First Nations No Longer Under the Indian Act

“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.” — Tradition and Education: Towards a Vision of our Future

Key Concepts

**Jurisdiction** can be inherent, constitutionally based or delegated, exclusive or shared. Inherent jurisdiction prevents the delegating government from restricting, withdrawing or interfering with First Nations jurisdiction.

**Self-government** is the right of a people or society to govern itself which includes the right to establish institutions of governance. It is linked to and flows from the concept of self-determination. The Aboriginal right of self-government is recognized, affirmed and protected under section 35 of the Constitution Act, 1982.

Models

**Unilateral jurisdiction** refers to First Nations passing their own laws, implementing customary laws or by simply, taking control. With this model, a First Nation can be subject to a challenge in court when trying to enforce laws. In the Delgamuukw decision (1997), the Supreme Court refused to rule on the issue of self-government. It recognized that “systems of Aboriginal law existed” and “referred to traditional laws as elements of the practices, customs and traditions of Aboriginal peoples”.

**Land claim agreements** with provisions for education include the James Bay and Northern Cree Agreement (1975) and the Northeastern Quebec Agreement (1978). Later agreements do not contain provisions in education due to the federal policy of keeping detailed provisions separate from land claim agreements.

**Self government agreements** are not to be interpreted as protected by section 35 of the Constitution. The Yukon First Nations’ Self-Government Agreements contain provision to exercise jurisdiction in education, while the Sahtu Dene and Métis and the Gwich’in only contemplate jurisdiction in education in self-government agreements.

**Modern treaties** include specific law-making powers in education. The Nisga’a Final Agreement and the Tlicho Agreement are some examples. The Tsawwassen Agreement is the first urban treaty.
First Nations No Longer Under the Indian Act

Others Models

- **Delegation of control** over a school or program provides First Nations decision-making authority with respect to administration.
- **Delegation of jurisdiction** provides First Nations with authority over a school, schools or a school board. First Nations would have the authority to make laws and rules that would apply within the parameters defined. In these agreements, the government usually sets the parameters in advance and retains the right to rescind the delegation.
- **Recognition of jurisdiction** agreements can be silent on jurisdiction of education or may allow each of the parties to state their interpretation of the existence or recognition of jurisdiction in education (Yukon and the Nisga’a agreements).
- **Recognition of inherent jurisdiction** refers to the recognition of the inherent rights of First Nations to make laws respecting education. The federal government is reluctant to recognize inherent jurisdiction in constitutionally protected agreements with First Nations.
- **Enabling legislation** provides opportunities to legally recognize education authorities established by First Nations, to recognize First Nation law-making authorities in education and to address conflict of law issues. The Mi’kmaq Education Act is one example.
- **Canada-wide legislation** means federal legislation applicable across Canada that would recognize First Nations jurisdiction in education.
- **Public government model** can be used as a model to achieve self-government in areas where First Nations make up the majority of the population i.e. Nunavut Education Act.

Education Acts

**Mi’kmaq Education Act (1999)**

This is between Nova Scotia and Canada. The federal statute recognizes Mi’kmaq Kina’matnewey (MK) as a legal entity to support the delivery of programs and services under the Act and states the education provisions of the Indian Act do not apply to their member communities. This Act includes the power to make laws, to the extent provided by the 1997 agreement, applicable on reserve in relation to primary, elementary, secondary and support for post-secondary for all of their members whether on or off reserve. Programs and services must meet the standard of comparability. The Nova Scotia statute states that where there is conflict between First Nations and provincial
First Nations No Longer Under the Indian Act

laws, the First Nations’ law prevails. In this model, First Nations are moving from delegated to self-governing treaty-based jurisdiction.

Nunavut Education Act (2008)

The Inuit jurisdiction over education includes being able to enact laws in education in and for Nunavut including the preservation, use and promotion of the Inuktitut language without diminishing the legal status of or any rights in respect of the English and French languages. The Inuit must maintain a majority of the population to control levers of government as they share decision-making capacity with the general population.


This agreement with the province and Canada recognizes the Sechelt’s inherent right to self-government with powers beyond those contained in the Indian Act, however, it is viewed as a delegated model of governance. The Sechelt’s law making powers referred to in this statute are not expressly delegated but do include the power to make laws respecting the education of Band members on Sechelt lands.

Nisga’a Final Agreement

Governance provisions are protected by section 35 as treaty rights. Under this final agreement, provided that certain conditions are met, the Nisga’a Lisims government may make laws to preserve, promote and develop Nisga’a language and culture for preschool to grade 12 and in respect of post-secondary education. In the event of inconsistencies with provincial or federal laws, Nisga’a laws prevail. The agreement suggests an inherent authority over education rather than delegated authority. Restrictions exist in matters such as teacher certification and comparability of standards. The Nisga’a-controlled School District 92 was established under provincial law.

First Nations Jurisdiction over Education in British Columbia Act, BC (2012)

This act authorizes participating First Nations to enact laws respecting education on First Nation land, to the extent provided by an individual agreement between the government of Canada and a participating First Nation. The British Columbia First Nation Education Agreement recognizes that a participating First Nation may enact First Nation laws with respect to education provided by the participating First Nation on First Nation land, to the extent authorized by an individual agreement between the government of Canada
First Nations No Longer Under the Indian Act

and that participating First Nation. This Act prevails in areas of conflict with other applicable laws.

Self-Government Agreements and Modern Treaties


Westbank has the authority to pass and enforce laws with jurisdiction in relation to kindergarten, elementary and secondary education on Westbank lands for members which includes authority to enter into tuition, post-secondary support, capital, curricular, recreational, special needs and other arrangements; create administrative bodies, enter into agreements regarding children of members who attend school off Westbank lands, enter into agreements with the province for the delivery of provincial services. Until Westbank enacts its own laws, sections 114 to 122 of the Indian Act, continue to apply. In the event of conflict, Westbank law prevails.

James Bay and Northern Quebec Agreement, QC

This agreement provides recognition for the establishment of the Cree School Board for Cree villages, the Kativik School Board for residents of Northern villages (who are mostly Inuit) and a special school for Naskapi students. The Cree school board operates under provincial jurisdiction with responsibility for elementary, secondary and adult education, with a special mandate to ensure culturally relevant programs. It includes Cree language instruction and gives the Cree School Board special powers over curriculum development, recognition to establish programs based on Cree language and culture, power to hire teachers and control over administration. The agreement stipulates Quebec will provide 25 % of funding while Canada provides 75%. This model has limited delegated administrative control over education.


This includes self-government provisions protected by section 35 of the Constitution Act, 1982 with powers to enact laws in education (including preschool and early childhood but not post-secondary) for the Tlicho people in Tlicho communities or on Tlicho lands. Authorities include the teaching of language, history and culture, and not the certification of teachers. An intergovernmental agreement among the Tlicho, the Northwest Territories and the federal government provide a single delivery system for education and other services to Tlicho citizens.
First Nations No Longer Under the Indian Act

Yukon First Nations Self-Government Agreements

Each Yukon First Nation has the power to make laws with respect to the provision of training and the provision of education programs and services for its citizens. These agreements are not protected under section 35 of the Constitution Act, 1982.

Tsawwassen First Nation Final Agreement, BC (2006)

This tripartite agreement with BC and Canada recognizes that the Tsawwassen government may make laws in respect of education (K-12) in the culture of Tsawwassen and the Hun’qum’i’num language for their members on Tsawwassen lands. They will negotiate with BC in making laws concerning the provision of K to 12 for individuals, other than Tsawwassen members, residing on Tsawwassen lands and members residing off Tsawwassen lands. The Tsawwassen government may make laws in respect of post-secondary education provided by a Tsawwassen Institution on Tsawwassen lands. Tsawwassen laws prevail to the extent of a conflict with application federal or provincials.


This tri-partite agreement with BC and Canada recognizes that each each Maa-nult First Nation Government may make laws in respect of education provided by that Maa-nult First Nation Government or its Maa-nult First Nation Public Institution on its Maa-nult First Nation Lands of the applicable Maa-nult First Nation in respect of: certification and accreditation of its Nuu-chah-nulth language and culture teachers; and the development and teaching of its Nuu-chah-nulth language and culture curriculum. In addition, each Maa-nult First Nation Government may make laws in respect of Child Care Services on the Maa-nult First Nation Lands of the applicable Maa-nult First Nation. Maa-nult First Nation Law under prevails to the extent of a conflict with federal or provincial law.

Other

Kahnawake Mohawk Nation/federal government joint statement – This provides Kahnawake jurisdiction over primary, secondary and special education, as well as the preservation and promotion of the Mohawk language and culture on Kahnawake territory. Kahnawake laws prevail over pertinent provisions of the Indian Act.
First Nations No Longer Under the Indian Act

Conclusions

While some First Nations have been successful in getting recognition for jurisdiction over education, the federal government is generally reluctant to recognize the inherent right of First Nations. Jurisdiction does not ensure adequate and sustainable funding. Own source revenue has become an issue when negotiating agreements.

“Most arrangements are legally vulnerable to unilateral actions on the part of other governments. Recognition of jurisdiction alone will not help First Nations achieve the goal of providing quality education.” (Morgan, 58)

List of Sources, References, and Further Readings

2. Morgan, Nancy A. "If not now, then when?” First Nations Jurisdiction over Education: A Literature Review, A Report to the Minister’s Working Group on First Nations Education. BC. Nov 19, 2002
5. Tsawwassen First Nation Final Agreement. 2006
   http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf