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LEGISLATIVE SUMMARY



Bill C-33: First Nations Control of First Nations Education Act

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Legislative Summary of Bill C-33
(Legislative Summary)

Publication No. 41-2-C33-E

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LEGISLATIVE SUMMARY OF BILL C-33: FIRST NATIONS CONTROL OF FIRST NATIONS EDUCATION ACT

1 BACKGROUND

Bill C-33, An 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 (short title: First Nations Control of First Nations Education Act), was introduced in the House of Commons by the Minister of Aboriginal Affairs and Northern Development on 10 April 2014.

The bill requires that education services leading to a recognized high school diploma be delivered by First Nations in one of three ways:

- by administering a school on reserve;
- by delegating the administration of a school to a First Nation Education Authority; or
- through an agreement with a provincial school board.

Bill C-33 establishes, among other things, mandatory education standards to be developed through regulations, compulsory school attendance, teacher certification requirements and school inspections to ensure compliance with the Act's provisions, policies and procedures. The bill provides, for the first time, a statutory basis for First Nations education funding and creates a Joint Council of Education Professionals.

1.1 CURRENT SITUATION

There are approximately 520 band-operated schools in Canada. Band-operated schools must ensure that their teachers are certified to teach in the band's province and that the school follows the provincial curriculum, adapted to reflect the First Nation's language and culture, where possible.¹ Many of these schools are supported by regional education service organizations that were initiated and funded by groups of First Nations, with additional support from Aboriginal Affairs and Northern Development Canada (AANDC).²

Departmental estimates indicate that of the 120,000 eligible on-reserve First Nations students, approximately 60% attend school on reserve, 37% attend provincial schools (usually at the secondary level), and 3% attend the seven schools operated by the federal government.³

There is a significant gap in educational attainment between First Nations people on reserves and the rest of the Canadian population. In 2011, 35.5% of those living on reserves had a high school leaving certificate, compared with 78% for other Canadians.⁴ At current rates of progress, it is estimated that it will take nearly three decades to close this gap. This is a long-standing concern shared by First Nations and federal policy-makers alike.⁵

Current federal policy commits to providing educational services to First Nations that are “comparable to those required in provincial schools by the statutes, regulations or policies of the province in which the reserve is located.”⁶ While the provinces have comprehensive legislation on education, the federal government has no specific legislation governing First Nations education, other than the modest provisions set out in the *Indian Act*.⁷

The lack of a well-developed on-reserve education infrastructure is considered a key factor contributing to the poor education outcomes of First Nations learners.⁸ While provincial governments have established comprehensive education systems, including ministries of education, elected school boards, education Acts, and legal requirements for parental involvement, the education system in place for First Nations children lacks many of these features. While there have been efforts in recent years to address this gap in educational services, for the most part, the key components of an education system for First Nations are missing on reserves across Canada.

1.2 EDUCATION REFORM INITIATIVES (1973–2010)

1.2.1 DEVOLUTION

Since 1973, federal policy with respect to First Nations education has, in principle, affirmed the goals articulated in the 1972 position paper of the National Indian Brotherhood (precursor to the Assembly of First Nations) entitled *Indian Control of Indian Education*. Soon after the document’s release, then Minister of Indian Affairs, Jean Chrétien, accepted the proposal as a new basis for federal education policy.⁹ This acknowledgement led to a process of transferring administrative responsibility for on-reserve elementary and secondary education to First Nations. This transfer to First Nations was, for the most part, accomplished within existing federal legislation, administrative arrangements and policies.

Implementing the *Indian Control of Indian Education* policy has not been without its challenges. Key among the criticisms has been that “Indian control” has often meant little more than local administration of federal education programs and policies. The policy paper on education entitled *First Nations Control of First Nations Education*, prepared by the Assembly of First Nations (AFN) in 2010, described the devolution process instituted by AANDC as transferring limited administrative control of education to First Nations, without the necessary resources that would have allowed for full implementation of education systems controlled by First Nations.¹⁰

1.2.2 SECTORAL EDUCATION AGREEMENTS

In 1995, the federal government formally recognized the inherent right of Aboriginal self-government as an existing right under section 35 of the *Constitution Act, 1982*. Under the Inherent Right of Self Government Policy, federal recognition of that right is “based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions.”¹¹ Importantly, the policy identified education as a matter falling within the scope of self-government negotiations.

Since the policy's implementation, two significant regional education agreements have been concluded where jurisdiction for education has been transferred from the federal government to participating First Nations: the *Mi'kmaq Education Act* (1998)¹² and the *First Nations Jurisdiction over Education in British Columbia Act* (2006).¹³ Each of these jurisdictional agreements replaces the education provisions of the *Indian Act*, establishes regional education authorities to support band-operated schools and provides legal recognition of First Nations authority over education. Both agreements also require that students be in a position to transfer, without academic penalty, to an equivalent level in another school within the school system of the respective province.

In addition to these sectoral self-government education agreements, comprehensive land claims agreements typically provide First Nations signatories with the authority to make laws in relation to education, while self-government agreements generally contain provisions enabling signatories to enact laws over education when prepared to do so.¹⁴ The first comprehensive land claims agreement in Canada, the 1975 *James Bay and Northern Quebec Agreement*, also contained the first agreement providing a measure of First Nations control over education, with the establishment of the Cree School Board. Under the agreement, the Cree took control of their children's education, gaining the ability to decide the language of instruction, design the curriculum, hire teachers and set a Cree school calendar.¹⁵

1.2.3 FEDERAL REFORM INITIATIVES

Recognizing the need to improve education outcomes among First Nations children, in December 2008, the federal government launched its Reforming First Nation Education Initiative, which showcased two new programs.¹⁶

- The First Nation Student Success Program supports First Nations educators in developing and implementing school success plans, conducting student learning assessments and measuring student performance.
- The Education Partnership Program supports the participation of regional-level First Nations' organizations in developing and implementing partnership arrangements and joint action plans with provincial schools and educators.

To date, the federal government has concluded tripartite agreements with regional First Nations' organizations and provincial authorities in six provinces and one territory – Manitoba, New Brunswick, Ontario, Quebec, Alberta, Prince Edward Island and Yukon – and a sub-regional agreement with the Saskatoon Tribal Council.¹⁷ Unlike the agreements concluded in British Columbia and Nova Scotia, these agreements are not legally binding and do not involve a transfer of jurisdiction recognized by new federal and provincial legislation. Nevertheless, the agreements are focused on promoting collaborative relationships between the parties, and cover a range of practical issues designed to improve education outcomes for First Nations students attending both band-operated schools and provincial schools. They include:

- service and tuition agreements;
- performance criteria and indicators;

- improved accountability measures;
- transition protocols;
- curriculum and resource development initiatives;
- data collection and management measures; and
- the development of specific action plans.

1.3 PARLIAMENTARY AND MINISTERIAL REPORTS (1996–2011)

1.3.1 *SHARING THE KNOWLEDGE: THE PATH TO SUCCESS AND EQUAL OPPORTUNITIES IN EQUAL EDUCATION* (HOUSE OF COMMONS REPORT, 1996)

The 1996 report of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Sharing the Knowledge: The Path to Success and Equal Opportunities in Equal Education*, set out to document successful models of on-reserve education, and made the following three recommendations:

- that new federal education legislation recognizing First Nations education authorities as legal entities separate from band councils be developed;
- that a new funding formula to better meet First Nations' educational needs be adopted; and
- that a national Aboriginal education institute be established to, among other things, specialize in curriculum development, teacher orientation, distance education, literacy and language programs, as well as standards development.¹⁸

1.3.2 *OUR CHILDREN – KEEPERS OF THE SACRED KNOWLEDGE* (MINISTER'S NATIONAL WORKING GROUP ON EDUCATION REPORT, 2002)

The 2002 final report of the Indian and Northern Affairs Minister's National Working Group on Education, entitled *Our Children – Keepers of the Sacred Knowledge*,¹⁹ outlined a vision of a holistic, high-quality First Nations education system and called for:

- the transfer of jurisdiction for education to First Nations;
- the creation of a First Nations education infrastructure with supporting mechanisms that would enable First Nations to exercise education jurisdiction; and
- a revised education budget that would reflect the actual costs of comprehensive First Nations education renewal and reform.

1.3.3 *REFORMING FIRST NATIONS EDUCATION: FROM CRISIS TO HOPE* (SENATE REPORT, 2011)

In its December 2011 report, *Reforming First Nations Education: From Crisis to Hope*, the Standing Senate Committee on Aboriginal Peoples examined potential strategies for reform of First Nations on-reserve primary and secondary education.²⁰ The report made four recommendations:

- Key is the development of First Nations education legislation that would explicitly recognize First Nations authority for on-reserve education and allow for the establishment of second- and third-level education structures, such as regional education authorities.
- The Committee cautioned that while education legislation would provide the legal underpinning for First Nations education institutions, to ensure flexibility, such legislation should not prescribe those structures.
- The Committee recommended that a First Nations education Act provide a statutory basis for First Nations education funding – one based on a new funding formula to include resources for language preservation.
- It called for a joint task force to monitor, oversee and report on progress related to the implementation of education reform.

1.4 STEPS TOWARD LEGISLATIVE REFORM OF FIRST NATIONS EDUCATION (2010–2014)

1.4.1 THE NATIONAL PANEL ON FIRST NATIONS ELEMENTARY AND SECONDARY EDUCATION FOR STUDENTS ON RESERVE

As part of the reform initiative, in December 2010 the federal government, along with the AFN, announced the creation of a national panel of experts to lead an engagement process and to provide advice on options, including legislation, for improving the education outcomes of First Nations children who live on reserve.²¹ This announcement followed the AFN's June 2010 Call to Action on First Nations Education, which highlighted the need for a fundamentally new approach to education, including statutory funding arrangements and the establishment of First Nations education systems.²²

In February 2012, following a series of engagement sessions which took place between June and November 2011 and included eight regional sessions and one national session,²³ the Panel released its final report, entitled *Nurturing the Learning Spirit of First Nation Students*.²⁴ The report found that there is no system of First Nations education that consistently supports and delivers positive outcomes for First Nations students in Canada. Further, panel members concluded that the current patchwork of policies and agreements fails to provide “an adequate foundation to support comprehensive improvement or meet accountability requirements of ensuring that all partners in the education of First Nations students do better.”²⁵

Advocating a child-centred approach as the basis of any First Nations education reform, the report's overarching finding was that a First Nations education system must be created to provide the infrastructure, programs and services necessary to support positive education outcomes for First Nations students. The report makes five specific recommendations that, taken together, would comprise the structural components of a First Nations education system. The report recommends:

- the joint development of a First Nations Education Act outlining the roles and responsibilities of each partner in the system and establishing a First Nation child's right to a quality education;

- the establishment of a National Commission for First Nations Education responsible for the overall coordination, guidance and oversight of the First Nations education system;
- the establishment of regional First Nations education organizations to provide support and services to First Nations schools and students;
- statutory funding that is needs-based, predictable and sustainable and includes accountability for education expenditures and student success; and
- the establishment of a national information system for First Nations education standards, performance and accountability to assess improvement in First Nations education.

In outlining next steps, the report indicated that the joint development of a First Nations Education Act should be accompanied by an implementation plan and schedule.

The creation of the national panel was not without controversy. Concerned with the level of First Nations' involvement in selecting panel members, developing the terms of reference and the potential impact on treaty rights, First Nations across Ontario, Saskatchewan and Quebec opted out of the national panel process and jointly undertook their own initiative. In November 2011, a joint report was submitted to the federal government and to AFN officials, highlighting the position of the First Nations Education Council (Quebec), the Federation of Saskatchewan Indian Nations and the Nishnawbe-Aski Nation (Northern Ontario) on priority actions with respect to improving First Nations Education.²⁶

1.4.2 CONSULTATIONS ON LEGISLATIVE REFORM OF FIRST NATIONS EDUCATION

The government's intention to work with First Nations and "other willing partners" to develop education legislation was first signalled in Budget 2010²⁷ and reaffirmed in Budget 2012,²⁸ the latter highlighted the government's commitment to put in place a First Nations Education Act by September 2014, and to explore mechanisms to ensure stable, predictable and sustainable funding.

In light of these commitments and the recommendations advanced by the national panel, on 11 December 2012, then Minister of Aboriginal Affairs and Northern Development John Duncan announced the start of consultations with First Nations on the development of a First Nations Education Act.²⁹ The announcement was accompanied by the release of a discussion guide that would form the basis of these consultations.³⁰ The guide set out a legislative proposal for a possible First Nations Education Act and for associated regulations that would include provision for:

- mandatory education standards;
- compulsory school attendance;
- a legislative basis for funding;
- options for the delivery of education programs; and
- strengthened accountability frameworks.

From January to April 2013, eight single-day regional sessions were scheduled across the country,³¹ with the purpose of supporting open and meaningful consultations.³² In addition to these regional sessions, online consultation activities and approximately 30 video and teleconference sessions took place.³³

On 12 July 2013, the government released *A Blueprint for Legislation*, which provided an annotated outline of the government's proposed approach to a First Nations Education Act.³⁴ Indicating that the legislative proposal was directly informed by the findings of the national panel and the ensuing consultations, the government sought further feedback from First Nations leaders and organizations, provincial governments and third-party experts prior to finalizing a proposed Education Act.

1.4.3 PROPOSAL FOR A BILL ON FIRST NATIONS EDUCATION

On 12 October 2013, the federal government released *Working Together for First Nation Students: A Proposal for a Bill on First Nation Education*, which contained draft text of its proposed First Nations Education Act, for further input.³⁵ The document's release fulfilled the government's commitment to share a draft of its proposed education legislation with First Nations.³⁶ The proposed legislation would require that education services capable of leading to a recognized high school diploma be delivered by First Nations in one of three ways: by administering a school on reserve, by establishing a First Nation Education Authority, or through an agreement with a provincial school board.

The document also set out a requirement for annual school inspections to verify compliance with the Act's programs, policies and procedures. A "temporary administrator" could be appointed to manage the school's operations if:

- the school was deemed non-compliant with the provisions of the Act for two consecutive years;
- the minister felt there was significant risk to student well-being; or
- immediate action was required to deal with the school's financial difficulties.

The proposal identified a statutory basis for education funding – the precise amount to be paid would be determined by a funding formula contained in regulations to be developed following the adoption of the Act. In addition, while the proposal did not explicitly recognize First Nations jurisdiction over, or treaty rights to, education, First Nations with comprehensive or sectoral self-government agreements that include education would be exempt from its application.

At the time of the document's release, the Minister of Aboriginal Affairs and Northern Development, Bernard Valcourt, indicated that First Nations would have 75 days to provide their feedback on the proposal.³⁷

1.4.3.1 FIRST NATIONS' REACTION TO THE PROPOSED BILL

The government's legislative proposal was criticized by many First Nations chiefs and organizations across the country. Among the key concerns expressed by First Nations were the lack of a clear funding commitment to support the

implementation of a new education system, including funds for language and culture; an increased federal oversight role; and a top-down approach.

On 25 November 2013, in an open letter to the Minister, the National Chief of the AFN described the draft legislative proposal as “not acceptable” to First Nations and inconsistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, the treaty relationship and the principle of First Nations control of First Nations education.³⁸ The letter also outlined five conditions that needed to be met to advance a First Nations education system:

- First Nations control of First Nations education;
- statutory funding based on actual costs;
- support for languages and cultures;
- reciprocal accountability for First Nations education; and
- an ongoing process of meaningful engagement, including co-development and shared oversight.

Criticism of the federal proposal hit a high-water mark at the December 2013 AFN Special Chiefs Assembly, where chiefs voted unanimously to reject the bill.³⁹ The five conditions outlined in the National Chief’s letter, however, were endorsed as a basis for productive education negotiations with Canada. The chiefs also called on the federal government to commit to “immediate investments in Budget 2014 to address the current funding gap, and advance a statutory guarantee for the future of First Nations education systems.”⁴⁰

1.4.4 FIRST NATIONS CONTROL OF FIRST NATIONS EDUCATION ACT

On 7 February 2014, Prime Minister Stephen Harper announced that an agreement had been reached with the AFN to proceed with the final drafting and introduction of the First Nations Control of First Nations Education Act.⁴¹ While maintaining many of the features of the October 2013 legislative proposal, new in the proposed Act would be the provision for:

- a Joint Council of Education Professionals to provide advice and support to the Government of Canada and First Nations on the implementation and oversight of the First Nations Control of First Nations Education Act;
- a statutory guarantee of funding (including support for languages and cultural programs) with a reasonable rate of growth, transition funding to support the new legislative framework, and investments in on-reserve school infrastructure;
- the ability of First Nations to incorporate language and culture programming into the curriculum; and
- a commitment to work in conjunction with First Nations to develop the Act’s regulations.

The Prime Minister's announcement also highlighted \$1.9 billion in investments to support the implementation of First Nations education legislation, broken down as follows:

- \$1.252 billion in core funding over three years, beginning in 2016–2017, with annual increases thereafter, per a 4.5% funding escalator;
- \$500 million over seven years, beginning in 2015–2016, for school infrastructure; and
- \$160 million over four years, beginning in 2015–2016, toward implementation of the legislation.⁴²

Budget 2014 confirmed these investments, though it did not make specific reference to a funding escalator.⁴³

From the perspective of the AFN, the announcement met the five conditions adopted by the chiefs at their December 2013 assembly.⁴⁴ It also appears to have reflected their pre-budget submission to the House of Commons Standing Committee on Finance for \$1.9 billion to be earmarked in the federal budget for First Nations education, broken down as follows:

- \$510 million in basic funding to keep schools operational;
- \$1.2 billion in curriculum and language service funding; and
- \$266 million in infrastructure funding.⁴⁵

Support for the announcement among First Nations across the country has been mixed. Some organizations and chiefs expressed concern with both the timing and the adequacy of funding as well as the process which led to the agreement with the AFN, while others were more optimistic that the agreement represented a departure from the status quo.⁴⁶ In stark contrast to its national counterpart, on 19 February 2014, the Assembly of the First Nations of Quebec and Labrador filed an application for judicial review of the consultation process with respect to the proposed First Nations Control of First Nations Education Act.⁴⁷

2 DESCRIPTION AND ANALYSIS

The First Nations Control of First Nations Education Act consists of a preamble and 58 clauses. The following description and analysis provides a summary of key clauses contained in the bill. Rather than following numerical order, related provisions may be grouped together.

2.1 PREAMBLE

Bill C-33's substantive provisions are preceded by an 11-paragraph preamble which establishes the context and rationale for the legislation and clarifies the parliamentary intent in enacting it. It refers to, among other things, the need to establish quality, child-centred education in accordance with the principle of First Nations control over First Nations education and the importance of resulting education systems receiving

adequate, stable and predictable funding, including for First Nations languages and cultural instruction. It further points to the need for ongoing and meaningful dialogue on improving the education outcomes of First Nations children.

2.2 DEFINITIONS, PURPOSE AND GENERAL PROVISIONS (CLAUSES 2 TO 6)

Under the bill's definition section, a "responsible authority" means the council of a First Nation or First Nation Education Authority (clause 2). A First Nation's council has the legal rights and duties of a natural person, including the capacity to enter into contracts, sue and be sued (clause 6).

The stated purpose of the bill is to provide First Nations with control of their education systems by way of local administration of community schools, delegation of powers to recognized First Nations education authorities, or agreements with provincially regulated education bodies such as school boards (clause 3).

The bill contains a "non-derogation" clause which stipulates that the legislation should not violate the constitutional protections provided for existing Aboriginal and treaty rights (clause 4).

The bill applies to all First Nations, except for those that have the power to make laws related to education in accordance with their self-government agreements, where such agreements are given effect by federal legislation (including First Nations named in schedules to the *Mi'kmaq Education Act* and the *First Nations Jurisdiction over Education in British Columbia Act*, as well as the Sechelt Indian Band) (clause 5).

2.3 ACCESS TO EDUCATION (CLAUSES 7 TO 9)

Under the bill, First Nations are required to provide elementary and secondary education services, without fee, to all persons between the ages of six and 21, ordinarily resident on reserve (clauses 7(1) and 9). The education provided must enable students to obtain a recognized high school diploma, an International Baccalaureate diploma, or an equivalent graduation certificate or diploma approved by the Minister (clause 7(3)). Kindergarten and junior kindergarten programs may also be offered (clause 7(2)).

Clause 8 stipulates that parents are required to enrol children between the ages of six and 16 years in a First Nations or provincial school, provide written notice of the registration to the First Nation's council, and ensure their attendance.

First Nations can enact bylaws requiring persons who are 18 years old and ordinarily resident on a reserve to register for the school year and regularly attend for that full school year (clause 8(4)). Any such bylaws must be made public (see discussion of clause 47 in section 2.9 of this Legislative Summary).

2.4 JOINT COUNCIL OF EDUCATION PROFESSIONALS (CLAUSES 10 TO 19)

Clause 10 establishes the Joint Council of Education Professionals, which consists of a minimum of five and a maximum of nine members, including the chair and vice-chair. Members must have knowledge of or experience in elementary or secondary education (clause 12(3)).

All members are appointed for a maximum five-year term by the Governor in Council upon the recommendation of the Minister (clause 13; clause 12(1)). The Governor in Council must appoint at least one, and up to a maximum of four members, from among persons nominated by an entity representing First Nations interests (clause 12(1)).

The chairperson is also appointed by the Governor in Council upon the recommendation of the Minister following consultation by the Minister with an entity representing First Nations interests (clause 12(2)).

The Governor in Council retains sole authority to remove members from the Joint Council (clause 14). However, the chairperson and individuals nominated by an entity representing First Nations interests can only be removed by recommendation of the Minister after consultation with that entity.

The role of the Joint Council is to provide advice to the Minister, First Nations councils and First Nation Education Authorities on matters related to the bill (clause 11(1)); additional responsibilities may be assigned to the Joint Council after the Minister consults an entity prescribed by regulation that represents First Nations interests (clause 11(3)). In certain circumstances, such as appointing a temporary administrator, approving or revoking the designation of a First Nation Education Authority, or enacting regulations, the Minister must seek the advice of the Joint Council (clauses 11(2), 27(3) and 27(5), 39(2), 40(1) and 40(3), 42(4) and 42(5), 44(1) and 48)). The Council is required to meet at least three times a year (clause 16).

2.5 GOVERNANCE (CLAUSES 20 TO 31)

The bill identifies three principal ways by which a First Nation can deliver on-reserve elementary and secondary education services:

- by administering a school on reserve;
- by establishing a First Nation Education Authority; or
- through an agreement with a provincial school board.

These options are identical to those set out in the October 2013 legislative proposal described in section 1.4.3 of this Legislative Summary.

2.5.1 ADMINISTRATION BY THE COUNCIL OF A FIRST NATION (CLAUSES 20 TO 22)

Clause 20 transfers administrative responsibility for on-reserve elementary and secondary education to First Nations. Law-making authority (i.e., jurisdiction) for elementary and secondary education, similar to that provided under the *Mi'kmaq Education Act* and the *First Nations Jurisdiction over Education in British Columbia Act*, is not transferred.

Clause 21 outlines the responsibilities of First Nations administering schools on reserve, including preparing annual budgets that must be provided to the Minister and the Joint Council, establishing financial management plans, establishing attendance and registration policies, monitoring the quality of education, and managing the school property, all of which are subject to provisions set out in the regulations.

First Nations are required to provide classroom instruction in either English or French, and may also offer a First Nation language as a secondary language of instruction (clause 21(2)). Students may also be provided with the opportunity to study a First Nation language or culture (clause 21(3)).

2.5.2 AGREEMENTS RESPECTING TUITION IN AND ADMINISTRATION OF SCHOOLS (CLAUSES 23, 24 AND 30)

Rather than deciding to run a community-operated school, a First Nation can choose to enter into an agreement with a provincial school board to operate a First Nation school on reserve (clause 24) or to allow students resident on reserve to attend provincially operated schools off reserve (clause 23).

Clause 30(2) provides authority for reciprocal tuition agreements in circumstances where persons not normally residing on a reserve attend an on-reserve school.

2.5.3 ADMINISTRATION BY A FIRST NATION EDUCATION AUTHORITY (CLAUSES 27 TO 29 AND 48)

A First Nation can choose to delegate its authority for the provision of on-reserve education services, by way of written agreement, to a federally or provincially incorporated First Nation Education Authority (clause 27(1)). Only designated First Nations Education Authorities would be able to exercise delegated authority (clause 27(3)).

Agreements reached between a First Nation and a First Nation Education Authority for the delivery of education services on a reserve must meet the conditions set out in the regulations (clause 27(1)).

The Minister has the authority to designate a “body corporate” as a First Nation Education Authority under the Act as well as remove such designation if that body has failed to comply with the provisions of the bill and its associated regulations (clauses 27(3) and 27(5)). In both circumstances, the Minister is required to seek the advice of the Joint Council.

Conditions under which designations are approved or revoked by the Minister are to be established in the regulations (clause 48(1)(h)).

The Minister is also required to post a list of designated First Nations Education Authorities, including the names of participating First Nations, to the departmental website (clause 29).

2.5.4 COMMUNITY PARTICIPATION (CLAUSE 25)

The bill requires that First Nations provide regular opportunities to students, parents, elders and other community members to give their advice on school policies, success plans and extra-curricular education programs relating to First Nations languages and cultures.

Unlike the previous legislative proposal, which provided for the establishment of community education committees, the current provision does not specify the mechanism by which community input must be sought.

2.6 OPERATION OF SCHOOLS (CLAUSES 32 TO 42)

2.6.1 SERVICES (CLAUSES 32 TO 34)

A First Nation or a First Nation Education Authority (“responsible authority”) is required to provide students with the necessary educational services and materials, as stipulated by the regulations, for the school(s) they administer (clause 32).

In addition, it must provide financial, human resources, information technology, building management, and any other services prescribed by regulation, to each school under its administrative authority (clause 33).

The bill also requires that the responsible authority purchase insurance for each school it administers (clause 34).

2.6.2 DIRECTOR OF EDUCATION (CLAUSE 35)

Clause 35 requires a responsible authority to hire a director of education (DOE) to supervise the day-to-day management of the school, including implementing school policies and developing specific policies with respect to special needs’ students (clauses 35(1), 35(2)(a) and 35(2)(b)). The DOE is responsible for managing the school’s human resources, including the hiring of certified teachers and principals (clause 35(2)(c)).

The DOE is also responsible for establishing and maintaining a record of student registration and is required to provide a copy to the Minister (clause 35(2)(e)).

To avoid a conflict of interest, the DOE cannot serve as a member of the council of a First Nation, if the council:

- administers the school where he or she is employed; or
- is a party to an agreement with a First Nation Education Authority administering that school (clause 35(5)).

2.6.3 PRINCIPAL (CLAUSE 36)

The principal reports to the DOE and is responsible for, among other things:

- implementing school success plans, education programs, registration and attendance policies;
- supervising teachers;
- planning extra-curricular activities and the school's daily schedule;
- ensuring that students are evaluated and that report cards are provided to parents; and
- school maintenance.

Clause 36 stipulates that school success plans must include the schools' educational objectives and the timelines within which those objectives are to be achieved. Plans must also include measures to help graduating students' transition to post-secondary institutions or the labour market, as well as to help students who are not in their graduating year transition to the provincial school system (clause 36(2)).

The restrictions on employment that apply to the DOE also apply to the position of principal (clause 36(3)).

2.6.4 SCHOOL INSPECTOR (CLAUSES 37 AND 38)

Clause 37 requires a responsible authority to hire a qualified school inspector, who is not the principal or the DOE, to carry out school inspections, as prescribed by the regulations, in order to ensure compliance with the provisions of the bill and its accompanying policies, plans and procedures.

Upon completion of the inspection, the school inspector must prepare a report, including recommendations addressing outstanding non-compliance issues, and submit a copy to the responsible authority (clauses 38(1) and 38(2)). Upon receipt of the report, the responsible authority has 10 days to provide a copy to the Minister. If the school is administered by a First Nation, a copy must also be provided to the Joint Council (clause 38(3)).

2.6.5 COMPLIANCE WITH THE ACT (CLAUSES 39 TO 42)

A responsible authority is required to undertake remedial measures when a school inspection report identifies issues of non-compliance (clause 39(1)). In such cases, the Minister may, after seeking the advice of the Joint Council, require the responsible authority to employ a special advisor to help develop and implement such measures (clause 39(2)).

After seeking the advice of the Joint Council, the Minister may also appoint a qualified temporary administrator to manage the school's operations, if:

- the responsible authority fails to submit the inspection report as required under the bill (clause 40(1)(a));
- the Minister is of the opinion that adequate remedial measures have not been put in place (clause 40(1)(b));
- the Minister is of the opinion that there is significant risk to student well-being and success at the school (clause 40(1)(c)); or
- the Minister is of the opinion that that the responsible authority will not be able to comply with the requirements under the bill due to serious financial difficulties (clause 40(1)(d)).

The temporary administrator must submit a report to the Minister and Joint Council outlining measures taken to address issues of non-compliance and can make recommendations regarding future measures, including whether a First Nation Education Authority should have its designation under the Act revoked (clause 42(1)). Where such a recommendation has been made, the Minister can, after seeking the advice of the Joint Council, revoke the designation of the First Nation Education Authority (clause 42(5)).

Clause 41(2) provides that legal proceedings cannot be brought against the DOE, principal, teachers or school staff for having provided assistance or information to the temporary administrator in good faith.

2.7 FUNDING (CLAUSES 43 TO 45)

The bill provides a statutory basis for First Nations elementary and secondary education funding, which will replace the current system of contribution agreements.⁴⁸

Specifically, clause 43 authorizes the Minister to make payments to a responsible authority from the Consolidated Revenue Fund (clause 45(2)), with the objective of providing elementary and secondary educational services on reserves.

The method, or formula, for calculating these payments is established in the regulations and must allow for the provision of education services of a quality reasonably comparable to those services available in a similarly sized and situated provincial school (clause 43(2)).

The method of calculating payments does not specifically include the provision of First Nations languages and cultural study, but a portion of the total amount paid to the responsible authority must be directed to this purpose (clause 43(4)).

Notwithstanding the payment amounts calculated, the Governor in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, and with the concurrence of the Minister of Finance, can limit the maximum amounts payable under the bill (clause 45(1)).

2.8 LIABILITY (CLAUSE 46)

Clause 46(1) insulates the federal Crown from legal proceedings for any act or omission that a third party performed in the exercise of its powers or functions under the bill.

Clause 46(2) insulates the federal Crown, its employees, the temporary administrator and Joint Council members from legal proceedings for any act or omission when conducting their duties in good faith.

2.9 PUBLICATION OF BY-LAWS (CLAUSE 47)

First Nations are required to publish their bylaws on their Internet site, in the *First Nations Gazette*, or in a newspaper of general circulation on a reserve (clause 47(1)). Notwithstanding this requirement, First Nations must, upon request, provide a copy of the bylaws to any person requesting it (clause 47(3)).

A bylaw comes into force at the time of its publication or on any later day specified in the bylaw (clause 47(4)).

2.10 REGULATIONS (CLAUSE 48)

Clause 48 establishes that the Minister, after seeking the advice of the Joint Council, may make regulations that are necessary for carrying out the purposes of the bill, including regulations relating to:

- approval processes for equivalent high school graduation certificates (clause 48(1)(a));
- matters to be addressed in annual budgets (clause 48(1)(b));
- defining the language of instruction and use of a First Nations language as a language of instruction (clause 48(1)(d));
- management of human resources, including the professional qualifications required (clause 48(1)(e));
- matters to be addressed in school policies, success plans and school safety plans (clause 48(1)(f));
- management of school property, including the maintenance of insurance (clause 48(1)(g));

- conditions for the approval of tuition and administration agreements entered into with provincial entities, such as school boards, and First Nations education authorities (clause 48(1)(i));
- matters related to home schooling, including supervision and discontinuance (clause 48(1)(j));
- establishing the minimum number of instructional hours and days in a school year (clause 48(1)(k));
- timing of school inspections, matters to be included in an inspection report and qualifications of the school inspector (clause 48(1)(n));
- methods of calculating funding (clause 48(1)(o)); and
- anything prescribed by the bill (clause 48(1)(q)).

Notably, regulations may incorporate by reference provincial laws and regulations (clause 48(3)).

The Joint Council is required to give First Nations an opportunity to make representations, and must fully consider those representations prior to giving advice to the Minister with respect to regulations (clause 48(2)).

2.11 REVIEW (CLAUSE 49)

Every five years, the Joint Council is required to undertake a review of the Act and its accompanying regulations (clause 49(1)). In the context of review, the Joint Council must give First Nations an opportunity to make representations and must fully consider those representations (clause 49(2)).

The Joint Council must submit its final report to the Minister within one year of its review (clause 49(3)), and the Minister must table that report in Parliament within six months of receipt. The Minister may, at that time, table his or her own report regarding the operations of the Act and its regulations as well as the operation of the Joint Council (clause 49(4)).

2.12 TRANSITIONAL PROVISIONS (CLAUSES 50 TO 52)

Clause 50 exempts First Nations schools under the January 2012 Tripartite Education Framework Agreement between Canada, British Columbia and the First Nations Education Steering Committee from the application of the Act until 30 June 2017.

The Minister continues to be the responsible authority for federally operated schools (clause 51).

2.13 RELATED AMENDMENTS TO THE *INDIAN ACT* (CLAUSES 53 AND 54)

The education provisions of the *Indian Act* (sections 114 to 122) are repealed upon the coming into force of this bill (clause 54).

2.14 COMING INTO FORCE (CLAUSE 58)

The bill comes into force on a day or days to be fixed by the Governor in Council.

3 COMMENTARY

Early commentary suggests that government and First Nations' perspectives continue to differ with respect to the merits and potential effects of the First Nations Control of First Nations Education Act.

From the government's point of view, the bill reflects commitments to ensure better outcomes for First Nations students by establishing standards, policies and supports that are consistent with provincial systems and that are necessary to ensure access to a high-quality education.⁴⁹ Minister of Aboriginal Affairs and Northern Development Bernard Valcourt has stated that Bill C-33 reflects the five conditions outlined in the November 2013 letter from the National Chief of the AFN and "comes after years of unprecedented dialogue and consultations."⁵⁰

At the press conference after the bill's introduction in the House of Commons on 10 April 2014, the then AFN National Chief, Shawn A-in-chut Atleo, indicated that he felt the legislation met the five conditions unanimously endorsed by the First Nations chiefs in December 2013, namely First Nations control, a statutory funding guarantee, the incorporation of language and culture into curriculum, no unilateral oversight by government, and meaningful engagement in the future.⁵¹ However, in its news release, the AFN did not expressly confirm this position, stating, "Each nation will need to determine for themselves if this bill meets their needs and our demand for an approach that places our children front and centre and is founded on our rights, Treaties and jurisdiction."⁵²

In contrast to the government's viewpoint and the initial statements made by the AFN National Chief, a number of First Nations organizations, including the Federation of Saskatchewan Indian Nations,⁵³ the Association of Iroquois and Allied Indians,⁵⁴ the Union of Ontario Indians,⁵⁵ the Nishnawbe Aski Nation,⁵⁶ the Assembly of the First Nations of Quebec and Labrador,⁵⁷ and the Assembly of Manitoba Chiefs,⁵⁸ have expressed concerns with the legislation. In its news release, the Union of BC Indian Chiefs called on the federal government to withdraw the legislation.⁵⁹ Some of First Nations' key criticisms of the bill are that it was drafted without adequate consultation or consent following a flawed process, it provides the Minister with substantial authority and control over First Nations education, and it does not recognize First Nations jurisdiction over education or respect treaty rights to education.

In February 2014, the First Nations Education Council and the Assembly of First Nations of Quebec and Labrador requested a judicial review of the government's October 2013 legislative proposal, alleging that the federal government had not fulfilled its obligations to consult and accommodate First Nations throughout the legislative process.⁶⁰ To date, the application for judicial review has not been withdrawn.

NOTES

1. Aboriginal Affairs and Northern Development Canada [AANDC], [Elementary/Secondary Education Program – National Program Guidelines 2014–2015](#).
2. Examples of First Nations multi-school organizations include, but are not limited to:
 - First Nations Education Steering Committee;
 - Cree School Board;
 - L'Institut Culturel Éducatif Montagnais;
 - Treaty Seven First Nations Education Consortium;
 - Treaty 8 Education Initiative;
 - Indigenous Education Coalition;
 - New Brunswick Education Initiative; and
 - Mi'kmaq Kina'matnewey.

In some areas, support services are provided directly by First Nations political organizations or tribal councils (e.g., Yorkton Tribal Council, Prince Albert Grand Council, Association of Iroquois and Allied Indians, and Federation of Saskatchewan Indian Nations).

3. AANDC, [Federal Funding Levels for First Nations K–12 Education](#).
4. AANDC, [Fact Sheet – 2011 National Household Survey Aboriginal Demographics, Educational Attainment and Labour Market Outcomes](#).
5. Office of the Auditor General of Canada, "[Indian and Northern Affairs Canada – Education Program and Post-Secondary Student Support](#)," Chapter 5 in *2004 Report of the Auditor General of Canada to the House of Commons*, November 2004.
6. AANDC, [Audit of the Elementary and Secondary Education Program](#), 1 May 2009, p. i.
7. Sections 114 to 122 of the [Indian Act](#), R.S.C. 1985, c. I-5, authorize the Minister of Indian Affairs and Northern Development to establish, operate and maintain schools for Indian children. The education provisions of the Act, however, deal largely with truancy and make no reference to substantive education issues or the quality of education to be delivered. Importantly, the *Indian Act* does not authorize bands to set up and run their own schools and makes no reference to band councils or First Nations educational authorities.
8. See, for example, Michael Mendelson, [Why We Need a First Nations Education Act](#), Caledon Institute of Public Policy, October 2009.
9. House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes and Evidence*, Issue no. 18, 24 May 1973, 1120.
10. Assembly of First Nations, [First Nations Control of First Nations Education: It's Our Vision, It's Our Time](#), July 2010.

11. Government of Canada, [*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*](#), 1995.
12. [*Mi'kmaq Education Act*](#), S.C. 1998, c. 24.
13. [*First Nations Jurisdiction over Education in British Columbia Act*](#), S.C. 2006, c. 10.
14. AANDC, "[Tripartite Education Agreements](#)," *First Nation Education Partnerships and Agreements*.
15. See, in particular, [*The James Bay and Northern Quebec Agreement \(JBNQA\)*](#), s. 16. In July 1978, the Cree School Board was formally constituted under Quebec's *Education Act*. Underlying the philosophy of the Board is that the Cree language and culture are at the root of the Cree education system.
16. AANDC, [Backgrounder – Reforming First Nation Education Initiative](#), 2008.
17. Government of Canada (1995).
18. House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, [*Sharing the Knowledge: The Path to Success and Equal Opportunities in Equal Education*](#), 1996.
19. Minister's National Working Group on Education, [Our Children – Keepers of the Sacred Knowledge](#), December 2002.
20. Senate, Standing Committee on Aboriginal Peoples, [Reforming First Nations Education: From Crisis to Hope](#), December 2011.
21. AANDC, "[Government of Canada and Assembly of First Nations Announce the Creation of a Panel of Experts to Lead Engagement on First Nation Elementary and Secondary Education](#)," News release, 9 December 2010.
22. Assembly of First Nations, [Call to Action on Education: A Vision for First Nations Education and Canada](#), June 2010. Education was also identified as a shared priority in AANDC, [Canada–First Nations Joint Action Plan](#), June 2011. The Action Plan committed the parties to an engagement process that would result in recommendations on a framework to strengthen and improve the delivery of First Nations education on reserves.
23. During these engagements, the members of the National Panel on First Nations Elementary and Secondary Education for Students On Reserve visited 30 First Nations communities and 25 First Nations schools across all regions; held over 60 meetings with stakeholders, including provincial officials, community leaders, practitioners and academics; and provided an opportunity for those interested to propose ideas, make submissions and complete a questionnaire online (see AANDC, [Chronology of First Nations Education](#)).
24. National Panel on First Nation Elementary and Secondary Education for Students on Reserve, [Nurturing the Learning Spirit of First Nation Students](#), Report, February 2012.
25. *Ibid.*, p. vi.
26. First Nations Education Council (Quebec), Federation of Saskatchewan Indian Nations and the Nishnawbe Aski Nation, [Report on Priority Actions in View of Improving First Nations Education](#), November 2011.
27. Government of Canada, [Budget 2010: Leading the Way on Jobs and Growth](#), 4 March 2010.
28. Government of Canada, [Jobs and Opportunities for Canadians](#), 29 March 2012.
29. AANDC, "[Government of Canada Launches Consultations for Development of First Nation Education Act](#)," News release, 11 December 2012.
30. AANDC, [Developing a First Nation Education Act: Discussion Guide](#), 11 December 2012.

31. Regional sessions were held in Vancouver; Calgary; Saskatoon; Winnipeg; Wendake, Quebec; Kenora and Thunder Bay, Ontario; and Halifax.
32. AANDC, [Chronology of First Nations Education](#).
33. AANDC, [The Consultation Process](#).
34. AANDC, [Developing a First Nation Education Act: A Blueprint for Legislation](#), July 2013.
35. AANDC, [Working Together for First Nation Students: A Proposal for a Bill on First Nation Education](#), October 2013.
36. Government of Canada, [Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2013](#), 21 March 2013.
37. Susana Mas, ["Valcourt urges First Nations education reform 1st, funds later,"](#) *CBC News*, 9 October 2013.
38. Assembly of First Nations, [Open Letter to Minister of Aboriginal Affairs and Northern Development Canada](#), 25 November 2013.
39. Assembly of First Nations, Special Chiefs Assembly, [Resolution no. 21/2013 – Outlining the Path Forward: Conditions for the Success of First Nations Education](#), 10–12 December 2013.
40. Ibid.
41. Office of the Prime Minister of Canada, ["PM announces an historic agreement with the Assembly of First Nations to reform the First Nations education system,"](#) News release, 7 February 2014.
42. Office of the Prime Minister of Canada, ["First Nations Control of First Nations Education Act,"](#) Background, 7 February 2014.
43. Government of Canada, [The Road to Balance: Creating Jobs and Opportunities – Economic Action Plan 2014](#), 11 February 2014.
44. Assembly of First Nations, [Communiqué from National Chief Shawn Atleo: First Nations Control of First Nations Education Announcement and Federal Budget 2014](#), February 2014.
45. Olesia Plokhii, [AFN urges Flaherty to earmark \\$1.9B for First Nations education](#), *iPolitics*, 3 December 2013.
46. Gloria Galloway, ["Cracks forming in Tories' First Nations education plan,"](#) *Globe and Mail*, 21 March 2014.
47. Assembly of the First Nations of Quebec and Labrador, [First Nations Control of First Nations Education Act: The First Nations make an application for a Judicial Review of the consultation process](#), 20 February 2014.
48. In a 2011 status report to Parliament, the Auditor General of Canada identified the lack of appropriate funding mechanisms as one of the four key structural impediments that severely limit the delivery of public services to First Nations and impedes improvements in education outcomes. According to the Auditor General, "statutory funding could remove the uncertainty that results when funding for services depends on the availability of resources" (see Office of the Auditor General of Canada, ["Programs for First Nations on Reserves,"](#) Chapter 4 in *2011 Status Report of the Auditor General of Canada to the House of Commons*, June 2011). A statutory basis for First Nations education funding has been advocated by First Nations educators and leaders for over 30 years.
49. AANDC, [Background: First Nations Control of First Nations Education Act](#).
50. AANDC, [Statement by Minister Valcourt on Bill C-33, First Nations Control of First Nations Education Act](#), 28 April 2014.

51. Gloria Galloway, "[Shawn Atleo under fire for support of Conservative native-education measures](#)," *Globe and Mail*, 10 April 2014.
52. Assembly of First Nations, "[Assembly of First Nations National Chief Says First Nations Must Drive Next Steps in First Nations Education](#)," 10 April 2014.
53. Janet French, "[Education act could change the way Sask. First Nations schools are run](#)," *Star Phoenix* [Saskatoon], 10 April 2014.
54. Association of Iroquois and Allied Indians, "[Five conditions are not met by enabling legislation on First Nations control of education](#)," News release, 10 April 2014.
55. Union of Ontario Indians, "['We need a real say in how our kids are taught': Madahbee](#)," News release, *CNW*, 14 April 2014.
56. Nishnawbe Aski Nation, "[NAN responds to introduction of First Nation education legislation](#)," News release, 10 April 2014.
57. Assembly of the First Nations of Quebec and Labrador, "[The Education Bill is an Insult to First Nations](#)," News release, *CNW*, 11 April 2014.
58. Derek Nepinak, "[New First Nations Education Act an 'illusion of control'](#)," *CBC News*, 11 April 2014.
59. Union of BC Indian Chiefs, "[Federal Government Must Withdraw Bill C-33](#)," News release, 15 April 2014.
60. Assembly of the First Nations of Quebec and Labrador (20 February 2014).