislation. The focus of FNEESC is to "make room" for First Nations jurisdiction and to recognize the power of First Nations' community education authorities to pass their own laws through a flexible

optional process. FNEESC also wants to ensure that the agreement captures First Nations' vision of life long learning and provides for the eventual recognition of jurisdiction over all education programs from early childhood to post-secondary.

Chapter VI above describes the provisions in the Nisga'a Nation's Final Agreement relating to exercise of jurisdiction over education.

9. Yukon

As noted earlier, many First Nations in the Yukon have the authority under their Self-Government Agreements to exercise jurisdiction with respect to education. To date, none of these First Nations has passed laws or actively taken over education. In the 1950s, the federal government transferred its responsibility for First Nations education to the Government of the Yukon. For that reason, many of the First Nations' concerns are currently directed at the territorial education system. First Nations, however, believe that the current arrangements between the federal and territorial governments should not prevent First Nations from accessing the necessary resources from the federal government to provide quality education to First Nations students.

The report prepared for the Council of Yukon First Nations and the First Nations Education Commission, entitled *Education Paper*, notes that the Yukon Government must work with First Nations to develop a common vision of education and a governance model that reflects the spirit of the Self-Government Agreements and to fund accordingly. The report also calls on the Yukon Government to abide by the definition of "consultation" contained in the First Nations' land claims agreements with respect to all matters relating to education. In the areas of education and language, territorial legislation must be supportive and reflective of the Self-Government Agreements.

While there is guaranteed First Nation participation on School Councils, the report suggests that there should be equal participation and having one member is not sufficient.

There is also concern about the lack of accountability of the Department of Education with respect to the performance results of First Nations students. The report also indicates that some First Nations students are falling through the cracks in the existing system, with much higher drop out rates, lower attendance rates and a greater need for upgrading courses before proceeding to college level courses.

Capacity building is highlighted as a key strategic directive necessary to develop and implement educational programs pursuant to First Nations jurisdiction.

VIII. CONCLUSION

A number of consistent and recurring themes emerge from this review of the various initiatives underway and reports on the issue of First Nations jurisdiction over education.

While many initiatives are underway with respect to education, there is very little experience with respect to the actual implementation of First Nations law-making authority. This is principally because the recognition by other governments of First Nations' inherent right of self-government is quite recent. As well, even though the federal government has a policy that recognizes the inherent right of self-government, it has been unwilling to recognize the inherent right except in certain limited contexts.

The issues of recognition and protection are strongly emphasized in the literature. However, many of the existing models fall short of full recognition of the inherent right. As for protection, most of the arrangements are legally vulnerable to unilateral actions on the part of the other governments. The agreements with the greatest degree of protection are section 35-protected treaties and self-government agreements. To date, more than seven years after the release of the federal government's inherent right policy, not a single constitutionally-protected stand alone self-government agreement has been concluded and brought into effect.

However, recognition of jurisdiction alone will not help First Nations achieve the goal of providing quality education. The Yukon example confirms that recognition of jurisdiction alone, without the necessary capacity or financial resources, will not assist First Nations in exercising jurisdiction over education. It may, however, be a critical step that helps empower First Nations and may lead to further capacity building initiatives and more access to human and financial resources, which in turn will facilitate the exercise of jurisdiction.

The goal is clearly to provide a balance between family and community control over education, on one hand, and comparability and transferability, on the other hand. The arrangements need to provide communities with a great deal of control, while making sure that the education their members receive allows them to thrive both within their communities and elsewhere.

With so many initiatives underway across the country, it seems that what is needed is to expedite the conclusion of these and begin to gather more experience so that examples of best practices (and pitfalls) in relation to the establishment and exercise of jurisdiction can be developed. While a comprehensive Canada-wide First Nations initiative might appear to be a useful solution, there is a real risk that it could displace all of the ongoing initiatives with one that is simply too cumbersome to succeed. Furthermore, it is necessary to bear in mind that there is no single solution that will be appropriate to all First Nations.

Four key themes that are emphasized in the literature include:

1. recognition of First Nations inherent jurisdiction over education;
2. providing greater support for First Nations capacity building initiatives related to education;
3. increasing financial resources for First Nations education and providing them on a more flexible and responsive basis; and
4. strengthening the negotiating position of First Nations vis-à-vis provincial and territorial education authorities.

Each of these recommendations has been seen before and is reflected in much of the literature on First Nations education. In order to implement these key recommendations,

the following immediate, medium- and long-term strategies are suggested. Many of these recommendations go beyond the literature surveyed. It is therefore strongly recommended that the National Working Group review these carefully to determine if they are likely to meet First Nations' needs and to effectively advance the implementation of jurisdiction over education. It is likely that many of these strategies overlap with research being conducted for the National Working Group on other issues.

1. Recognition of Jurisdiction

Immediate strategy

- a. Provide written instructions to federal bureaucrats and negotiators to recognize First Nations' inherent jurisdiction over education, from early childhood to post-secondary, in discussions and negotiations with First Nations.
- b. Reinvigorate ongoing negotiations with First Nations over education by setting ambitious but achievable time lines, providing more flexible mandates to federal negotiators and providing First Nations with the necessary resources to effectively participate in such negotiations.
- c. Recognize the link between interim discussions on jurisdiction over education and the longer term goal of negotiating stand-alone self-government agreements, treaty implementation agreements or treaties that provide constitutional protection to the inherent jurisdiction over education. This will provide First Nations with the assurance they may require that any arrangements are not intended to prejudice their rights or their ability over the longer term to exercise full jurisdiction and control over education.

- d. Establish a joint process between the federal government and representatives of First Nations for developing and reviewing federal policy and programs with respect to First Nations education.
- e. Support the establishment of pilot projects to test various models of First Nations jurisdiction and control.
- f. Support the establishment of information sharing initiatives nationally and regionally with respect to jurisdiction over education.

Mid-term strategy

- g. Develop a “First Nations Education Act” that enables the recognition of First Nations jurisdiction over education and provides a legal underpinning for First Nations community education authorities. This Act would only apply in regions where another federal legislative initiative was not already in place (such as Nova Scotia or, eventually, British Columbia). The Act would allow First Nations to opt in and out through an orderly process and to negotiate agreements with the federal and/or provincial or territorial governments. It could also recognize the right of First Nations to unilaterally exercise jurisdiction. Finally, it could allow community education authorities to delegate some of their powers to regional or provincial/territorial First Nations organizations.

Long-term strategy

- h. Negotiate self-government agreements, treaty implementation agreements and treaties that recognize First Nations’ inherent jurisdiction over education protected by section 35 of the *Constitution Act, 1982*.

- i. Support the unilateral exercise of jurisdiction by First Nations by providing adequate financial, human and other resources to First Nations.
- j. Amend section 35 of the *Constitution Act, 1982* to explicitly clarify that the inherent right of self-government is an Aboriginal right recognized, affirmed and protected by that section.

2. Support Capacity-Building

Immediate strategy

- a. Provide funding to First Nations to support capacity-building initiatives, including pilot projects, related to the implementation of jurisdiction over education.
- b. Support capacity-building initiatives that will strengthen the involvement of parents, elders and the community in education planning and the concept of life-long learning.
- c. Support an initiative to review on a regional basis what capacity is required to implement First Nations' jurisdiction over education and how to best develop that capacity.
- d. Support efforts to coordinate or integrate the delivery of related services, such as child and family services, child care and health care.
- e. Support regular reviews conducted by First Nations on a national and regional basis of initiatives to implement education jurisdiction with a view to developing reports on case studies and lessons learned that are made available to other First Nations.

3. Increase Availability and Flexibility of Funding

Immediate strategy

- a. Increase the funds that are available to First Nations for education initiatives in the upcoming fiscal year.
- b. Jointly undertake a review with First Nations of what criteria in funding agreements present them with the greatest difficulties.

Mid-term strategy

- c. Replace current funding arrangements with more flexible and responsive ones.

4. Strengthen First Nations vis-à-vis Provinces and Territories

Immediate strategy

- a. Include First Nations in any future negotiations with provincial and territorial education authorities that relate to the transfer of funding for First Nations students.
- b. Support the development of local education agreements by refusing to transfer funds to school districts that have not concluded local education or other agreements with First Nations.
- c. Make funding to provincial or territorial governments for First Nations students conditional on the province or territory agreeing to meaningfully

involve representatives of First Nations in the development of the provincial curriculum and all First Nations-oriented programming.

- d. Establish a First Nations/federal/provincial/territorial roundtable for dialogue on education that includes the Ministers of Education from each of the provinces and territories, the Minister of Indian Affairs and Northern Development and representatives of First Nations (such as the AFN Chiefs Committee on Education) to meet at least twice a year to discuss First Nations education.

Mid-term strategy

- e. Recognize the jurisdiction of First Nations over their members who are living off reserve.
- f. Directly provide First Nations with funding to enable them to work out the arrangements with provincial and territorial education authorities with respect to the education of First Nations students attending provincial and territorial schools.

In 2000, the Auditor General recognized in his report that the Department of Indian Affairs and Northern Development was failing to meet the needs of First Nations students and that:

Remedial action is urgently needed. Today's urgency will be exacerbated by increasing demands for education services as a result of demographic changes in Aboriginal communities. In the absence of satisfactory progress, there will be an increased waste of human capital, lost opportunities, high financial cost in social programs and a degradation of the relationship between the government and First Nations peoples. (Auditor General's Report, April 2000, para. 4.97)

The time has come to make far greater efforts to reverse the effects of decades of colonialism, residential schools and well-intended paternalism. If not now, then when?

IX. BIBLIOGRAPHY

Assembly of First Nations, *First Nations Educational Jurisdiction: Proceedings Manual* (August 2001).

Assembly of First Nations, Backgrounder, “First Nations Education” (January 2001).

Assembly of First Nations, Backgrounder, “First Nations Self-Determination and Educational Jurisdiction” (January 2001).

Auditor General of Canada, *2000 Report of the Auditor General of Canada* (April 2000).

Auditor General of Canada, News Release, “Indian and Northern Affairs Canada fails to meet needs of Indian children living on reserves” (April 11, 2000).

Jean Barman, Yvonne Hébert & Don McCaskill (eds.), *Indian Education in Canada – Volume 2: The Challenge* (UBC Press, 1987).

Marie Battiste and Jean Barman (eds.), *First Nations Education in Canada: The Circle Unfolds* (UBC Press, 1995).

Audrey Doerr, “Building new orders of government - the future of aboriginal self-government”, *Canadian Public Administration*, Volume 40, No. 2, pp. 274-289.

Peter W. Hogg, *Constitutional Law of Canada, Volumes 1 & 2* (3rd ed.) (Carswell, 1992).

Peter W. Hogg and Mary Ellen Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues”, *The Canadian Bar Review*, Volume 74, No. 2 (June 1995).

House of Commons Special Committee on Indian Self-Government (Chairman: Keith Penner), *Indian Self-Government* (Queen’s Printer, 1983).

Shin Imai, Katherine Logan & Gary Stein, *Aboriginal Law Handbook* (Carswell, 1993).

Indian and Northern Affairs Canada, Backgrounder, “First Nation Elementary/Secondary Education” (updated October 10, 2002).

Indian and Northern Affairs Canada, New Release #2-02151, “Education Self-Government Agreement-in-Principle reached with First Nations within the Anishinabek Nation” and accompanying Backgrounder (June 4, 2002).

Indian and Northern Affairs Canada, New Release #2-01152, “Consultations on Canada/Kahnawake Relations” and accompanying “Summary of the Draft Agreements” (May 30, 2001).

Indian and Northern Affairs Canada, New Release #2-00140, “Treaty First Nations closer to new governance relationship” and accompanying “Saskatchewan Common Table Processes Framework for Governance of Treaty First Nations – Executive Summary” (May 27, 2000).

Thomas Isaac, *Aboriginal Law: Cases, Materials and Commentary* (Purich, 1995).

James C. MacPherson, *MacPherson Report on Tradition and Education: Towards a Vision of Our Future* (DIAND, 1991).

Minister of Indian Affairs and Northern Development, *Federal Policy Guide: Aboriginal Self Government - August 1995*.

Minister of Indian Affairs and Northern Development, *James Bay and Northern Quebec Agreement Implementation Review – February 1982*.

Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada’s Aboriginal Action Plan - 1997*.

Nancy A. Morgan, “Legal Mechanisms for Assumption of Jurisdiction and Control over Education by First Nations”, prepared for the First Nations Education Steering Committee (revised, June 1998).

Nancy A. Morgan and Deidre McGettigan, *Integration of Services: From Concept to Reality* (Prepared for First Nations Education Steering Committee, July 1999).

Bradford Morse, “Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867”, in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (David Hawkes, ed.), (Carleton University Press, 1989).

National Indian Brotherhood, *Indian Control of Indian Education* (1972).

National Indian Brotherhood/Assembly of First Nations, *Tradition and Education: Towards a Vision of Our Future - Declaration of First Nations Jurisdiction Over Education* (1988).

National Indian Brotherhood/Assembly of First Nations, *Tradition and Education: Towards a Vision of Our Future - National Review of First Nations Education, Volumes 1, 2 and 3* (1988).

Jerry Paquette, *Aboriginal Self-Government and Education in Canada*, Background Paper Number 10 (Institute of Intergovernmental Relations, Queen's University, 1986).

Evelyn Peters, "Federal and Provincial Responsibilities for the Cree, Naskapi and Inuit under the James Bay and Northern Quebec, and Northeastern Quebec Agreements" in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (David Hawkes, ed.) (Carleton University Press, 1989).

Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation - Report of the Royal Commission on Aboriginal Peoples* (Canada, 1996).

Brian Slattery, "First Nations and the Constitution: A Question of Trust", *The Canadian Bar Review*, Volume 71, No. 2, p. 261 (June 1992).

Paulette Tremblay, *First Nations Educational Jurisdiction: National Background Paper*, Assembly of First Nations (2001).

Union of BC Indian Chiefs' Steering Committee on Indigenous Education, "Stolen Jurisdiction Reclaimed: The Control of Indigenous Education in Canada" (March 1993).

Sharon Helen Venne, *Our Elders Understand our Rights: Evolving International Law Regarding Indigenous Rights* (Theytus Books, 1998).

Christa Williams, "Building Strong Communities through Education and Treaties", First Nations Education Steering Committee (April 1997).

Jack Woodward, *Native Law* (Carswell, 1994).

Cases

Casimel v. I.C.B.C. (1993), [1994] 2 C.N.L.R. 22 (B.C.C.A.)

Campbell v. British Columbia (Attorney General), 2000 BCSC 1123

Connelly v. Woolrich (1867), 11 L.C.J. 197

Delgamuukw v. British Columbia, [1997] S.C.J. No. 108 (QL) (S.C.C.)

Eastmain Band v. Gilpin, [1987] 3 C.N.L.R. 54 (Que. Prov. Ct.)

R. v. Badger, [1996] 4 W.W.R. 457 (S.C.C.)

R. v. Pamajewon et al; *R. v. Gardner et al*, [1996] 138 D.L.R. (4th) 204 (S.C.C.)

R. v. Sioui [1990] 1 S.C.R. 1025

R. v. Sparrow (1990), 70 D.L.R. (4th) 385

R. v. Van der Peet, [1996] 2 S.C.R. 507.