

REPORT ON PRIORITY ACTIONS IN VIEW OF IMPROVING

FIRST NATIONS EDUCATION



NOVEMBER 2011



First Nations Education Council
(FNEC), Quebec

PRESENTED BY



Nishnawbe Aski Nation

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Federation of Saskatchewan Indian Nations

Federation of Saskatchewan
Indian Nations (FSIN)

EDITOR'S NOTES

This independent report is not to be considered as consultation for the National Panel Process and at no time shall this independent report be utilized or quoted out of context. This report is a joint report intended to inform the federal government and the National Chief of the Assembly of First Nations (AFN) of the position of the First Nations Education Council (FNEC) of Quebec, the Federation of Saskatchewan Indian Nations (FSIN) and the Nishnawbe Aski Nation (NAN) of Northern Ontario on priority actions in view of improving First Nations Education with respect to First Nations Rights.

In the present report, many references are made to the Department of Indian and Northern Affairs Canada (INAC), as well as to the Department of Aboriginal Affairs and Northern Development Canada (AANDC). The latter replacing the former since May 18, 2011. We would like to notify readers that throughout the present report, both names and acronyms are used interchangeably. It is understood that the report is referring to the same department.

Similarly, the terms “First Nations”, “Aboriginal peoples”, “Indians”, and “Indigenous peoples” are used interchangeably in this document. However, in a context-sensitive manner, “Aboriginal” may still be used by external consultants, as well as referred to in previous studies. The same applies to “Indians”, used previously in the context of the federal government’s 1969 White Paper. The term “First Nations” is the one commonly and officially used today in Canada, in reference to its First inhabitants, while “indigenous peoples” is used in the international context of the *United Nations Declaration on the Rights of Indigenous Peoples*, to identify native peoples worldwide.

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INDEPENDENT REPORT

INTRODUCTION

For over 100 years, First Nations have been subjected to decisions being made on our behalf as to what is in our best interests. This paternalistic line of thinking has resulted in over a century of detrimental policy and legislation. Study after study has been undertaken with few of the recommendations being implemented. Time and time again others have offered solutions to “fix” First Nations education. First Nations are no longer willing to be spectators in our own future and that of our future generations. From our own cultures, history, languages and traditions, the way forward is clear; we must be the decision makers. Having others, who do not intrinsically know who we are as a people, making fundamental policy and legislative decisions, will never have the success that we as First Nations peoples will have.

To understand why the FNEC in Quebec, the FSIN in Saskatchewan and NAN in Ontario, opted out of the National Panel process and jointly undertook their own initiative, one must first understand the historical context and potential impact of policy and legislative changes made to First Nations education.

Pre-contact, First Nations had developed and implemented a traditional education system that was reflective of the skills and abilities required to sustain the individual and the community. Always willing to help others, First Nations taught the settlers how to survive on their lands. First Nations focused on the importance of balance and prioritized values, morals and ideals. Children were taught through the activities that enabled life on the land including hunting, fishing, trapping and gathering. The community collectively supported the growth and development of children, ensuring that the teachings they received benefited the individual, as well as the community. First Nations peoples had evolved thousands of years before the arrival of Europeans.

Far too many Canadians do not know or understand the history of First Nations in Canada. When the Prime Minister issued an apology for the residential school system on June 11, 2008, many Canadians were hearing for the first time of the residential school era and Canada’s role. Prime Minister Harper’s apology stated that:

“In the 1870s, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the residential schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, ‘to kill the Indian in the child’. Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country”¹.

¹ <http://www.pm.gc.ca/eng/media.asp?id=2146>.

The Indian Act enabled the development and operation of residential schools. The Indian Act, adopted in 1876, is still adhered to today and is reflective of the general lack of understanding and impediment of First Nations and First Nations issues. The residual effect of residential schools continues to impact First Nations families and communities today. For many residential school students, the existence of a family structure, of having a mother and father, grand parents and siblings was taken away. Many survivors of the residential school system have had challenges building healthy families and this has not always been achievable, as many struggle through their healing journey. For others there is a complete lack of trust or importance placed on formal education, as education has been such a destructive factor in their lives and their communities. It is going to take real investment in First Nations education and parental and community commitment to bridge the gap created during the residential school era and by the Indian Act.

“It was a policy of assimilation, a policy designed to move Aboriginal communities from their ‘savage’ state to that of ‘civilization’ and thus to make in Canada but one community - a non-Aboriginal one. At the core of this policy was education. It was, according to Deputy Superintendent Duncan Campbell Scott, who steered the administration of Indian Affairs from 1913 to 1932, ‘by far the most important of the many subdivisions of the most complicated Indian problem. In the education of the young lay the most potent power to effect cultural change a power to be channelled through schools and, in particular, through residential schools. Education would, Frank Oliver, the Minister of Indian and Northern Affairs, declared in 1908, ‘elevate the Indian from his condition of savagery’ and make ‘him a self-supporting member of the State, and eventually a citizen in good standing.’”²

On June 16, 2010 Minister Strahl announced that the federal government intends to repeal the sections of the Indian Act that enabled the development of residential schools; removing children from their homes, families and communities. The fact that the clauses that enabled the development of residential schools are still part of the Indian Act today, is indicative of how oppressive the Indian Act has been, and in many instances still is, for First Nations people.

From 1945 to the late 1950s, the government concentrated on building day schools on reserves. Unfortunately, the schools were primarily involved in elementary education. If Native children wanted to continue their education, they were still forced to leave the reserve. It was not surprising that many students did not continue school past their elementary years. Additionally, the quality of education did not improve. Qualified teachers were scarce, even for the "white" schools, so the Natives had to be taught by many teachers who were questionably suited for the job.³

² Milloy, J.S., University of Manitoba Press 1999, A National Crime, The Canadian Government and The Residential School System 1879 to 1986, pg 3.

³ <http://www.canadiancontent.ca/issues/0499firsted.html>

The issues from more than five decades ago are still issues today. First Nations have been subjected to many external studies undertaken by the Government of Canada, with little to none of the numerous education recommendations being implemented. In addition to this, we, First Nations, have undertaken our own studies and reports to highlight our successes and identify barriers including funding, jurisdiction, second level services, elements of a quality education system etc... Many of these studies have also been ignored or written off as biased research.

In the June 2011 Status Report from the office of the Auditor General it was stated that:

4.14 Education is critical to raising the social and economic strength of First Nations individuals and communities to a level reached by other Canadians. Many First Nations students and communities face fundamental issues and challenges that are comparatively rare among other Canadians and that may impede their educational achievement. We found that, based on 2001 and 2006 census data, the education gap has not been reduced and Indian and Northern Affairs Canada (INAC) has only begun to implement a strategy for closing it.”⁴

Launch of a National Panel

On December 9, 2010 in the House of Commons, the Minister of Indian and Northern Affairs Canada announced the appointment of a National Panel on First Nations Education. National Chief Shawn Atleo welcomed the announcement and the opportunity for First Nations to work in partnership with the federal government to improve First Nations education. Within the government’s process, the Minister received Cabinet authority to establish the Panel to be an independent body reflective of areas of expertise: federal, provincial and First Nations respectively.

First Nations leadership and technicians raised many concerns regarding the proposed National Panel on First Nations Education as the process was not entirely clear and the press release issued stated the mandate of the Panel to “*explore and advise on the development of options, including legislation, to improve elementary and secondary education outcomes for First Nations children who live on-reserve.*”⁵

The Panel that has been appointed by the Minister of Indian and Northern Affairs Canada is comprised of the Chair, Scott Haldane, the President and Chief Executive Officer of YMCA Canada, George Lafond, who is from Muskeg Lake Cree Nation, Treaty 6 Territory, Saskatchewan, and is the Aboriginal Initiative Special Advisor to the University of Saskatchewan’s president, along with Caroline Krause, a faculty associate at the University of British Columbia.

⁴ http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html

⁵ AFN Press Release, AFN Welcomes Commitment by Government of Canada to Work with First Nations to Improve First Nations Education

Terms of Reference of the National Panel – Non-negotiables

Initially the National Chiefs Committee on Education and National Indian Education Council had expressed numerous concerns:

- With the process.
- The Terms of Reference.
- The appointed panellists.
- The remuneration for panellists.
- The extremely tight timeframe.
- The potential development of legislation.
- That the partnership is not an equal one.

Below are reproduced the non-negotiables developed by the FNEC, FSIN and NAN to be included in the terms of reference of the National Panel to ensure that the process is truly reflective of a joint partnership.

a. Process

COMMENT: The CCOE is not driving this process at all since it has no authority or power to make any decisions. Currently everyone is in a holding pattern waiting for INAC to make up their minds. This is no way to drive a process.

- *SUGGESTION: If the CCOE is to be driving the process, then INAC should be meeting with the CCOE to negotiate this process.*
- *Maybe the CCOE or the Regional Chief could meet with INAC to negotiate the process and directly report to the CCOE – something different needs to happen whereby First Nations are more informed and are included in the negotiations and the decision-making process.*

COMMENT: Regional Input - Regions must be the ones establishing the roundtables in the regions.

- *SUGGESTION: Regions/PTOs involved in the vetting process should decide where the regional roundtables will be held, who will participate (including non-First Nations partners), and how the meeting will be structured.*

COMMENT: Review of previous studies and papers – this must be performed jointly.

- *SUGGESTION: A joint review will ensure that the review process is impartial and includes all relevant recommendations from previous studies.*
- *The review process should also include previous attempts at developing legislation in this manner (i.e. Bill S-11) in order to ensure lessons are learned and the process is improved upon accordingly.*

b. Composition and Framework of the National Panel

Representativeness of First Nations on the National Panel.

Consensus between the National Chief and the Minister on the choice of the members.

Funding of the regions for planning regional roundtables, including per diem expenses incurred by the participants. The final report represents a joint effort between First Nations representation and INAC representation. Validation of progress reports and approval of the final report by the National Chief and the CCOE-NIEC⁶.

c. Scope of the Mandate

The process encompasses the principle of “life-long learning” and includes early childhood and post-secondary education. It also encompasses systems that are holistic, high quality, linguistic and culturally-based.

d. Position on Current INAC Policies and Practices

The National Panel must complete an analysis of current INAC policies and practices that may hinder the implementation of some of its recommendations:

Regarding the importance of adequate funding for First Nations schools (reference: Resolution No. 13/2010).

- *More specifically, express an informed opinion on the necessity for a funding formula, given the generalized practice of all provinces in Canada to determine said funding of provincial schools. COMMENT: Concerned about a funding formula due to regional differences, but open to discuss comparable funding for regions that includes systems and governance (i.e.: a structural base enabling First Nations to establish school boards and committees).*
- *Express an informed opinion on whether or not any new approach to funding should include a duly revised funding formula for First Nations schools in order to take all related indexation and cost factors in education into account.*

Regarding the funding of a genuine First Nations education system under the control of First Nations, as advocated by the policy document entitled, First Nations Control of First Nations Education (reference: Resolution No. 12/2010).

⁶ The Chiefs Committee on Education and the National Indian Education Council

Analyze the policy document entitled, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*:

- More specifically, the excerpt stating that: “The Government of Canada recognizes that there will be new costs associated with the transition from the existing regime to implementation of new self-government arrangements. There will not be, however, a separate source of funding for implementation and transition costs. All federal costs associated with the implementation of self-government agreements will have to be accommodated within existing federal expenditures.”
- As well, related analysis concerning self-government, particularly the sections referring to the fact that “federal funding for self-government will be achieved through the reallocation of existing resources”⁷, and “The Government will normally require that an agreement on cost-sharing between the federal government and the relevant provincial or territorial government be secured prior to the commencement of substantive negotiations... while the provinces have primary but not exclusive responsibility for other Aboriginal peoples”⁸.

Regarding adequate support to the right to self-determination of First Nations, as recognized by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):

- More specifically, as to an eventual requirement to sign tripartite agreements in order to access a new approach to funding (yet undefined), as stated in a letter addressed to British Columbia and co-signed by Assistant Deputy Minister Christine Cram and Patrick Borbey.
- More specifically, on the actual Comprehensive Claims Policy and the right for First Nations governments to dispose of adequate resources to exert their functions and responsibilities as per the United Nations Declaration on the Rights of Indigenous Peoples (reference: Resolution No. 10/2010).

e. Guiding Principles for Reports and Recommendations

Proposed policies, legislation and conduct must be measured against the standards of the UNDRIP (reference: Resolution No. 48/2010).

Must assert and respect Aboriginal and treaty rights and not allow the Minister, or any executive, administrative, or provincial body the discretion to derogate from those rights and override the constitutional rights of First Nations (reference: Resolution No. 48/2010).

Must align with the FNCFNE (reference: Resolution No. 12/2010).

⁷ Wherrett, Jill, 1999. Aboriginal Self-Government. In *Current Issue Review*, 96-2, Parliamentary Research Branch

⁸ Federal Policy Guide – Aboriginal Self-Government. In *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*

As the process was rolled out, it became clear that the non-negotiables that were presented were not going to be adopted. The process appeared to be heavily government controlled, with little control by the Assembly of First Nations Chiefs Committee on Education/National Indian Education Council.

RATIONALE FOR PRESENTING AN INDEPENDENT REPORT

First Nations and First Nations organizations have been through numerous governmental processes regarding education that have resulted in little to no change. When the limited mandate of the Panel was announced, it was contradictory to the life-long learning/holistic model that many First Nations employ. To focus on only Kindergarten through to grade twelve, is an injustice in an already fragmented system. With a number of different ministries and departments funding aspects of First Nations education, it becomes increasingly difficult for First Nations to bridge the gaps between available funding and policies to foster an effective First Nations education system. To exclude early learning, alternative education and training, and post-secondary education only exacerbates the fragmentation of available programs and services for First Nations.

Through Quebec, Saskatchewan and NAN's individual processes, the leadership in these regions rejected participating in the National Panel on First Nations Elementary and Secondary Education. Resolutions were passed by Saskatchewan and NAN and Quebec carried a motion rejecting participation in this Panel. Following this, discussions were held regarding the creation of a joint report that would be presented to the National Chief and the Minister of Indian and Northern Affairs Canada. One of the catalysts for this was the need to produce a report based on the issues and challenges experienced by First Nations and First Nations organizations.

The section below refers to letters, motions, resolutions and press releases from the three regional organizations which fully explain their rationale for presenting an independent report.

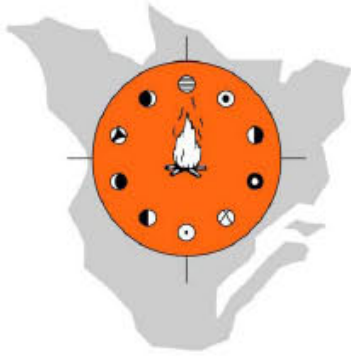
First Nations Education Council (FNEC)

a. Motion

At the FNEC Special General Assembly held April 5, 2011, concerning the national consultation on priority actions in view of improving First Nations education, the Chiefs carried the following motion:

“Whereas, in the framework of the consultation led by the National Panel on First Nations Elementary and Secondary Education, the FNEC presents a parallel report to the National Chief.” [translation]

b. Letter Addressed to the National Chief of the AFN



Secrétariat
de l'Assemblée des
Premières Nations
du Québec
et du Labrador

Secretariat of the
Assembly of the
First Nations
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April 13, 2011

Shawn A-in-chut Atleo
National Chief
Assembly of First Nations
473 Albert Street, Suite 900
Ottawa (Ontario) K1R 5B4

Re: Motion adopted by the FNEC Special General Assembly

Dear National Chief:

The present letter is to inform you of a motion adopted at the First Nations Education Council (FNEC) Special General Assembly held on April 5, 2011, concerning the national consultation on priority actions to support in view of improving First Nations education. I would like to point out that only one Chief did not support the motion below:

"That, within the context of the consultation led by the National Panel on First Nations Elementary and Secondary Education, the FNEC submit a parallel report."

One of the concerns expressed by the Chiefs during discussions is the importance of positively contributing to the process aiming to identify priority actions. Given the numerous consultation reports and studies compiled by the FNEC on this issue for which there was a broad consensus among First Nations, the Chiefs considered that the best way to achieve this positive contribution is to forward you a parallel report. The Chiefs highlighted that the selected option is the best one to reflect their position and to contribute to the process in a spirit of unity among all First Nations of Canada.

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LE GRAND CERCLE DE NOS PREMIÈRES NATIONS – THE GREAT CIRCLE OF OUR FIRST NATIONS

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Other factors have influenced the FNEC Chiefs' decision to ask their communities to not participate in the consultations led by the National Panel on First Nations Elementary and Secondary Education (hereafter the Panel) and to consider the presentation of the FNEC parallel report as the best option to positively contribute to the process. The main factors are, to name but a few:

- The FNEC has been denouncing the chronic underfunding of First Nations schools for several years and made a priority to stress the urgent need to remedy the situation. However, the Panel's Terms of Reference do not make remedying the situation a priority and do not commit the Panel to conduct a thorough analysis of funding inequities nor to propose immediate remedial measures as required by the critical situation.
- Despite the importance for First Nations that Canada has endorsed the United Nations Declaration on the Rights of Indigenous Peoples and two resolutions of the Assembly of First Nations (AFN) emphasizing the need to refer to the Declaration in any agreement with the federal government, the Panel's Terms of Reference do not take the UN Declaration into account. The Panel is therefore not bound to take account of such an important document which defines the standards in terms of First Nations rights in education, in spite of the fact that it is the result of several years of efforts by First Nations.
- In 1972, in reaction to the White Paper of Trudeau's government, the policy document *Indian Control of Indian Education* was published. This document became a source of inspiration and a reference for First Nations in their initiative to improve their education systems, but it never received adequate support from the federal government despite the latter's commitment. AFN Chiefs adopted a revised version of the said document, now entitled *First Nations Control of First Nations Education*. The revised version must serve as a reference document for the position of First Nations concerning measures to take to support autonomy in education as well as genuine First Nations education systems. The Panel's Terms of Reference, however, do not contain any obligation to comply with the standards outlined in this fundamental document as per the positions of the Chiefs on measures to improve First Nations education.
- Lack of confidence was also expressed regarding the Panel composition. This derives, among other things, from certain unfounded statements made by one of the members concerning the alleged mismanagement of post-secondary education by First Nations communities. The lack of confidence is also rooted in the Panel's significant lack of knowledge in regard to elementary and secondary education in First Nations communities.

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- Lastly, there is general dissatisfaction that the mandate is limited to elementary and secondary education and there are concerns that this process serves as a diversion to current initiatives that would enable the federal government to impose modifications to the post-secondary education program that have been denounced by First Nations, including the withdrawal of the program management from First Nations.

In Peace and Friendship,



Ghislain Picard
Chief of the AFNQL

C. c. Regional Chiefs
Chiefs of the AFNQL
Lise Bastien, FNEC

c. Press Release

Secrétariat
de l'Assemblée des
Premières Nations
du Québec
et du Labrador

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**PRESS RELEASE
FOR IMMEDIATE DISTRIBUTION**

FIRST NATIONS EDUCATION: THE TIME TO ACT IS NOW

Wendake (Québec), August 30, 2011 – The First Nations Education Council (FNEC), will not be taking part in the National Panel on First Nation Elementary and Secondary Education discussions. “It is no longer the time for speeches and analysis. It is time to adequately invest in the First Nations education system,” says the Director General of the FNEC, Lise Bastien.

The Director General of the FNEC mentions that the government possesses numerous reports that have been produced over the years, yet the majority remain ignored. The Royal Commission Report on Aboriginal Peoples (1996) and the Final Report of the Minister’s National Working Group on Education (2002), put in place by the Minister for Indian Affairs, are two excellent examples. The Director General also points out that “in the last 25 years of our existence, the FNEC has had the opportunity to regularly consult its communities and has presented many well-documented reports on actions that are priorities in order to improve First Nation education. We know what the problems are and we know what the solutions are. Now it is time to apply them.”

Faced with the announcement of a National Panel, whose mandate will be to lead another consultation, the FNEC took some time before deciding not to take part in the Panel’s consultations. Wanting instead to take a more constructive approach, the FNEC united its efforts with the Federation of Saskatchewan Indian Nations (FSIN), and the Nishnawbe Aski Nation (NAN) of Ontario in order to present the elements to include in the reference terms for this kind of panel. It is the lack of consideration for some of these elements that led to the final decision of the Chiefs of the FNEC to abstain from participating in the consultations spearheaded by the Panel and to instead, present a parallel report.

More precisely, even though a request was made on this subject, the Panel’s terms of reference do not contain any commitment to respect the principles of the United Nations Declaration on the Rights of Indigenous Peoples. This Declaration represents, for all First Nations in the world, the result of more than 20 years of effort with the objective of specifying and enforcing their rights, including rights in education. “Not considering it is absurd,” affirms the Chief of the AFNQL, Ghislain Picard.

A commitment to respect the principles of the policy document, First Nations Control of First Nations Education (2010), was also refused inclusion in the Panel’s reference terms. This policy document, which is supported by all the Chiefs in Canada, was first published in 1972 (First Nations Control of Education), and even though it received official recognition by the federal government, it never obtained adequate support to be implemented.

Lastly, there has not been any further commitment to adjust the non-equitable financing (from the federal government) of First Nation schools as compared to provincial schools (funded by provincial government), which

constitutes a well-documented injustice towards First Nations youth and is denounced by the FNEC and all First Nations in Canada.

An independent report

To the three fundamental reasons mentioned above that led to the choice to not participate in the National Panel's consultations, other considerations are added, which include a concern for the lack of familiarity of the Panel members with the reality of primary and secondary education in the First Nations communities, along with a clear dissatisfaction that the mandate of the Panel is limited to primary and secondary education. "Moreover, since the process is non-binding, this leaves the government with all the necessary latitude to retain only the recommendations that suit its political agenda, including a new legislation that could be used as an opportunity to diminish the rights of the First Nations instead of enhancing them," warns Ms. Bastien.

One of the concerns that the Chiefs of the FNEC voiced in assembly, is the importance of bringing a positive contribution to each and every process that aims to determine action plans to improve First Nation education. Under the circumstances, it appears that the best way to contribute was to abstain from participating in the consultations of the National Panel and to jointly present with the FSIN and the NAN a parallel report. "We have enough information to define the measures needed to improve the education of our Nations' youth. The time when others decided what was good for us is over. Our education is our business," concludes Chief Picard.

About the AFNQL and the FNEC

The Assembly of First Nations of Quebec and Labrador is the regional organisation that groups together the 43 First Nations Chiefs of Quebec and Labrador. The First Nations Education Council is assembled by 22 First Nations communities in Quebec whose mandate is to support, promote and defend life-long education along with the unique cultural identity of the First Nations. For further information: www.avenir-future.com

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SOURCE : Éric Cardinal
 Conseiller en communication
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Federation of Saskatchewan Indian Nations (FSIN)

a. Resolution 1771



Federation of Saskatchewan Indian Nations

LEGISLATIVE ASSEMBLY RESOLUTION

July 6, 2011

REFERENCE NUMBER: 1771

**FREE, PRIOR AND INFORMED CONSENT IN THE PROTECTION OF
TREATY**

WHEREAS the First Nations of Saskatchewan have Inherent and Treaty Rights and responsibilities that are recognized by the United Nations Declaration on the Rights of Indigenous Peoples; and

WHEREAS an expression of these rights, the Chiefs of Saskatchewan signed the Convention of 1982 which formed the Federation of Saskatchewan Indian Nations (FSIN) and established the Chiefs-in-Assembly; and

WHEREAS the FSIN *Convention Act*, January 1985, unequivocally states the Chiefs-in-Assembly:

- have the authority to safeguard and promote the recognition and implementation of Inherent and Treaty Rights in provincial, national and International fora;
- have the responsibility to uphold the Inherent and Treaty Rights of First Nations by ensuring these rights will not be diminished or abrogated by any impacts that may result from amendments to and or development of national legislation related to the Treaty Right to Education; and

FREE, PRIOR AND INFORMED CONSENT IN THE PROTECTION OF TREATY

REFERENCE NUMBER: 1771

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WHEREAS the First Nations have the right to free, prior and informed consent; and

WHEREAS our fundamental Treaty Rights are protected by international legal norms and this demands that the highest standards are met; and

WHEREAS the honour of the Crown must be upheld, including the obligation to fulfill the terms of Treaty and to ensure that any amendments to legislation impaction Inherent and/or Treaty rights are conducted through a formal consultation process agreed upon by First Nations; and

WHEREAS the Chiefs-in-Assembly have not mandated the FSIN Executive or the Assembly of First Nations to formally engage in a consultation process with the Federal Government on their behalf on legislation that impacts and/or abrogates Inherent and Treaty Rights and responsibilities; and

WHEREAS First Nations are the only ones who can negotiate, repeal and/or amend the *Indian Act* or negotiate the development of federal legislation with Indian and Northern Affairs Canada (INAC).

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly direct the Assembly of First Nations (AFN) to cease and desist in its efforts to repeal sections of the *Indian Act* until such time as the Federal Government and First Nations have agreed to a formal process that guarantees Inherent and Treaty Rights and responsibilities will not be diminished or abrogated; and

FREE, PRIOR AND INFORMED CONSENT IN THE PROTECTION OF TREATY

REFERENCE NUMBER: 1771

PAGE THREE

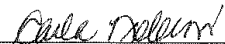
FURTHER BE IT RESOLVED that the Chiefs-in-Assembly direct the Assembly of First Nations (AFN) to cease and desist in negotiating on behalf of First Nations with INAC on the reconciliation of Inherent and Treaty Rights in national legislation.

MOVED BY: Chief Michael Starr, Starblanket Cree Nation

SECONDED BY: Chief Carolyn Bernard, Waterhen First Nations

CARRIED

It is **HEREBY CERTIFIED** by the undersigned that the foregoing is a true copy of a resolution unanimously passed by the Chiefs of the Legislative Assembly at a meeting duly called and regularly held on the 6th day of July 2011, and the said resolution is now in full force and effect.



CLERK OF THE LEGISLATIVE ASSEMBLY

b. Letter Addressed to the National Chief of the AFN



April 28, 2011

National Chief Shawn A-in-chut Atleo
 Assembly of First Nations
 Trebla Building
 Suite 900 - 473 Albert St
 Ottawa ON K1R 5B4

Dear National Chief Atleo:

For more than 30 years, Saskatchewan First Nations have been fighting the good fight to implement 'Indian Control of Indian Education.' Originating with our fellow First Nations in Alberta, our First Nation communities in Saskatchewan have made huge strides to institute this policy in order to improve the graduation rates of our talented young people. I am certain that you are well aware of our successes in Saskatchewan, despite the fact that the federal government has not provided an adequate level of support, financially or otherwise, for First Nations control of First Nations education.

Many challenges confront our First Nation education systems. The most obvious inequity revolves around the reality that students in First Nation classrooms are not valued as highly as other Canadian students. This is reflected in the fact that First Nation schools are allocated, on average, one third of the funding for our children, as compared to children attending other schools. In addition, the funding that is provided is unstable and short-term, which undermines sound planning. INAC's policies and practices impose a system whereby First Nation education funding is driven by proposals that must be submitted and re-submitted year after year. School administrators cannot plan for their school's future with confidence, yet they are expected to prepare their students as best they can for the future.

As the FSIN and other regions have stated in the past, it is imperative that stable and long-term funding and other supports for First Nations schools, on par with off-reserve education systems be a key priority for the federal government. However, First Nations educators, Chiefs and communities have just been informed by INAC officials from the Saskatchewan Region that the **proposal based funding is actually going to be reduced nationally by 15%.**

I hope it strikes you as odd, as it does me, that the escalation of this blatant inequity in education comes at a time when the AFN and its partner, INAC, are launching an unbudgeted, multi-million dollar National Panel process on Education. In addition, INAC continues work on its costly \$27 million dollar database to roll up our reports. It is of grave concern to the Chiefs of Saskatchewan that while they continue to face cuts and

National Chief Atleo
April 28, 2011
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struggle to provide quality First Nations education to their students, the AFN and INAC are moving forward with costly processes that will have little impact on improving the educational experiences of First Nations students. We are calling on the AFN to reconsider its present course of action, and not be complicit in supporting INAC's cuts to our funding, at a time of great need for our children.

If we are to conscientiously work together to close the education gap between First Nations and Canadian students, then we should be examining the education inputs and investments made for mainstream Canadian students and seek to remedy the obvious lack of inputs and investments for educating our First Nation students – primarily funding.

Unfortunately, the AFN/INAC National panel is only examining the funding issue as an option and as we have just learned recently it is now going to concentrate and focus on National First Nation Education legislation. However, the AFN does not have jurisdiction to engage INAC on legislation affecting First Nations without our full participation in designing the overall process. Any proposed legislation on First Nation education requires the Chiefs of Saskatchewan, as well as other Chiefs from across Canada to be in the driver's seat. At the current time, it is obvious that INAC is wholly in control of the design and implementation of any such proposed legislation. If the INAC-driven panel process results in binding recommendations for any legislation, our greatest fear is that this legislation would be absent of any recognition of our Treaty rights, or legitimate and fair funding mechanisms for our schools and students. As a result, this lack of focus on the funding issue and a stronger focus on National Education Legislation is deeply disconcerting. History has shown that legislation and policy unilaterally imposed on First Nations by the federal government only serves to undermine the independence and well-being of our First Nations communities.

Although the National Panel has yet to get fully off the ground, already the effects will be felt through the 15% direct cut to our schools, which literally takes resources off the desks of our students. These cuts will impact literacy and numeracy efforts, amongst others, in our schools directly. How serious is the federal government in addressing the educational gap and how can this panel possibly be beneficial to First Nations when INAC is driving the process towards legislation, absent of our rights and any serious efforts to address funding abuses against our schools? It is in fact exacerbating the problems experienced within our schools.

The panel at best appears to be a smokescreen for inaction and at worst a means to disguise another legislated attempt to erode the First Nations Treaty Right to Education. Whatever reason was offered to get this rushed process off the ground in the short term has now been overtaken by the reality of the federal election. The FSIN has no confidence that the panel will be able to effectively deal with our concerns within the compressed time frame with which the AFN and INAC are now operating.

I ask that the AFN please respond to the above-noted concerns, which I have raised on behalf of the Chiefs of Saskatchewan. I urge you to address these concerns in a

National Chief Atleo
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meaningful way, outlining how the AFN will ensure the protection of our Treaty rights and take INAC to task on its current and proposed funding abuses. Please do not disregard the valid concerns of the Chiefs of Saskatchewan, which are expressed in the attached resolution, passed on March 28, 2011. This resolution rejects the National Panel on Education in its current form and with its existing limited mandate, and also challenges the appointments of Caroline Krause and David Hughes to the National Panel on Education. Please refer to the attached resolution for further guidance.

I look forward to your prompt response.

Sincerely,



Chief Guy Lonechild
FEDERATION OF SASKATCHEWAN INDIAN NATIONS
Indian Governments of Saskatchewan

Att.

cc: Chiefs of Saskatchewan
Chiefs Committee on Education (AFN)
Regional Chiefs of the Assembly of First Nations

c. Press Release

Backgrounder to the Education Media Release August 10, 2011

The AFN and INAC have joined a National Panel on Education legislation, which was announced by the Minister on Dec 9, 2010.

The Panel is scheduled for one national meeting and eight one-day regional dialogues. The joint press release stated that the Panel will “explore and advise on the development of options, including legislation, to improve elementary and secondary education outcomes for First Nations children who live on-reserve.” The number one concern of First Nations is the lack of equitable funding. This position has been supported by former Prime Minister Paul Martin and several provincial premiers. However, four of the six themes of the Panel are about legislation.

This Panel appears to be following a federal government agenda and is not independent, judging from the dialogue at Akwesasne. Nine INAC staff members were in attendance to support the Panel and all questions from the press had to be vetted by the government ahead of time.

While we have issues with the Panel, in the makeup of its members and its mandate, and the fact that over 230 First Nations are not participating in this process, the primary issue is the impact of federal legislation on the treaty right to education. Saskatchewan chiefs have not given the mandate to negotiate treaties with the AFN and there is a real fear the government will call the National Panel meetings a fulfillment of First Nations consultation on legislation.

As a result, the FNEC, FSIN and NAN are collaborating to write a separate report for delivery to the Minister of Indian Affairs and the National Chief outlining their position on the Inherent and treaty right to education. The core issue of First Nations education has been, and continues to be deficient funding. INAC provides approximately \$6,500/student for education on a Saskatchewan reserve. Provincial schools in Saskatchewan receive approximately \$10,500. This is not the treaty right to education.

Saskatchewan chiefs have passed two resolutions on this Panel. The first, on March 28, 2011 at the Saskatchewan Indian Education and Training Commission, rejected the Panel and its mandate. The second resolution was passed on July 6, 2011 at the Legislative Assembly and demanded the AFN/INAC cease and desist until there is a formal process guaranteeing inherent and treaty rights and that it will not be diminished or abrogated. The reason the chiefs have decided to not participate is because education is a treaty right and the exercise of legislating the treaty right to education must trigger a formal process whereby the federal government must engage the members, chiefs and councils of EACH First Nations in discussions on the legislation of the treaty right to education.

Federal legislation on First Nations education will allow the government to define the treaty right to education and to change it at will. The federal government, and therefore INAC, does not require legislation to properly fund First Nations education. They fund First Nations students attending provincial schools at the higher provincial rates.

There are concerns that this Panel is just like the federal government's water panel that influenced federal legislation. The federal water panel issued a report, then the federal government developed legislation that essentially forced First Nations to follow provincial standards. The federal government did not allocate any funds to ensure First Nations could implement the federal legislation and provincial standards for water. In fact, the imposition of these standards without funding only increased liabilities to First Nations while decreasing the federal government's responsibilities and liabilities.

There is a pattern of the federal government signing tripartite agreements, memorandums of understanding, self-government agreements and legislation for the development of education and then refusing to adequately fund or follow through with implementation.

The discussion on the development of federal legislation for First Nations education is definitely not a First Nations process. The unilateral development of this Panel, their mandate and coercive acceptance has shown an undeniable lack of respect for First Nations communities, their leaders, educators, students and processes they have developed.

Nishnawbe Aski Nation (NAN)

a. Press Release



NEWS RELEASE

Thursday August 11, 2011 FOR IMMEDIATE RELEASE

NISHNAWBE ASKI NATION REJECTS PROCESS FOR EDUCATION REVIEW

THUNDER BAY, ON: Nishnawbe Aski Nation (NAN) First Nations will not participate in a proposed national education review process established by the federal government and the Assembly of First Nations (AFN). Citing the National Panel process as both flawed and deficient, NAN will undertake their own review, working in conjunction with other First Nations in Ontario as well as with those in Saskatchewan and Quebec. Together, they will submit their views directly to the federal government and the AFN.

The National Panel was established without input from any First Nations in Canada to conduct a national review of elementary and secondary education for First Nations students who live on reserve, and to submit a report to Canada and the AFN. The First Nations of NAN see no need for the National Panel's work, given that issues impacting First Nations education are well known, and have been set out in many reports completed in the past, the Auditor General reports of recent years, and in the NAN education strategic plan.

NAN Deputy Grand Chief Terry Waboose who holds the education portfolio for NAN, is concerned that the legislative focus of the National Panel's work threatens the Treaty right held by the First Nations of NAN. "The National Panel will recommend legislation to govern First Nations education," said Waboose. "This has the potential to arbitrarily define and diminish our Treaty right to education. It amounts to a backdoor revision of the Indian Act and holds little prospect of actually improving the quality of education our children deserve."

The National Panel has no mandate to review pre-school education, post-secondary or vocational education nor' to address the current and significant funding gap that exists between funding provided to provincial schools and that provided by Canada to First Nations schools. The well-known and much needed improvements in education facilities, education support services, special education, teacher salaries and curriculum education outcomes will not improve simply because Ottawa passes legislation. Appropriate funding to address these issues must be on the table and it isn't.

"The federal government talks about restraint," said Muskrat Dam First Nations Chief Gordon Beardy. "But why is that burden being placed on the shoulders of our children

and their education. Funding for First Nations education is an investment for Canada not a cost. But unfortunately, real investment in the future of our children is clearly not on National Panel's agenda."

NAN Chiefs have expressed concern that having their voice heard in Ottawa by the AFN and the federal government requires their views to be filtered through a Panel whose members include only one First Nations person.

"We are perfectly capable of speaking for ourselves and don't require a National Panel with a limited mandate and minimal First Nations representation to do it for us." said Waboose. "That is precisely what we intend to do through submission of our own report directly to the National Chief and the Minister of Aboriginal Affairs and Northern Development".

Nishnawbe Aski Nation is a political territorial organization representing 49 First Nations communities in James Bay Treaty No. 9 and Ontario portions of Treaty No. 5 – an area covering two thirds of the province of Ontario.

For more information please contact *Amy Harris, Director of Communications – Nishnawbe Aski Nation (807) 625-4906 or (807) 252-2806 mobile or by email aharris@nan.on.ca.*

THE THREE REGIONAL ORGANIZATIONS PRESENTING THIS REPORT

First Nations Education Council (FNEC) – Website: www.cepn-fnec.com

The FNEC is an association of eight Quebec First Nations regrouping twenty-two First Nations communities in total whose common purpose is to achieve full jurisdiction in education. This will be accomplished through mutual collaboration in providing mandates to the Education Secretariat in assembly to support, promote, inform and defend the interests and actions of members in regards to all matters of education, while respecting our unique cultural identities and common beliefs as well as promoting our languages, values and traditions. The authority for its mandates and actions comes from General Assemblies, to which each member community sends a representative, and from Special General Assemblies, which are attended by the chiefs of the member communities.

Established in 1985, the FNEC has developed over twenty-five years of experience and has demonstrated exceptional political leadership in educational issues of crucial importance to the First Nations of Quebec. Through the work of its designated authorities, it decisively intervenes to resolve the fundamental problems facing the communities in education. The FNEC has also done ground-breaking work in highly important areas such as special education. Another part of its leadership role is to maintain links with other First Nations organizations working in education, including political organizations such as the AFN. The FNEC shares its expertise with these partners in a strong spirit of collaboration.

The FNEC's mission:

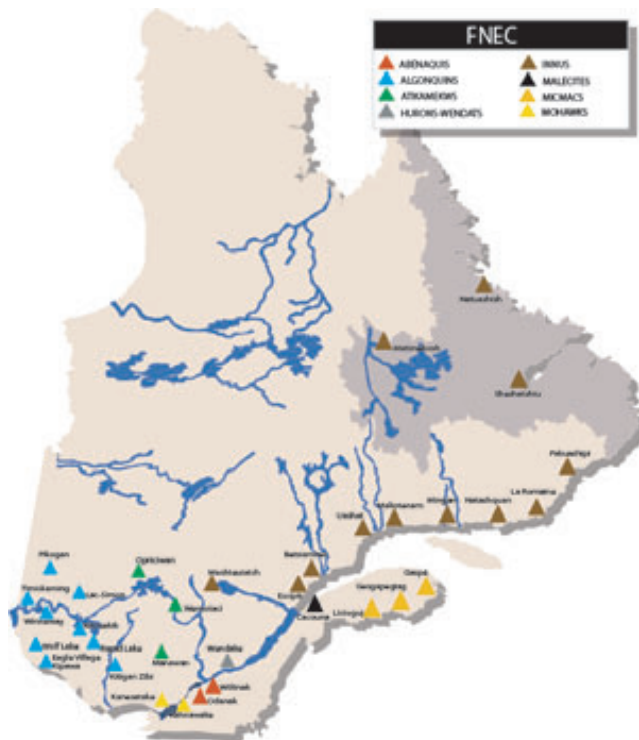
- Achieve, through mutual collaboration, the common purpose of full jurisdiction in education for the member communities.
- Support, promote and defend the lifelong interests of First Nations education.
- Promote and defend the interests of the member communities in education and their unique cultural identities.

The FNEC's main mandates:

- Representation and defence of the interests of First Nations education.
- Support to the communities in view of:
 - Making progress in the control of education by the communities.
 - Increasing the quality of programs and services.

The FNEC's priorities:

- Jurisdiction over First Nations education.
- Setting up of a comprehensive First Nations education system.
- Funding of all levels of education.
- Post-secondary education.
- Vocational training.
- Technologies.
- Special projects.



Federation of Saskatchewan Indian Nations (FSIN) – Website: www.fsin.com

Many of the culture and traditions of First Nations people in Saskatchewan flow from the teachings and practices of our forefathers and elders of today. Our forefathers, who entered into treaties with the Crown, did so with the intention of establishing mutually beneficial arrangements between the Crown and First Nations. The chiefs and headmen who negotiated the treaties also had the wisdom and forethought to provide for our generation and those yet to come.

The FSIN represents 74 First Nations in Saskatchewan. The Federation is committed to honouring the spirit and intent of the treaties as well as the promotion, protection and implementation of treaties that were made with the First Nations more than a century ago.

The goals and objectives of the FSIN are:

- **The protection of treaties and treaty rights**
- **The fostering of progress in economic, educational and social endeavours of First Nations peoples**
- **Co-operation with civil and religious authorities**
- **Constructive criticism and thorough discussion on all matters**
- **The adherence to democratic procedure**

- **The promotion of respect and tolerance for all people**

Every year the chiefs of the FSIN conduct three sessions of the Legislative Assembly: fall, winter, and spring. Special sessions are held as required. The Assembly deals with a variety of issues of mutual concern to the member First Nations. The Legislative Assembly is entrusted with legislative powers including; the passing of laws, ordinances, statues, regulations and codes, and the supervision of the activities of the executive power.

The Legislative Assembly objectives include, but are not limited to, the following:

- Promote the protection and implementation of treaty rights
- Consultation with member First Nations on issues of mutual concern
- Determine action plans for resolution of issues
- Develop and ratify policy documents
- Develop and ratify First Nations legislation
- Development and supervision of institutions to implement its power
- Establishment of boards/commissions which have their powers and functions set out in legislation
- Determine the number and powers of the Executive

The FSIN Education Secretariat:

Mission Statement

The primary role of the Education and Training Secretariat is to provide technical assistance and support to the Saskatchewan Indian Education and Training Commission (SIETC) and the FSIN Executive Member with the Education Portfolio. Under the overall direction of the SIETC, and the Executive Member, the Secretariat is also responsible for duties related to the on-going regional development of the First Nations education system.

Responsibilities of the Education & Training Secretariat:

- Consultation, coordination and management of specific education initiatives including science festivals and science, math and technology mobiles, Action Plan on Education in the Context of Treaty (APECT) and Summer Student Work Experience Program
- Organization and facilitation of regional forums such as the Directors of Education Table and the Post-Secondary Education Coordinators Forum
- Provision of technical and administrative support to the Saskatchewan Indian Education and Training Commission (SIETC).
- Provision of technical support to the Chiefs Legislative Assemblies
- Saskatchewan representation to the National Indian Education Committee (NIEC) of the AFN.
- Provision of technical support to the Saskatchewan representative on the AFN Chiefs Committee on Education (CCOE).
- Provision of technical support within the FSIN on various regional issues and initiatives that impact on educational development.

The Secretariat provides advice and assistance in the following areas:

- Specific advice, assistance and support services to individuals and First Nations in response to questions and issues they have in regard to education programming and funding.
- Advice and assistance to non-First Nations governments, agencies and individuals in regard to First Nations education.

The Secretariat is also responsible for the provision of development services such as technical support, advice and assistance in areas of on-going education jurisdiction work that result from FSIN, federal and provincial agreements. Currently, these development services include the work required to support FSIN's development in the treaty governance process. This work includes the technical support, advice and assistance with respect to the on-going work that results from general FSIN initiatives that relate to education, youth, sports, culture and recreation; and specific research under the direction of the SIETC and the Executive Member.

Nishnawbe Aski Nation (NAN) – Website: www.nan.on.ca

NAN History

NAN represents 49 First Nations communities within the territory of James Bay Treaty No. 9 and the Ontario portions of Treaty No. 5. This name is based on a principle that is sacred to our people, the notion of the people and the land, and their unique relationship. NAN (known as Grand Council Treaty No. 9 until 1983) was established in 1973 as the regional organization representing the political, social and economic interests of the people of Northern Ontario. In 1977, Grand Council Treaty No. 9 made a public declaration of the rights and principles of Nishnawbe Aski.

NAN Mandate

NAN represents the legitimate socioeconomic and political aspirations of its First Nations members to all levels of government in order to allow local self-determination while establishing spiritual, cultural, social, and economic independence.

Objectives:

- Implementation of advocacy and policy directives from NAN Chiefs-In-Assembly.
- Political advocacy to improve the quality of life for the people of Nishnawbe Aski in the areas of education, lands and resources, health, governance, and justice.
- Improved awareness and sustainability of the strong traditions, culture, and language of the people of Nishnawbe Aski through unity and nation building.
- Development and implementation of policies reflecting the aspirations and betterment of the people of Nishnawbe Aski.
- Strong partnership development and networks.

Corporate Structure

Each First Nations community that is part of NAN elects a chief and council. The chief of each community is a member of the NAN Board of Directors. Every three years NAN chiefs elect a four-member Executive Council consisting of a Grand Chief and three Deputy Grand Chiefs.

NAN Executive Council operates on a nation-to-nation level with the governments of Ontario and Canada. Each Executive Council member is responsible for specific portfolios that correspond to the various departments of NAN.

Land, Culture, Community

NAN is a political territorial organization representing 49 First Nations communities throughout the province of Ontario. These communities are grouped by Tribal Council according to region. Five NAN communities are unaffiliated with a specific Tribal Council.

NAN encompasses James Bay Treaty 9 Territory and Ontario's portion of Treaty 5. NAN has a total land mass covering two-thirds of Ontario spanning an area of 210,000 square miles.

The total approximate population of NAN First Nations members (on and off reserve) is 45,000.

The majority of Nishnawbe Aski Nation First Nations are remote or isolated. The people of Nishnawbe Aski traditionally speak Ojibway, Cree, and Ojicree.



WHAT NEEDS TO BE DONE TO IMPROVE FIRST NATIONS EDUCATION

INTRODUCTION

First Nations in Canada aspire to a kind of education that will foster the overall development of their children, for example, an education that incorporates the values and elements essential to the survival of their distinct cultures and peoples. This is a legitimate aspiration for all peoples and it is one which Canadian society supports in general. To make it a reality, the leadership of the First Nations must be vigilant. The role played by their leadership in this regard involves promoting certain basic principles in a spirit of mutual understanding and respect.

During the past ten years, First Nations have unceasingly denounced the federal government's chronic and deliberate underfunding of First Nations education as well as their lack of support for First Nations control over their education. The federal government itself has supported, conducted and/or participated in numerous committees, studies, and evaluations including some which revealed the inadequacy of their current funding mechanisms and the lack of support for First Nations control over their education. Our position is that any serious action plan to improve First Nations Education must include as a premise, a commitment to put an end to these unfair and fundamental causes of the educational gap between First Nations' members and other Canadians.

From this perspective, it is important to begin by situating our position within the framework of the policy statement *First Nations Control of First Nations Education*, which is a update (July 2010) of *Indian Control of Indian Education*, which was published in 1972. This initial version gained official recognition in 1973 from the Minister of Indian and Northern Affairs Canada at the time, the Honourable Jean Chrétien. It subsequently went without adequate support for its full implementation. Nevertheless, it was a source of inspiration for various education-related studies and developments conducted by the FNEC, FSIN and NAN and other First Nations all across Canada during the past decades.

Below, some of these studies and developments are referenced due to their great importance in communicating what needs to be done to improve First Nations education.

Major Studies Completed by the FNEC

- *Thirty Years of Struggle and Accomplishment-1972-2002: A First Nations Perspective on Educational Takeover*. Final Report, Special Project of the FNEC (September 2002): this report was the result of a study that was conducted by the FNEC. The study recorded the history of the education takeover by its member communities in keeping with the policy statement *Indian Control of Indian Education*.
- *The Destiny of Education for First Nations Children: Priority Intervention Areas* (December 2002): this document presents original, innovative and stimulating measures to overcome the recurring and current gaps in the education systems and services offered in the First Nations communities. These measures were

determined according to the real needs in the communities and the relevant areas of intervention.

- *Paper on First Nations Education Funding* (February 2009): this paper presents the extent of the chronic under-funding in education and highlights the funding shortfalls facing the First Nations *communities* in Canada, particularly those in Quebec. The four main sections of the paper are:
 - **Section 1:** Elementary and Secondary Education Funding;
 - **Section 2:** First Nations Education Systems;
 - **Section 3:** Post-secondary Education Funding;
 - **Section 4:** Recommendations.
- *Five-Year Plan for Reinforcing a First Nations Educational System by Implementing Essential Services in Support of the FNEC Member Communities* (2008-2009 to 2013-2014): This document reaffirms the FNEC's conviction that the First Nations must have a true education system *under* their control, which is an indispensable factor for their children's success at school, but one that is nevertheless dependent on their gaining access to the appropriate resources. This document also reviews the situation concerning the underfunding of band schools. The band school funding formula was established in 1988. It is now out of date and it has not been indexed to the cost of living since 1996. Finally, it does not take into account numerous developments in education over the past several decades.
- *Supporting a Comprehensive and Equitable Funding Framework - FNEC Rationale for Funding Formula for First Nations Elementary and Secondary Schools* (April 2009). This *report* is the result of two years of work carried out to establish a funding formula that takes into account the quality and range of services that the schools must provide as well as the additional costs related to specific or commonly-encountered situations in First Nations schools.⁹

Major Studies Completed by the FSIN

- As stated earlier in this report, the FSIN has a long history of consensus building and democracy. Since the early 1940s the FSIN has unified to diligently work and establish foundational institutions to support *Indian Control of Indian Education*.

The last forty years have been a time of significant educational development and growth of educational institutions and systems. These institutions include the First Nations University of Canada established in 1976, the Saskatchewan Indian Institute of Technologies established in 1976 and the Saskatchewan Indian Cultural College established in 1972. They testify to the importance of developing institutions and systems that support the language, culture, history and education of First Nations. In the early seventies these institutions supported the first devolution of First Nations schools to First Nations communities. First Nations communities took over the management of the schools; however, INAC did not transfer systems or funding authorities for these schools. In the mid-1980s

⁹ The AFN has sent these documents to the members of the National Panel.

tribal councils started to provide second level services to First Nations schools with an understanding First Nations schools would be under the authority of the First Nations. Some Saskatchewan tribal councils expanded their second level services and became known as Regional Management Organizations in the mid-1990s with an emphasis on taking advantage of economies of scale for First Nations schools; meaning that First Nations pooled together to ensure their students received access to quality second level services. Second level services are extremely expensive and prohibitive for the majority of First Nations Schools to afford on their own, so aggregation to provide these services in agreed upon terms and conditions seemed to be the plausible answer. The FSIN has also established tables of chiefs and technicians to guide the work of the FSIN, garner consensus and further build and develop educational systems. The FSIN is currently mobilizing the Saskatchewan Indian Education and Training Commission, a Directors of Education Table and a Post-Secondary Education Coordinators Table. The Saskatchewan region is one of the few regions in the country with this systematic infrastructure to support First Nations and the advocacy of their rights and institutions.

- The FSIN has published documents that deal with the development of these institutions and the rights of First Nations to educate their children. These documents include:
 - *Treaty Rights to Education (1996), A Document Presenting the Basis, Scope and Federal Obligations thereto, of the Education Rights Guaranteed by the Crown to the First Nations.* This document looked at the historical context, principles, foundations, performance of the Crown to treaty obligations, benefits accruing to the parties, the legal and constitutional enforceability and education as a treaty right and the treaty right to a post-secondary education.
 - *The Saskatchewan Blueprint to Education (2006):* This document was created through research and consultation with First Nations communities, elders, leaders, educators, parents and caregivers. The project examined capacity building and jurisdiction for First Nations education in Saskatchewan. This report was created because First Nations parents, communities and leaders wanted to ensure that First Nations children receive a level and quality of education that will enable them to achieve economic and social parity with other Canadians.
 - *Action Plan on Education in the Context of Treaty (2009-present).* The FSIN is currently involved in the three-year APECT project. The goal of APECT is to support and further develop Saskatchewan First Nations education systems, guided by the treaty relationship, based on the principle of First Nations control of First Nations education. It will enhance and protect all First Nations languages and cultures and improve the quality of education and its outcomes for First Nations people living in Saskatchewan.

Major Studies Completed by the NAN

- *Nishnawbe Aski Nation Residential School Curriculum*. This curriculum was designed to bring awareness to students regarding the history and impacts of the residential school era. The curriculum is for grade 5 through to grade 12.
- *The History of Education in Nishnawbe Aski Nation*, Dr. Emily Faries, Dr. Don Auger. This document examines the history of education in the Nishnawbe Aski Nation from pre-contact through to current day.
- *Nishnawbe Aski Nation Education Policy Framework*. The *NAN Education Policy Framework* sets out a path for progress toward the collective goal of making significant improvement in the quality of education programs and services available to NAN learners of all ages.

Other Studies Across the Country

It would be too lengthy to refer to the many other reports written on First Nations Education across the country, many of which make recommendations that were passed along from one report to the next, all being subsequently ignored.¹⁰ Suffice it to mention two of these reports emphasize and demonstrate the federal government's obvious and persistent lack of political will to follow up on the recommendations dealing with First Nations education needs. These two reports are:

- The five-volume *Report of the Royal Commission on Aboriginal Peoples* (RCAP), published on November 21, 1996 following a vast nation-wide consultation: In this report, the commissioners formulated 400 recommendations for improving relations between the federal/provincial governments and the populations of close to 70 Aboriginal nations in Canada. Volume 3, which was entitled *Gathering Strength*, dealt with, among other things, new directions for social policy, families, health and healing. It also shed new light on such issues as housing conditions, the arts and heritage and more importantly, the current education system and the way in which it applies to First Nations. Appendix A contains a list of recommendations. Like the other recommendations in the RCAP report, the recommendations concerning education were given scant consideration.
- The final report by the Minister's National Working Group on Education (under then Minister, the Honourable Robert D. Nault), entitled *Our Children – Keepers of the Sacred Knowledge* (December 2002): This working group, created by the Minister for AANDC and made up of experts in education, met five times to come up with recommendations for facilitating the establishment of a complete and effective education system based on Aboriginal knowledge. They also commissioned a series of research reports and carried out an exhaustive review of the literature, a list of which is included in the final version of the report.

¹⁰ See *First Nations Education Timeline – Linda Cree, AFN, A Work in Progress* in appendix, it outlines all the major historical developments.

Motion by MP Charlie Angus

We also welcome and support motion No. 571 presented by MP Charlie Angus, (Timmins – James Bay), on September 16, 2010. The motion reads as follows:

That, in the opinion of the House, the government should:

1. declare that all First Nations children have an equal right to high quality culturally-relevant education;
2. commit to provide the necessary financial and policy supports for First Nations education systems;
3. provide funding that will put reserve schools on par with non-reserve provincial schools;
4. develop transparent methodologies for school construction, operation, maintenance and replacement;
5. work collaboratively with First Nations leaders to establish equitable norms and formulas for determining class sizes and for the funding of educational resources, staff salaries, special education services and indigenous language instruction; and
6. implement policies to make the First Nations education system, at a minimum, of equal quality to provincial school systems.

The next section will stress the importance of the long-standing issue of chronic underfunding of First Nations schools and will explain how it should be addressed.

ADEQUATE, SUSTAINABLE AND PREDICTABLE FUNDING OF FIRST NATIONS SCHOOLS

Most urgent priority to be addressed

In a report published in 2000, the Auditor General expressed regrets and stated:

4.26 Although we are concerned that costs have been incurred to produce studies that have been left dormant, we believe that the costs of remedial inaction are greater.¹¹

Evidently, we firmly believe that the chronic underfunding of First Nations schools is the most urgent issue to be addressed as the inequities are glaringly obvious and must be addressed to close the education gap. An issue that the Auditor General also saw as a priority based on the following statement from her report published in 2000:

4.66 We also observed that current methods used to allocate funds from the Department's headquarters to its regions are based largely on information that was developed at least 15 years ago. The Department has no updated analyses to determine whether the current practice reflects actual education needs and is reasonable in the circumstances.

In its response to the above-mentioned report, AANDC indicated that it would review the funding formula for purposes of renewing the education program authorities by the end of fall 2001. This has yet to take place.

Furthermore, an INAC (AANDC) internal report entitled: *EVALUATION OF BAND-OPERATED AND FEDERAL SCHOOLS (2003) – AEC APPROVAL DATE: 30/06/2005* mentions: “**Conclusion 8: The current funding formula fails to take advantage of opportunities to leverage the program / The current funding formula is an archaic instrument for achieving public policy ends and meeting the needs of First Nations people. A new, more strategic formulation of funding elements would allow INAC to target mutually agreed priorities in First Nations education. Indeed, INAC and the Assembly of First Nations are currently working on a review of funding issues, which in part addresses the base elements of what should be included in the funding formula. This exercise should facilitate the development of a targeted formula tailor-made for First Nations education.**”

Nevertheless, we have not moved forward from that observation.

According to AANDC, the main objective of its Elementary/Secondary Education Program is to “provide eligible students living on reserve with education programs comparable to those that are required ...by the statutes, regulations or policies of the

¹¹ Ref: Online report of the Auditor General of Canada, 2000:
http://www.oag-bvg.gc.ca/internet/English/parl_oag_200004_04_e_11191.html

province in which the reserve is located.”¹² Evidently, after admitting that the funding formula is archaic and inadequate, AANDC indicated that it would review the funding formula. Ten years later, we are still waiting for a new funding formula.

Examples of Underfunding Resulting From the Outdated Federal Funding Formula

a. Tuition Fees Charged by Provincial Schools

There are numerous cases across Canada where First Nations band councils are being charged tuition fees by provincial schools in amounts that exceed those that are received through their funding agreements with AANDC. This is particularly true for some FNEC-member communities that are geographically located near other provincial borders. These communities have to pay more money than they receive from AANDC in order to send their children to schools across their respective provincial borders. The following chart illustrates the situation well:

PROVINCIAL TUITION FEES CHARGED FOR FIRST NATIONS STUDENTS ATTENDING PROVINCIAL SCHOOLS (2010)¹³

School Board	Elementary	Secondary
Northeastern Catholic School District of Ont.	\$12,796	--
District Ontario North East	\$11,584	\$12,552
Conseil Catholique Grandes Rivières Ontario	\$12,280	\$14,528
Band School Rates Paid by AANDC (formerly INAC)	\$4,951	\$5,579

There are also many examples across Canada where INAC funds students in provincial schools at a higher rate than students in similar First Nations schools located in the same province and area.

b. Underfunding of First Nations Languages

Another example is the funding of First Nations languages. In 2001, it was stated that over half of the 60 (or so) First Nations languages in Canada were at risk of extinction.¹⁴ The majority of these First Nations languages reflecting a unique worldview of Indigenous peoples towards their land are not spoken in any other location on earth.

¹² Indian and Northern Affairs Canada (2005). *Evaluation of Band-Operated and Federal Schools*, Evaluation and Internal Audit Branch.

¹³ Timiskaming First Nations (2010). *Case Study: Provincial High School Tuitions of Timiskaming First Nations*. Submitted to: Indian and Northern Affairs Canada, October 13, 2010.

¹⁴ Norris M.J. and L. Jantzen (2004). *From Generation to Generation*.

When AANDC's funding formula was first introduced, it allocated \$215 per student for First Nations schools to support the sustainability of First Nations languages. This amount was based on the salary for one language teacher in a school of 200 students. Under the current federal funding formula, approximately \$15.0 million was granted for First Nations language instruction in band schools in 2008. AANDC's regional formula in Quebec provides \$185 per student for First Nations languages and \$190 for the teaching of a second language (some communities teach two second languages), totalling approximately \$2.1 million for First Nations schools in Quebec in 2008.

In 2008, each provincial and territorial government received a total of \$258.6 million in federal funding, on top of their existing provincial grants, to support minority languages (Aboriginal languages and English as a second language).¹⁵ For additional provincial grants, Quebec provides over \$2,082 per student at the elementary level and \$3,253 per student at the secondary level for each newly immigrated student to learn French.¹⁶ In 2011-2012 the Saskatchewan French School Division was funded at \$18,800 per student, almost three times what Saskatchewan First Nations schools receive. The province of Alberta provides \$2,261 per student, on average, to teach French as a first language, while the Northwest Territories Aboriginal Language Strategy provides an average of \$1,145 per student.¹⁷

It is difficult to estimate the exact costs for First Nations schools to support First Nations languages, as these would differ depending on the nature of the language program being implemented (i.e. immersion, second language or per credit). However, by analyzing comparable costs¹⁸ for provincial spending on official languages, it is estimated that approximately \$126.6 million more would have been required in 2008 for First Nations across Canada, and \$22.4 million in Quebec.¹⁹

¹⁵ CMEC (2005). *Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2005-2006 to 2008-2009* Between the Government of Canada and Council of Ministers of Education, Canada, Minister of Public Works and Government Services of Canada 2005.

¹⁶ FNEC (2008). Comments on the Real Intentions of the Federal Government and Provincial Government Concerning First Nations Education.

¹⁷ AFN/INAC Joint BOFF Working Group (2005). A Study of Educational Cost Drivers to First Nations Education.

¹⁸ Estimates for Canada are based on average per-student language funding provided by Alberta, Quebec and the NWT. Estimates for Quebec are based on average per-student language funding provided by province of Quebec.

¹⁹ FNEC (2009). *Paper on First Nations Education Funding*, p. 22.

c. Estimated Revenue Comparison Between Ontario’s Student-Focused Funding Model and AANDC’s Band-Operated Funding Formula, Based on a Small Southern School of 100 Students

Formula Line	Band-Operated Funding Formula	Ontario Student-Focused Funding Formula
Core funding		
	Per Student Allocation	
Classroom Teachers (5)	Based on an average salary of Level 5 Year 5 of \$46,179 plus 15.5% benefits (2002 estimate) = \$1,885	Based on an average salary of \$54,079. plus 12% benefits = \$2,472
Supply Teachers	\$196	\$88
Staff Development	\$33	\$11
Assistants	\$7.25	\$6
Textbooks & Materials	\$196	\$77
Classroom Supplies		\$79
Classroom Computers	not mentioned	\$44
Library & Guidance Services	included in Classroom Teachers	\$79 teacher \$12 librarian guidance
Professional/Paraprofessional Support	not mentioned	\$71
Prep Time	Included in Supply Teachers	\$247
Administration Principal Vice-Principal Secretary	included in Classroom Teachers ----- \$146	\$259 ----- \$130
Consultants	not mentioned	\$40
Local Priorities Amount	not mentioned	\$200
Total Core Funding Per Student	\$2,463.25	\$3815.00
Total Estimated Revenue for a small, southern school of 100 students	\$246,325.00	\$381,500.00

Formula Line	Band-Operated Funding Formula	Ontario Student-Focused Funding Formula
Special Purpose Grant		
	Per Student Allocation	
Special Education	\$478 per pupil	Special Education Per Pupil Amount SEPPA \$562 per K-3 pupil \$424 per 4-8 pupil Intensive Support Amount separate application process Level 1 Boards cover first \$800 Level 2 funded to \$12,000 per file Level 3 funded to \$27,000 per file Level 4 programs in facilities
Native Language As a Second Language As Immersion	included in Classroom Teachers, Textbooks & Materials & Classroom Supplies	Second Language \$244 per pupil [Immersion] \$311 per pupil
Geographic Circumstances	not available for southern schools	By formula
Learning Opportunities	Adjustment factors by formula	Low Income Low Education Aboriginal
Early Literacy	Not addressed	JK to Gr. 3 \$122 per pupil
Literacy & Math Outside School Day for Gr 7 & 8	Not addressed	\$131 per pupil for <i>program</i>
Summer School	Not addressed	provided by school(s)
Students At-Risk	Not addressed	Co-ordinator funding provided to Bd Program funding by formula
Teacher Qualification & Experience	Not addressed	Extra funding to cover high level on teacher pay grid - by formula
Early Learning	Not addressed	available where JK not offered
Transportation	-----	-----
School Board Admin & Governance	Mentioned - no amount allotted	\$5,000 per trustee for honorarium \$5,000 per trustee for expenses, PD \$100
Grand Total Estimated Comparison Foundation Grant & Special Purpose Grant for a school of 100 students	\$294,125.00	\$489,100

d. Examples of Provincial Schools Receiving More Funding Than the Provincial Average

The common expression to dismiss unfair comparisons is that one cannot compare apples with oranges. It is almost impossible to find a perfect comparison between the realities of First Nations schools and those of provincial schools. However, as there are schools whose conditions are more similar than others to First Nations schools, we can at least try to establish a comparison between them.

On a national scale, the following table gives examples of some provincial or territorial schools, providing better comparability to the majority of First Nations schools than an average provincial school. These schools receive additional funding to take into account a factor or a combination of factors that create supplementary operating costs, such as remoteness factor, size of the school, minority language, disadvantaged socioeconomic conditions, geographical scattering of schools, etc. The outdated federal funding formula is totally inadequate to take into account these kinds of factors.

School Boards with Schools Comparable to First Nations Schools	Province or Territory	Average Funding per Student		
		Reference Years	For Similar School	Provincial Average
Francophone Board, 210 students (language and remoteness)	Newfoundland & Labrador	2003-2004	\$21,334	\$7,914
Conseil francophone (language)	Saskatchewan	2003-2004	\$13,816	\$7,534
Northern Schools (remote)	Saskatchewan	2003-2004	\$10,606	\$7,534
Moyenne Côte-Nord (remote)	Quebec	2003-2004	\$12,874	\$8,465
Frontier School Division (remote)	Manitoba	2004-2005	\$12,696	\$8,117
Francophone Board (language)	Manitoba	2004-2005	\$10,204	\$8,117
Average ²⁰			\$13,588	\$7,946

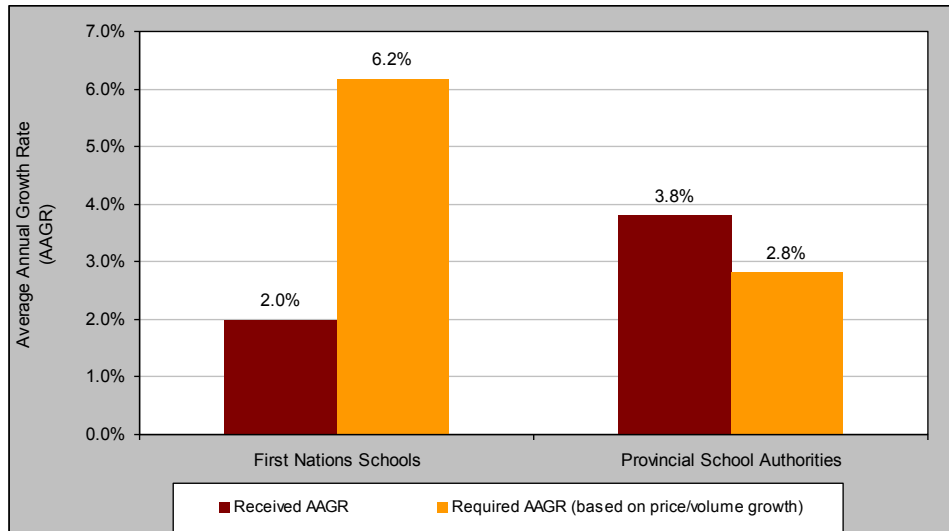
e. A Cumulative Shortfall Due to a 2% Cap on Funding Increase

The funding formula of INAC (elaborated in 1988) has never been revised and was last indexed in 1996. In 2009, former National Chief Phil Fontaine denounced the fact that the 2% ceiling “does not keep pace with inflation or population growth, which is at 6.2 per cent in First Nations communities.” (February 24, 2009)²¹

²⁰ FNEC (2006) *Formula Funding for Elementary and Secondary Band Schools, Rationale with Accompanying Reference Materials*, November 2006

²¹ CMEC, February 24-25, 2009. *Strengthening Aboriginal Success*, p.12.

Average Annual Growth Rates (AAGR), First Nations Schools and Provincial Schools, 1996-2008, Canada²²



Source: INAC expenditures; Statistics Canada, 2007

According to this chart, between 1996 and 2008:

- Provincial schools would have needed an average annual funding increase of 2.8%, but they actually received an average funding increase of 3.8%.
- For First Nations, the annual funding increase has been **capped at 2%**, while the schools required an annual funding increase of 6.2%.

As a result, at the national level, the 2% ceiling in the annual funding increase has led to a cumulative shortfall of \$1.54 billion for the period between 1996 and 2008, solely for instructional services, and an immediate shortfall of \$233 million in 2008.²³

Concerning the impact of this 2% cap, authors Beavon (Strategic Research and Analysis, INAC (now AANDC), Peters (Ph.D. student in sociology, University of Western Ontario) and White (Associate Dean, Graduate Studies Planning and Education, Social Sciences, University of Western Ontario) indicate that:

First Nations are currently facing an education funding crisis which is hindering meaningful progress from being made in improving education outcomes for Aboriginal students. Over the last eight years, there has been a 2% funding cap for First Nations education which has contributed to the current underfunding.²⁴

²² First Nations Education Council (2009). Paper on First Nations Education Funding, P. 16

²³ First Nations Education Council (2009). Paper on First Nations Education Funding, p. 25.

²⁴ Beavon, D., J. Peters and J. P. White, P. 125. Enhancing Educational Attainment for First Nations Children. In *Aboriginal Education – Current Crisis and Future Alternatives* (coll). Toronto: Thompson Educational Publishing, Inc., 2009, 366 p.

Furthermore, as indicated previously, the funding formula has not been modernized and as a result, does not provide any provision for additional amounts to take into account new developments which are included in provincial funding formulas:

- Integration of technologies in schools
- Sports and recreation (extra-curricular) activities
- Vocational training (at the high school level for Quebec)
- School library operations²⁵

The amounts for other costs such as teaching of First Nations' languages and adapting the curricula are wholly inadequate.

f. A Huge Need for Investments in School Infrastructure

Finally, school infrastructure costs come under another program and the whole situation was severely criticized in a report by the Office of the Parliamentary Budget Officer, Kevin Page in May 2009:

In the absence of a robust capital budgeting methodology and an underlying financial model backed up by data with integrity, the department's examination of funding requirements and, hence allocations, are based to a large extent on subjective and non-financial criteria.²⁶

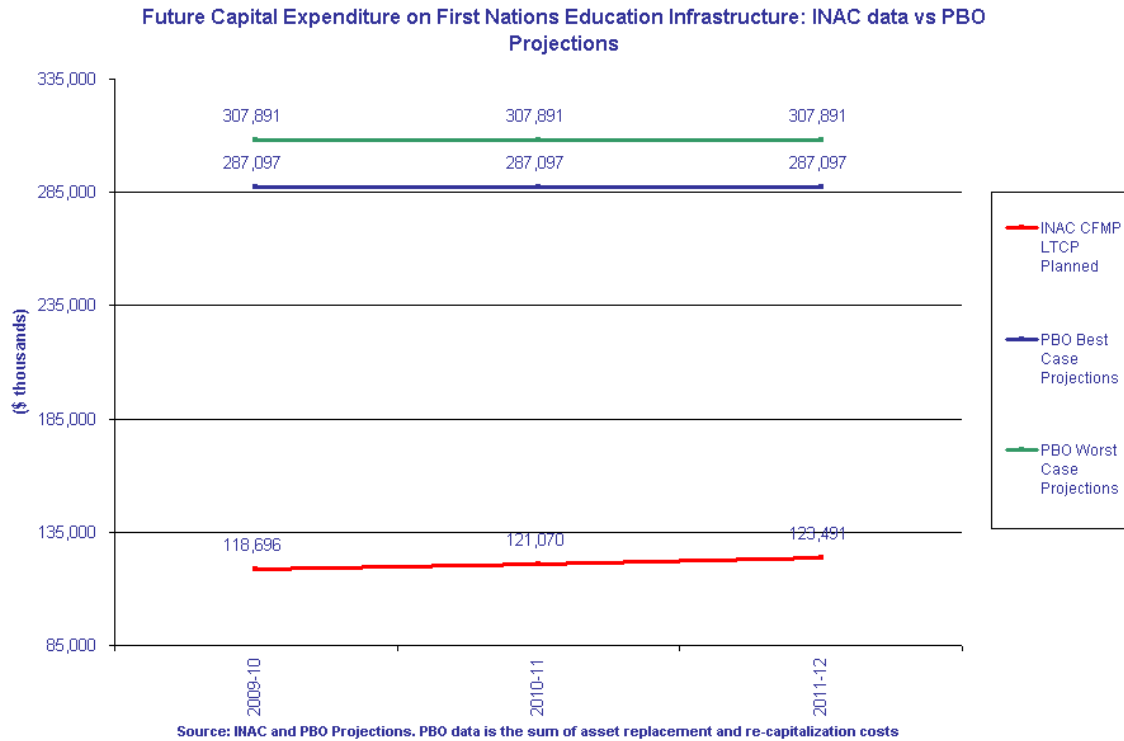
Further, Kevin Page notes that he "would like to re-emphasize the purely subjective nature of the classification and reporting scheme as employed by INAC for the reporting of the school condition" and that "even a cursory glance at the INAC ICMS database show that 468 of the 803 school assets that are listed in the INAC ICMS database have not been inspected since FY2006-07. Furthermore no evidence of inspection for 179 of the remaining 335 school assets was provided to the PBO."²⁷

²⁵ FNEC. First Nations children are being sacrificed (flyer, December 2009).

²⁶ Page, Kevin, PBO (2009). Letter to Michael Wernick, Deputy Minister, INAC, June 22, 2009. P. 2.

²⁷ Page, Kevin, PBO (2009). Letter to Michael Wernick, Deputy Minister, INAC, June 22, 2009. P. 6-7.

The chart below indicates the huge gap between the INAC and PBO projections on investments needed in First Nations Education Infrastructures.²⁸



Vocational Training in Quebec

In most regions across Canada, vocational training for First Nations schools is funded through AANDC’s Post-Secondary Student Support Program (PSSSP), as trade and technical programs are provided at the college level in all provinces except Quebec. In Quebec, over \$2 billion is invested annually in the provincial secondary system to support student access to vocational education.

AANDC’s national funding model does not recognize Quebec’s unique approach to vocational training, leaving First Nations schools in Quebec with no funding to access and develop vocational and technical competencies in a trade.

This leaves First Nations secondary schools in Quebec with no resources to support and retain potential high school dropouts, who might otherwise excel in the Attestation of Vocational Education (AVE) applied program or the full Diploma of Vocational Studies (DVS) program. This leaves First Nations youth who are uninterested in, or having difficulty with, regular secondary school programs with no option of switching to an applied trade certification program. Most of these students must wait until they finish regular secondary school programs (or drop out of school) to complete their vocational

²⁸ Office of the Parliamentary Budget Officer, May 25, 2009 – *The Funding Requirement for First Nations Schools in Canada*, Ottawa, Canada, URL: www.parl.gc.ca/pbo-dpb

training as an adult under Human Resource and Skills Development Canada (HRSDC) programs.

Moreover, in the scope of the reform in Quebec, all provincial schools have to set up a career path at the secondary level but AANDC has no funding planned to take this into account. A 2008 FNEC report on vocational education concludes that \$10.1 million would be required simply to cover the operating costs of First Nations communities to provide vocational training services at the community level. This entails the development of eleven secondary school sites providing a full DVS program, as well as another four providing an AVE program.

Vocational training is critical for job market accessibility for individuals and the economic development of First Nations. Vocational training strives for:

- The acquisition of necessary skills to integrate the labour market.
- The economic development of the communities.
- The struggle to reduce the school drop-out rate.

Some statistics indicate that:

- 50% of the population identified as Native are under the age of 25 years of age, as compared to 31% in mainstream Canada.
- 44% of the population identified as Native do not possess any diploma.

FNEC's numerous attempts to address this issue:

- **January 1998:** creation of the first FNEC committee to examine the issue. Observation: the authorizations for funding programs prevent taking account of the vocational training costs in Quebec.
- **June 2003:** meeting between the FNEC Chiefs and the regional office of INAC. A joint FNEC-INAC Committee is set up for in-depth analyses.
- **April 2005:** publication of the first joint report entitled *Study on Quebec First Nations Access to Vocational Education and Technical Training*.
- **May 2006:** meeting between the FNEC, the INAC regional office and INAC Headquarters for the presentation of the 2005 report.
- **June 2006:** the FNEC received a letter from the Director of Education Programs for INAC acknowledging that the elementary and secondary program does not adequately fund vocational training in the band-operated schools of the First Nations of Quebec and indicated that they were looking forward to collaborating.
- **October 2006:** funding from MELS and INAC for a joint study by the First Nations Human Resources Development Commission of Quebec (FNHRDCQ) and the FNEC. Phase 1 of the study aimed to have a consultation on the obstacles in the access to vocational training and Phase 2 proposed solutions to these obstacles.
- **2007:** the FNEC prepared a brief to obtain funding so that the schools of its member communities can provide career paths at the secondary level.
- **2008:** submission of phase 1 and phase 2 reports and integration of the results of the consultation into the FNEC's five-year plan.

Unfortunately, no measure has been taken and none is being considered to modify the funding formula in order to take into account the supplementary costs for vocational training in Quebec.

Some of our Conclusions

A hidden federal agenda of forced integration and assimilation

In the introduction of *Aboriginal Education: Current Crisis and Future Alternatives* (2009), authors Jerry P. White and Julia Peters trace the history of the development of First Nations education in Canada, beginning with the establishment of New France and the efforts, first by the Recollets and later by the Jesuits, to assimilate Aboriginal people into French culture. Their survey then turns to look at the British system, which also sought integration and brings the reader to the 20th century, which the authors believe represents a period during which the tactics of assimilation remained virtually the same as in previous times.

From our perspective, we believe that the assimilation strategies have evolved and have become more sophisticated over time. We also believed that they have become part of a hidden agenda which has not always been the case. We believe that the fully documented chronic underfunding of our education system is among the many strategies or tactics currently being used to force our integration into the provincial system which is better funded than the First Nations system. This strategy responds to a well-documented objective of transferring costs and responsibilities over to the provinces (see *First Nations Education Timeline – Linda Cree, AFN, A Work in Progress* in appendix). This was particularly obvious at the beginning of the 1960s²⁹ and this became increasingly evident in the 2008 federal budget, where it was stated that:

“The government will spend \$70 million over two years to improve First Nations education by encouraging integration with provincial systems.”³⁰

This being said, the current situation does not take into account the expertise that has been developed by First Nations over the past 50 years (since 1972). The FNEC, FSIN and NAN, as regional organizations put in place by First Nations’ communities, have been developing and supporting this local capacity for the past 25 years. We have come to the conclusion that First Nations possess the expertise, regardless of the fact that they have never been adequately funded for capacity building. We also come to the conclusion that First Nations are not against partnerships with the provinces, but it must be done on a voluntary basis.

We can be certain beyond the shadow of a doubt that the shortfall in funding of education will become more pronounced in 2011 and in the years to come. This is a reality because nothing has been done to rectify the situation for First Nations, and meanwhile provincial funding formulas continue to be reviewed, revised and indexed on a regular basis.

²⁹ The Indian Problem Today: The History and Trajectory of Cost-Avoidance and Offloading, Draft, Discussion Paper prepared for the Assembly of First Nations, Andrew Webster, 31 March 2008

³⁰ FNEC (2009). Paper on First Nations Education Funding, p. 10.

Competing with provincial schools shall become more and more difficult and this in itself is seen as reinforcing our conclusion of a political agenda of forced integration, as opposed to a political agenda of providing adequate support to the policy document *First Nations Control of First Nations Education* which has been adopted unanimously by the Chiefs of the AFN.

Inadequacy of funding analysis currently conducted by AANDC

In this respect, we also question the seriousness and adequacy of the actual comparability analysis conducted by AANDC through a contract with the firm KPMG. In spite of the FNEC's offer to collaborate with KPMG, AANDC has not followed up on it and has even refused to keep First Nations informed on any progress.

In this perspective, we wish to raise caution about an AANDC practice that was reflected in a letter sent by former Minister Chuck Strahl to the Chiefs in August 2010. This practice involves using the average funding per student in the provincial schools as the basis for comparison. To this end, a letter addressed to the minister by the Chief of the Assembly of First Nations of Quebec and Labrador (AFNQL) seriously questions the idea that the average funding per student in the provincial schools could serve as a comparison parameter with the average funding per student in the First Nations schools, seeing that a much higher percentage of First Nations communities are in difficult socio-economic situations, are located in remote regions, have small schools, must protect their languages which are on the brink of extinction and must teach in a second language. To date, apart from acknowledging the letter, the Minister of AANDC has been silent about its content.

Urgent need for a new funding formula

If First Nations must continue to provide comparable quality education with the provinces as a requirement set by the federal government, the latter must assume its fiduciary obligation to fund First Nations adequately to provide the same quality programming, yet adapted to their realities.

Consequently, we are convinced that funding of First Nations schools must be determined by an up-to-date formula which takes into account indexation factors, educational costs, and cost drivers in modern education.³¹ This new funding formula should determine the level of funding to be allocated to each of the First Nations schools in a given region. In doing so, we would be applying a standard that is determined by a general practice in all other provinces in Canada, namely the practice of using a modern funding formula that takes into consideration various indexations and cost factors in education to determine the adequate level of funding for each school. Even the last report of the Auditor General³² indicates that “The Department also identified seven categories

³¹ FNEC (February 2011). Funding of First Nations Schools – Document presented to the KPMG firm, p. 2.

³² 2011 June Status Report of the Auditor General of Canada, Chapter 4 – Programs for First Nations on reserve, Introduction, 4.20

of factors having an impact on the cost of First Nations education, although it did not make funding adjustments based on its findings”.

In a nutshell, it is essential to adapt a First Nations national formula to reflect the reality of each school and each region, since, as indicated above, the Canadian standard shows differences between provinces as well as among provincial schools in a given province. The same principle applies to the First Nations schools, which all present their own specific reality. To ensure this adaptation, the FNEC has developed for its member-communities a funding formula model based on a solid rationale which was afterwards adapted by Ontario (NAN) and Saskatchewan (FSIN) to suit their regional realities.

The FSIN took the model developed by the FNEC and used it to look at the funding of a multi-community First Nations in Northern Saskatchewan. The FSIN was supported in this work by Jarrett Laughlin, senior policy advisor with the AFN. The team started by looking at the work done by the FNEC on developing a funding template for First Nations in Quebec, including the template developed by the FNEC in Quebec on school financing. This template looked at two areas, first what would a First Nations receive if it were funded at provincial rates and secondly what would the funding be if current needs were included. This included areas such as technology, vocational training, language, etc.

The FSIN template does not look at missing areas of funding from INAC but rather looks solely at what First Nations schools would receive if funded under the provincial guidelines. The Ministry had agreed to provide information on the funding for the school divisions but after two meetings it was determined that the information required was established at the school-division level.

Several provincial school divisions agreed to supply information and understanding of the Saskatchewan provincial funding model for this project. It is interesting to note that the province is currently undergoing a transition from the old system of funding, known as the Foundation Operation Grant (FOG) to a new model as yet undetermined. In the interim the province has locked school divisions into the 2008-2009 budget with some alterations. For 2009-2010 the provincial school divisions were given a 3% increase and funding for teacher salary increases. For 2010-2011 the province budget announced a 2% increase to provincial school divisions. While there still remains work to be done on a made in Saskatchewan funding formula, it is clear that the First Nations schools in this area are receiving at least 50% less than a similar provincial school would receive.

The FNEC model is clearly a model of a national funding formula that can be adapted to each region. As does provincial formula, this formula takes into account the following categories of factors:

- a) Averaging out of all the real costs for quality education;
- b) Cost drivers;
- c) Indexation to the cost of living and population growth.

Recommendations

1. That the federal government commits to develop and implement, within 6 months to one year, a new funding formula that adequately funds First Nations schools. This formula must be based on existing joint FNEC/AANDC and AFN/AANDC cost analysis as well as the work done by the FNEC, the FSIN and NAN.³³
2. That the federal government commits to providing funding through a new federal formula unconditional to a community's adhesion to a tripartite agreement, since this condition is a threat of maintaining the unacceptable status quo in the case of non-adhesion and consequently corresponds to an attempt to force integration. All measures of forced integration are denounced by the United Nations Declaration on the Rights of Indigenous Peoples; which the Canadian government has signed.
3. That the federal government makes major investments in school infrastructure and develop transparent methodologies for school construction, maintenance and replacement as recommended in the report by the Office of the Parliamentary Budget Officer, Kevin Page, in May 2009.

ADEQUATE, SUSTAINABLE AND PREDICTABLE FUNDING OF POST-SECONDARY EDUCATION

Impact of 2% Cap on Funding Increase

A 2% cap on funding increase was imposed in 1996, which made it impossible to meet all financial assistance requests by eligible students. This resulted in a waiting list. The chart below clearly indicates the impact of the 2% cap that was implemented.

Year	Students	Comments
1963	3	
1968 ³⁴		Implementation of new funding assistance initiative to students (modest origins).
1977	3,600	
1977		Review of initiative
1996		2% cap on funding increase implemented
2000	27,500	
2004-2005 ³⁵	23,000	Decline of students
2007	22,303	13,447 students have been refused financial assistance since 2001

³³ *Supporting a Comprehensive and Equitable Funding Framework, FNEC Rationale for Funding Formula for First Nations Elementary and Secondary Schools*

³⁴ *No Higher Priority: Aboriginal Post-Secondary Education in Canada. Report of the Standing Committee on Aboriginal Affairs and Northern Development (2007)*, p. 4.

³⁵ *No Higher Priority: Aboriginal Post-Secondary Education in Canada. Report of the Standing Committee on Aboriginal Affairs and Northern Development (2007)*, p. 6.

According to the 2006 census of Statistics Canada:

1. **4.3%** of First Nations people possess a college level diploma in comparison to **11%** in mainstream Canada.
2. **2.5%** of First Nations people possess a university degree in comparison to **9.8%** in mainstream Canada.

Report of the Standing Committee on Aboriginal Affairs and Northern Development

Many First Nations representatives from all across Canada made presentations to the Standing Committee on Aboriginal Affairs and Northern Development whose report 'NO HIGHER PRIORITY: ABORIGINAL POST-SECONDARY EDUCATION IN CANADA' was published in February 2007. In our opinion, this is an important report that must be considered.

This parliamentary committee report makes a dozen recommendations concerning the improvement of data collection and accountability, the financial support provided to students, and the support given to First Nations post-secondary institutions due to the contribution they make to increase the number of graduates. We support the recommendations contained in this report.

Report of the First Nations Post-Secondary Education: Access, Opportunity and Outcomes Panel

The AFN has also released the report 'Taking Action for First Nations Post-Secondary Education: Access, Opportunity, and Outcomes – Discussion Paper – June 21, 2010 – First Nations Post-Secondary Education: Access, Opportunity, and Outcomes Panel'. We also support this report in its entirety in which many of its recommendations overlap with those of the Standing Committee on Aboriginal Affairs and the Northern Development.

Recommendations

4. **We recommend that the federal government commits to improving the post-secondary program based on the recommendations of its Standing Committee on Aboriginal Affairs and Northern Development report, submitted in February 2007 during the 39th Parliament and the recommendations of the First Nations Panel report prepared by the AFN and submitted on June 21, 2010.**
5. **That the federal government recognizes the important role that First Nations institutes assume in meeting the post-secondary needs of First Nations communities and students. That First Nations institutes are provided stable and adequate funding to deliver quality education programs and services.**

ADEQUATE, SUSTAINABLE AND PREDICTABLE FUNDING OF A FIRST NATIONS EDUCATION SYSTEM

What is a Real Education System?

A real education system can be defined from two complementary perspectives which are, on one hand, the organizational levels from which education services are offered and on the other, the extent of educational services that must be covered.

a. Commonly Understood Definition Based on the Organizational Levels

Provincial and territorial education systems typically have three organizational levels from which education services are offered.³⁶ First-level services are directly related to the operation of a school (i.e. teaching, school administration), and are provided directly for the students by teachers, principals, professionals and support staff. Second-level services are support services offered to first-level professionals and designed to improve student performance and enhance classrooms, teachers and ultimately schools. Third-level services³⁷ are typically provided by ministries of education and include broader education services such as the development of regulations, standards, certification and codes of conduct, as well as establishing school curriculum.

b. Definition Based on the Range of Educational Services (Lifelong Learning)

First Nations' vision of lifelong learning encompasses learning from the pre-natal to Elder levels and includes systems that are holistic, high quality, linguistic and culturally based.

Lifelong learning is a process of nurturing learners in linguistically, culturally-appropriate and holistic learning environments that meet individual and collective needs. The lifelong learning model incorporates formal, informal, instinctive and experiential learning systems. Full implementation and support for this model will ensure that all First Nations people have the opportunity to achieve their personal aspirations within comprehensive lifelong learning systems that encompass early childhood education, elementary and secondary school, vocational training and post-secondary, and adult learning.

³⁶ First Nations Second-Level Education Services - Discussion Paper for the Joint Working Group. Harvey McCue Consulting, 2006.

³⁷ Taking into account there is no department of education for First Nations, a second-level services needs assessment may include services which, at the provincial level, would be considered as third-level services.

In referring to the position paper, *First Nations Control of First Nations Education*, the key components to a First Nations' lifelong learning process are:

- Languages;
- Early Learning;
- Curriculum Development;
- Inclusion;
- Access;
- Cultural Competency.

Second-Level Services Definition (Support Services)

As indicated in the introduction of the second section, we firmly believe that the policy document entitled *First Nations Control of First Nations Education* should be the key reference upon which such a real First Nations education system should be based. Although firmly convinced that every aspect of a real First Nations education system will have to be adequately funded due to limited resources, the considerations contained in the present report do not deal with the issue in full detail as does *First Nations Control of First Nations Education*.

Consequently, the present section is limited to more specific elements and recommendations to be considered in respect to Second-Level Services³⁸.

Second-level services differentiate from third-level services because they are directly offered to first-level professionals and designed to improve student performance and enhance classrooms, teachers and ultimately schools. In general, second-level services are divided into three main categories:

- *Pedagogical support services pertaining to:* curriculum material; alternative education programs (i.e. on-line learning, literacy, or intervention strategies for special needs students); language and cultural programs; textbook approval; school calendar establishment; planning and distribution of services and resources; evaluation of student achievement; and cultural and leisure activities.
- *Professional development support services pertaining to:* professional development of teachers, professionals, and principals; evaluation of principals, vice principals and teachers; evaluation of educational programs; improving access to and performance of technologies;³⁹ and coordination of special education programs.
- *Administrative support services pertaining to:* the business and administrative aspects of a school that includes: human resources; maintenance of student records; communications; facilities; and financial and fiscal reporting.

³⁸ Second Level Services deal mainly with the funding of First Nations regional organizations, according to the needs to be addressed.

³⁹ The literature is somewhat unclear on how technology is defined within the concept of second-level services. Technology is often seen to be both an enabler to achieve the implementation of the support services, as well as an area requiring support.

The definition of second-level services for First Nations education described in the *Report of the Royal Commission on Aboriginal Peoples* (volume 3, Ottawa: 1996) builds on provincial and territorial characterization, and defines a First Nations education system as one that:

- Provides pedagogical and technological assistance, defines educational standards, supports professional development and conducts culturally appropriate⁴⁰ educational research to rationalize the financial support required for first-rate learning environments;
- Supports learning opportunities that begin with early childhood education and progress through elementary, secondary and post-secondary education, to adult skills training and employment;
- Incorporates culturally relevant curricula based on First Nations knowledge and community-based language and culture programs, while also preparing First Nations learners to participate in Canadian society;⁴¹ and
- Is based on the view that learning is a holistic and lifelong process, where learning occurs in both informal and formal settings such as in the home, on the land, in the community or at school.⁴²

Second-Level Services Needs Assessment

a. Five-Year Plan Developed by FNEC

A First Nations Socioeconomic Forum was held on October 25, 26 and 27 2006 in the community of Mashteuiatsh, Quebec, under the theme “Acting now...for the future”. Hundreds of participants, including the Chiefs of Quebec’s First Nations communities, federal and provincial government officials, as well as representatives of civil society took part in the discussions which addressed the following four (4) themes:

- Economy and employment
- Education and culture
- Health, social services and early childhood services
- Infrastructures and sustainable community development

Discussions focused mainly on definite commitments of the partners to upgrade the overall living conditions of the Quebec First Nations members, regardless of their place of residency.

It is during this forum that the FNEC concluded an agreement with the Minister of Indian and Northern Affairs Canada at the time, the Honourable Jim Prentice. The agreement provided funding for the FNEC to conduct a

⁴⁰ Standards are described as 3rd level above.

⁴¹ Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, Volume 3 (Ottawa: 1996).

⁴² FNEC (unpublished). Presentation to the Standing Committee on Aboriginal Affairs and Northern Development.

study on the needs of second-level services (support services to First Nations schools), services which do not benefit from any kind of federal funding, and a commitment to collaborate in the implementation of those services based on results of the study.

The FNEC undertook several consultations and workshops with its member-communities, in order to get their input in regards to their needs for second-level services. Subsequently, FNEC's final report entitled: *FIVE-YEAR PLAN FOR REINFORCING A FIRST NATIONS EDUCATIONAL SYSTEM BY IMPLEMENTING ESSENTIAL SERVICES IN SUPPORT OF THE FNEC MEMBER COMMUNITIES* was completed in September 2008.

The Five-Year Plan provided for a collaborative process towards the implementation of said services, from Year 0 (2008-2009) to Year 5 (2013-2014) for the benefit of First Nations communities. The support services to be covered comprised:

- Accountability
- Pedagogical/instructional support services
- Post-secondary program management support
- Human resource management and professional development
- School and system management support
- Technology
- Research and development
- Representation and implementation strategy
- Operations and maintenance – FNEC secretariat
- Creation of a First Nations post-secondary institution

The document was presented to Associate Assistant Deputy Minister Christine Cram and Mrs. Kathleen Keenan, Education Director, at INAC Headquarters. Upon submission of the Five-Year Plan, INAC's response was:

“Congratulations on your good work... which helps us to understand your needs... unfortunately, we cannot follow up on it, because the only funding available is for our two new programs.”

Unfortunately, in spite of the many accolades and commitment of their Minister AANDC Officials made it very clear that the Five-Year Plan could not be funded, the only availability for federal funding being under the First Nations Student Success Program (FNSSP) and the Education Partnerships Program (EPP). Consequently, for the FNEC, we are obligated to again refer to the Five-Year Plan, and update it, in terms of the second-level services funding needs.

b. FSIN APECT Model

The FSIN is currently involved in a three-year project, the Action Plan on Education in the Context of Treaty (APECT). The goal of APECT is to support and further develop Saskatchewan First Nations education Systems, guided by the Treaty relationship, based on the principle of *Indian Control of Indian Education*. It will enhance and protect all First Nations languages and cultures and improve the quality of education and its outcomes for First Nations people living in Saskatchewan.

In APECT Phase I (2009-2010), five Traditional Elders Gatherings were held. A total of 96 Lakota/Dakota/Nakoda, Dene, Sauteaux/Anisnabek and Cree Elders shared their wisdom while speaking their own languages. Seven overarching themes emerged at these gatherings and serve to outline the foundational requirements for a strong and effective First Nations Education Structure.

APECT Elders' Gatherings Seven Common Themes

1. Holistic Life-long Learning is the Key to Self-sufficiency
2. Relationship with Languages
3. Relationship with Spirit
4. Relationship with Community
5. Relationship with all First Nations Language Groups
6. Relationship with the Land and Natural World
7. Relationship between First Nations knowledge and Western Knowledge

APECT Focus:

- First Nations Control of First Nations Education
- Increased retention & graduation rates
- Increased First Nations language access, immersion & support programs
- Increased traditional knowledge and linkages to the western world
- Increased engagement, self-esteem and confidence in youth

Currently, APECT is creating the first drafts of the APECT Action Plan and First Nations Education Model and collecting feedback from education stakeholders at meetings with Tribal Councils and Independent First Nations.

Second-level services are currently being offered by First Nations tribal councils, education authorities, and regional management organizations which are supported by proposal programs. It is clear that First Nations see the need for these services and in some cases have been using core funding to provide them since the 1980s. First Nations schools in Saskatchewan are not stand alone schools that can only get services from the province. In spite of low and unstable funding they have and are developing expertise in serving the needs of their students. What needed is adequate and sustainable funding to allow these organizations to meet the needs as identified by the schools

they serve. Some may opt for partnerships with provincial school divisions such as Saskatoon Tribal Council and other will continue to develop their own services as is being done by Treaty 4 through FNSSP, File Hills Qu'Appelle Tribal Council, Northwest Nations Education Council, Battlefords Agency Tribal Council, Meadow Lake Tribal Council, and others. First Nations are working to support successful outcomes for their students; they just need to be adequately resourced for the work they are currently engaged in and the work they know needs to be completed in the future. It is not conducive for long range strategic development if educators' programs are dependent on decisions made by a federal department of predominantly unqualified non-educators. Canadians and provinces would not allow non-educators to be the ones making decisions on their child's education, so why is this acceptable for First Nations students?

As well, Saskatchewan approved by resolution at the May 29, 2007 Legislative Assembly of Chiefs Treaty Implementation principles. Saskatchewan First Nations will ensure that the following Treaty Implementation Principles are integrated into the further development of the First Nations Education model. The Treaty Implementation Principles are;

1. We, the First Nations, come from *Mother Earth*, and this determines our relationship with nature, our role as stewards of this land, and all forms of life and our sovereignty.
2. We, the First Nations, *occupied* North America as sovereign Nations long before other people came to our shores.
3. We, the First Nations have always made our own *laws, institutions and jurisdiction*, which reflects our cultures, values and languages.
4. Our sovereignty enables us to enter into Treaty and other political *accords* with other Nations.
5. The *Royal Proclamation of 1763* affirmed our sovereignty, institutionalized the Treaty-making process, and made our consent a condition before our lands and resources could be alienated.
6. First Nations and the Crown *affirmed* each other's sovereignty in the Treaty process.
7. Our *sovereignty will continue forever* and will continue to *define* our nationhood forever.
8. Our Treaty has *international stature*.
9. The *spirit and intent* of the Treaty relationship is more valid than the written text and will last "as long as the sun shines, the rivers flow and the grass grows."
10. Canada has an on-going obligation to fulfill the Treaty according to the Spirit and Intent.

This year APECT will be revising the First Nations Education Model based on this feedback and presenting it to the Education stakeholders for further feedback until it satisfies the collective requirements of the 74 First Nations and independent First Nations, yet is flexible enough to allow each First Nations to meet their unique cultural and language needs.

c. NAN Education Policy Framework

NAN acts as a coordinating and lobbying body for education. In NAN territory there are seven Tribal Councils delivering services in various areas of activity to their communities. In addition to this there are a number of second level education services organizations. The First Nations in NAN have determined what their needs are and have mandated the development of services in existing organizations, and the development of new organizations as required. Today the existing organizations work both independently and in partnership in meeting the needs of member First Nations.

The Political Territorial Organizational (PTO) funding that NAN receives has not been increased from its core budget for at least ten years, if ever. As well, the funding coming from the New Paths Education program may sunset when the Education Authorities are renewed. Such an unpredictable funding makes it hard for a long-term sound management.

The PTO, Tribal Councils and Education Service organizations in NAN all require core funding, that is stable and adequate to meet the needs of member First Nations, including the costs of delivering services to isolated and remote First Nations.

Some of our Conclusions

Again we come to the conclusion that behind the federal government's refusal to fund the regional First Nations organizations, despite an official recognition of the policy *Indian Control of Indian Education* in 1973, and the numerous studies recommending it, there predominates a hidden agenda toward integration into the structures of the dominant society.

Moreover, the threat that additional funding will be granted only to organisations that sign a tripartite agreement with the federal and provincial governments, is a clear demonstration of a strategy of forced integration and assimilation, which goes against the *Right to Free and Informed Consent*, as protected under the *United Nations Declaration on the Rights of Indigenous Peoples* (article 19).

Recommendations

- 6. That the federal government officially recognize the expertise of First Nations regional organizations such as the FNEC, FSIN and NAN, and fund them based on their needs assessments and action plans to implement second and third-level services with the intention of improving First Nations Education systems.**

- 7. That the federal government recognize the right of First Nations to sign bipartite as well as tripartite agreements on a Nation-to-Nation basis without the threat of being subject to an unacceptable status quo if they do not sign such agreements. This right is considered an Inherent and Treaty Right, and is also recognized under the United Nations Declaration on the Rights of Indigenous Peoples.**

JURISDICTION

INTRODUCTION

Education is a right of all peoples. All peoples, including Indigenous peoples, have an education system based on their customs, traditions, laws, and norms, which they transmit to future generations. For thousands of years prior to the arrival of non-Indigenous peoples, children were educated according to those norms. With the colonization of the “Americas”⁴³, Indigenous peoples’ education systems have been denied and subsumed under the colonizers’ system. As the late John C. Mohawk wrote about colonization and role of the colonizer state in the destruction of the education system of Indigenous peoples:

[Colonizer States’] stated goal was the eradication of the Indigenous nations as nations by eroding all of the elements that make a distinct people a people: their history, their languages, their laws and customs. It took quite a while and a lot of boarding schools, missionaries, and corrupt public officials but the process - being colonized - has had an impact. When an individual loses his or her memory, they cannot recognize other people, they become seriously disoriented, and they don’t know right from wrong. Sometimes they hurt themselves. Something similar happens when a people become colonized. They can’t remember who they are because they are a people without a common history. It’s not that they don’t have a history, it’s just that they don’t know what it is and it’s not shared among them. Colonization is a kind of spiritual collapse of the nation. This is one result of a colonial education based on canonical “great books” texts. Indigenous peoples’ histories and cultures are not in those texts, and the life of the nation is not there, either.⁴⁴

Canada cannot infringe Indigenous peoples’ inherent rights and jurisdiction over education or alter its treaties with Indigenous peoples without their free, prior and informed consent. Valid consent cannot be manufactured. The damaging, paternalistic approach that Canada has taken for so long regarding the education of Aboriginal peoples can no longer be countenanced. It is in this light that the National Panel on Education is analyzed. Given the National Panel’s limited mandate and engagement process, it is incapable of discharging the Crown’s constitutional obligation towards Indigenous people regarding education. It is now well established in international and Canadian law that Indigenous peoples’ rights and jurisdiction cannot be validly and unjustifiably infringed by administrative processes.

⁴³ The use of the term “America” is an example of the colonization process. America is not a word in indigenous languages. It comes from an Italian explorer whose name was put on the whole of “newly- found” worlds – now called North, Central and South America.

⁴⁴ John C. Mohawk, 23 January 2004, *Indian Country Today*.

THE CONSTITUTION ACT, 1867 AND 1982 - CONSTITUTIONAL OBLIGATIONS AND RESPONSIBILITIES

Section 91 (24) of the Constitution Act, 1867

Section 91 (24) of the *Constitution Act, 1867* vests all legislative authority regarding “Indian, and Lands reserved for the Indians” in the federal government. As a result, despite the provinces’ legislative authority over education pursuant to s. 93, the education of Aboriginal peoples in Canada is a matter of federal jurisdiction.

The purpose of s. 91 (24) was to safeguard the interests of Aboriginal peoples by continuing the general policy that was established by the *Royal Proclamation*. Aboriginal peoples and their lands were defined as exclusively federal responsibilities because it was assumed that the more distant level of government, the federal government, would be more likely to protect Aboriginal peoples against the interests of the local population, which were represented by the provinces.⁴⁵ Thus, as the Supreme Court of Canada affirmed in *Delgamuukw*, the federal government is vested with “primary constitutional responsibility for securing the welfare of Canada’s Aboriginal peoples”⁴⁶.

Canada’s responsibility to secure the welfare of Aboriginal peoples must include an obligation to ensure that Aboriginal peoples have access to relevant and effective educational services. The spirit and intent of s. 91 (24) make clear that, in order to ensure the protection of Aboriginal culture and interests, these educational services should be distinct from those provided by the provinces to the general population. Distinct but equivalent. Every individual has the right to equal benefit of the law without discrimination based on race or ethnic origin.⁴⁷ Aboriginal people have a right to access educational services on par with those offered to Canadians at large, and the federal government has a constitutional obligation to ensure that such services are provided.

Section 35 of the Constitution Act, 1982

It was the result of extensive lobbying by Indigenous peoples in England and Canada that there were certain sections that were inserted into the Constitution – including subsections 25 and 35 of the *Constitution Act, 1982*. Section 35 of the *Constitution Act, 1982* recognizes and affirms “existing Aboriginal and treaty rights”. This section in the *Constitution Act* was a hard section to have included in the Constitution. Indigenous peoples fought for the section. The Courts have attempted to give life to the section when the governments have refused to act. In one of the first cases to reach the highest court in Canada, *R. v. Sparrow*⁴⁸, the Supreme Court of Canada looked at the significance of section 35. *Sparrow* determined that:

- *the “general guiding principle” for section 35 is that “the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.*

⁴⁵ *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, 1909 at 118; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf, (Toronto: Carswell, 2011) at 27-2

⁴⁶ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 176

⁴⁷ *Canadian Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

⁴⁸ *R. v. Sparrow*, [1990] 1 SCR 1075

*The relationship between the government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship”;*⁴⁹

- *“the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the [infringing] legislation or action in question can be justified”;*⁵⁰
- *“[t]he justificatory standard to be met may place a heavy burden on the Crown,”*⁵¹ *while inquiries such as whether the infringement has been minimal, whether fair compensation has been available, and whether the affected Aboriginal group has been consulted may also be included in the justification test.*

In *R. v. Van der Peet*⁵², the Supreme Court of Canada commented that the doctrine of Aboriginal rights exists, and is recognized and affirmed by section 35(1), because of one simple fact:

*When Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact ... above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.*⁵³

In the 2005 *Haida* case, the Supreme Court of Canada wrote that the honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing". Treaties serve to reconcile **pre-existing Aboriginal sovereignty** with **assumed** Crown sovereignty, and to define Aboriginal rights guaranteed by section 35.

The Supreme Court of Canada in *Haida* also affirmed the Crown’s duty to consult, accommodate, and seek the consent of Aboriginal people. The source of the duty to consult is the honour of the Crown. The Court explained that it is the honour of the Crown that underlies all dealings with Indigenous peoples:

The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example R. v. Badger, [1996] 1 S.C.R. 771, at para. 41; R. v. Marshall, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

⁴⁹ *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108

⁵⁰ *R. v. Sparrow*, [1990] 1 SCR 1075 at 1114

⁵¹ *R. v. Sparrow*, [1990] 1 SCR 1075 at 1119

⁵² *R. v. Van de Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.).

⁵³ *R. v. Van de Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.) at para. 30

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown": Delgamuukw, at para. 186, quoting Van der Peet, supra, at para. 31.⁵⁴

There is no real analysis of the scope of the honour of the Crown in the judgment, but it is clear that the Court will not countenance government acting towards Indigenous peoples in a way that the Court regards as dishonourable.

In the *Taku*⁵⁵ case, the Supreme Court of Canada wrote:

The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

Since *Haida* and *Taku River* were released, the Federal Court of Appeal has released a judgment summarizing the scope of the honour of the Crown principle, concluding with this statement of principle:

[W]ith respect to the honour of the Crown, the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest.⁵⁶

The Supreme Court of Canada's decision in *Mikisew Cree*⁵⁷ decided on the meaning of the duty under a **treaty**. In that case, it was Treaty number 8. The Supreme Court's decision balanced governments' need to manage lands and resources in the broader public interest with proper consideration of impacts on treaty rights in government decision-making processes. The Supreme Court found that, because the taking up of the lands at issue in the case adversely affected the First Nations' treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making its decision. As Parks Canada had failed to do so, the Supreme Court set aside the Minister's approval of the winter road, and sent the matter back to the Minister for reconsideration

⁵⁴ *Haida Nation v. British Columbia (Ministry of Forestry)*[2005] 1 C.N.L.R. 72 (S.C.C.) at para. 19

⁵⁵ *Taku River Tlingit First Nations v. British Columbia (Project Assessment Director)*, [2005] 1 C.N.L.R. 366 (S.C.C.).

⁵⁶ *Canada v. Stoney Band*, 2005 FCA 15 at para. 18

⁵⁷ *Mikisew Cree First Nations v. Canada (Minister of Canadian Heritage)*, [2006] 1 C.N.L.R. 78 (S.C.C.).

in accordance with the decision. In the case of the National Panel on Education, the Minister is not making any effort to deal with the treaty promise of education, thereby frustrating the treaties' spirit and intent.

Other section 35 Court rulings containing relevant, generally applicable principles include *R. v. Adams*⁵⁸ (1996) in which the Court found that, “[i]n light of the Crown’s unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights ... in the absence of some explicit guidance.”

In *Delgamuukw*⁵⁹, the Court ruled that the degree to which the fiduciary duty requires scrutiny of infringing measures varies according to the nature of the Aboriginal right at issue. In the context of Aboriginal title, the Court expanded in particular upon the Crown’s obligation to consult affected Aboriginal group(s), finding that the consultation “must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue.”⁶⁰ *Delgamuukw* also stated that under section 35, “the Crown is under a moral, if not a legal, duty to enter into and conduct ... negotiations [with Aboriginal peoples] in good faith.”⁶¹

Governments’ duty to consult with Aboriginal people and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. The Crown cannot cavalierly run roughshod over Indigenous interests, whether established or asserted. Decisions affecting Aboriginal rights and interests must be based on full and meaningful consultation and accommodation.

FIRST NATIONS’ INHERENT RIGHT TO EDUCATION

First Nations’ inherent rights are the continuation of pre-existing systems of Aboriginal law – including customs, institutions, and cultural practices exercised in the form of Indigenous peoples’ sovereignty or self-governance. These rights existed prior to International laws, and they encompass rights the Courts have defined as Aboriginal rights and title, including the right to exercise self-government. They also encompass Aboriginal peoples’ rights connected to their culture, spirituality, language, and social dynamic (see section *International Rights*).

Inherent rights are provided constitutional protection as Aboriginal rights under s. 35 of the *Constitution Act, 1982*, but that is not their source. Aboriginal rights arise not only from the prior occupation of the land by Aboriginal peoples,⁶² but also from their self-determination which necessarily includes the exercise of jurisdiction.⁶³ As stated by

⁵⁸ [1996] 3 S.C.R. 101.

⁵⁹ *Delgamuukw v. The Queen*, [1998] 1 C.N.L.R. 14 (S.C.C.).

⁶⁰ *Delgamuukw v. The Queen*, [1998] 1 C.N.L.R. 14 (S.C.C.) at para. 168

⁶¹ *Delgamuukw v. The Queen*, [1998] 1 C.N.L.R. 14 (S.C.C.) at para. 186

⁶² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 74 [emphasis added].

⁶³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 30; also *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 48, for the principle that s. 35 (1) did not create the legal doctrine of Aboriginal rights; *Constitution Act, 1982*, ss. 35(1) and 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, C. 11; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

George Erasmus and Joe Sander, “[i]t is a matter of historical record that before the arrival of Europeans [...] First Nations possessed and exercised absolute sovereignty over what is now call the North American continent.”⁶⁴ The existence of “pre-existing Aboriginal sovereignty” was recognized by the Supreme Court of Canada in *Haida*,⁶⁵ and the on-going exercise of Indigenous peoples’ right to self-determination is recognized by international law as the paramount right of all peoples.⁶⁶ The exercise of self-determination entails the governance of First Nations’ lands and peoples by their laws and traditions.

There is a large body of law from the Commonwealth countries, including the Supreme Court of Canada that recognizes that Aboriginal legal systems and legal institution that existed prior to the assertion of European sovereignty have survived and co-exist with the common law.⁶⁷ As the Supreme Court stated in *Mitchell*, “Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights”.⁶⁸ Unless these rights were incompatible with Canada’s sovereignty or extinguished, “the practices, customs and traditions that defined the various Aboriginal societies as distinctive cultures continued as the part of the law of Canada.”⁶⁹ In contrast with the Court’s tests for Aboriginal rights, Aboriginal peoples do not need to prove that their laws exist as “customary laws are presumed to continue” in the common law.⁷⁰ Further, the Supreme Court has confirmed that these laws continue even in the absence of formal recognition by colonizing powers.⁷¹

⁶⁴ George Erasmus and Joe Sanders, “Canadian History: An Aboriginal Perspective.” in Diane Engelstad & John Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord, Ontario: Anansi Press, 1992) 1 at 3.

⁶⁵ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 27, [2004] 2 SCR 511 at para. 20; see also *Calder v. British Columbia (Attorney General)* (1973), 34 D.L.R. (3d) 145 (S.C.C.) at 156, where Judson J. observed that “the fact is that when settlers came, the Indians were there, organized in societies and occupying their land as their forefathers had done for centuries.” See as well *Guerin v. R.*, [1984] 2 S.C.R. 335 and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1052-53, where the Supreme Court concluded that “both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.”

⁶⁶ “All peoples have the right to self-determination”: *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 1; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, art. 1 (entered into force 3 January 1976). Indigenous peoples’ right to self-determination is affirmed in UNDRIP, art. 3. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007).

⁶⁷ See for instance, *Te Weehi v. Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680 (H.C.) (New Zealand), *Mabo v. Queensland (No. 2)* (1992), 107 A.L.R. 1, 175 C.L.R. 1 (H.C.) (Australia) and *Calder v. British Columbia (Attorney General)* (1973), 34 D.L.R. (3d) 145 (S.C.C.) at 210 (*per* Hall J.).

⁶⁸ *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911 at para. 10.

⁶⁹ *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911 at para. 10.

⁷⁰ See Jack Woodward, *Native Law*, looseleaf, (Toronto: Carswell, 2011) at 2§80.

⁷¹ *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 33; see also *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 51.

Madam Justice McLachlin (as she was then) described the incorporation of indigenous legal rights and principles into the common law a “golden thread of continuity”, observing that:

*The history of the interface of Europeans and the common law with Aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs the Aboriginal peoples who occupied the land prior to European settlement.*⁷²

The legal basis for Aboriginal peoples’ right to self-government is their own. Its roots are in their sovereignty and on the continued existence of their legal systems. This is recognized by the common law. The Aboriginal right to self-government, “akin to a legislative power to make laws”, has survived as one of the unwritten “underlying values” of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867.⁷³ The jurisdiction lies outside the power given the federal government and provinces in ss. 91 and 92 of the *Constitution Act, 1867*, filling “gaps in the express terms of the constitutional scheme”.⁷⁴ “[T]here was room in the Canadian Constitution for Aboriginal governments to exist and to exercise inherent jurisdiction.”⁷⁵

The Aboriginal right to self-government is a constitutionally protected right. This was confirmed in *Campbell*, where Justice Williamson found that the Nisga’a retained a section 35 right to self-government and noted that if rights to “social self-regulation” had not been extinguished by 1982, “they perforce are constitutionally protected by s. 35.”⁷⁶ As part of finding that the Nisga’a right continued, Justice Williamson drew on the federal government’s 1995 policy statement, applicable to all Aboriginal peoples, which stated:

*The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. It recognizes, as well, that the inherent right may find expression in treaties...*⁷⁷

⁷² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 263, McLachlin J., dissenting. Although Justice McLachlin wrote a dissenting opinion in *Van der Peet*, her golden thread of common law recognition is compatible with the majority’s reasons. It is significant that Justice L’Heureux-Dubé also spoke of the doctrine of continuity in the context of a “dynamic right” approach to interpreting the nature and extent of Aboriginal rights, noting that “[t]his idea relates to the “doctrine of continuity” founded in British imperial constitutional law, to the effect that when new territory is acquired the *lex loci* of organized societies, here the Aboriginal societies, continues at common law” (at para. 173, dissenting on other points).

⁷³ *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), 189 DLR (4th) 333 at para. 81.

⁷⁴ *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), 189 DLR (4th) 333 at para. 68.

⁷⁵ Kent McNeil, “The Jurisdiction of Inherent Aboriginal Governments” (research paper for the National Centre for First Nations Governance, 2007) online at: National Centre for First Nations Governance, http://fngovernance.org/ncfng_research/kent_mcneil.pdf.

⁷⁶ *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), 189 DLR (4th) 333 at paras. 181 and 141.

⁷⁷ *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), 189 DLR (4th) 333 at para. 175, discussing Government of Canada, *Aboriginal Self-Government: the Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-*

First Nations hold the inherent right to exercise jurisdiction over education as an aspect of the Aboriginal right to self-government protected by s. 35. Jurisdiction over education rises in part from the right to education, which entails the right to make decisions on education, such as the control of traditional knowledge and the development of pedagogy, teaching methodologies and the rights of students and teachers. In *Campbell*, Justice Williamson concluded that where communities held the right to make decisions, they also have “the right to have a political structure for making those decisions”.⁷⁸

The inherent right to jurisdiction over education is also connected to the inherent rights to education and cultural identity and integrity. It cannot be disputed that the transmission of culture and knowledge, which lies at the heart of educational systems, is essential to the cultural survival of Aboriginal peoples. Nor can it be denied that Aboriginal peoples exercise control over their systems of education through their laws and institutions of governance. These rights are clearly inherent rights that would be recognized by the Courts as integral to their distinctive culture, a crucial step in proving the existence of the right.⁷⁹

First Nations have the inherent right to transmit and teach their culture, customs and traditions. As affirmed in *Cree School Board*, “[e]ducation is the instrument through which cultures perpetuate themselves”.⁸⁰ The Report of the Royal Commission on Aboriginal Peoples highlights the importance of passing on culture, observing that, “[t]he destiny of a people is intricately bound to the way its children are educated. Education is the transmission of cultural DNA from one generation to the next.”⁸¹

TREATIES AND THE RIGHT TO EDUCATION

This analysis will focus on the legal and constitutional rights of the treaty peoples. The right to education recognized in the treaties is two-fold. First, the treaties recognize the jurisdiction of First Nations over their own education in order to ensure the health and perpetuation of their cultures and societies. Second, the treaties recognize the Crown’s responsibility to provide First Nations with the knowledge and skills necessary for their societies to adapt to the Crown’s assertion of sovereignty and colonial settlement. These rights and responsibilities are affirmed by s. 35 of the *Constitution Act, 1982*. The basic tenants on which Canada was built – constitutionalism, the rule of law, the honour of the Crown, and reconciliation of the Crown’s assumption of sovereignty with First Nations’ pre-existing and continuing sovereignty – continue to oblige the Crown in right of the federal government to ensure that treaty First Nations have the means of providing their

Government (policy statement) online: Aboriginal Affairs and Northern Development Canada, <<http://www.ainc-inac.gc.ca/eng/1100100031843>>.

⁷⁸ *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), 189 DLR (4th) 333 at para. 137, explaining that the right to Aboriginal title in its full form includes the right to political structures for making decisions related to the land.

⁷⁹ See *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁸⁰ *Cree School Board v. Canada (Attorney General)*, [2002] 1 C.N.L.R. 112 at para. 96, citing I. James Quillen, “Problems and Prospects” in George D. Spindler ed., *Education and Culture: Anthropological Approaches* (New York: Holt, Rinehart and Winston, 1963) at 50.

⁸¹ *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996) at 433.

people with a culturally appropriate education equivalent with that received by any other Canadian citizen.

Pre-Confederation Treaties

Pre-confederation treaties signed by First Nations in the Maritimes and Quebec were treaties of peace and friendship. They recognized the mutual obligations of protection between the Crown and the First Nations signatories⁸², as well as the First Nations' continuing rights to the free exercise of their religion and customs⁸³, in particular their continuing right to harvest as they always had.⁸⁴ The Supreme Court of Canada has found that these treaties protect not only the rights that they explicitly recognize, but also the implied rights necessary to support the meaningful exercise of those explicit rights.⁸⁵ The right to trade fish has been found to include the right to fish⁸⁶; the freedom to carry on customs and religion has been found to include a territorial component⁸⁷; the right to hunt has been found to include the right to carry a gun⁸⁸. Similarly, the right to the free exercise of customs, religion, and traditional activities necessarily implies the right to cultural transmission, a right to education. "Education is the instrument through which cultures perpetuate themselves."⁸⁹ The Crown's recognition of the sovereignty of the First Nations who signed the first treaties should be understood to include recognition of their right to control their own education. The Crown's commitment to protect these First Nations should be understood to include a commitment to protect the efficacy of their education systems.

Following their victory over the French and their assumption of sovereignty over the lands that now comprise Canada, the British set out their duties towards the territory's Aboriginal peoples in the *Royal Proclamation of 1763*.⁹⁰ The *Royal Proclamation* constitutes instructions to British subjects on the manner of dealing with Indigenous peoples. One of the main purposes of the *Royal Proclamation* was to protect Aboriginal peoples from the unscrupulous dealings of settlers and local governments by ensuring that "lands reserved for Indians" could only be ceded to the Crown.⁹¹ British subjects were barred from occupying the lands of Indigenous peoples that were not treated for. The *Royal Proclamation* was a signal to other European powers of the obligations that Britain would discharge prior to encroaching on Indigenous peoples' territory.

⁸² See, for example, the Mi'gmaq-British Treaty of 1752 as confirmed in *Simon v. The Queen* [1985] 2 SCR 387; the Huron-British Treaty of 1760 as confirmed in *R. v. Sioui*, [1990] 1 SCR 1025

⁸³ See, for example, the Huron-British Treaty of 1760 as confirmed in *R. v. Sioui*, [1990] 1 SCR 1025

⁸⁴ See, for example, the Mi'gmaq-British Treaty of 1752 as confirmed in *Simon v. The Queen* [1985] 2 SCR 387 at paras. 26 & 68; the Mi'gmaq British Treaties of 1760-61 as confirmed in *R. v. Marshall*, [1999] 2 SCR 456 at paras. 35 & 56; the Treaty of Swegatchy between the British and the Algonquins as confirmed in *R. c. Côté*, 1993 CanLII 3913 (QC CA)

⁸⁵ *R. v. Marshall*, [1999] 2 SCR 456 at para. 44

⁸⁶ *R. v. Marshall*, [1999] 2 SCR 456 at paras. 35 and 56

⁸⁷ *R. v. Sioui*, [1990] 1 SCR 1025 at 1067

⁸⁸ *Simon v. The Queen* [1985] 2 SCR 387

⁸⁹ *Cree School Board v. Canada (Attorney General)* [2002] 1 C.N.L.R. 112 at para. 97

⁹⁰ George R., Proclamation, 7 October 1763 (3 Geo. III) reprinted in R.S.C. 1985, App II, No. 1.

⁹¹ *R. v. Sioui*, [1990] 1 S.C.R. 1025; Charlotte A., Bell. "Have You Ever Wondered Where s. 91(24) Comes From?: Or (for the erudite) The Content of s. 91 (24) of the *Constitution Act, 1867*" (2004/2005) 17 N.J.C.L. 285 at 287

Numbered Treaties (ref.: section Rationale for Presenting an Independent Report, Saskatchewan resolution 1771)

After Confederation, as a result of the requirements of the *Royal Proclamation of 1763* and the terms of admittance of Rupert's Land into the Dominion⁹², the Crown's representatives negotiated a series of treaties with the First Nations living on the lands whose waters drain into Hudson's Bay. These are the Numbered Treaties.

Education was a key issue in the negotiations of the Numbered Treaties. The elders and chiefs at the time realized that there were new people coming into their territories and wanted to learn as much as possible about the newcomers and their way of life. In the oral understanding, the education clauses of the treaties were intended to create reciprocal education systems. The Indigenous children would learn the ways of the non-Indigenous while the non-Indigenous would learn the ways of the Indigenous peoples. The negotiations were to ensure the survival of the First Nations for the future. The elders recognized that a key to that survival was education: education in both indigenous ways and non-indigenous ways.

Although the Numbered Treaties' terms vary, they all include explicit recognition of the First Nations signatories' right to education. This recognition is variously expressed in the written instruments as the Crown's promise to maintain a school on each reserve "whenever the Indians of the reserve should desire it"⁹³ or, in addition, whenever the Government of Canada may deem it advisable⁹⁴, or whenever the First Nations signatories settle on their reserves.⁹⁵ In other instances, the right to education is expressed as an agreement to pay teacher's salaries,⁹⁶ or, simply, to make provisions for the education of Indian children.⁹⁷

The education provisions in the Numbered Treaties are not to be interpreted in a strict and limited way. They must be interpreted in the sense that they would naturally have been understood by the First Nations at the time of signing; they must be understood in relation to the oral terms exchanged and agreed to during the treaty negotiations.⁹⁸ In concluding the Numbered Treaties, Canada committed to providing the signatory First Nations with the necessary means, whenever required, to ensure that they received an education equivalent to that given to non-Aboriginals in public schools. For example, in negotiating Treaty 3, Alexander Morris promised, "schools whenever any band asks for them, so that your children may have the learning of the white man."⁹⁹ In negotiating Treaty 6, Alexander Morris promised, "your children will be taught, and then they will be

⁹² *Rupert's Land and North-Western Territory Order* (June 23, 1870) (U.K.), Schedule A, reprinted in R.S.C. 1985, App. II, No. 9 at 8

⁹³ Treaty 1, Treaty 2

⁹⁴ Treaty 3, Treaty 5, Treaty 6

⁹⁵ Treaty 4

⁹⁶ Treaty 7, Treaty 8, Treaty 9, Treaty 11

⁹⁷ Treaty 10

⁹⁸ *R. v. Badger*, [1996] 1 SCR 771 at para. 52

⁹⁹ Hon. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based* (Calgary: Fifth House Publishers, 1880) at 58.

as well able to take care of themselves as the whites around them.”¹⁰⁰ In light of statements such as this, and in consideration of how these statements must have been received by the leaders of autonomous Indigenous nations in the 19th century, it is not surprising that Aboriginal elders “believe that the education rights negotiated at the treaties assured them free education at all levels and in perpetuity in return for the use of the land by newcomers.”¹⁰¹

This interpretation of the scope and extent of the treaty right to education has received approval in Canadian courts. In *Beattie v. Canada*, the Federal Court found that Treaty 11 guarantees its beneficiaries a constitutionally protected right to free education akin or equivalent to the education provided to non-Native children in the public school system.¹⁰² In *Greyeyes v. M.N.R.* the Crown recognized in a statement of agreed facts that money it provided to Ms. Greyeyes to fund her post-secondary education was given “pursuant to an agreement to assist band members in their education in compliance with the obligations of the Federal Government under Treaty No. 6.”¹⁰³ This constitutes admission by Canada before a court of law that its treaty education obligations include an obligation to fund post-secondary education.¹⁰⁴

However, it must be understood that by agreeing to the Crown’s promises to ensure that they receive a quality education, the First Nations signatories would not have understood themselves to be surrendering control over their education. Time and again, the treaty relationship being established was described metaphorically by the Crown’s representatives as akin to that of a parent, the Great White Mother, and her Indian children. In Cree society, for example, “the child has autonomy and freedom from the parents but the parents are obligated to provide aid in time of need.”¹⁰⁵ Thus, the First Nations signatories of the Numbered Treaties quite reasonably expected that the treaties guaranteed their autonomy, including autonomy over their education, while simultaneously securing the Crown’s aid and protection for that autonomy.¹⁰⁶ “The chiefs and headmen who signed the Numbered Treaties negotiated an education right complementary to their own Aboriginal teachings. Aware of the instructional practices of

¹⁰⁰ Hon. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based* (Calgary: Fifth House Publishers, 1880) at 213

¹⁰¹ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The True Spirit and Original Intent of Treaty 7* at (Montreal & Kingston: McGill-Queen’s University Press, 1996) at 302

¹⁰² *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 1 FC 104. Note that in this decision the court found that the treaty right to free education was confined to the treaty territory.

¹⁰³ *Greyeyes v. M.N.R.*, 84 D.L.R. (3d) 196 at 196 (F.C.T.D.)

¹⁰⁴ Vic Savino & Erica Schumacher, ““Whenever the Indians of the Reserve Should Desire It”: An Analysis of the First Nations Treaty Right to Education” (1991-1992) 21 Man L. J. 476 at 488

¹⁰⁵ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The True Spirit and Original Intent of Treaty 7* at (Montreal & Kingston: McGill-Queen’s University Press, 1996) at 302

¹⁰⁶ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The True Spirit and Original Intent of Treaty 7* at (Montreal & Kingston: McGill-Queen’s University Press, 1996) at 302

the newcomers, they sought to supplement their community educational practices with the linguistic and literary skills of the settlers.”¹⁰⁷

The education provisions of the Numbered Treaties were not implemented. Instead, the Crown “chose to provide limited educational services not as a treaty right, but as an assimilationist mechanism through its own criteria, the *Indian Act*.”¹⁰⁸ When the day schools failed to assimilate the Indigenous children, the federal government and various churches moved to establish residential schools. In violation of the treaty relationship, the state of Canada unilaterally imposed a system of education designed to destroy the First Nations and undermine the education of the Indigenous peoples. As Indigenous peoples were pushed to forget their rights, the state hoped to impose its own values and systems. To its dishonour, the Crown sought to take the Indian out of the child.

INTERNATIONAL RIGHTS

Indigenous peoples’ right to govern their own educational systems is confirmed in Article 14(1) of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which states that Indigenous peoples have the right “to establish and control their educational systems and institutions in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”¹⁰⁹ In a nutshell, international law recognizes First Nations’ inherent rights (see section on *First Nations’ Inherent Right to Education*).

This norm places an obligation on state governments to “recognize the right of [Indigenous] peoples to establish their own education institutions and facilities.”¹¹⁰ The *UNDRIP* affirms that Indigenous peoples, “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs”¹¹¹ and the right to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”¹¹² Education is “a fundamental aspect and a crucial tool”¹¹³ to Indigenous peoples pursuing the right to freely determine their political status and freely pursue their economic, social and cultural development¹¹⁴ and is necessary to Indigenous peoples’ realization of their full right to self-determination.

¹⁰⁷ Sheila Carr-Stewart, “A Treaty Right to Education”, (2001) Vol. 26, No. 2 *Canadian Journal of Education/Revue canadienne de l’éducation* 125 at 138

¹⁰⁸ Sheila Carr-Stewart, “A Treaty Right to Education”, (2001) Vol. 26, No. 2 *Canadian Journal of Education/Revue canadienne de l’éducation* 125 at 126

¹⁰⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 14(1). (emphasis added)

¹¹⁰ *International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, art. 27(3).

¹¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 4.

¹¹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 5.

¹¹³ Lorie Graham, “The Right to Education and the UN Declaration on the Rights of Indigenous Peoples” (2010), Suffolk University Law School Research Paper No. 10-61. Available at SSRN: <http://ssrn.com/abstract=1701913>.

¹¹⁴ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 1; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 1 (entered into force 23

Realizing the individual right to education is dependent on Indigenous peoples exercising jurisdiction over education in order to create and maintain culturally appropriate educational systems. The right to education is a fundamental human right proclaimed in the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*.¹¹⁵ Every Indigenous person, regardless of age, has the right to an education in the person's own language and culture.¹¹⁶ The right of Indigenous children to education is highlighted in both the *UNDRIP* and the *Convention on the Rights of the Child*¹¹⁷, which recognize both children's and communities' right to enjoy their own culture, practice their own religion, and use their own language.¹¹⁸ International norms affirm that Indigenous communities and families have a primary role in guiding the child's education.¹¹⁹ As recognized in the preamble of the *UNDRIP*, Indigenous families and communities have the right to retain "shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child."¹²⁰ These rights require an educational system based on indigenous cultural values and methods of teaching, as well as giving the student the opportunity to learn and speak their language.

Canada must provide adequate funding to indigenous educational systems to secure and protect Indigenous individuals' right to education without discrimination. The Committee on Economic, Social and Cultural Rights has observed that under international law, States have an "immediate obligation" to ensure that the right to education "will be exercised without discrimination of any kind."¹²¹ When Indigenous peoples exercise their right to control of their education system, Canada should provide indigenous educational institutions with the resources necessary to ensure that Indigenous students receive the same quality of education as students in non-indigenous schools. This is supported by Article 4 of the *UNDRIP*, which provides that Indigenous peoples have the right to "ways and means for financing their autonomous functions."¹²² In addition, states are obliged to

March 1976); *International Covenant on Economic, Social and Cultural Rights*, art. 1 (entered into force 3 January 1976).

¹¹⁵ The right to education is enshrined in the *Universal Declaration on Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948), 71 at art. 26; *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, art.13 (entered into force Jan. 3, 1976).

¹¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), arts.14(1), 14(2).

¹¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 14(1); *United Nations Convention of the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, art. 28(1). Under article 28(1) of the *United Nations Convention of the Rights of the Child*, ratified by Canada in 1991, State parties confirm they "recognize the right of the child to education".

¹¹⁸ *United Nations Convention of the Rights of the Child* 20 November 1989, 1577 U.N.T.S. 3, art. 30.

¹¹⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007); *United Nations Convention of the Rights of the Child* 20 November 1989, 1577 U.N.T.S. 3.

¹²⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), Preamble.

¹²¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art.13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

¹²² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 4.

“take effective measures, in order for Indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”¹²³

The Committee on Economic, Social and Cultural Rights has elaborated on states’ responsibilities that arise out of the right to education, observing that under international law “States have obligations to respect, protect and fulfill each of the “essential features” (availability, accessibility, acceptability, adaptability) of the right to education.” The Committee specified that the obligation to fulfill includes ensuring “the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and Indigenous peoples” and taking “positive measures that enable and assist individuals and communities to enjoy the right to education.”¹²⁴

At the national level, Canada’s continuing obligation to protect Indigenous peoples’ rights and interests, to ensure their welfare and to honour the treaties, was affirmed by Lord Denning in the High Court of the United Kingdom prior to the repatriation of the Canadian Constitution:

*“There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. **No Parliament shall do anything to lessen the worth of these guarantees.** They should be honoured by the Crown in respect of Canada ‘as long as the sun rises and the river flows’. The promise must never be broken.”¹²⁵*

In light of section 35 of the *Constitution Act, 1982*, Aboriginal peoples’ treaty rights to education continue to exist and to bind the Crown. In *Sparrow*, the Supreme Court of Canada held that treaty rights protected by s. 35 could only have been extinguished by legislation passed prior to 1982 that demonstrates a “clear and plain intention” to extinguish such rights.¹²⁶ Since 1982, treaty rights are constitutionally protected and can only be extinguished by further treaty between the Indigenous people holding those rights and the Crown. Since 1880, there has been federal legislation regarding First Nations that includes references to education. “These provisions, while regulating the provision of education to a small extent, certainly do not serve to extinguish the right in accordance with the test set out in *Sparrow*.”¹²⁷

¹²³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 14(3) [emphasis added].

¹²⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art.13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 at paras. 47, 50.

¹²⁵ *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta [1982] QB 892*

¹²⁶ *R. v. Sparrow*, [1990] 1 SCR 1075

¹²⁷ Vic Savino & Erica Schumacher, “‘Whenever the Indians of the Reserve Should Desire It’: An Analysis of the First Nations Treaty Right to Education” (1991-1992) 21 Man L. J. 476 at 495

The continuing validity of the treaties made between the Crown and Indigenous people is also recognized by international law. When the Constitution was repatriated, the elders were not convinced that Canada could be trusted. There was a lobby for a study on treaties within the international community of Nations. The result of the ten-year study¹²⁸ by Dr. Alfonso-Martinez is summarized in the following key paragraphs on the relevance of the treaties within the international community.

75. Yet, Indigenous peoples justly attach considerable importance to the recognition, promotion and securing of their collective rights, that is, their rights as social groups. Equally, they seek the possible establishment of international mechanisms for the resolution of conflicts with State authorities, in particular, in connection with the rights recognized in, or acquired by means, of instruments with acknowledged international status, such as treaties.

76. Consequently, the Special Rapporteur has already expressed the view that Indigenous peoples, although they may constitute numerical minorities in a number of the countries in which they now live, are not "minorities" in accordance with United Nations usage and for the purposes of possible practical action on the part of the organization. By the same token, ethnic and/or national minorities are not to be considered "Indigenous peoples" in the United Nations context.

270. This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with Indigenous nations currently continue to be instruments with international status in the light of international law.

*271. The Special Rapporteur is of the opinion that **those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.***

*272. The legal reasoning supporting the above conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. **Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void.** This is a notion that has been deeply ingrained in the conceptual development, positive normativity and consistent jurisprudence of both municipal and international law since Roman Law was at its zenith more than five centuries ago, when modern European colonization began.*

*273. As a result of his research, the Special Rapporteur has ample proof that Indigenous peoples/nations who have entertained treaty relationships with non-Indigenous settlers and their continuators strongly argue that those instruments not only continue to be valid and applicable to their situation today **but are a key***

¹²⁸ E/CN.4/Sub2/1999/20.

element for their survival as distinct peoples. All those consulted - either directly in mass meetings with them or in their responses to the Special Rapporteur's questionnaire, or by direct or written testimony - have clearly indicated their conviction that they indeed remain bound by the provisions of the instruments that their ancestors, or they themselves, concluded with the non-Indigenous peoples.

As the above analysis demonstrates, Canada's treaties with Indigenous peoples impose continuous and existing constitutional obligations to respect Indigenous peoples' right to control their own education and to ensure that the education treaty peoples receive is equivalent in quality to that provided to non-Aboriginal children in public schools.

Free, Prior, and Informed Consent (ref.: section Rationale for Presenting an Independent Report, Saskatchewan resolution 1771)

First Nations' peoples have an internationally recognized right for their free, prior and informed consent, which is promoted by various United Nations agencies in dealing with Indigenous peoples.¹²⁹ These United Nations agencies have indicated that information to be given to Indigenous peoples must include: the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the activity; the duration of the activity; the locality of the areas that will be affected; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; the personnel likely to be involved in the execution of the project; and, the procedures that the project may entail. In addition, the communities should be informed of their rights and the duties of the state. The information has to be provided in the appropriate language and in a culturally appropriate way. The most successful engagement efforts have used a combination of small groups and community-wide sharing sessions.

CANADIAN LAW AND THE DUTY TO CONSULT

The most succinct and direct explanation of Canadian law regarding First Nations consultation is found in the ruling of the Supreme Court of Canada in *Haida*.¹³⁰ The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Aboriginal and treaty rights are communal in nature and cannot be transferred or assigned to an incorporated body. Canada has the legal obligation to respond to the inherent and treaty rights of Indigenous peoples.

There is always a duty on the Federal Crown to consult with First Nations where Aboriginal or treaty rights are or may be affected prior to any action being taken by government. The nature and scope of the duty of consultation will vary with the

¹²⁹ United Nations: Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues. International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005)

¹³⁰ *Haida Nation v. British Columbia (Ministry of Forestry)* [2005] C.N.L.R. 72 (S.C.C.).

circumstances.¹³¹ The duty to consult is a constitutional right: it cannot be overridden by statute. A statute can provide for the duty to consult, but it must provide for the same level and content of consultation as required by the courts, or the legislation will be unconstitutional.¹³² This applies to an attempt to enact legislation on the rights of education of Indigenous children.

First Nations have an inherent right to Education and this right was reaffirmed during Treaty negotiations and again with the publishing of *Indian Control of Indian Education* in 1972, and repeatedly ever since. The Crown's duty to consult Aboriginal people is triggered whenever it has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it.¹³³ Crown conduct, in this sense, includes higher-level strategic decisions.¹³⁴ Even if Parliament does not have a duty to consult before adopting legislation, an issue that the Supreme Court of Canada has thus far declined to address,¹³⁵ the duty to consult still falls on study groups assigned the task of developing the policy behind legislation or making recommendations concerning future policies and actions.¹³⁶ The National Panel is mandated to develop options, including legislation, to improve elementary and secondary education outcomes for First Nations children who live on reserve. It is clear that the National Panel process has triggered the Crown's duty to consult First Nations regarding their inherent and treaty rights to education.

Whether the Crown's duty to consult a First Nations lies at the low or high end of the spectrum, the Crown must consult with the goal of substantially addressing the First Nations concerns.¹³⁷ The FNEC, the FSIN and the NAN have made it abundantly clear that the First Nations they represent are concerned with their need to exercise and implement their inherent and treaty rights to control their own education with the necessary assistance of the federal government. First Nations' treaty and inherent rights are only mentioned in the National Panel's terms of reference in a non-derogation clause, an acknowledgement that the National Panel will not consider these rights or the First Nations' concerns. Given the National Panel's narrow mandate, its work cannot possibly satisfy the Crown's duty to consult First Nations in considering new policy or legislation that would affect First Nations' rights and jurisdiction over education. As a result, any recommendations the National Panel may issue will not only be ill-informed, but constitutionally deficient.

¹³¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168

¹³² *Ka'a'Gee Tu First Nations v. Canada (Attorney General)*, 2007 FC 763 at para. 121

¹³³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at para. 35; *Halfway River First Nations v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) at para. 133

¹³⁴ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 44

¹³⁵ "We leave for another day the question of whether government conduct includes legislative action", *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 44

¹³⁶ *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137 at para. 55; *R. v. Lefthand*, 2007 ABCA 206 at para. 39

¹³⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at para. 42; *Mikisew Cree First Nations v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 67

SOME OF OUR CONCLUSIONS

Underlying Assumptions

In all of the National Panel supporting documents, there is no reference to the inherent rights or jurisdiction of First Nations' peoples. Consequently, there is no recognition of the legal rights of the treaty peoples. There is a constant reference to the government which is not the First Nations peoples' government. Downgrading the First Nations peoples' jurisdiction to management of the education system that is part of a provincial educational system is to undermine the right of First Nations peoples. It is a Eurocentric value that you can manage everything including the education systems of Indigenous peoples. It is a violation of First Nations peoples' laws. In fact, it is an oxymoron. Education includes all the living and non-living, and is the responsibility of First Nations peoples for the future generations. First Nations peoples are the caretakers of their territory. First Nations peoples can make decisions for the future.

It must be clear that statements made by individuals to the National Panel do not necessarily represent First Nations' position on inherent and treaty rights or the education of First Nations' members.

Furthermore, we are in the opinion that the AFN does not have the authority or mandate to convene a Panel, conduct consultation or make recommendations in regards to the development or implementation of legislation on behalf of First Nations students, parents, educators or First Nations education systems;

1969 White Paper Moving Towards Assimilation

In 1969, Canada issued a policy paper known as The White Paper.¹³⁸ There was a backlash against the paper from all First Nations peoples. The Government of Canada stated that they were going to shelve the paper. However, the colonial state of Canada never stated that it was going to stop the implementation of the goals and aspiration of the state as set out in the White Paper. It might be useful to review some of the language used in 1969:

It cannot be accepted now that Indians should be constitutionally excluded from the right to be treated within their province as full and equal citizens, with all the responsibilities and all the privileges that this might entail. It is in the provincial sphere where social remedies are structured and applied, and the Indian people, by and large, have been non-participating members of provincial society.

Canadians receive a wide range of services through provincial and local governments, but the Indian people and their communities are mostly outside that framework. It is no longer acceptable that the Indian people should be outside and apart. The Government believes that services should be available on an

¹³⁸ Presented to the First Session of the Twenty-eighth Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development. Published under the authority of the Honourable Jean Chrétien, PC, MP Minister of Indian Affairs and Northern Development Ottawa, 1969 Queen's Printer Cat. No. R32-2469

equitable basis, except for temporary differentiation based on need. Services ought not to flow from separate agencies established to serve particular groups, especially not to groups that are identified ethnically.

Separate but equal services do not provide truly equal treatment. Treatment has not been equal in the case of Indians and their communities. Many services require a wide range of facilities which cannot be duplicated by separate agencies. Others must be integral to the complex systems of community and regional life and cannot be matched on a small scale.

It is important to keep the stated objectives of the White Paper in mind while reviewing the work of the National Panel and make sure it will not lead to the implementation of the 1969 White Paper.

The final proposal, which is for the elimination of special status in legislation, must be relegated far into the future. It will be time enough to stress its importance when the many more urgent and material problems of Indians are significantly reduced. If pressed on question we should respond to the effect that the Government considers the elimination of special status to be ultimately desirable, but it is not about to force the issue now.

Thus my conclusion is that we need not change the policy content, but we should put varying degrees of emphasis on its several components and we should try to discuss it in terms of its components rather than as a whole. I have suggested that we should adopt somewhat different tactics in relation to policy, but that we should not depart from its essential content.

[Transcript of a memo on the White Paper from David A Munro, Assistant Deputy Minister, dated April 1, 1970 - first two paragraphs of p. 10]

An Act to Provide Jurisdiction over Education

In December 2006, the Parliament of Canada enacted legislation to allow for the jurisdiction of education on First Nations lands in British Columbia. In effect, the Parliament of Canada allowed the province of British Columbia to have jurisdictional say over the schools and curriculum on federal Indian reserves. The purpose of the legislation as it is set out under Article 4 is to enable First Nations to agree to the provincial jurisdiction. In order for the jurisdiction to be effective, and the law to apply, the First Nations and the federal government must enter into individual contribution agreements. It is clear that the federal government is attempting to change the constitutional jurisdiction by moving a key component of Indian lands under the federal system of the Indian Act to the province. It is the thin edge of the wedge being used by the federal government to implement the White Paper Policy of 1969. The federal legislation at this time is targeting the province of British Columbia – it would be a simple amendment to make the legislation effective across the country as the federal system can use the contribution agreements on funding to implement the scope of the legislation. It would be a simple amendment at the federal level since the legislation has been in place since 2006. There does not appear to be any major issues that have been raised in the last five years about

the legislation and its implementation. It might be appropriate to determine how the board that was created in British Columbia is operating. A board receiving funding takes away from the First Nations and the relationship to the treaties. There are few treaties in British Columbia. The legislation in British Columbia which is companion legislation to the federal legislation makes reference to treaty First Nations. The creation of the National Panel at the federal level appears to have the mandate to look only at the reserve schools and how the provincial standards can be applied to those schools. There is a mistaken assumption operating in this regard. The issue is not the lack of compliance with the provincial government standards. It is that the inherent and treaty rights have been ignored. Legislation merely takes away the inherent and treaty rights rather than implement the spirit and intent of the treaties. There is no reference in the National Panel to look at the treaties and their implementation.

Tripartite Agreements & Jurisdiction over Education

The constitutional jurisdiction over and responsibility for First Nations education cannot be altered by administrative agreements.

First Nations' jurisdiction over education flows from their inherent, Aboriginal rights. These are *sui generis* rights, collectively owned by the Aboriginal community. They are not transferable.¹³⁹ The federal government's responsibility for First Nations education flows from s. 91 (24). "The Dominion cannot give jurisdiction, or leave jurisdiction, with the province."¹⁴⁰ Thus, while the federal and provincial governments can legally enter into agreements in which the provinces undertake to perform duties that would otherwise have fallen on the federal Crown, the ultimate authority over and responsibility for the performance of those duties will always be the federal Crown's, regardless of the terms of the agreement.¹⁴¹ Tripartite agreements may be useful administrative tools in ensuring the delivery of educational services, but they cannot alter the parties' constitutional responsibilities.

The federal government must recognize First Nations' legal rights and the government's constitutional responsibilities. The federal government must put an end to their coercive tactics and provide First Nations with the resources and the respect that First Nations have the experience, knowledge and right to provide students with what they need to be educationally successful. An example of the federal government's coercive tactics is witnessed in the correspondence directed to First Nations from the federal government. On December 23rd, 2010 a letter to President Tyrone McNeil of the FNESC from Christine Cram and Patrick Borbey of INAC stated:

It is proposed that First Nations operating under the Indian Act could either continue to receive funding under the current model or, alternatively, elect to participate in the new approach. If the latter, improved funding would be made

¹³⁹ Jack Woodward, *Native Law*, looseleaf, (Toronto: Carswell, 2011) at 13§270

¹⁴⁰ *C.P.R. v. Notre Dame de Bonsecours* [1899] A.C. 367, as quoted by Lefroy in *Canada's Federal System*, 1913, p. 70 note 10(a)

¹⁴¹ Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented, (Thomson Carswell: Toronto 2008) at 14-26

*available under tripartite education agreements designed to formalize the tripartite relationship between Canada, British Columbia and First Nations.*¹⁴²

These statements are viewed as coercive due to the fact that First Nations education funding has been capped at 2% since the late 1980s and the federal government is keenly aware of the chronic underfunding they have continually provided. Therefore the provision of new and improved funding being contingent upon First Nations engaging in a tripartite agreement is certainly a coercive tactic. It is unacceptable for the federal government to force their educational agenda upon First Nations through their underhanded tactics. It is unethical to continually provide chronic underfunding of educational programs and services and expect First Nations to provide a quality education based on draft programs and chronic unsustainable funding and resources.

Therefore, discrimination by forcing schools and regional organizations to remain funded based on an unacceptable status quo unless they accept to adhere to a tripartite agreement which will give them access to a new funding formula or method constitutes a violation of the Canadian Charter of Rights and Freedoms. It also constitutes a violation of the international right of First Nations and especially that of free and informed consent and a violation of their inherent and treaty rights.

Mandate of the National Panel

The mandate of the National Panel was established through an agreement between the Minister of AANDC and the AFN. The AFN had no mandate from the Chiefs to create such a Panel. The AFN attempted to get such a mandate at their annual general assembly held in Moncton, New Brunswick in mid-July.

The participation in any meetings on the National Panel cannot be seen or used as consultations by Canada or the proponents of the Panel. Despite having no mandate, the Panel has begun hearings. It appears from the limited reports on the first efforts of the Panel that it is to focus on selected First Nations during the critical summer months when the schools are closed and parents are on holidays with their children. The Panel was to report by the end of September, however due to the election there was a delay and final report will be completed by late 2011. The schedule is designed to ensure the maximum effect of having no real or substantive discussions. It is stage managed to the point of selected questions to the members of the Panel and limited access of press questions. The First Nations inherent and treaty rights holders were not consulted or involved in the establishment of the Panel.

It is clear from establishment of the Panel that the Minister did not consult with the First Nations inherent and treaty peoples for their view of the structure of the Panel. The discussions took place with the AFN, an organization that is not an inherent and treaty rights holder. There was no effort on the part of the Minister or his staff to talk to treaty peoples for their input. It was not part of the criteria. The Minister of the Crown did not insist on the honour of the Crown being upheld in order to respect their legal obligations.

¹⁴² Correspondence

There was no consideration of the treaties prior to the establishment of the Panel. The members of the Panel were appointed by the Government of Canada to answer specific questions raised by the project. They are on the Panel in their individual capacity and do not have any mandate from the treaty rights holders. There is no reference in any of the materials on the treaty right to education – it is merely an administrative exercise according to the Government of Canada’s PR machine. All treaty peoples know that there is more at stake than the surface statements of the Minister or the National Chief.

RECOMMENDATIONS

The following are a series of recommendations that would support First Nations education systems. Both the federal and provincial governments along with First Nations have a role to play and a responsibility to act now. First Nations students, parents and communities have waited far too long and continuously experience profound inequalities in the area of education. The time is to act now and listed below are a series of recommendations that must be supported and enacted upon;

- 8. The federal and provincial governments must respect First Nations’ inherent rights, authorities, processes, experience and ability to educate their children. This lack of respect afforded to First Nations education is evident in the extent of resolutions, recommendations, position papers, studies and research reflecting First Nations’ positions on education that have never been followed up on, which is the direct result of continuous assimilation policies (see *First Nations Education Timeline – Linda Cree, AFN, A Work in Progress* in appendix).**
- 9. The federal and provincial governments must support First Nations to deal with the primary issue confronting First Nations education which is the chronic underfunding of First Nations education systems.**
- 10. Federal and provincial governments must respect and engage First Nations’ political, educational and community processes if a true transformational change is to occur in education.**
- 11. First Nations have adopted resolutions at the community, regional and national level to endorse and support the document entitled *First Nations Control of First Nations Education*. This document has numerous recommendations that must be implemented if First Nations students, parents and communities are to fully participate in their education.**
- 12. Federal and provincial governments must understand and respect the legal rights of First Nations such as the free, prior and informed consent, as recognized under the *United Nations Declaration on the Rights of Indigenous Peoples*, to address inherent and treaty rights. Any legislation that will be developed without free, prior and informed consent will be subject to challenge.**

- 13. That all federal law and policy regarding education for Aboriginal people be based on the explicit acknowledgement of Aboriginal peoples' inherent and treaty rights and jurisdiction over education.**
- 14. That the Government of Canada recognize First Nations peoples' inherent jurisdiction over their own education by, as soon as practicable, entering into Nation-to-Nation negotiations with the view of transferring the governance, management, and administration of educational services to First Nations' communities that wish assume these responsibilities.**
- 15. That the Government of Canada recognize First Nations Peoples' inherent and treaty education rights to education pursuant to the *United Nations Declaration on the Rights of Indigenous Peoples* and that current federal laws and policies be reviewed and, where appropriate, amended to ensure that they do not infringe or adversely affect the exercise of these rights.**
- 16. That the Government of Canada recognize and fulfill its treaty obligation to provide education, contained in the texts, documents, and oral histories of the treaties, by supporting a full range of educational services, including post-secondary education.**
- 17. The AFN National Chief, the Minister of Aboriginal Affairs and Northern Development Canada, and the Government of Canada must work hard to collaborate to achieve and implement the First Nations' vision and policy implementation recommendations outlined in the document *First Nations Control of First Nations Education*.**
- 18. That the Government of Canada recognize that its constitutional obligation to ensure First Nations peoples' welfare includes the obligation to ensure that First Nations peoples have access to educational services of at least equivalent quality to those provided in the public school systems of the provinces and that federal policies and funding formulas be amended to ensure that this is the case.**
- 19. That no federal legislation regarding the education of First Nations peoples be developed or enacted without the consent of the Aboriginal peoples concerned.**
- 20. That all parties – including First Nations, provincial schools, and the federal government – that allocate and receive education funding for First Nations students be transparent and accountable to First Nations communities.**