



Analysis:

Bill C33 – First Nation Control of First Nation Education

Context: the status quo and forty years of effort to achieve change

To conduct an analysis of current efforts in advancing First Nation Education, it is important to first recall what currently exists in Canadian law under the **Indian Act**. At present the Minister has absolute and sole authority over every aspect, including outdated and highly objectionable authorities from the residential school era.

Moreover, under current systems, there is no recognition of First Nation language and First Nation culture, arbitrary funding allocations on an annual basis as well as restrictions and regulations imposed through contribution agreements. Further, such funding allocations have been subject to caps and cutbacks for the past 15 years and beyond. First Nation children have no right to education or access to fairness and opportunity in Canadian law. This status quo is absolutely and fundamentally contrary to Treaty, inherent and human rights and must change.ⁱ

Successes achieved in First Nation education over the past forty years have been *despite* these incredible challenges and have been achieved thanks to the dedication of First Nation educators. Where we see increased graduation and achievement in all aspects including language and culture, it is thanks to the leadership and determination of Nations or regions to move out of the **Indian Act** through agreements, Acts, advancing Treaty implementation and other initiatives on their own terms.

Let us look to international instruments to appreciate the broader context and responsibilities and obligations for Canada set out in key conventions and declarations to which Canada is signatory. This year, 2014 marks the 25th anniversary of the **United Nations Convention on the Rights of the Child**. Article 28 recognizes the right of the child to education with a view to achieving this right on the basis of equal opportunity. The **United Nations Declaration on the Rights of Indigenous Peoples** sets out that States and Indigenous peoples are to work in *mutual respect and partnership* to achieve standards. With regard to education – Indigenous peoples must have access to schools consistent with language, cultures and values, and Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages and cultures. Let us look at Article

13 of UNDRIP, “ Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons”. Many First Nations are currently undergoing this transformation and reclamation. For example, on December 31, 2013 the name of the Hobbema community was changed to Maskwacis (Bear Hills), the original name. The return of the name to the traditional one is a demonstration of resilience and the incremental steps required to achieve change.

Background: consistent vision for over forty years

Beginning in 1972, First Nations engaged a formal conversation with Canada to advance a vision of First Nations control of First Nations Education (FNCFNE). Canada responded by affirming the policy paper, Indian Control of Indian Education and assured it was committed to realizing the goals outlined. In 1998, Canada provided a Statement of Reconciliation and committed to renewal and to take an opportunity to correct wrong doings and to move forward to cooperative relationships. This was to be an essential step in building trust.

Canada formally acknowledged past failures in First Nation education through the historic Statement of Apology - June 2008 - and committed to advancing a new beginning to move forward together, with First Nations, on the basis of reconciliation and partnership.

The renewal of the Crown-First Nations relationship, including the recognition and implementation of inherent and Treaty rights is essential to re-building trust. Dedicated action to recognize and implement First Nation Treaty and rights is needed across all sectors as well as meaningful dialogue to support First Nation economic, social, and education outcomes.

The education of our children is a fundamental and sacred responsibility and duty of our Nations. First Nations are resolved to resume our responsibility fully to First Nation education. While our ways, our rights and our responsibilities were pushed aside by the federal government in the residential school era, we are resolved to achieve this better day for our children now.

As reflected in 1972 – the core values of First Nations regarding education remain the foundation of change and advancement now:

“We want education to give our children the knowledge to understand and be proud of themselves and the knowledge to understand the world around them. We believe in education: as a preparation for total living as a means of free choice of where to live and work; and as a means of enabling us to participate fully in our own social, economic, political and education advancement.”

First Nations advance the centrality of our jurisdiction and responsibility to shape our children as First Nation citizens through education based in on our history, culture, values, spirituality, language and traditional knowledge.

Current Status and Mandate

First Nations have continually affirmed our right, responsibility and jurisdiction to control education. There has been consistent and dedicated advocacy and support to move forward commitment and investments to make First Nation control a reality. This work requires a combination of a national effort as well as regionally and locally directed efforts and understanding of respective roles.

Most importantly, we have worked together over several years and have arrived at a place that can truly support and enable First Nations to drive the work forward, drive it at a local level. Every First Nation must have a full range of opportunity and options including:

- to determine their vision, laws, policies in relation to education,
- to determine options for First Nation education systems through working with other First Nations potentially as part of broader nation-building efforts or within existing arrangements with provincial systems,
- to advance self-government agreements or legislation or to advance a treaty implementation approach enabling a Treaty system and recognition by Canada, and;
- to advance existing or new Memorandums of Understandings (MOU's) or other regional agreement processes to develop and enable First Nation education systems.

Guiding Documents and Announcements:

- First Nations Control of First Nations Education (1972 – re-affirmed in 2010)
- Resolution 21/2013 – Outlining the Path Forward : (1) rejected the federal proposal for First Nations Education Act (FNEA) of October 2013, (2) set five clear conditions for First Nation control of First Nation education, and (3) directed that all necessary steps be taken to advance this advocacy and outcomes
- February 7, 2014 - Federal announcement committing to the outlined conditions in Resolution 21/2013 for First Nation control and committing to new investment to close gaps, end the 2% cap, and to build schools and systems
- Canada's response - Bill C-33: First Nation control of First Nation education

The February 7th federal announcement signalled we are in a moment of opportunity, and that there is significant work ahead to ensure First Nations Control of Education supported through enabling legislation. This work requires dialogue and community identification of FNE and it involves all levels of First Nations participation with particular emphasis on the work in the regions. The tabling of Bill C-33 is an important and necessary first step in terms of identifying and putting in place requirements and obligations of the federal government; such requirements must be carefully considered by all First Nations to ensure that regions and individual First Nations are fully engaged in driving forward the development of regulations as well as other options to achieve First Nations control.

Interpretative Clauses

Bill C -33 Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for related funding and to make related amendments to the Indian Act and consequential amendments to other Acts.

The Bill begins with a title, purpose and preamble or interpretative clause that sets the overall scope and intent of the Bill. These sections contain references that directly reflect statements from Indian Control of Indian Education (1972) and commits Canada to a new approach of recognition and affirmation of First Nation control as the guiding principle for change.

These sections also contain references to language and culture, confirm that education must be child-centred, affirms the critical role of parents and families, and, provides an acknowledgement that K-12 is important but, only part of, the lifelong learning continuum.

Whereas the Government of Canada, in its Statement of Apology on June 11, 2008 to former students of Indian residential schools, acknowledged past failures in the field of First Nations education and committed to moving forward in partnership with First Nations in a spirit of reconciliation;

Whereas the Government of Canada recognizes the importance of quality, child-centred education for the success of First Nations children;

Whereas First Nations education systems should be designed and implemented in accordance with the principle that First Nations have control of their children's education;

Whereas First Nations must receive support that enables them to exercise their rights and fulfil their responsibilities relating to the elementary and secondary education provided to their children;

Whereas First Nations children attending schools on reserves must have access to education that is founded on First Nations history, culture and traditional values and enables them to participate fully in the social, economic, political and educational advance

Whereas First Nations children attending schools on reserves must have access to elementary and secondary education that allows them to obtain a recognized high school diploma and to move between education systems without impediment;

Whereas parents and families of First Nations students must have the opportunity to play a meaningful role in the academic success of their children and to ensure that their children receive a quality education that is culturally appropriate;

Whereas First Nations education systems must receive adequate, stable, predictable and sustainable funding that provides for the teaching of First Nations languages and cultures as well as for education support services;

Whereas elementary and secondary education is an essential part of lifelong learning;

Whereas the Government of Canada and First Nations must have ongoing and meaningful dialogue with respect to the continuous improvement of education outcomes for First Nations children;

*And whereas the Government of Canada acknowledges the protection provided for existing Aboriginal or treaty rights of the Aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982;**

*This statement above combined with non-derogation clause below are important in relation to respecting Aboriginal and Treaty rights. It is important to ensure that the references made in the preamble are supported throughout the bill.

Purpose

3. The purpose of this Act is to provide for the control by First Nations of their education systems by enabling councils of First Nations to administer schools situated on their reserves, to delegate that power to First Nation Education Authorities or to enter into tuition or administration agreements in accordance with this Act

The purpose of the Bill sets out the overall scope and intent and, all aspects must be therefore consistent with the stated purpose. By 'providing for the control' and also acknowledging that First Nations can delegate 'that power', these important statements affirm First Nation control of First Nation education. This is not delegation but rather, enabling recognition of First Nation control that includes the power to delegate or enter into agreements. ICIE in 1972 pressed for the direct relationship between the First Nations (Bands) and the federal government.

Non-derogation – Aboriginal and Treaty Rights

4. For greater certainty, nothing in this Act is to be construed so as to abrogate or derogate from the protection provided for existing Aboriginal or treaty rights of the Aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.

5. This Act does not apply to (a) a First Nation that has the power to make laws with respect to elementary and secondary education under an Act of Parliament or an agreement relating to self-government that is given effect by an Act of Parliament, including a First Nation that is named in the schedule to the Mi'kmaq Education Act or the schedule to the First Nations Jurisdiction over Education in British Columbia Act; or (b) the Sechelt Indian Band established by subsection 5(1) of the Sechelt Indian Band Self-Government Act.

This provision exempts self-government agreements under acts of Parliament.

ACCESS to First Nation education

The next section requires that all First Nation children have access to a First Nation school and sets out standard provisions in terms of school age and access. While these provisions are largely what is currently required under contribution agreements or tuition agreements – these provisions do recognize ability of First Nation to make adjustments pertaining to their circumstances.

7. (1) The council of a First Nation must, in accordance with this Act, provide access to elementary and secondary education to any person who is ordinarily resident on a reserve of the First Nation and who is between the ages of six and 21 years.

*(2) If the council of a First Nation establishes an education program for persons who are four or five years of age and who are ordinarily resident on a reserve of the First Nation, the program must be offered to all such persons. (3) The education provided by virtue of subsection (1) must enable a student to obtain (a) a certificate or diploma issued by the Minister of Education of a province; (b) an International Baccalaureate diploma issued by the International Baccalaureate foundation; or (c) any equivalent graduation certificate or diploma approved by the Minister.**

*This matter requires further consideration as First Nations should set the criteria for what an equivalent graduation certificate or diploma could be and possibly there is a role here for the Joint Council of Education Professionals.

Following the tabling of a proposed Bill in October 2013 and its subsequent rejection, First Nations were very clear that unilateral authority of the Minister was completely unacceptable and not consistent with the principle of First Nation control. As a transition step, it has been recognized that support and assistance with capacity development will be required as First Nations develop education authorities and/or self-government, other agreements or acts including Treaty implementation.

The proposed Joint Council of Education Professionals is, in part, a response to First Nations insistence on reciprocal accountability. Working together, the members of the Council will support First Nations control of their education. We have seen in other areas in recent years that Joint Councils have been established with regard to the implementation of regional management boards and authorities.

For certain, the most important element is that the JOINT COUNCIL be established with sufficient independence and legitimacy through a clear and open nomination process. It is important to ensure the council is co-chaired by a First Nation education professional and that First Nation appointments of other First Nation education professionals are linked directly to First Nation decision-making processes. The JOINT COUNCIL must also report and advise both First Nations and the Government of Canada on a regular basis, this ensures ongoing meaningful dialogue.

The JOINT COUNCIL is anticipated to have an important role in ensuring First Nation involvement in the proposed regulatory process. A clear and confirmed plan for this involvement as well as access points for direct First Nation engagement is required.

Minister Bernard Valcourt has formally invited the development of a political protocol with the Assembly of First Nations on this matter. Political protocols between Canada and First Nations have been used in recent efforts including the establishment and operation of the Aboriginal Healing

Foundation, the effort to establish the Specific Claims Tribunal as well in regions such as in the British Columbia Health Accord. In addition, a political protocol has been suggested specifically with regards to education by regions, notably Ontario in January 2014.

There are several options and considerations with regard to the Joint Council that includes pressing for clearly distinct regional components of the regulatory work and, designated regional representation to ensure that regional variation is fully respected.

Governance

The next section describes basic functions relating to the operation of a school that a First Nation will prepare including setting an annual budget, school success plans, education programs and school policies. There is no Ministerial oversight of these functions, rather they are described as part of education governance by the First Nation. This section also includes First Nation language as a language of instruction in addition to English and French. Based on interpretations comparing other statutes dealing with education – the reference ‘language of instruction’ confirms immersion programming in a First Nation language.

*Subject to the regulations, the council of a First Nation is to offer English or French as the language of instruction and may, in addition, * offer a First Nation language as a language of instruction.*

The council of a First Nation may, as part of an education program, give students the opportunity to study a First Nation language or culture.

*There have been questions raised regarding the inclusion of “in addition” of First Nation language of instruction as First Nations want to ensure that this is inclusive of First Nation language immersion. It is important to note that in a letter to all First Nations on April 15, 2014, the Minister states that Bill C-33 “legally supports the incorporation of First Nations language and culture programming in the education curriculum, **including the ability to administer immersion in a First Nation language...**”.

First Nation delegating power to a ‘responsible authority’ or education system

First Nation control of First Nation education has always insisted on the need to build and develop second and third level First Nation education services. Bill C-33 recognizes this power and authority of First Nations and sets a process where this is enabled. The ongoing role of the Minister and the Joint Council as well as what is required through regulation must be carefully considered to ensure respect to regional and provincial variation. Under section 48 (4), variation is contemplated: “*the regulations may vary from province to province*”. This section will require careful consideration to ensure regional diversity.

The council of a First Nation may, by written agreement, delegate its powers and functions...to a body corporate incorporated under federal or provincial legislation if the agreement meets the conditions set out in the regulations.

After seeking the advice of the Joint Council, the Minister may, subject to the regulations, revoke a designation if the agreement is no longer in compliance

Compliance with Act

39. (1) *If a school is the subject of a report submitted under subsection 38(2) that identifies problems of non-compliance with the requirements under this Act, the responsible authority administering the school must ensure that measures are taken to remedy those problems.*

(2) *After seeking the advice of the Joint Council, the Minister may require the responsible authority to employ a special advisor to provide advice on the development and implementation of the measures referred to in subsection (1).*

40. (1) *After seeking the advice of the Joint Council, the Minister may appoint a temporary administrator to administer a school for a specified period... (if Minister does not receive report, that there is significant problems of non-compliance and if immediate action is required due to significant risk to student well-being)*

It is acknowledged that education and provision of schools clearly require rigorous oversight for safety and outcomes for students. The objective should be to have that oversight provided by First Nation authorities - with the support and capacity building required through First Nation education entities and/or the Joint Council whenever possible. Consideration is required to ensure Ministerial and departmental involvement is limited or eliminated wherever possible.

Statutory Guarantee of Funding

First Nations have consistently demanded a statutory guarantee for fair funding for their schools. Bill C-33 is the first time that the obligation of the Canadian government to fund First Nation education has been confirmed and at a rate that is comparable to regions sharing the same geographic and demographic characteristics. In addition, Canada must also fund language and culture programming. Exact funding allocations will be set through regulatory development which must be done in a cooperative process directly with First Nations. The \$1.9 billion budget commitment in the 2014 budget is a key component with the intention that such additional investment will close existing gaps in funding and, create a stable funding transfer relationship that is no longer reliant on annual contribution arrangements. Furthermore, the funding will no longer be subject to a 'cap' but rather a 'reasonable rate of growth' similar to transfer payments between federal and provincial governments starting at 4.5%. Through funding projections as demonstrated in AFN's funding fact sheet released after the Federal Budget – annual contributions for First Nations governments will have grown to \$2 billion annually by 2012-22, an increase of \$800 million from current funding and it will be annualized. Additional amounts, beginning in January 2015 secured through Federal Budget 2014 include \$500 million for infrastructure and \$160 million for transition and systems development.

43. (1) *The Minister must pay to a responsible authority, in respect of each school year and at the time and in the manner prescribed by regulation, the amounts determined in accordance with the methods of calculation established in the regulations for providing access to elementary or secondary education in accordance with this Act.*

(2) *The methods of calculation must allow for the provision under sections 32 and 33 of services to each First Nation school and to persons referred to in section 7 attending such a school that*

are of a quality reasonably comparable to that of similar services generally offered in a similarly sized public school that is regulated under provincial legislation and is located in an analogous region.

(3) For the purposes of subsection (2), an analogous region means a region that is in the same province as the First Nation school in question and whose geographic and demographic characteristics are similar to those of the region in which that school is located.

(4) The amounts payable under subsection (1) must include an amount to support the study of a First Nation language or culture as part of an education program.

Review

49. *(1) The Joint Council must, five years after the day on which section 21 comes into force and every five years after that, undertake a review of the provisions and the operation of this Act and the regulations. (2) In carrying out the review, the Joint Council must give First Nations an opportunity to make representations and must consider fully any representations made. (3) The Joint Council must, no later than one year after the day on which the review is undertaken, submit to the Minister a report on its review. (4) The Minister must cause the Joint Council's report to be tabled in each House of Parliament.*

AFN has received comments that the reciprocal relationship and accompanying accountability between Canada and First Nations evidenced through the Joint Council should be reflected through an independent report to parliament without edit from the Minister.

Repeal of Indian Act provisions

All provisions referenced in the context section of this analysis (sections 114- 122) will be permanently deleted by Bill C-33 - ending unilateral Ministerial control of First Nation education in law. This provision also means that the Minister no longer has any power to place First Nation children in residential or other schools.

Next Steps - Conclusion

Recalling that local control, parental responsibility and sufficient funding were called for in 1972 as a response to the abhorrent conditions that First Nation children were exposed to and forced to participate in through residential school systems – moving forward to resume First Nation control remains a paramount need.

Bill C-33 is enabling legislation which means that much detail will be in regulation. Bill C-33 states that the Joint Council must ensure that First Nations are engaged in this process. This next step will be critical – First Nations are very diverse and have distinct needs, circumstances and approaches.

Bill C-33 provides for transition to local control and increased funding that is guaranteed. As well, it recognizes and puts in place the requirement that First Nation languages and cultures will be part of a First Nation education system.

Bill C-33 does not replace nor does it create any barrier to Treaty implementation, self-government and self-determination. Through increased resources and support, Bill C-33 creates a transition to these steps as directed and advanced by First Nation citizens and their leaders.

Based on the foregoing analysis and summary charts, Bill C-33 is a constructive and necessary step supportive of the goals expressed by First Nations for control, respect for Treaty and Aboriginal rights, recognition of language and culture and a clear statutory guarantee for fair funding. Details associated with reciprocal accountability including the Joint Council, joint regulation development, and further clarity on the ongoing meaningful dialogue are important matters which may be addressed through the proposed political protocol between First Nations and Canada - and must now be considered by all First Nations.

ⁱ Indian Act: 114. (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with (a) the government of a province [or territories]; a public or separate school board; and (e) a religious or charitable organization.(2) The Minister may establish, operate and maintain schools for Indian children. 115. The Minister may (a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools;(b) provide for the transportation of children to and from school;(c) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations; and (d) apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school 116. (1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.... 118. Every Indian child who is required to attend school shall attend such school as the Minister may designate. 119. (1) The Minister may appoint persons, to be called truant officers, to enforce the attendance of Indian children at school, and for that purpose a truant officer has the powers of a peace officer. ..., a truant officer may enter any place where he believes, on reasonable grounds, that there are Indian children who are between the ages of seven and sixteen years, or who are required by the Minister to attend school;(b) investigate any case of truancy; and(c) serve written notice on the parent, guardian or other person having the care or legal custody of a child to cause the child to attend school regularly thereafter. (2.1) Where any place referred to in paragraph (2)(a) is a dwelling-house, a truant officer may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (2.2). Where on ex parte application a justice of the peace is satisfied by information on oath(a) that the conditions for entry described in paragraph (2)(a) exist in relation to a dwelling-house,(b) that entry to the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and(c) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry thereto will be refused, the justice of the peace may issue a warrant under his hand authorizing the truant officer named therein to enter that dwelling-house subject to such conditions as may be specified in the warrant. (2.3) In executing a warrant issued under subsection (2.2), the truant officer named therein shall not use force unless he is accompanied by a peace officer and the use of force has been specifically authorized in the warrant. (3) Where a notice has been served in accordance with paragraph (2)(c) with respect to a child who is required by this Act to attend school and the child does not within three days after the service of notice attend school and continue to attend school regularly thereafter, the person on whom the notice was served is guilty of an offence and liable on summary conviction to a fine not exceeding five dollars or to imprisonment for a term not exceeding ten days or to both. (4) Where a person has been served with a notice ... whenever that person within the period of twelve months fails to cause the child with respect to whom the notice was served or any other child of whom he has charge or control to attend school and continue in regular attendance as required by this Act, that person is guilty of an offence and liable to the punishment (5) A child who is habitually late for school shall be deemed to be absent from school.(6) A truant officer may take into custody a child whom he believes on reasonable grounds to be absent from school contrary to this Act and may convey the child to school, using as much force as the circumstances require.