Preliminary view of jurisdiction and governance in the field of Aboriginal education in Ontario

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A PRELIMINARY VIEW of JURISDICTION and GOVERNANCE in the FIELD of ABORIGINAL EDUCATION in ONTARIO

The attached discussion paper is made available for distribution at the CAPSLE '98 Conference. This discussion paper is not to be construed as a federal policy statement on the matter of Aboriginal self-government. Its distribution is intended to encourage informed discussion on the subject of Aboriginal jurisdiction in relation to education.

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[DRAFT FOR DISCUSSION ONLY]

A PRELIMINARY VIEW OF JURISDICTION AND GOVERNANCE IN THE FIELD OF ABORIGINAL EDUCATION IN ONTARIO

INDIAN AND NORTHERN AFFAIRS CANADA
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INTRODUCTION AND PURPOSE FOR THE DISCUSSION PAPER

The terms *jurisdiction* and *governance* have been discussed at considerable length by the parties to the tripartite negotiations on education, pursuant to the ***Declaration of Political Intent***, without achieving any clear consensus for a collective understanding of these concepts. This paper presents a preliminary federal view on possibilities for implementation of aboriginal jurisdiction in the field of education. The background information which is contained in the paper is intended as a focus for discussion which may help facilitate some agreement on general definitions for these terms. In addition, the suggestions related to practical issues surrounding education negotiations may be of some benefit to generate further dialogue on the subject.

This paper is presented for the consideration of the Senior Steering Committee. It is meant to facilitate the discussion of strategic direction for future tripartite negotiations as it relates to identifying alternative means for recognizing and implementing aboriginal educational jurisdiction and governance in Ontario.

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PROVINCIAL JURISDICTION IN THE FIELD OF EDUCATION

The legislature of each province derives the authority to enact laws in relation to education through the ***Constitution Act, 1867***. Provincial legislative authority over education is conferred by section 93. This section of the Constitution of Canada establishes that each legislature has exclusive jurisdiction, and the legislative powers, to define and create a system of education for its citizens. The government of each province then becomes responsible to implement, regulate and finance education in accordance with the laws enacted by its respective legislature.

In addition to placing education matters exclusively under provincial jurisdiction, section 93 also contains some rights to denominational education. Within the powers conferred on the provinces certain rights to denominational education for Roman Catholics and Protestants, that were legally recognized in statutes enacted before Confederation, receive constitutional protection.

The Canadian *Charter of Rights and Freedoms* guarantees continued protection for denominational education rights through section 29 of the ***Constitution Act, 1982*** which states that the *Charter* itself does not abrogate or derogate from constitutionally protected "rights or privileges...in respect of denominational, separate or dissentient schools". This additional commitment to denominational education rights reinforces the previous constitutional guarantee to Roman Catholic education found in section 93. As well as protecting denominational education rights the *Charter* now provides, through section 23, a constitutional guarantee for newly created minority language educational rights for Francophone and Anglophone parents.

When a provincial legislature enacts laws in relation to education it has the freedom within its exclusive jurisdiction to define education, *to create local governance structures* which identify educational priorities and control their implementation, and to design educational systems to deliver programs. One of the few limitations that are placed on the freedom of the legislatures to enact laws is that the constitutionally protected rights for denominational and minority language education must be respected. This means that legislation, in this case the Ontario ***Education Act***, must allow for the creation of Roman Catholic separate school boards and governance structures for minority language education within a provincial regime for elementary and secondary education. These separate school boards and linguistic governance units come under the same legislative and policy processes which enable a public school system to operate.

The legislature in each province empowers a government Minister to administer the primary legislation pertaining to education. In Ontario, *an elected Cabinet Minister* is appointed by the government of the day to the Ministry of Education and Training to oversee the educational regime instituted by the legislature. The Minister ensures the public interest and provincial policy coordination for the overall educational process while local governance structures, established through the election of trustees, ensure that educational priorities are addressed and that an accountability regime to ratepayers and parents exists within each school board jurisdiction.

The ***Education Act***, and its attendant regulations, sets out the composition and governance structures for the various types of school boards found in Ontario. The Act creates rights and obligations in relation to school attendance; it defines the powers and duties of boards, financial accountability criteria and appeals procedures for certain board decisions; and, it identifies the duties of principals, teachers, parents and students. The Act also grants to the Minister the authority to make regulations and provincial policies for the financing of education, curriculum development and teacher certification. Standards for elementary and secondary education and course requirements for secondary school graduation are also set out by provincial policies.

The development of curriculum and the professional development of teachers, for example, becomes a matter of government policy. Although these types of activities are necessary to enable a system of education to operate effective programs they are not prescribed in legislation. Their design and implementation is based primarily on local decisions of school boards, in collaboration with the teaching profession and other education stakeholders, within the broad policy parameters and provincial guidelines established by Minister of Education and Training.

The ***Education Act*** does not operate in isolation from other decisions of the legislature. The authorities and responsibilities of the Minister of Education and Training, and of locally elected trustees, are derived from several legislative sources which are circumscribed within a provincial government structure that has been created by the legislature through its constitutional authority.

In addition to the ***Education Act*** there are other statutes specific to elementary and secondary education and a number of related Acts which provide additional guidance and direction to the educational process for the province. The Minister of Education and Training has responsibility for the *Teaching Profession Act*, the *School Boards and Teachers Collective Negotiations Act*, the *Teachers' Pension Act*, and the *Ontario School Trustees' Council Act.* Various other statutes also impact on education. For example, the process for the election of school board trustees is contained in the *Municipal Elections Act*; the *Child and Family Services Act* provides the legal requirements for teachers to report suspected cases of child abuse; and, the operation of day care programs within schools is administered under the *Day Nurseries Act.* These are only a few examples of related statutes which are the responsibility of other provincial government ministries. The *Young Offenders Act*, in this case a federal statute by which parliament recognizes the special needs of youth regarding rehabilitation and the right to legal counsel on arrest or detention, must also be read with the ***Education Act*** when provincial and local school board educational policies are being developed or implemented.

The ***Ministry of Colleges and Universities Act***, together with Acts related to the granting of degrees and the establishment of private vocational schools, constitutes the legislative regime for the province for post-secondary education. Under the authority of these Acts the Minister formulates regulations and policies for private vocational schools and sets policies related to provincial transfer payments to publicly funded universities and colleges.

LEGISLATIVE JURISDICTION FOR ABORIGINAL EDUCATION

Section 91(24) of the ***Constitution Act, 1867*** grants exclusive legislative authority to the Parliament of Canada to enact laws in relation to "Indians, and Lands reserved for the Indians". Although jurisdiction over education is assigned exclusively to the legislatures of the provinces, the Parliament of Canada, through its power to legislate with respect to "Indians", has made provision for the education of aboriginal children by including sections 114 to 122 within the ***Indian Act***. Section 4(3) limits the statutory authority of the federal government for education to registered "Indians" who are normally resident on reserves and on Crown lands.

The scope of the ***Indian Act***, which was first passed by parliament in 1876, encompassed a very broad range of subject matters within a single piece of legislation. This legislation was implemented by a department of the federal government which was assigned responsibility to oversee all matters pertaining to the affairs of "Indians". Education provisions of the ***Indian Act*** were not intended to create parallel school systems to those which were already instituted by the provincial legislatures or administered privately by religious institutions. It was the view of parliament, at the time of Confederation, that "Indian" education could be best served by those institutions which were already involved in the schooling of children.

Section 114(1) of the current ***Indian Act*** grants the federal Minister the authority to arrange for the education of "Indian children" by entering into agreements with provincial governments, public and separate school boards, and religious organizations. In the event that schooling would not otherwise be available to "Indian children" living on reserves, section 114(2) authorizes the Minister to "establish...and maintain schools for Indian children". Section 115 also establishes the Minister's authority to make regulations related to the operation of schools, to provide for the transportation of pupils, and to arrange for the financing of schooling for "Indian" children.

The ***Indian Act*** is limited in scope with respect to education. While section 115(1) gives the Minister a broad power to make regulations "with respect to standards for...teaching, education, inspection and discipline..." this power has not been exercised. The provisions in the current Act with respect to "schools" do not contain the detail necessary for establishing a comprehensive regime for federally administered 'aboriginal school systems', as does the ***Education Act*** for the province of Ontario which, for example, establishes regional boards of education and creates governance structures to oversee their administration. As a result of the lack of specificity within the ***Indian Act*** with respect to educational structures, and their governance and administration, the numerous statutes, regulations and policies which are generally applicable to all departments of the federal government for financial administration, personnel and staff relations, or capital assets, to name only a few areas, become applicable to federal school administration. Since the orientation of the applicable legislation does not have an educational focus, federal schools operate without a consistent educational policy framework. Educational administration and the management of education programs focus on bureaucratic, rather than pedagogic, priorities. Pedagogic and curricular advancement, including provision of aboriginal languages and learning related to cultural aspects of aboriginal life, continues to be highly dependent on local initiative

within the community and the school. Regional curriculum development initiatives and teacher education programs specific to aboriginal education are incidental undertakings and not a matter of coordinated federal education policy. This necessitates that much of the pedagogic requirements of federal schools be informally borrowed from the provincial educational system.

Parliament has not extended ***Indian Act*** legislation beyond elementary and secondary schooling to include aboriginal post-secondary education. Many, but not all, post-secondary institutions in Ontario operate under provincial legislation. The Ministry of Education and Training has the authority to control the number of publicly funded colleges of applied arts and technology and universities that operate in the province and confers degree granting capacity to a very limited number of privately operated (self-funded) post-secondary institutions which meet prescribed academic criteria. Direct federal government operating grants are not available to post-secondary institutions. Federal government transfer payments provide supplementary financing to the provinces for institutional support of publicly funded colleges and universities attended by all students: aboriginal and non-aboriginal. The federal government does, however, under its discretionary authority for financing social policy initiatives, provide for the funding of an aboriginal student support program at the post-secondary level which provides financial assistance to eligible individuals who reside in Canada for allowances and tuition.

TREATY AND FIDUCIARY OBLIGATIONS RESPECTING ABORIGINAL EDUCATION

Sections 93 and 91(24) of the ***Constitution Act, 1867*** establish the exclusive authority of the legislatures and of parliament to enact laws in relation to "education" and "Indians" respectively. Certain treaties add another dimension to the Crown's obligation related to aboriginal education. All eleven Post-Confederation "numbered treaties", covering the period from 1871 to 1923, contain some reference to schools or payment of teacher salaries. Treaty provisions for education, in addition to other guarantees for services, reserve lands, the retention of certain rights to hunt and fish on ceded lands and the payment of annuities, constitute part of the binding arrangements which effected large surrenders of land in Ontario and the western provinces. Treaty 3, Treaty 5 and Treaty 9 cover most of the land mass of northern and northwestern Ontario. The existing rights arising from these treaties, including the Pre-Confederation treaties of other parts of Ontario which, however, do not explicitly mention education, are now constitutionally protected under section 35(1) of the ***Constitution Act, 1982***.

"Treaty Indian" peoples hold the view that the treaties are of fundamental importance to defining their relationship with the Crown. The federal and provincial governments, on the other hand, tend to rely on statutes and current social policy initiatives to describe the Crown's relationship with all "treaty" and "status Indians". The federal government recognizes that its existing relationship with various "Indian" peoples is also guided by a fiduciary responsibility. The courts have provided some guidance on this matter and the federal government continues to respect this obligation as Aboriginal self-government is negotiated. The federal fiduciary responsibility will, of course, diminish to some degree as Aboriginal self-government is negotiated and First Nation governments become directly accountable for their decision-making to their membership.

RESTORING vs REPOSITIONING ABORIGINAL JURISDICTION FOR EDUCATION

THE EMERGENCE OF SELF-GOVERNMENT IN THE CONSTITUTIONAL CONTEXT

During the early part of Canadian history a government relationship was established between the Imperial Crown and various "Nations or Tribes" of Aboriginal peoples which was delineated in the ***Royal Proclamation of 1763***. The primary purpose of this document was to enunciate the Imperial Crown's policy for affairs conducted in the Americas. The section of the *Proclamation* related to affairs with "Indians" prescribed the policy of the Crown for a treaty-making process which was to be adhered to by colonial governments when they engaged in negotiations that involved the ceding, or purchase, of lands in certain geographic territories which eventually were to become part of Canada.

The political and government structures of the "Nations or Tribes" of Aboriginal peoples, that were acknowledged by the treaty process initiated under the authority of the *Proclamation*, were not recognized, however, within the meaning of the ***Constitution Act, 1867*** at the time of Confederation. Responsibility for legislative matters related to "Indians", as a result, was placed exclusively with Parliament by section 91(24).

The post-Confederation relationship between the federal and provincial governments and the Aboriginal peoples of Canada began to take on a different form through the negotiations which led up to the ***Constitution Act, 1982***. These constitutional debates opened the door to a political dialogue which has since been seeking to articulate legal foundations for the newly evolving Aboriginal-Crown relationship. The emergence of the concept of an aboriginal inherent right to self-government further expanded the debate through the suggestion that Aboriginal peoples already held the right to be self-governing within the framework of the Canadian Constitution.

Section 35(1) of the ***Constitution Act, 1982*** recognizes and affirms "existing aboriginal and treaty rights". Section 25 provides that the guarantee of certain rights and freedoms within the ***Charter of Rights and Freedoms*** shall not be interpreted so as to "abrogate or derogate from any aboriginal, treaty or other rights [of Aboriginal peoples]...including any rights...that have been recognized by the ***Royal Proclamation of 1763***". Although section 35 does not refer explicitly to self-government, the federal government takes the position that self-government is an existing right within the meaning of section 35.

Section 37 made a constitutional commitment to a series of First Ministers' Conferences (FMC) at which Aboriginal peoples were to be full participants. Although this process did not achieve a consensus on a constitutional amendment by the end of the last FMC in 1987, it clarified that the pivotal issue was the constitutional recognition of an aboriginal right to self-government. The question of whether the right of self-government should be freestanding under section 35 and enforceable on its own, subject to judicial definition, or whether the powers to be exercised by aboriginal governments were to be negotiated with the respective federal or provincial government before receiving constitutional protection, remained unresolved.

Since the negotiations had not been able to facilitate a consensus on a constitutional amendment by the end of the second FMC during 1986 the federal government introduced a *Community Based Self-Government* (CBSG) policy in that year. This policy initiated a process for negotiating practical models of self-government with those First Nations that wanted to proceed with something that went beyond the limitations of administering devolved federal programs. This functional approach to support the development of a variety of community based self-government applications, at local as well as sub-regional levels, was undertaken by the federal government while the remaining FMC and the wider negotiations on self-government continued at the national level.

The CBSG policy was based on a working model of local self-government that was developed through the negotiation process that lead to the enactment of the *Sechelt Act*. This was accomplished by the federal government within the existing authorities of Parliament. The Act provided a source of legal jurisdiction for the Sechelt band council to have greater control over its affairs. The Legislature of British Columbia passed a "companion" Act to clarify the new relationship which the provincial government would have with the local Sechelt government. The *Sechelt Act* could be viewed as parallel federal legislation to a *municipal act* of a province which delegates provincial powers to municipalities through a statute passed by a legislature. In the case of Sechelt, the federal legislation is specific to a single community; whereas all municipalities in a province operate under a single provincial statute that creates and organizes the structures of municipal government.

Since the enactment of the ***Constitution Act, 1982*** and the patriation of the Canadian Constitution in 1982, other efforts have been made to clarify the legal and constitutional status of the right of aboriginal peoples to be self-governing. The *Special Committee on Indian Self-Government* of 1983 (the Penner Report) recommended to the Parliament of Canada that the federal government undertake the steps necessary to establish a new relationship with First Nations which would recognize aboriginal self-government. It suggested that the right to self-government be entrenched in the constitution, thereby recognizing aboriginal governments as a distinct order of government in Canada. The *Report of the Special Joint Committee on a Renewed Canada* (1992) further recommended an amendment to section 35 to include the recognition of an inherent right of self-government. It also suggested that the structures, powers and rights of aboriginal self-government and the relationship between aboriginal and other governments within Canada be "... elaborated in treaties, agreements or other arrangements".

The most recent constitutional negotiations achieved a political consensus to amend the ***Constitution Act, 1982***. Although attempts through the FMC and the *Charlottetown Accord* to amend the constitution have not been successful they did result in consensus that progress must be made on the subject of aboriginal self-government. The areas of agreement which were reached at these constitutional negotiations, however, could not be implemented without the passage of an amendment to the Constitution of Canada.

Indian Control of Indian Education was the formal response of the National Indian Brotherhood (NIB) to the 1969 *White Paper* statement on the proposed federal direction for Indian policy. NIB took the position that the devolution of aboriginal education to provincial administration would further threaten aboriginal cultures, languages and the unique identity of Aboriginal peoples within Canadian society. It asserted that Aboriginal peoples "must reclaim [their] right to direct the education of [their] children". The two principles of *Parental Responsibility* and *Local Control of Education*, enunciated in the NIB position, were accepted by the government as the basis for a new federal policy on devolution which enabled the government to delegate its general administrative function for the education of "Indian children" to local band councils.

A gradual devolution of the education program to local band council administration was started in the mid-1970's. This process did not involve any legislative action by parliament. Devolution was almost fully accomplished in Ontario by the 1990's based only on federal government policy decisions which enabled each band council to assume full or partial administrative responsibility for existing federal programs. This process did not result in a transfer of federal jurisdiction for aboriginal education to individual First Nation communities. Devolution constituted an administrative arrangement between two parties: the federal government and the band council, which was formalized through annual or multi-year funding agreements.

The operation of schools by local First Nation communities to some extent could be compared to the "charter" school model which has more recently emerged in Alberta as an alternative to public schools. The concept of "site-based" or "school-based management" is also found on similar principles. "Charter" schools are viewed as locally controlled independent schools which receive public funding and operate within the legislative and policy parameters of the provincial government. Schools operated under the local administration of band councils, or their designated education authorities, could be viewed as independent First Nation community schools which are publicly funded under the terms and conditions of federal funding agreements. Many First Nation schools in Ontario that offer secondary credits also register as "private" schools under the provincial ***Education Act*** for purposes of granting provincially recognized secondary school graduation diplomas.

According to a view shared by First Nation education authorities and the Ministry of Education and Training, provincial involvement, in the form of supervisory officer services to inspect and approve secondary school credits, is necessitated in the absence of federal regulations and policies related to academic credit requirements for graduation from federally operated schools. In the case of band council operated schools, there is no legislation to establish First Nation jurisdiction for operating elementary and secondary schools or authority to set, for example, academic standards and policies for the granting of diplomas to graduating students which would be recognized by post-secondary institutions. Each First Nation school independently delivers elementary, and in some cases secondary, level programs that were devolved from the federal government based on the level of expertise and resources accessible to the local community. Some education authorities

have been formed by groupings of First Nation communities to take advantage of economies of scale by co-ordinating access to additional educational, administrative and professional services. These education authorities also network professional and pedagogic information between First Nation schools and with provincial schools; and, participate in area curriculum development initiatives, and regional teacher and para-professional training programs.

Although a significant degree of autonomy has been achieved by each First Nation community through "local control" and administration of education programs it should be noted that accountability for parliamentary appropriations for the financing of aboriginal education and government policy decisions related to the education of "Indians" still rests with the Minister under the authority of section 91(24) of the ***Constitution Act, 1867***.

The Assembly of First Nations (AFN) released a report on aboriginal education in 1988 titled ***Tradition and Education: Towards a Vision of our Future***. It was the view of AFN that there were three acceptable alternatives for establishing the jurisdiction of First Nations to govern their educational processes. It proposed that a constitutional amendment affirming an inherent right to self-government, which specifically included education, would be the substantive change needed to establish clear jurisdiction and legislative authority in this field. This approach was consistent with the general thrust of positions taken by Aboriginal leadership at the FMC's, and was proposed by AFN as the most desirable avenue for achieving full educational jurisdiction. Concurrent with this approach the federal and provincial governments would be required to vacate the field of aboriginal education. The AFN report, however, did not articulate clear options related to the potential forms of educational governance or the structures that would be necessary to implement legislative authority by aboriginal governments within their jurisdictions.

If a constitutional amendment was not possible in the immediate future AFN advocated the enactment of federal legislation to replace the ***Indian Act*** provisions for "schools". This proposal endorsed a *First Nations Education Act* which could be developed based on existing examples of self-government agreements such as the *James Bay and Northern Quebec Agreement*, or in a form similar to self-government legislation enacted through the *Cree-Naskapi Act* and the *Sechelt Act*. In Ontario, the tripartite negotiations on aboriginal education pursuant to the ***Declaration of Political Intent (D.P.I.)*** mandated a committee on First Nation Education Law to investigate and develop a foundation for potential legislative action that reflected the second alternative proposed by the AFN. It should be noted that the ***D.P.I.*** did not have a mandate to negotiate constitutional amendments. It did, however, have authority to clarify legal and constitutional sources of jurisdiction and recommend federal and provincial legislative reforms necessary to support the development and implementation of aboriginal governance structures in the field of education.

The analysis presented in the AFN report also expressed the view that if constitutional and legislative options (referring to a constitutional amendment to recognize the inherent right of self-government or the enactment of federal legislation to establish legal status of First Nation educational jurisdictions) were not available, a third option would be to seek judicial clarification on the jurisdictional issues relating to aboriginal education.

THE MacPHERSON REVIEW OF "TRADITION AND EDUCATION"

James MacPherson, then Dean of Osgoode Hall Law School, was commissioned in 1991 by Indian and Northern Affairs Canada and Justice Canada to conduct a review the AFN study. As a preliminary step to formulating a federal response to the AFN report the review had a twofold purpose: to investigate options which would enhance First Nation jurisdiction; and, to make recommendations for a preferred direction for reform. In addition, a legal opinion in relation to AFN's recommendations would provide some guidance to the negotiations which were being contemplated at that time by the ***D.P.I.*** committee on aboriginal education law.

MacPherson concurred with the analysis that was presented in the AFN study and offered several models for achieving varying forms of jurisdiction over education. As a initial observation, MacPherson agreed with the AFN that ineffective implementation of policy on *Indian Control of Indian Education* limited First Nations to a local administrative role for education programs rather than allowing for full control of the educational process. He observed that the organizing principles of the 1972 NIB policy focused on community 'control' over education whereas the thrust of AFN's *Tradition and Education* was aboriginal 'self-government'.

MacPherson concluded that an expanded provincial presence in the field of aboriginal education would be significantly hindered by "jurisdictional pitfalls". He suggested that where government jurisdictions overlapped with respect to legislative authority over certain aspects of education confusion and legal conflict would result that would not be beneficial to effective administration of aboriginal education. In addition, the notion of devolving authority for aboriginal education to provincial governments and to local boards of education clearly continues to be unacceptable to Aboriginal peoples as witnessed by the 1972 NIB position and reinforced by the views presented in the AFN report of 1988.

Provincial thinking in this regard has changed as well. Whereas the *Provincial Committee on Aims and Objectives of Education in the Schools of Ontario* (the Hall-Dennis Report of 1968) advocated the transfer of schools on reserves to the administration of provincial school boards, the *Royal Commission on Learning* (1995) proposed the continuation of tripartite negotiations on aboriginal governance in the field of education which were begun through the ***D.P.I.*** process. The provincial government of Ontario had also signed a *Statement of Political Relationship* in 1991 which "... pledged to promote the exercise and implementation of [the] inherent right ... [to self-government]". To consider expanded provincial authority and responsibility in the field of aboriginal education would be counterproductive to the direction that had been established as well by the FMC and other constitutional negotiations in relation to aboriginal self-government.

MacPherson suggests that there are no constitutional constraints on an expanded federal role in education given the authority of parliament under section 91(24), the education provisions contained in the numbered treaties, and the judicial formulation of the fiduciary doctrine through recent Supreme Court of Canada decisions. According to this view the federal government could proceed to amend the ***Indian Act*** "schools" provisions which would expand, rather than diminish,

the federal role and place greater direct responsibility for the administration of aboriginal education on the federal government. The AFN, and the earlier Penner Report, strongly recommended against any amendment of the ***Indian Act***. In view of the current thrust toward aboriginal self-government, parliament has no plans to reverse its support of self-government initiatives by expanding the federal government's role in aboriginal education.

Another avenue available to parliament would be the enactment of a *First Nations Education Act* as suggested by the second alternative in the AFN report. Such legislation would replace the ***Indian Act*** "schools" sections. A "stand-alone" federal education statute could be permissive and delegate significant aspects of jurisdiction to groups of First Nations which are prepared to establish collaborative governance regimes on a province-wide, regional or treaty area basis. This type of legislation would recognize the legal status of cooperative education governance structures which would be accountable, in part, to the members of the participant First Nation groups. It would recognize the legal capacity of each First Nation within the group to make local regulations and policies in relation to education within the specified parameters set out in the Act. On the other hand, where individual First Nations are engaged in negotiations designed to lead to a local model of self-government through legislation under the federal CBSG policy, which could be similar in format to the *Sechelt Act*, the subject matter of education would appear under the section which establishes the legal powers of the band council.

Aboriginal jurisdiction over education could be repositioned to a number of regional or treaty area governance regimes through legislation that establishes legal recognition for First Nation institutions and delegates functions which previously had been under federal authority. Legislation of this type would be normally limited to those aspects of education which the federal government has within its existing authorities and administers through its various departments. Federal legislation transferring (or delegating) jurisdiction and authority to aboriginal governments would continue to have fiscal accountability through the Minister which may impede, or even conflict with, some accountability aspects that the membership of the participant First Nation communities may require of their governing bodies. Another potential drawback of this type of legislation which should be considered is that a *First Nations Education Act* would not receive constitutional protection and could be unilaterally changed by parliament.

When the federal government announced that it was now prepared to proceed on the premise that the inherent right of self-government was an existing aboriginal right within the meaning of section 35 of the ***Constitution Act, 1982*** it created wider potential for clarifying aboriginal jurisdiction in the field of education. In MacPherson's view, the recognition of aboriginal government jurisdiction for education within the Constitution of Canada is the preferred option. To achieve this goal he suggests that a number of sub-models would need to be considered by Aboriginal groups in relation to how formal educational governance structures could be created with legal status within a constitutional framework that recognizes the legislative capacity of an aboriginal government.

The emergence of a government-to-government relationship is a very recent occurrence within the context of Canadian history. As this relationship unfolds and matures between the federal, aboriginal and provincial governments opportunities to examine the nature and forms that future decision-making structures of governments could potentially take need to be carefully considered. Negotiations, such as the tripartite ***Declaration of Political Intent*** forum as well as a number of bilateral negotiations between associations of First Nations and the federal government, provide such opportunities which will have an impact on the shape of future structures and relationships of governments. As the inherent right of self-government and jurisdiction over aboriginal education is negotiated through agreements and is recognized under section 35 the federal government will begin to vacate the field of aboriginal education. The federal government will, however, respect its residual fiduciary responsibilities, as well as its treaty and fiscal obligations which might continue with respect to First Nation peoples. As this occurs, newly created aboriginal governance regimes will simultaneously need to consider the appropriateness of existing administrative structures and local policies cognisant that there may be some necessity to undergo a period of transition and some reorganization. As formal aboriginal governments, constitutionally recognized under section 35, are instituted in Canada they will begin to construct legislation for defining, creating, implementing and regulating systems under their jurisdiction which will displace the administrative structures which had been devolved from the federal government.

In the process of preparing for a new relationship and creating formal and legally recognized governance structures, which will exercise the negotiated arrangements on educational jurisdiction, the principle of local control and decision-making that is by necessity within the domain of the communities and the parents must not be lost. As regional or treaty area aboriginal governance structures begin to displace the decision-making processes of the federal government Aboriginal peoples will need to determine how to implement educational and administrative decisions which respect the rights of students and parents while enabling aboriginal governments, and their designated education authorities, to exercise the legal powers that are necessary to operate programs and services within their legislative authority. It will be imperative that decision-making and accountability do not exist in a vacuum but are appropriately linked with the educational process in the schools and communities.

IMPLEMENTING ABORIGINAL JURISDICTION THROUGH EDUCATION GOVERNANCE REGIMES

PRINCIPLES FOR NEGOTIATIONS

The absence of explicit constitutional recognition of the inherent right to self-government necessitates a clarification of the legal status of aboriginal groups to govern their educational processes within the existing framework of the Canadian Constitution. The federal government has recently stated its position that it is prepared to proceed with negotiations based on the premise that the inherent right to self-government is an existing aboriginal right within the meaning of section 35 of the ***Constitution Act, 1982***. Negotiations, whether on a province-wide, a regional or a treaty area basis, could advance legal recognition of interim sectoral governance structures that are specific to education. Formal negotiations on aboriginal education jurisdiction and governance are already proceeding in Ontario through, for example, the Tripartite Council's ***Declaration of Political Intent*** and bilateral initiatives between the federal government and various regional and treaty area aboriginal groups through several memoranda of understanding.

A limited number of initiatives could continue to proceed in the education sector to develop practical models of governance which could form a foundation for future organization of regional aboriginal education institutes, area education boards or families of local school authorities while the wider negotiations with respect to aboriginal government seek to establish agreement for defining the full scope of constitutional jurisdiction of Aboriginal peoples and the various forms of associated government structures where legislative authority of Aboriginal, federal and provincial governments would be compatible. All levels of negotiations will continue to shape new government-to-government relationships which are envisioned by Aboriginal, federal and provincial governments within the Constitution of Canada. Regardless of what else is going on in the negotiation of agreements to implement aboriginal self-government, the importance of building on progress which has already been made in education negotiations should not be overlooked.

The negotiation of arrangements to formally recognize the legal status of regional government jurisdictions in the field of education will need to address certain basic aspects of governance. In addition to such things as the scope of jurisdiction, as well as the geographic reach of the educational jurisdiction and the resident population covered within that jurisdiction, the participant First Nations collectively will need to clarify the decision-making role of the proposed governance structure and its legal powers and authorities. A mechanism for dispute resolution and an amending formula for the negotiated agreement, which would allow for the proposed governance structure to continue to develop and evolve in concert with the wider self-government negotiations, are areas that will need careful consideration by the participant First Nations.

The decision to negotiate an arrangement leading to the recognition of an aboriginal jurisdiction for education will also need to ensure that the participating First Nations have collectively committed to the process and have a very clear mandate from their membership to proceed with

such negotiations. A transparent ratification process must clearly establish the consent of the membership of the participant First Nation bands for the proposed agreement before the agreement, which is recognized as legally binding, can be concluded. However, aboriginal constitutions which establish and guide the governance structures, the formal processes for the selection of governing bodies, the structures of educational institutions, including their legal authorities and responsibilities, are all internal matters which will be subject to internal decision-making and approval processes.

The negotiators of the federal government and the participant First Nations must ensure that certain guiding principles are reflected in this form of agreement. In the case where discussions overlap with matters which are within provincial jurisdiction it will be necessary for the provincial government to participate in the negotiation process. Alternatively, the aboriginal group may chose to engage in a separate bi-lateral process with the provincial government to negotiate areas of education that are solely within the jurisdiction of the province. These could include, for example, the delivery of publicly funded provincial post-secondary courses which lead to the granting of degrees under Ontario legislation or the delivery of daycare services which are licensed and funded by a provincial government ministry. (The requirement for a provincial role in negotiations, however, has not detracted from the ability of various aboriginal groups from defining education more broadly than what has been contemplated by current legislation made pursuant to section 91(24) of the *Constitution Act, 1867*. Aboriginal groups in Ontario define education as separate and distinct from section 91(24) and, in particular, from section 93 of the *Constitution Act, 1867*. It is their view that an aboriginal group has the right to define the scope of education within its jurisdiction that is protected under sec. 35 of the *Constitution Act, 1982*).

As a minimum the negotiations should take into consideration certain basic principles which are suggested below:

- a political, financial and administrative accountability regime which clearly delineates the linkages and the division of powers, authorities and responsibilities between the participant First Nations and the governance structure and its institutions;

- the governance structure has the mandate to establish education standards for its membership which ensure programs of study that are consistent with standards of other educational jurisdictions within the province and ensures transferability of academic credits;

- Aboriginal, federal and provincial (if applicable) government roles and responsibilities are defined to ensure harmonious development and application of laws, regulations and policies;

- the Crown's fiduciary relationship and existing treaty obligations for education are respected by the negotiations;

- the agreement is established within the framework of the Constitution of Canada and the *Charter of Rights and Freedoms* applies to all governance structures and institutions which are created to implement the agreement and to deliver programs and services;

- the funding of aboriginal governance structures is a shared responsibility with sources of funding that include components of federal, First Nation and provincial (if applicable) appropriations;

- the resident populations on reserve lands of all of the First Nations defined by the agreement will receive all educational services through the education authority, which is created under the governance regime of the participant First Nations, and will not be eligible for the same or similar services through the Department of Indian and Northern Affairs (INAC); and,

- the agreement will be implemented within the existing resources of INAC and the participant First Nations and may be supplemented by other revenues which may be available to the First Nations or the aboriginal government from other sources.

GOVERNANCE STRUCTURES

The educational decision-making processes of the proposed governance structure must be based on a constitution which is internally developed and ensures an open and clear ratification process by the membership. The process selected for the appointment or election of the governing body by the membership must be clear and transparent. It must ensure political, financial and administrative accountability directly to the membership. This accountability includes the articulation of the formal relationships between the participant First Nations and the proposed governance structure, which includes an education authority or any other institutions that it may create to administer the educational system and to deliver programs.

A clear, open and transparent decision-making process must be established for the governing structure in the constitution. Access to information on laws, regulations and policies must be open and a clearly defined appeals mechanism available to all residents living on reserve lands. The application of conflict of interest regulations for elected and non-elected officials must be ensured though the accountability regime.

The powers and responsibilities of the governing body will be defined within the constitution as ratified by the membership. The powers and responsibilities addressed in the constitution may include, but not be limited to, some of the following areas:

- Law-making capacity in relation to education matters defined by the constitution:

  define the scope of public aboriginal education and its associated programs and services (ie. ECE, elementary, secondary, post-secondary, training);

define the rights, and obligations, of students; and student access to education programs and services;

define a system of education and its structures (ie. education authority) which is legally empowered to administer and manage the educational system and deliver programs;

define the methodology for the financing of education;

make regulations related to the raising of revenues for educational purposes which may include assessment, collection and appeals procedures for interests in reserve lands by tenants and occupants other than members of the First Nations;

make regulations governing provision of education services to the participant First Nations, as well as to external First Nation and provincial authorities, or on behalf of government agencies (ie. ECE, college/university courses, vocational or adult training); and make regulations related to the purchase of services from other jurisdictions;

- Political, financial and administrative accountability:

based on the constitution of the aboriginal government establish regulations for clear, open and transparent decision-making; and, establish conflict of interest guidelines for elected and non-elected officials serving the membership within the defined jurisdiction;

make regulations related to financial procedures that meet generally accepted accounting principles for public audit and instal accountability mechanisms which can verify that public funds have contributed to the objectives as established by the constitution;

make regulations for a formal appeals procedure which is open/accessible to the membership.

SCOPE OF AUTHORITY OF REGIONAL EDUCATION AUTHORITIES

The jurisdiction and powers of an aboriginal government to enact laws would include such matters as the creation of educational institutions that are mandated to implement the decisions of the governing body. An education authority should have the legal capacity to perform various professional, administrative and management functions which may include, but are not limited to, the following:

- authority to design and implement programs which will advance the educational needs of the participant First Nation schools and to establish policies with respect to:
  - educational standards and academic equivalency benchmarks
  - curriculum development, adaptation and review process
  - cultural education and aboriginal languages
  - student academic and special needs assessment processes
  - evaluation of education and related programs and services
  - teaching methodologies, in-service training and teacher professional development

- authority to work collaboratively with other First Nation education authorities, provincial school boards, and the Ministry of Education and Training on program and curricular areas which are of common interest

- authority to establish operational policies related to the delivery of programs and for conducting business administration in accordance with the regulations which may include:
  - operational guidelines for education programs and services
  - purchase of educational programs and curricular materials
  - financial administration policies related to borrowing of funds
  - purchase and management of capital assets for educational purposes

- legal capacity and authority to enter into agreements with other First Nation education jurisdictions and provincial education authorities for the purpose of purchasing educational programs and services which could include:
  - tuition agreements for elementary and secondary education
  - tuition agreements for special education
  - tuition agreements for blind and deaf pupils

- legal capacity and authority to enter into agreements with other First Nation education jurisdictions, provincial education authorities, and federal departments for the purpose of provision of educational programs and services which could include:
  - tuition fee agreements for pupils from other jurisdictions
  - agreements for the provision of early childhood education
  - agreements for the administration of DIAND post-secondary support program
  - agreements for the provision of accredited college and university courses

CONCLUSION

Aboriginal education programs and services were devolved through federal government policy. The existing First Nation administrative structures for the delivery of education are still based to some degree on the decision-making mechanisms that allowed the federal government to devolve administrative authority for education to First Nation band councils, tribal councils, and certain First Nation education authorities and institutions. First Nations should be prepared to design and create their educational processes and governance structures in a manner which is consistent with an aboriginal educational philosophy and their concept of aboriginal government which at the same time has the ability to interface with other educational authorities operating in the provinces.

The above is not an exhaustive listing of areas which could be considered in a negotiation process that seeks to restore educational jurisdiction through negotiated governance regimes while wider aboriginal government structures, and their powers and authorities, become defined within the context of section 35 of the ***Constitution Act, 1982***. Such agreements need to be flexible to ensure that they are consistent with self-government objectives of Aboriginal peoples; they need to carefully consider, early in the developmental process, a wide range of internal and external factors which will impact on the practical application of governance and decision-making such that later refinements to First Nation constitutions and education structures do not become major reform efforts; and, they need to be viewed as contributing toward the shaping of future aboriginal government sectoral structures, not only in education but also have potential for other fields. The implementation of such negotiated governance models will provide the opportunity for the concept of regional education authorities to be tested by the First Nation membership in a real setting through a governance regime of their design.

This paper should not be construed as a policy statement on jurisdiction and governance. It is presented for the consideration of the Senior Steering Committee to assist the continuing dialogue which seeks to clarify the role and focus of the various negotiations on aboriginal education, which includes the ***Declaration of Political Intent*** discussions. Its purpose is to provide as well some background information that may be useful for promoting further discussion and a framework for the negotiation of agreements related to practical applications of aboriginal jurisdiction in the field of education.