



First Nations and Encounters with Federal Legislation in Education

In 1972 the National Indian Brotherhood (NIB) issued "Indian Control of Indian Education" (ICIE) which was seen as a response to a federal White Paper issued in 1969 which proposed the elimination of First Nations peoples in law and to reverse years of federally imposed education experiments. ICIE affirmed the pride and identity of First Nations peoples:

The time has come for a radical change in Indian education. Our aim is to make education relevant to the philosophy and needs of the Indian people. We want education to give our children a strong sense of identity, with confidence in their personal worth and ability. We believe in education:

- *as a preparation for total living,*
- *as a means of free choice of where to live and work,*
- *as a means of enabling us to participate fully in our own social, economic, political and educational advancement.¹*

ICIE was an articulation of the right of First Nations to educate First Nations people. The paper noted:

What we want for our children can be summarized very briefly:

- *to reinforce their Indian identity,*
- *to provide the training necessary for making a good living in modern society.*

We are the best judges of the kind of school programs which can contribute to these goals without causing damage to the child.

We must, therefore, reclaim our right to direct the education of our children. Based on two education principles recognized in Canadian society: Parental Responsibility and Local Control of Education, Indian parents seek participation and partnership with the Federal Government, whose legal responsibility for Indian education is set by the treaties and the Indian Act. While we assert that only Indian people can develop a suitable philosophy of education based on Indian values adapted to modern living, we also strongly maintain that it is the financial responsibility of the Federal Government to provide education of all types and all levels to all status Indian people, whether living on or off reserves.²

¹ Indian Control of Indian Education – Policy Paper Presented to the Minister of Indian Affairs and Northern Development by the National Indian Brotherhood/Assembly of First Nations, 1972, pp. 2

² Ibid., pp 1

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The federal government at the time accepted the principle of First Nations control by enabling the building of First Nations schools across the country and taking steps for communities to manage and operate schools. However, overall financial and policy decisions have remained in the hands of the federal government to the present day.

Verna J. Kirkness, one of the authors of *Indian Control of Indian Education*, provided the following reflection on this state of affairs:

The most serious problem arises from the lack of legislation (Cardinal, 1977). The Indian Act provides no legal basis for the transfer of education from the control of the Minister of Indian Affairs to Indian Bands. It authorizes the Minister to enter into agreements with public or separate school boards, provincial/territorial governments, religious or charitable organizations, but not with Indian Bands. The present authority allowing Indian Bands to administer education funds derives from various Treasury Board authorities, covering a range of educational and student support services, which extend from kindergarten to postsecondary school programs.

These problems are all directly related. If we examine the authority used to accommodate the policy of Indian Control of Indian Education, it reveals that the lack of legislation enabling the Minister to transfer control of education to Indian Bands, prevents the implementation to occur as it should. This fact relates directly to funding as well as the problem of dual administration. It explains why the concept of Indian Controlled Schools by the Indian people became known to the Department of Indian Affairs as Band Operated schools. Controlling and operating are two entirely different concepts. To control is to have power over, to exercise directing influence, whereas to operate means to manage or to keep in operation. It is predictable that the difference in perception would lead to misunderstanding and impede the direction of the policy.³

First Nations educator Dr. Rose-Alma McDonald summarized First Nations perspectives on the current federal framework for First Nations education:

The greatest concern of First Nations is that they are only operating their schools: control which includes the development of First Nations standards is still attached to the federal government. INAC still controls the funds for educational programming and there is no legislation to recognize either the legal transfer of authority to First Nations or their inherent right..... The result

³ Verna J. Kirkness, *Aboriginal Education in Canada: A Retrospective and Prospective*, *Journal of American Indian Education*, Vol 39, #1, Fall 1999, Special Issue 2

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is that in essence First Nations have been given the right to control the management of their education systems within parameters established and monitored by the federal government.⁴

The education sections of the current Indian Act (s. 114-122) remain virtually unchanged from 1951, the era of residential schools. First Nations children from the age of six to eighteen are required to attend school. The key sections are 114 and 115. Section 114 enables the federal government to "...establish, operate and maintain schools for Indian children" and to make agreements with provinces, territories and religious institutions for the education of First Nations children. Notably there is no provision for entering into agreements with First Nations for the education of First Nations children. Section 115 enables the federal government "to provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools." Current, and longstanding, federal policy requires First Nations schools to deliver a provincial curriculum by provincially certified teachers.

In reviewing the Indian Act provisions, First Nations educator Diane Longboat concluded:

In short, there is nothing in the Indian Act that could give a community any leverage in gaining control over its education....Legally, control is concentrated in one person: the Minister of Indian Affairs and Northern Development. There is no right of appeal or review...

...What some Indian groups have proposed instead is a separate piece of legislation that would recognize the rights of Indian communities and their governments to take control of education; it would contain a recognition of their jurisdiction – their right to make laws in respect of all aspect of education. This "enabling legislation" would place Canada in a position to negotiate administrative and funding arrangements on a "government-to-government" basis, much as it does today in agreements with provincial governments under Section 114.⁵

In 1988 the Auditor General of Canada raised concern about the existing framework for First Nations education: "Through enabling legislation Parliament confers on a Department an obligation to do certain things. In the absence of enabling legislation, as is the case for

⁴ Dr. Rose-Alma J. McDonald: "Standards for Quality Education: Towards a Framework for Affective and Effective Schools in a First Nation Environment," in Manifesto for First Nations Education, Chiefs of Ontario, April, 2005

⁵ Dianne Longboat: *First Nations Control of First Nations Education – The Path to Our Survival as Nations* in Barman, Jean, Hebert, Yvonne, and McCaskill, Don: Indian Education in Canada – Volume 2 – The Challenge, University of British Columbia Press, Vancouver, 1987, pp. 32-33

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*the above services to Indians, DIAND's obligations are not defined and therefore it cannot be held accountable to Parliament.*⁶

Twenty-three years later, in 2011, the Auditor General noted *"The federal government has often developed programs to support First Nations communities without establishing a legislative or regulatory framework for them. Therefore, for First Nations members living on reserves, there is no legislation supporting programs in important areas such as education, health, and drinking water. Instead, the federal government has developed programs and services for First Nations on the basis of policy. As a result, the services delivered under these programs are not always well defined and there is confusion about federal responsibility for funding them adequately."*⁷ Clearly there are structural issues to be addressed.

In 1988 the Assembly of First Nations released "Tradition and Education – Towards a Vision of Our Future," the conclusion of a multi year study of First Nations education. This led the Chiefs in Assembly to unanimously adopt a "Declaration of First Nations Jurisdiction Over Education." An extensive document, the Declaration clearly affirmed that First Nations have the right to control their education and called for action by the federal government to address existing legislation:

First Nations demand that the Government of Canada vacate the field of administering First Nations education. First Nations call for radical reform of the Indian Act, repeal of all sections that promote paternalism, full recognition of federal obligations to resource First Nations education, and the establishment of a Ministry of State for First Nations Relations as recommended in the "Penner Report" to deal with First Nations on a government-to-government basis... The development of any new legislation affecting the processes and procedures required to implement the government-to-government relationship between First Nations and the Government of Canada must involve the full participation and sanction of the First Nations in accordance with the Indigenous and Tribal (Peoples/Populations) Convention (Revised), 1989.

Legislation should create the mechanism for the Government of Canada to relate to the sovereign First Nations and administer their treaty obligations and trust responsibilities without interference in the internal operations and functions of the First Nations governments. The legislation must provide for the efficient delivery of adequate funding resulting from these obligations directly from Treasury Board to the individual First Nations governments. First Nations will determine the extent of need for resources required to meet

⁶ Report of the Auditor General of Canada, 1988, Chapter 14, Department of Indian Affairs and Northern Development, paragraph 14.26

⁷ Status Report of the Auditor General of Canada to the House of Commons, Chapter 4 - Programs for First Nations on Reserve, 2011, pp. 3

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*the federal obligations to the First Nations in a manner and at a level consistent with the local First Nations needs and in accord with international standards. First Nations alone will allocate and distribute such resources to the various programs designed to meet the needs identified by the First Nations.*⁸

In 1991, James C. Macpherson, now a long-serving justice in the Ontario Court of Appeal, but then a member of the Osgoode Hall Law School, conducted a review of Tradition and Education. He noted that:

*I have been asked by the Department of Indian Affairs and Northern Development and the Department of Justice to review Tradition and Education: Towards a Vision of Our Future (hence forth simply Tradition and Education).... The context for my review, as I understand it, is that the Department of Indian Affairs and Northern Development (henceforth DIAND) regards Tradition and Education as a substantial and significant document. DIAND is in the process of considering it and wants to respond to it. DIAND intends and believes that its response will be sympathetic and, in many respects, affirmative. However, the ultimate DIAND response will depend, at least in part, on jurisdictional factors and on choosing the right directions and themes and implementing the right substantive reforms. It is these jurisdictional factors, directions, themes and reforms that I have been asked to address – always, however, in the context of the research, analysis and recommendations contained in Tradition and Education itself.*⁹

The review was conducted at the time that four constitutional negotiations had occurred, unsuccessfully, between the federal government, provincial premiers, and First Nations and Aboriginal leaders to explicitly entrench self-government as a right protected in the Constitution Act. Macpherson recommended that if constitutional change was not imminent, then legislation should be examined:

⁸ National Indian Brotherhood/Assembly of First Nations: A Declaration of First Nations Jurisdiction Over Education, 1988, pp. 33-34

⁹ James C. Macpherson: Macpherson Report on Tradition and Education: Towards a Vision of Our Future, Osgoode Hall Law School, York University, September, 1991

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I would further recommend, however, that neither DIAND nor the AFN, as they decide what to do in the Indian education field, put all their eggs in the constitutional negotiations reform basket. If the history of constitutional negotiations in the 1980s teaches us anything it is that those negotiations are complex, difficult and divisive and are fraught with the potential for failure and even tragedy...Accordingly, I would recommend that DIAND (especially the Education Branch) and the AFN (especially the Education Secretariat) seriously consider working together on developing a national education statute. I suggest this for several reasons:

One I have already mentioned - - there is no guarantee that the current constitutional reform process will succeed. The failure of that process, particularly at this fragile time in our history, would be disappointing, perhaps devastating. Moreover, it would make progress in other arenas, including in the legislative arena, more difficult to achieve. However, it should not, in my view, completely preclude the possibility of progress in other arenas.

My second reason for suggesting that joint DIAND-AFN work on a national education law be seriously considered at this time is that such work might provide an interesting and useful point of intersection between a specific issue, namely education, and the broad concept of self-government which will be a principal focus in the constitutional reform arena. One of the standard criticisms by governments of the concept of self-government is that it is too vague, that its contents are too murky and uncertain. Serious, shared work by DIAND and the AFN on a specific issue like education in a self-government context might remove some of the mystery, confusion and governmental unease which surround the concept. If that happened in the education context, the process might provide a useful backdrop or experience against which progress on other arenas could proceed.

Thirdly, the education provisions of the Indian Act are skeletal and archaic. They, along with so many other provisions of the Act, are in need of serious attention and revision.

Fourthly, based on my analysis in Part IV of the report, there is no doubt about the constitutional authority of the federal government to enact a national education law. Provincial governments, on the other hand, would run into serious constitutional obstacles if they tried to deal more directly with the subject of Indian education.

Fifthly, I believe that Tradition and Education provides a great deal of useful information about the state of Indian education in Canada. I also believe that there is substantial experience, expertise and genuine commitment to improve the quality of Indian education in both the Education Secretariat and

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the Education Branch of DIAND. It would be a shame to waste this happy conjunction of good information and good people. A joint enterprise to try to develop a national education statute would provide a real opportunity to improve the structure of education delivery systems and the quality of education for Indian students throughout Canada.¹⁰

Macpherson took the next step of providing some thoughts about what subject matter should be included in any new education statute. He noted that a national education law should place an emphasis on the preservation of First Nations languages and proposed that the federal government and the AFN undertake a study of the Kohango Reo language nest program in New Zealand to determine its applicability for the preservation of Indian languages and cultures in Canada.

Macpherson also commented on the issue of funding.

The national education law should deal with the question of resourcing the structures and programs established by law. In that vein, I would suggest that what the Supreme Court of Canada said in Mahé v. Alberta (at p.95) about the resourcing of minority language schools is a useful yardstick in the context of Indian education.

"(T)he quality of education provided to the minority should in principle be on a basis of equality with the majority ... It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools."

The principles in this passage – parity in the quality of education and recognition that additional financial support for minority education may be necessary to achieve the parity – are already part of the education policy of the federal and provincial governments (see for example, the Canada-British Columbia Master Tuition Agreement). A national education law should explicitly affirm and further implement these principles.¹¹

A Special Chiefs Conference on Education was held in November, 1991 at which time the Chiefs-in-Assembly received draft versions of a First Nations Education Act, and a First Nations Education Administration Act. This was a First Nations-driven exercise occurring about a year after the failure of the Meech Lake Accord proposal to amend the Constitution Act. Resolutions from the Assembly were held over to an Assembly in February, 1992. AFN Resolution 14/92 stated, among other matters, that:

"...the First Nations structures and institutions for education are protected

¹⁰ Ibid, pp. 42-43

¹¹ Ibid. pp.45

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and affirmed under Section 35 of the Constitution Act, 1982, and therefore, that a National Education Act developed by First Nations be enacted by the Federal government to facilitate the resourcing of our constitutionally affirmed right to education consistent with the spirit and intent of our inherent Aboriginal rights and our treaties.”

At about the same time, the federal government began floating proposals for a new round of constitutional discussions. The Charlottetown Accord to amend the Constitution Act included the participation of First Nations, Metis and Inuit leaders. The Accord identified that Aboriginal peoples “constitute one of three orders of government in Canada” and specified that the right of self-government would include the right “to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions,” and, “to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.”¹² A national referendum on the Accord led to its demise. First Nations voters did not support the Accord.

Subsequent proposals for fundamental change arising from the Royal Commission on Aboriginal Peoples (RCAP) in 1996 and the Minister’s Working Group on Education (2002) were shelved.

In 2010, the AFN Chiefs-in-Assembly endorsed *First Nations Control of First Nations Education* (FNCFNE) as an AFN policy document. This is viewed as an updated version of *Indian Control of Indian Education* and actually includes the 1972 document in the appendices. Among other matters the policy document notes that:

... it is essential that:

Federal and provincial governments amend current laws affecting education and training that are inconsistent with the exercise of the inherent and Treaty rights recognized and affirmed by the Constitution Act, 1982 and in the United Nations Declaration on the Rights of Indigenous Peoples.

The government of Canada, in partnership with First Nations, take immediate steps to engage in the development of federal legislation guaranteeing First Nations high quality, culturally relevant education programs and services and full support for the comprehensive implementation of First Nations control of First Nations education at all levels of learning, including early learning initiatives, elementary and secondary school, adult and post-secondary education and Language Nests.

¹² <http://www.thecanadianencyclopedia.com/articles/charlottetown-accord-document>

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The government of Canada uphold the Honour of the Crown and fulfill its fiduciary obligations with respect to First Nations education in a manner fully consistent with and in affirmation of First Nation Aboriginal and Treaty rights.

Statutory funding arrangements be developed, in collaboration with First Nations, based on real costs, indexation and appropriate treatment for Northern and remote communities.¹³

Michael Mendelson of the Caledon Institute on Social Policy has advocated for the creation of national legislation to replace the education sections of the Indian Act. He has noted that:

Most of what is contemplated by [national legislation] could be achieved, in theory, through other government instruments such as individual statutes for each First Nations multi-service organization that requires a legal existence beyond incorporation; Treasury Board authorities for financial arrangements; negotiation of a new funding formula; and so on. [National legislation] would do all of this, and more, except in an open, legally-binding form with the consent of Parliament. Perhaps the most significant difference between [National legislation] and the current piecemeal approach is its presentation of a comprehensive vision for a system of First Nations education.

First Nations have long been waiting for a willing partner to join them at the table to discuss the fundamental transformation of education for First Nations peoples. It has been forty years since Indian Control of Indian Education was issued. It has been almost twenty-five years since First Nations began to articulate the need for legislative and/or constitutional change to recognize First Nations jurisdiction over education. First Nations have developed draft legislation, proposed constitutional provisions, advocated for policy and program change, and made every effort to change an unacceptable status quo.

Perhaps the current challenge is best summarized as follows:

Canada must move beyond simply espousing comparable services and fulfill its Constitutional and treaty obligations to provide educational structures, services, and legal parameters equitable with provincial frameworks and commitment to student achievement. Only by meeting these commitments do First Nations children have a realistic opportunity of experiencing the same learning opportunities available within provincial systems of education. Only then can the fractured mirror be reconciled. Only then can First Nations

¹³ Assembly of First Nations: First Nations Control of First Nations Education, 2010, pp 20-21

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*people receive the educational commitments that were promised in the treaties.*¹⁴

¹⁴ Sheila Carr-Stewart and Larry Steeves: First Nations Educational Governance – A Fractured Mirror, Canadian Journal of Educational Administration and Policy, Issue #97, December 10, 2009. © by CJEAP and the author(s), pp. 14