

**LEGAL MECHANISMS FOR ASSUMPTION  
OF JURISDICTION AND CONTROL  
OVER EDUCATION BY FIRST NATIONS**

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## I. EXECUTIVE SUMMARY

### A. INTRODUCTION

This paper has been written to complement the work being done by the First Nations Education Steering Committee in British Columbia on the development of models of First Nations education. While the Steering Committee is reviewing the needs and priorities of First Nations regarding the design and delivery of education, the goal of this paper is to consider various legal mechanisms that would enable First Nations to assume greater jurisdiction and control over education. This paper is an update of an earlier paper that was written in May 1995. This paper will highlight two significant legal issues related to the assumption of jurisdiction and control: **recognition of the inherent jurisdiction** of First Nations over education and **protection** of that jurisdiction.

### B. KEY CONCEPTS

Because Canada has exclusive jurisdiction over “Indians, and Lands reserved for the Indians” under **section 91(24)** of the *Constitution Act 1867*, while the provinces have exclusive jurisdiction over education under **section 93**, it is difficult to determine with absolute certainty which of them has jurisdiction over “First Nations education” (see [Appendix 1](#) for the full text of the relevant constitutional provisions). Nevertheless, it can probably be said that the federal government has jurisdiction over First Nations education, while the provincial governments would face serious constitutional obstacles if they tried to deal directly with First Nations education. The provincial governments, however, maintain the right to enact education laws of general application which affect First Nations students in the provincial school system.

**Section 35** of the *Constitution Act, 1982* provides a foundation for the constitutional recognition of aboriginal rights. Section 35 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.

**Jurisdiction** is a concept which refers to legal power or authority, and includes the right to make laws. Jurisdiction can be “inherent”, “constitutionally-based” or “delegated”. Inherent jurisdiction is an original source of authority that is not derived from an outside constitutional or statutory authority. Constitutionally-based jurisdiction is authority which is derived from a constitutional document. In the case of Canada, both the federal and provincial governments have constitutionally-based jurisdiction. Constitutionally-based jurisdiction cannot be withdrawn or altered except through constitutional amendment. Delegated jurisdiction is authority that has been granted by another level of government and can be withdrawn or restricted by the government that delegated the jurisdiction.

**Control** is 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 or to the "practical ability" to make decisions in relation to something. 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.

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*). This 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 (see *Badger*).

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 land claims agreements between Canada, First Nations and provincial or territorial governments. The thousands of other agreements signed by First Nations with other governments are probably not protected by section 35.

The concept of **fiduciary duty** refers to the responsibility which arises when one party (the fiduciary) undertakes to act for the benefit of the other 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.

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The Canadian courts have held, in a number of landmark cases (including *Sparrow* and *Delgamuukw*), that both the federal and provincial governments owe a fiduciary duty to First Nations. Section 35 incorporates this fiduciary relationship and consequently places limits on the ability of the federal and provincial governments to legislate in relation to First Nations. 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.

First Nations frequently express the concern that treaty-making should not be used by non-aboriginal governments 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. 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.

In August 1995, the federal Minister of Indian Affairs officially announced the government's new policy on the **inherent right of 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. This policy acknowledges that the inherent right of self-government is an existing aboriginal right recognized and affirmed under section 35 of the *Constitution Act, 1982*. However, under this policy, self-government must be exercised within the existing Canadian Constitution and the *Canadian Charter of Rights and Freedoms* must apply fully to aboriginal governments as it does to all other governments in Canada. Rights in self-government agreements may be protected in new treaties under section 35 of the *Constitution Act, 1982*. The policy also states that the federal government is prepared to deal with the implementation of the inherent right of self-government in conjunction with other processes, such as the negotiation of modern day treaties and processes already established through existing treaties.

Some First Nations are reluctant to enter into trilateral agreements with Canada and British Columbia out of concern that such agreements pave the way for the eventual transfer of jurisdiction and fiduciary duty from Canada to British Columbia. 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 British Columbia. This would allow Canada to transfer responsibility and funding to First Nations who could then transfer all or part of these to British Columbia.

### **C. MODELS FOR INTERIM MEASURES**

The June 1991 BC Claims Task Force Report recommends that parties negotiate interim measures agreements when an interest is being affected which could undermine the treaty process. In addition to this goal, interim measures are also a useful way of testing a new approach to determine its effectiveness.

### **D. SELF-GOVERNMENT MODELS OUTSIDE THE MODERN TREATY PROCESS**

The federal government’s new policy on the inherent right of self-government was unveiled in 1995. Outside of British Columbia, where most First Nations have existing treaties, Canada is prepared to enter into negotiation processes leading to agreements respecting the inherent right of self-government, building on their already-established relationships. These agreements could be free-standing or incorporated into existing treaties. Free-standing agreements could be explicitly protected by section 35, while agreements incorporated into existing treaties would be automatically protected.

In Nova Scotia, the Mi’kmaq have been in negotiations with the federal government with respect to the transfer of jurisdiction over education since 1991. These negotiations culminated in the signing of an “Agreement with respect to Mi’kmaq Education in Nova Scotia” between the federal government and Mi’kmaq Bands in Nova Scotia on February 14, 1997 (see [Appendix 2](#) for the full text of the agreement). Legislation to implement this agreement has just been passed by Parliament and parallel legislation has been introduced in the Nova Scotia Legislature.

The Mi’kmaq agreement provides for the transfer of jurisdiction (i.e. the power to make laws) for primary, elementary and secondary education on reserve to the 9 participating Mi’kmaq communities. It also transfers jurisdiction over the administration and expenditure of funds for post-secondary education for students who are members of participating communities, regardless



of where they live. Each community must provide or ensure that primary, elementary and secondary educational programs and services are provided for all residents of its reserve. These programs and services must be comparable to other educational systems in Canada in order to permit students to transfer to and from other educational systems. Education laws passed by the participating communities in accordance with the agreement are paramount to federal and provincial education laws. The agreement allows community education boards to be established and provides for the creation of a Mi'kmaq education organization which will assist Mi'kmaq communities in the exercise of their education jurisdiction.

One significant aspect of the Mi'kmaq agreement is that it provides for delegated jurisdiction, rather than a recognition of inherent jurisdiction over education. This indicates that, even with the new federal government policy on the inherent right of self-government in place, it continues to be a significant challenge for First Nations to negotiate arrangements that fully reflect the recognition of the inherent right. The fact that this agreement is expressly stated to not be a treaty within section 35 also indicates the federal government's current unwillingness to enter into stand-alone agreements with respect to education that are constitutionally-protected.

The First Nations of Manitoba signed an agreement on November 22, 1994 (see [Appendix 3](#)) regarding the dismantling of the Department of Indian Affairs, the restoration of jurisdictions to First Nations and the recognition of First Nations governments. This wide-ranging agreement recognizes the inherent right of self-government. One of the three projects which will be expedited under the dismantling agreement is the implementation of the existing Education Framework Agreement signed on December 5, 1990. Although the federal government and the Manitoba First Nations were aiming to finalize their negotiations on education by 1996, they have not yet done so.

## **E. EDUCATION MODELS IN MODERN LAND CLAIMS AGREEMENTS OUTSIDE BC**

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 which contain detailed provisions on education. The other 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

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from land claims agreements. The education provisions of three of these First Nations' agreements (James Bay Cree, Champagne and Aishihik First Nations, and Sahtu Dene and Metis) are set out in Appendices 4 to 6.

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 other school boards, although it has unique powers and a special mandate to ensure that education programs are culturally relevant. For example, the Cree School Board is given the jurisdiction and responsibility for elementary, secondary, and adult education. The Agreement specifically provides for instruction to be carried out in Cree and gives the School Board special powers regarding curriculum development, establishment of programs based on Cree culture and language, hiring of teachers, and control of administration (see [Appendix 4](#)).

The Yukon First Nations' Self-Government Agreements contain provisions which enable the First Nations to exercise jurisdiction in the area of education (see [Appendix 5](#)). 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 agreements contemplate that self-government agreements will include jurisdiction in relation to education (see [Appendix 6](#)). While it is difficult to characterize the nature of the First Nations' jurisdictions 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 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 the First Nation's 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 date, none of the other 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.

## **F. EDUCATION MODELS AND TREATY-MAKING IN BC**

In order to highlight the distinctions between the federal government's comprehensive claims policy and the new "made in BC" approach, the BC Claims Task Force chose to use the word "treaty" to describe the agreements which will be entered into in British Columbia. It was also a deliberate attempt to move away from the federal government's policy of differentiating between lands and resources components protected by section 35 and self-government components not protected by section 35.

In the Nisga'a AIP there is no differentiation between those portions of the agreement which address governance and those which address lands and resources, nor is there any indication that these issues will be addressed separately in the Nisga'a Final Agreement (which is still being negotiated). Consequently, the final provisions on self-government will most likely be contained in a section 35-protected agreement.

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

- (a) to preserve, promote and develop Nisga'a culture and language;
- (b) 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; and
- (c) in respect of post-secondary education within Nisga'a lands.

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 Government is described as having "primary responsibility" to make laws with respect to Nisga'a language and culture.

The Nisga'a AIP suggests that some of the key issues that First Nations may choose to address in the treaty-making process 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's Government's authority, the overall context of the AIP implies that Nisga'a jurisdiction over matters such as education is inherent rather than delegated. Finally, the Nisga'a AIP bodes well for First Nations that are hoping to include their self-

government powers, including jurisdiction over education, in a unified section 35-protected treaty. 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.

## **G. UNILATERAL ASSUMPTION OF JURISDICTION**

The most direct way for First Nations to assume jurisdiction and control is through the unilateral assumption of jurisdiction. This can be effected by a First Nation passing its own laws, implementing unwritten customary law or simply taking control. Two critical impediments to the unilateral assumption of jurisdiction are funding and the possibility of an expensive and risky court challenge. To date, 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.

When a court is faced with a broad claim of “self-government”, the court itself will likely attempt to narrow down the right claimed to a particular element of the broader category of self-government. While there is little certainty as to what the outcome will be in future cases, it is significant that the courts have not dismissed the possibility that First Nations will be able to successfully establish rights of self-government.

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. It is possible that other rights, such as control over education, health and housing could be treated similarly.

## **H. CONCLUSION**

Throughout this paper we have emphasized the importance of jurisdiction and we have implied that jurisdiction is more important than control. From a strictly legal perspective this is true. However, from a purely practical perspective, control is certainly as important as jurisdiction. First Nations must therefore ensure that they develop workable models to support their assumption of greater jurisdiction and control over education and secure the necessary long-term financial resources.

Numerous options are available to British Columbia First Nations that want to assume greater jurisdiction and control over education. They can enter into interim measures agreements that may enable them to assume delegated jurisdiction and greater control. Under the federal self-government policy, First Nations should also be able to negotiate free-standing self-government agreements dealing with education alone or education and other governance matters. First Nations may prefer to focus their attention on treaty negotiations. Nonetheless, in the course of developing an education model for incorporation into the treaty, First Nations may find it useful to implement the model on a trial basis as an interim agreement. First Nations will likely be able to incorporate education models, which they have tested through interim measures agreements or that they have established as free-standing self-government agreements, into their treaties. In choosing the legal mechanism for the assumption of jurisdiction and control, First Nations should pay little attention to categories and titles of agreements and concentrate on the central underlying issues of recognition and protection.

British Columbia First Nations today face an unprecedented opportunity. The new federal policy enables First Nations to negotiate the implementation of the inherent right of self-government through the BC treaty process. Also, self-government components, including provisions recognizing First Nations' inherent jurisdiction over education, are likely to be incorporated into final treaties protected by section 35 of the *Constitution Act, 1982*. The implementation of this new approach to treaty-making enables First Nations to attain both recognition and protection of their inherent jurisdiction over education.

## II. INTRODUCTION

This paper has been written to complement the work being done by the First Nations Education Steering Committee in British Columbia on the development of models of First Nations education. While the Steering Committee is reviewing the needs and priorities of First Nations regarding the design and delivery of education, the goal of this paper is to consider various legal mechanisms that would enable First Nations to assume greater jurisdiction and control over education. This paper is an update of an earlier paper which was written in May 1995.

At the outset, it is important to acknowledge two significant points. First of all, First Nations exercised exclusive jurisdiction and control over the education of their citizens before the arrival of the Europeans. The assumption by First Nations of greater jurisdiction and control is

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therefore, in some respects, a return to a tradition of community-based learning. Secondly, First Nations have, especially over the last 25 years, made considerable headway in regaining control and jurisdiction over education. As a result, there are today many examples of First Nations across Canada successfully exercising jurisdiction and control over education.

Two of the recurring themes in this paper are **recognition of the inherent jurisdiction** of First Nations over education and **protection** of that jurisdiction. First Nations have made it clear that it is time for Canada and British Columbia to implement their respective policies of recognizing First Nations' inherent right of self-government. This means that the federal and provincial governments must recognize 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*. However, none of the modern land claims agreements or treaties signed to date explicitly recognize First Nations' inherent right of self-government or explicitly provide section 35 protection for First Nations' jurisdiction. Recent changes in federal and provincial policy may enable First Nations to attain these objectives. This is reflected in the Nisga'a Agreement-in-Principle, which states that the Final Agreement (which is currently being negotiated) will be a section 35-protected treaty.

This paper will begin by considering key concepts, including the meaning of "jurisdiction" and "control", from a legal perspective. The paper will then briefly review the legal history of First Nations education in British Columbia to determine how First Nations got to where they are today. The paper will then consider examples of legal mechanisms which enable the assumption of jurisdiction and control:

- interim measures agreements;
- self-government agreements outside the modern treaty process;
- modern land claims agreements outside British Columbia;
- British Columbia treaties; and
- unilateral assumption of jurisdiction.

Attached as appendices to this paper are the principal constitutional provisions relating to First Nations education and excerpts from a number of agreements reached by First Nations in Canada

relating to education: the Mi'kmaq of Nova Scotia; the First Nations of Manitoba; the James Bay Cree (Quebec); the Champagne and Aishihik First Nations (Yukon); the Sahtu Dene and Metis (Northwest Territories); and the Nisga'a Agreement-in-Principle (British Columbia). These agreements are included to provide concrete examples of some of the approaches for assuming jurisdiction and control 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.*

### III. KEY CONCEPTS

#### A. CANADIAN CONSTITUTIONAL CONTEXT

This paper will begin its review of key concepts, including jurisdiction and control, with a brief review of the Canadian constitutional context. 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 (see [Appendix 1](#) for the full text of these provisions).

##### 1. *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.

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 with absolute certainty 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 which 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. *Section 35 of the Constitution Act, 1982*

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.

## **B. JURISDICTION**

Jurisdiction is a concept which refers to legal power or authority, and includes the right to make laws. Jurisdiction can be inherent, constitutionally-based or delegated.

### *1. 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 or provincial government which recognizes and facilitates the exercise of the First Nation's inherent jurisdiction. This approach is discussed in Parts V to VIII. Secondly, a First Nation may unilaterally assume jurisdiction by, for example, enacting laws, implementing unwritten customary law or simply taking control. This latter approach to exercising jurisdiction is discussed in Part IX.

### *2. Constitutionally-based jurisdiction*

Constitutionally-based jurisdiction is authority which 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.

### 3. *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 two 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.

### 4. *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 which 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*. By this time British Columbia had already politically recognized the inherent right of self-government and had indicated that it intended to define the meaning of self-government within the current treaty process. As such, agreements negotiated in British Columbia are now more likely to reflect the "inherent" source of First Nations' jurisdiction.

### **C. 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.

### **D. FIDUCIARY DUTY**

Fiduciary duty is defined as the responsibility which 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 treaty-making should not be used by non-aboriginal governments 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.

## **E. CONSTITUTIONAL STATUS OF AGREEMENTS**

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.

### 1. *Effect of section 35 protection*

It is possible that 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 which attempted to rescind a provision contained within a section 35-protected agreement.

### 2. *Northern land claims agreements*

In the most recent northern land claims agreements, the parties have negotiated self-government agreements alongside land claims agreements. The more westerly of the northern land claims agreements (i.e. the six Yukon First Nations Final Agreements (1993 and 1997), the Gwich'in Comprehensive Land Claim Agreement (1992), and the Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993)) include a short chapter on self-government; however, the chapter itself contemplates that separate self-government agreements will be negotiated. In the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada, reference is made to the negotiation of a separate political accord to deal with the establishment of a new Nunavut Territory (through the division of the Northwest Territories into two separate territories).

Canada previously insisted that only the land claims agreements receive section 35 protection. For instance, the six Yukon First Nation Final Agreements which are currently in effect all state that they are land claims agreements within the meaning of section 35 of the *Constitution Act*,

1982. Most legal experts agree that these agreements are protected by section 35. However, according to the “self-government chapter” of each of the Final Agreements, the six Yukon First Nations’ separate Self-Government Agreements “shall not be construed to be treaty rights within the meaning of section 35 of the *Constitution Act, 1982*” (see, for example, section 24.12.1 of the Champagne and Aishihik First Nations Final Agreement). This does not preclude Yukon First Nations from acquiring “constitutional protection for self-government as provided in future constitutional amendments”. Some legal experts believe that these Self-Government Agreements may be protected by section 35, despite the language to the contrary, because of their close link to the land claims agreements. In support of this view, it is noted that the courts have held that certain agreements not explicitly labelled as treaties or land claims agreements are nevertheless section 35 protected (see *Sioui*). However, in those cases, unlike the Yukon self-government agreements, the agreements did not contain provisions stating that they are not treaties or land claims agreements.

### 3. *Nisga’a Agreement-in-Principle*

The Nisga’a Agreement-in-Principle, which was signed in February 1996, does not distinguish between the land claims and self-government portions of the agreement. It also makes clear that the Final Agreement (when it is completed) will be a single unified agreement addressing all of the Nisga’a’s rights, including the jurisdictions of Nisga’a Government. The AIP also states that the “Final Agreement will be a treaty for the purposes of sections 25 and 35 of the *Constitution Act, 1982*.” (AIP, “General Provisions” Chapter, section 2)

### 4. *Interim measures*

In British Columbia, both bilateral and trilateral interim measures agreements are being negotiated between First Nations and the Governments of Canada and British Columbia. These agreements often contain a clause, which is likely favoured by all the parties, stating that the agreement is not a “treaty or land claims agreement” within the meaning of section 35 and a clause which states that the agreement is “without prejudice” to aboriginal rights. Consequently, interim measures agreements are probably not protected by section 35.

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 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.

## **F. FEDERAL POLICY ON SELF-GOVERNMENT**

### *1. Pre-1992 policy on self-government agreements*

In 1973, when the federal government began the process of settling the land question with First Nations across Canada who had not entered into treaties, Canada wanted to focus the negotiations on lands and resources. In response to calls for self-government, the federal government established a community-based self-government policy, but kept negotiations under that policy separate from treaty negotiations. Many First Nations objected to this policy on the basis that it failed to recognize the “inherent” nature of their right to govern themselves, and resulted in agreements which would not be constitutionally-protected.

During the negotiations leading to the repatriation of the Canadian Constitution in 1982, the federal and provincial governments agreed to recognize aboriginal rights but were unable 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.

### *2. 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, so 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.

### 3. *Canada's policy on the inherent right of self-government (1995)*

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.



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- 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 federal and provincial 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 will 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.

#### 4. *Gathering Strength: the federal response to RCAP (1998)*

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) released its final report entitled *People to People, Nation to Nation*, which included hundreds of conclusions and recommendations with respect to improving the circumstances of aboriginal people in Canadian society.

RCAP was of the view that aboriginal peoples' right of self-government is recognized and protected under section 35(1) of the *Constitution Act, 1982*. Further, the right of self-government is inherent in aboriginal people and was exercised for centuries before the arrival of European explorers and settlers. Broadly speaking, the scope of this right includes all matters relating to the good government and welfare of aboriginal peoples and their territories. In RCAP's opinion, aboriginal governments are one of three orders of government in Canada – federal, provincial/territorial, and aboriginal. Thus, RCAP was of the opinion that aboriginal governments are not like municipal governments, which exercise powers delegated from provincial and territorial governments.

In January 1998, the federal government issued its response to the RCAP Report, entitled *Gathering Strength: Canada's Aboriginal Action Plan*. 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.

In summary, the federal government's policy on self-government has evolved considerably over the last two decades. However, First Nations involved in negotiations often find that these changes in policy are not reflected in the position the federal government brings to the negotiation table.

## **G. TRILATERAL VS. BILATERAL NEGOTIATIONS**

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 British Columbia out of concern that such agreements

pave the way for the eventual transfer of jurisdiction and fiduciary duty from Canada to British Columbia. 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 British Columbia. This would allow Canada to transfer responsibility and funding to First Nations who could then transfer all or part of these to British Columbia.

#### **IV. HISTORY OF FIRST NATIONS EDUCATION POLICY**

Before examining various models for assuming jurisdiction and control over education in Parts V to VIII, this section of the paper presents a brief overview of the history of First Nations education policy in Canada.

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”.

##### **A. RESIDENTIAL SCHOOLS**

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.

##### **B. INTEGRATION AND THE MTA’S**

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, in part, 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 assimilating First Nations people. Under this new policy, the federal government began sending First Nations students to local public schools under the control of the provincial governments. With this change of policy, financial arrangements had to be worked out with the provinces.

In British Columbia, the multi-year Master Tuition Agreements (MTA) set out the financial arrangements from 1969 to 1992. The principal objective of the agreements was to place a *per capita* value on the services rendered by the province to First Nations students. Negotiations on the MTA did not involve those most affected – First Nations – in any meaningful way. Since 1992, the MTA's have been replaced with an *ad hoc* process whereby BC submits a bill to Canada for the First Nations students enrolled in the provincial education system, which Canada in turn pays.

### **C. INDIAN CONTROL OVER INDIAN EDUCATION (1972)**

The current trend towards increasing jurisdiction and control over education was best captured, and perhaps initiated, with the National Indian Brotherhood's 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.

Among other recommendations, *Indian Control of Indian Education* 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 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 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.

**D. TRADITION AND EDUCATION: TOWARDS A VISION OF OUR FUTURE - NATIONAL REVIEW OF FIRST NATIONS EDUCATION (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 six 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.

**E. FINAL 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.

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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 or provincial 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 will 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

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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 services, and transfers between aboriginal and provincial academic programs (e.g. accreditation). RCAP envisaged that such a body would also develop curriculum, monitor academic standards in aboriginal education systems, advise provincial 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 culture-based curriculum. For example, the Kahnawake Survival School in Quebec, which began more than 20 years ago, includes Haudenosaunee culture as part of the curriculum and allows students to study Mohawk language. As well, the students' council is modelled on the traditional Mohawk government, which is based on consensus-building. Yet, 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 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.

## **F. GATHERING STRENGTH: FEDERAL RESPONSE TO RCAP (1998)**

As noted above, the federal government issued its response to RCAP's final report, entitled *Gathering Strength: Canada's Aboriginal Action Plan*, in 1998. This plan identifies four main objectives: renewing the partnership; strengthening aboriginal governance; developing a new fiscal relationship; and 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 into First Nations schools 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.



## **G. CURRENT STATUS OF FIRST NATIONS EDUCATION IN BC**

Pending the implementation of the federal government's new policies on the ground, there are three basic models of First Nations education in British Columbia:

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

None of these 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 jurisdictional concerns which have been identified by First Nations include:

- adherence to provincial 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 provincial 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 address the various legal mechanisms available to First Nations that want to assume greater jurisdiction and control over education.

## **V. MODELS FOR INTERIM MEASURES**

### **A. BC CLAIMS TASK FORCE RECOMMENDATION**

In British Columbia, the majority of First Nations have chosen to participate in the treaty-making process. Over fifty First Nations have filed Statements of Intent to negotiate a treaty with Canada and British Columbia. The blueprint for the BC treaty-making process is *The Report of the British Columbia Claims Task Force* (June 1991). This Report recommended that parties negotiate interim measures agreements when an interest is being affected which could undermine the treaty process. In addition to this goal, interim measures are also a useful way of testing a new approach to determine its effectiveness.

Interim measures will be especially important for First Nations that do not anticipate finalizing a treaty in the near future or are seeking to address an issue on a more immediate basis. Interim measures are also available to First Nations that have not chosen to participate in the BC treaty process. Interim measures will be critical for the many First Nations that want to address education as a priority. This is because of the urgent need to improve the quality of First Nations education and to develop language retention programs while the generation that speaks the language is still alive.

### **B. INTERIM MEASURES OPTIONS**

The federal and provincial governments are often reluctant to deal with issues of jurisdiction in interim agreements. Furthermore, a November 1996 federal policy document, entitled *British Columbia Treaty Negotiations: The Federal Perspective*, states that Canada will not negotiate interim measures that would require changes in federal legislation. Consequently, First Nations may find there is more scope for assuming control than jurisdiction through interim measures agreements. Nevertheless, there are several potential mechanisms that may enable a First Nation to assume greater jurisdiction and control over education, pending the finalization of treaties:

- 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.

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- The First Nation can assume greater jurisdiction through a delegation of jurisdiction over a school or school board from Canada (or British Columbia). The First Nation would then have the authority to determine the laws and rules which would apply within provincial parameters. Because the jurisdiction is delegated, the federal (or provincial) government will usually set the legal parameters in advance and retain the ability to rescind the delegation.
- The First Nation could enter into an agreement which is silent as to whether it grants delegated jurisdiction or recognizes inherent jurisdiction. Alternatively, the agreement could contain parallel statements on jurisdiction which allow each of the parties to state its perspective on jurisdiction. None of the parties would be required to accept the others' statements.
- First Nations could work with the federal and provincial governments to develop and enact legislation which 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. This option would require a change in the federal policy which does not allow changes to legislation for interim measures.

### **C. INTERIM MEASURES VS. IMPLEMENTATION OF INHERENT RIGHT**

The distinction between interim measures and the implementation of inherent self-government outside the modern treaty process would be of no consequence if Canada were to broaden its interim measures policy. There is no legal barrier to recognizing inherent self-government in an interim measures agreement. This refusal is based in part on the federal view that interim measures should not become ends in themselves, thereby distracting the parties from concluding treaties. The only basis for addressing these two approaches separately in this paper has been the refusal to date of the federal government to recognize the inherent self-government in interim agreements. Consequently, while the models listed in the following section (Part VI) could also serve as models for interim measures, a significant change in the federal interim measures policy would likely be required to enable this to occur.

First Nations in British Columbia that wish to assume inherent jurisdiction over education will have to choose between negotiating education through treaty negotiations and establishing a

separate process to deal solely with education or education together with other aspects of self-government. One option might be to establish an interim process through which First Nations could assume inherent jurisdiction over education without requiring the parties to constitutionally protect the agreement. If the First Nation and Canada are satisfied that the arrangements are working effectively, the agreement could then be transplanted to the treaty table where it could be incorporated into the treaty and receive protection under section 35.

## **VI. SELF-GOVERNMENT MODELS OUTSIDE THE MODERN TREATY PROCESS**

As stated above in Part III, the federal government's new policy on the inherent right of self-government was unveiled in 1995. Outside of British Columbia, where most First Nations have existing treaties, Canada is prepared to enter into negotiation processes leading to agreements respecting the inherent right self-government, building on their already-established relationships. These agreements could be free-standing or incorporated into existing treaties. Free-standing agreements could be explicitly protected by section 35, while agreements incorporated into existing treaties would be automatically protected.

Many First Nations already involved in the BC treaty process have stated that they intend to negotiate self-government through the treaty process (see Part VIII below). Given the federal government's policy, First Nations in BC should have a choice of negotiating self-government through a separate self-government process or through the BC treaty process.

Even before the federal self-government policy was announced in 1995, comprehensive province-wide processes to negotiate jurisdiction in relation to education were already in place in Manitoba and Nova Scotia. Agreements to develop processes were also underway in other parts of Canada. For example, Six Nations in Ontario was already negotiating an education agreement with the federal government. Since 1995, other initiatives have been launched, including formal discussions on jurisdiction and authority over education pursuant to an agreement between the Minister of Indian Affairs and the Alberta Council of Chiefs dated November 19, 1996.

## A. MI'KMAQ OF NOVA SCOTIA

In Nova Scotia, the Mi'kmaq have been in negotiations with the federal government with respect to the transfer of jurisdiction over education since 1991. These negotiations culminated in the signing of an “Agreement with respect to Mi'kmaq Education in Nova Scotia” between the federal government and Mi'kmaq Bands in Nova Scotia on February 14, 1997 (see [Appendix 2](#) for the full text of the agreement). Attached to this agreement are several schedules including: a funding agreement; an implementation plan; and a tripartite agreement with the Province of Nova Scotia.

Legislation to implement this agreement was passed by Parliament on June 19, 1998 and parallel legislation has been introduced in the Nova Scotia Legislature. Prior to the signing of this agreement in 1997, the Mi'kmaq had negotiated a Framework Agreement (1992) and a Political Accord (1994). While all 13 Mi'kmaq communities signed the Political Accord in 1994, only 9 of the 13 signed the final agreement in February of 1997. The Mi'kmaq agreement provides for the transfer of jurisdiction (i.e. the power to make laws) for primary, elementary and secondary education on reserve to the 9 participating Mi'kmaq communities. It also transfers jurisdiction over the administration and expenditure of funds for post-secondary education for students who are members of participating communities, regardless of where they live. Each community must provide or ensure that primary, elementary and secondary educational programs and services are provided for all residents of its reserve. These programs and services must be comparable to other educational systems in Canada in order to permit students to transfer to and from other educational systems. Education laws passed by the participating communities in accordance with the agreement are paramount to federal and provincial education laws.

The 1994 Political Accord, which led to the negotiation of the 1997 agreement, stated that “Canada is prepared to act on the premise that the inherent right of self-government includes jurisdiction in respect of education.” Despite this commitment and the fact that the agreement was entered into a year and a half after Canada's policy on the inherent right of self-government was announced, the jurisdiction transferred to the Mi'kmaq under this agreement is expressly stated to be “delegated”. It is also clearly stated that this agreement is not a treaty within the meaning of section 35 of the *Constitution Act, 1982*. It appears from the agreement that the Mi'kmaq intend to go beyond the restrictions of this agreement in future initiatives. This is evidenced in two of the introductory clauses which state:

"AND WHEREAS Canada recognizes that this Agreement does not constitute, nor shall it be construed as an endorsement by the Mi'kmaq Nation of Nova Scotia of Canada's policy on the implementation of the inherent right of self-government; ...

AND WHEREAS it is the long-term intention of the Mi'kmaq Nation in Nova Scotia to exercise jurisdiction in the broad field of education by way of future agreements;"

The agreement allows community education boards to be established and provides for the creation of a Mi'kmaq education organization called "Mi'kmaw Kina'matnewey" which will assist Mi'kmaq communities in the exercise of their education jurisdiction.

The tripartite agreement (federal/provincial/Mi'kmaq), which is attached as a schedule to the principal agreement, addresses the paramountcy of Mi'kmaq education laws, transferability and harmonization of education laws.

In the context of this paper, what is most telling about the Mi'kmaq agreement is the fact that it provides for delegated jurisdiction, rather than a recognition of inherent jurisdiction over education. This indicates that, even with the new federal government policy on the inherent right of self-government in place, it continues to be a significant challenge for First Nations to negotiate arrangements that fully reflect the recognition of the inherent right. In some cases, such as this one, the rationale for these delegated arrangements may be that they are an "interim approach" to the recognition of inherent jurisdiction. However, it is clear that the federal government remains reluctant to give full effect to its commitment in this regard. The fact that this agreement is expressly stated to not be a treaty within section 35 also indicates the federal government's current unwillingness to enter into stand-alone agreements with respect to education that are constitutionally-protected.

## **B. FIRST NATIONS OF MANITOBA**

The First Nations of Manitoba signed an agreement on November 22, 1994 (see [Appendix 3](#)) regarding the dismantling of the Department of Indian Affairs, the restoration of jurisdictions to First Nations, and the recognition of First Nations governments. This wide-ranging agreement recognizes the inherent right of self-government. One of the three projects which will be expedited under the dismantling agreement is the implementation of the existing Education Framework Agreement signed on December 5, 1990. Although the federal government and the

Manitoba First Nations were aiming to finalize their negotiations on education by 1996, they have not yet done so.

## **VII. EDUCATION MODELS IN MODERN LAND CLAIMS AGREEMENTS OUTSIDE BC**

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 which 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 six Yukon First Nations' Final Agreements (four in 1993 and two in 1997). 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 education provisions of three of these First Nations' agreements (James Bay Cree, Champagne and Aishihik First Nations, and Sahtu Dene and Metis) are set out in Appendices 4 to 6 and briefly described below.

### **A. 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 (see [Appendix 4](#)).

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 fights 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 which we proposed in the agreement. (Barman, Hébert & McCaskill, 1987: Volume 2, p. 95-6)

## **B. OTHER LAND CLAIMS AGREEMENTS**

As discussed in Part III, the more recent land claims agreements all contain a chapter on self-government calling for a separate self-government agreement which is not to be interpreted as an agreement protected by section 35. The Yukon First Nations’ Self-Government Agreements contain provisions which enable First Nations to exercise jurisdiction in the area of education (see [Appendix 5](#)). 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 (see [Appendix 6](#)). 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 provisions in the Yukon First Nations’ self-government agreements (see [Appendix 5](#)) 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 date, none of the other 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.

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, two 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. This process may be used to bring into effect the agreements still being negotiated with the remaining eight Yukon First Nations.

## **VIII. EDUCATION MODELS AND TREATY-MAKING IN BC**

In order to highlight the distinctions between the federal government's comprehensive claims policy and the new "made in BC" approach, the BC Claims Task Force chose to use the word "treaty" to describe the agreements which will be entered into in British Columbia. It was also a deliberate attempt to move away from the federal government's policy of differentiating between lands and resources components protected by section 35 and self-government components not protected by section 35.

This distinction between the self-government components, on one hand, and lands and resources components, on the other hand, has faded away since the federal government introduced its new policy on the inherent right of self-government in August 1995. The Nisga'a Agreement-in-Principle (AIP) signed on February 15, 1996 provides evidence of a new unified approach. In the Nisga'a AIP there is no differentiation between those portions of the agreement which address governance and those which address lands and resources, nor is there any indication that these

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issues will be addressed separately in the Nisga'a Final Agreement (which is still being negotiated). Consequently, the provisions on self-government in the Nisga'a Final Agreement will most likely be contained in a section 35-protected agreement.

It should be noted that the Nisga'a are not formally part of the BC treaty process because their negotiations had already been underway for many years when the BC treaty process, facilitated by the BC Treaty Commission, was established in 1992-93. However, there is little doubt that the Nisga'a AIP and Final Agreement (once it is completed) will provide a helpful model for First Nations in the BC treaty process. While many First Nations in BC have filed statements of intent to negotiate a treaty under the BC treaty process, other First Nations in BC have chosen not to participate in the BC treaty process and are seeking to establish an alternative process. The development of an alternative process would likely take several years.

Regardless of whether First Nations are in the BC treaty process or not, the Nisga'a AIP can provide them with a useful example of what types of provisions respecting education may be negotiated (see [Appendix 7](#)). The AIP, for example, clearly envisages that the Nisga'a Government will have jurisdiction in the field of education. This is set out under the heading "Nisga'a Government Jurisdiction and Authority". The provisions on education also describe how the Nisga'a Government's jurisdiction respecting education will interrelate with federal and provincial jurisdiction in this area.

Under the AIP, Nisga'a Government may make laws:

- (a) to preserve, promote and develop Nisga'a culture and language, including laws to authorize or accredit the use, reproduction and representation of Nisga'a cultural symbols and practices, and the teaching of the Nisga'a language, provided that such jurisdiction does not include the jurisdiction to make laws in respect of intellectual property or the authority to prohibit activities outside of Nisga'a Lands ("Nisga'a Government" Chapter, section 30);
- (b) 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, provided that any Nisga'a laws will provide for:

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- (i) curriculum, examination and other standards which permit articulation (transfer) between school systems and admission to provincial universities; and
  - (ii) certification of persons teaching subjects other than Nisga'a language and culture to a standard comparable to those of the College of Teachers or the Inspector of Independent Schools, or a requirement for certification by either of these bodies (section 52); and
- (c) in respect of post-secondary education within Nisga'a lands, including:
- (i) establishment and determination of the curriculum for post-secondary institutions with the ability to grant degrees, diplomas or certificates;
  - (ii) the accreditation of persons who teach or research Nisga'a language and culture; and
  - (iii) the provision for and coordination of all adult education programs (section 55);
- provided that such laws will be comparable to provincial standards respecting: institutional organizational structure and accountability; tuition and fee schedules; admission standards and policies; instructors' qualifications and certification; curriculum standards; and degree requirements (section 56).

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 (sections 27, 53 and 57). As well, the Nisga'a Government is described as having "primary responsibility" to make laws with respect to Nisga'a language and culture. Finally, the AIP expressly provides that the Final Agreement will include transitional provisions with respect to provincial School District #92, which is presently run by the Nisga'a (section 25).

The Nisga'a AIP suggests that some of the key issues that First Nations may choose to address in the treaty-making process 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. It is very interesting to note that both the

federal and provincial governments agreed that Nisga'a laws in these areas could prevail over federal and provincial laws, provided that Nisga'a laws were compatible with provincial standards and approaches in a number of key areas. While the agreement does not make reference to the "inherent" source of the Nisga'a's Government's authority, the overall context of the AIP implies that Nisga'a jurisdiction over matters such as education is inherent rather than delegated. Finally, the Nisga'a AIP bodes well for First Nations that are hoping to include their self-government powers, including jurisdiction over education, in a unified section 35-protected treaty. 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.

For a review of issues related to education and treaty-making in British Columbia, see the FNEESC's discussion paper entitled "Building Strong Communities Through Education and Treaties" (Williams, April 1997).

## **IX. UNILATERAL ASSUMPTION OF JURISDICTION**

The most direct way for First Nations to assume jurisdiction and control is through the unilateral assumption of jurisdiction. This can be effected by a First Nation 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* which 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 which 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 not generally been very supportive of First Nations in cases regarding the inherent right of self-government. As well, the courts have shown considerable reluctance to address self-government as a broad,

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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 unilateral assumption of jurisdiction was contemplated by the Charlottetown Accord 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. While there is little certainty as to what the outcome will be in future cases, it is significant that the courts have not dismissed the possibility that First Nations will be able to successfully establish rights of self-government.

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.

## **X. CONCLUSION**

Throughout this paper we have emphasized the importance of jurisdiction and we have implied that jurisdiction is more important than control. From a strictly legal perspective this is true. However, from a purely practical perspective, control (including financial control) is certainly as important as jurisdiction. First Nations must therefore ensure that they develop workable models to support their assumption of greater jurisdiction and control over education and secure the necessary long-term financial resources.

Numerous options are available to British Columbia First Nations that want to assume greater jurisdiction and control over education. They can enter into interim measures agreements that may enable them to assume delegated jurisdiction and greater control. Under the federal self-government policy, First Nations should also be able to negotiate free-standing self-government agreements dealing with education alone or education and other governance matters. First Nations may prefer to focus their attention on treaty negotiations. Nonetheless, in the course of developing an education model for incorporation into the treaty, First Nations may find it useful

to implement the model on a trial basis as an interim agreement. First Nations will likely be able to incorporate education models, which they have tested through interim measures agreements or that they have established as free-standing self-government agreements, into their treaties.

In choosing the legal mechanism for the assumption of jurisdiction and control, First Nations should pay little attention to categories and titles of agreements and concentrate on the central underlying issues of recognition and protection. Specifically, First Nations should consider:

- whether an agreement recognizes the First Nation's inherent jurisdiction and, if not, whether this of concern to the First Nation in the particular context; and
- whether the agreement is to be protected by section 35, and, if not, whether such protection is appropriate for such an agreement.

British Columbia First Nations today face an unprecedented opportunity. The new federal policy enables First Nations to negotiate the implementation of the inherent right of self-government through the BC treaty process. Also, self-government components, including provisions recognizing First Nations' inherent jurisdiction over education, are likely to be incorporated into final treaties protected by section 35 of the *Constitution Act, 1982*. The implementation of this new approach to treaty-making enables First Nations to attain both recognition and protection of their inherent jurisdiction over education.

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## BIBLIOGRAPHY

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

British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (June 28, 1991).

Dr. Doug Brown, “Draft Discussion Paper - The Master Tuition Agreement and First Nations Self-Government in Education”, prepared for the BC First Nations Congress (no date).

Department of Indian and Northern Affairs and Alberta Council of Chiefs, News Release Communique, “Minister Irwin and Alberta Chiefs Sign Agreement on Education” (November 19, 1996).

Department of Indian and Northern Affairs and Assembly of First Nations, News Release Communique, “Jane Stewart and Phil Fontaine Outline Framework for Partnership Between First Nations and Government of Canada” (January 15, 1998).

Department of Indian and Northern Affairs and Office of the Federal Interlocutor, News Release Communique 1-9648, “Final Report of the Royal Commission on Aboriginal Peoples” (November 21, 1996).

Department of Indian and Northern Affairs and Office of the Federal Interlocutor, News Release Communique 1-9801, “Canada’s Aboriginal Action Plan - Focused on Communities, Founded on Reconciliation and Renewal” (January 7, 1998).

Department of Indian and Northern Affairs, Program Development - Comprehensive Claims Branch, “Draft Paper: Interim Measures” (September 23, 1994).

Federal Treaty Negotiation Office, *British Columbia Treaty Negotiations: The Federal Perspective* (November, 1996)

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

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

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

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

Loretta Meade, “Indian Control/Rights of Education” prepared for the Assembly of Manitoba Chiefs (no date).

## Table of Contents

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).

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

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*.

Moyse, Geoffrey S., Ministry of Attorney General, Legal Services Branch, “Aboriginal Title Update” (Address to Continuing Legal Education Conference, *Aboriginal Law - 1997 Update*, March 1997)

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).

Douglas Sanders, “Aboriginal Self-Government” (Address to Native Investment and Trade Association Conference *Aboriginal Law in Canada 1998*, April 20-21 1998).

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

Andrew Thompson, “Land Claims Settlements in Northern Canada: Third Party Rights and Obligations”, *Saskatchewan Law Review*, Volume 55, p. 128 (1991).

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

## Table of Contents

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.)

*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

## **APPENDIX 1**

- sections 91, 92 & 93 of the *Constitution Act, 1867*
- sections 25 and 35 of the *Constitution Act, 1982*

## APPENDIX 2

- “Agreement with respect to Mi’kmaq Education in Nova Scotia” between Mi’kmaq Bands in Nova Scotia and Canada (February 14, 1997)
- Bill C-30, the *Mi’kmaq Education Act*

### **APPENDIX 3**

- Framework Agreement on Indian Education in Manitoba
- Framework Agreement for the Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba

## **APPENDIX 4**

- Section 16 of the James Bay and Northern Quebec Agreement

## **APPENDIX 5**

- Chapter 24 of the Champagne and Aishihik First Nations Final Agreement
- Sections 13.1 to 13.5 of the Champagne and Aishihik First Nations Self-Government Agreement
- Excerpt from the Champagne and Aishihik First Nations Self-Government Agreement - Implementation Plan



## **APPENDIX 6**

- Chapter 5 of the Sahtu Dene and Metis Comprehensive Land Claim Agreement
- Self-Government Framework Agreement - Appendix B to the Sahtu Dene and Metis Comprehensive Land Claim Agreement
- Excerpt from the Implementation Plan for the Sahtu Dene and Metis Comprehensive Land Claim Agreement

## **APPENDIX 7**

- Chapter entitled “Nisga’a Government” from the Nisga’a Treaty Negotiations, Agreement-in-Principle (February 15, 1996)