

First Nations Education: The Need for Legislation in the Jurisdictional Gray Zone

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Caught in a conflicting jurisdictional gray zone between provincial Public Schools Acts and the Indian Act, Canadian First Nations schools and educators find themselves without the guidelines, standards, and supports that maintain a desired standard in mainstream Canadian school settings. The gray zone is generated by conflicting and overlapping areas of jurisdictional responsibility for the education of First Nations peoples. Is First Nations education solely a federal responsibility, as proclaimed by federal interpretations of treaties and laid out in the Indian Act; a provincial responsibility as authorized by the provincial public schools act(s); or strictly a responsibility and sovereign right of First Nations themselves? This article examines several options and seeks to answer that we as First Nations peoples must take the final responsibility for the education of First Nations students throughout Manitoba and Canada. The article concludes by examining the need for and implications of a First Nations Education Act (FNEA) as a tool to address the profound disparities between the educational opportunities available to most Canadians and those available to First Nations people.

Introduction

An education crisis is happening in Canada. Caught in a gray zone of fighting over jurisdictional powers, trapped in the political language of *self-governance* and *sovereignty*, of accountability and cultural survival, Canada's First Nations communities are being held in an educational purgatory. Most of Canada's population has moved steadily toward goals of a higher standard of living, multiculturalism, and educational excellence, and continually remodels and transforms its educational practices to meet the changing dynamics of today's globalized world. In stark contrast to this, a large number of Canadians—that is, those of us who live in First Nations communities—receive a different form of education. In First Nations communities, education is bound and restricted by political fighting that leaves it underfunded, unregulated, and unsupported. First Nations communities in Canada display the lowest rates of education in the country and higher than average levels of unemployment, poverty, suicide, obesity, diabetes, and other health problems (Health Canada, 2003; Indian and Northern Affairs Canada [INAC], 2005). Our communities must contend with an education system based on policies that conflict with each other and that leave significant gaps in coverage and accountability. The actors in this scenario are the elected First Nation (FN) leadership, INAC, and provincial governments.

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Background

First Nations peoples' right to an education was incorporated into treaties negotiated between the Crown and the Indigenous peoples of Canada between the 1850s (Great Lakes Ojibwe Treaties) and 1921 (Treaty #11). Treaties 1-5 address education as follows: "Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it" (Treaty 3, 1873). First Nations leadership and the federal government, however, do not have the same understanding of what this agreement entails:

"Shall" means force of law; the government must comply. INAC says it is only legally obligated to provide one school and one teacher salary [regardless] of the number of students on a reserve. "Schools" can mean graduate school, school of nursing, school of engineering, etc, because those negotiating treaties were seeking the same level of education as those they were negotiating with. (Wilson, 2006)

In a modern context, the spirit of the treaty article presented above has been interpreted to mean that First Nations peoples have the right to receive a state-funded education (INAC Web site, November 2006). The Supreme Court of Canada has yet to determine exactly what education rights entail (McPherson, 1997). However, INAC's current practice is to provide funding to First Nations to support some of the education needs of First Nation community members. In Manitoba the provincial government's Public Schools Act (1890) establishes minimum standards with respect to such things as curriculum and teachers' qualifications in publicly funded education. INAC's expectation is that First Nations education systems should meet these provincial standards, even though they were not designed to meet the needs of First Nations people or communities. These issues are complicated by the fact that the treaty rights on which INAC's funding of First Nations education are based do not specify that First Nations people are entitled to any particular level of educational attainment or quality of access to education.

The government of Canada interpreted the treaties first through Royal Proclamation (1763), then through the Indian Act of 1867. Sections 114 through 122 of the Indian Act deal specifically with education. Band controlled schools in Manitoba receive their legitimacy and authority from the treaties (supported by the Canadian Constitution) and through these sections of the Indian Act.

Although provincial governments are primarily responsible for the education of most Canadians, treaties, court decisions relating to treaty obligations, and current First Nations and INAC policy have established the education of First Nations people (like other First Nations issues) as a federal responsibility.

As a result of Section 93 of the British North America Act, 1867 (later reenacted as the Constitution Act, 1867), education in Canada is maintained as an area of provincial responsibility and control. With the exception of the education of First Nations children, the federal government has no legislated role in the K-12 educative process. (Goddard, 2000)

Sections 114-121 of the Indian Act deal directly with the authority and administration of education on reserves, with an emphasis on attendance and truancy. In practice, INAC requires First Nations education authorities, which oversee First Nations schools, to sign on to the provincial education acts. For example, provisions in the transfer agreement between Opaskwayak Cree Nation and the federal government stipulate that the Opaskwayak Education Authority must implement the provincial curriculum in its K-12 school. Although First Nations education authorities must submit school plans and marks to the provincial government Education Information System (EIS), no system of accountability is in place to ensure that First Nations follow, for example, the Public Schools Act (PSA) or the Education Administration Act guidelines. No measure ensures that a school is open for an adequate amount of time, that curriculum is being followed, that instructors are qualified, or that due process is being followed. The only real accountability measure in place today is whether credits from our schools and graduates from our systems can transfer to other schools in the province. Even while INAC expects First Nations schools to follow the provincial Public Schools Act (PSA), the province insists that First Nations education is a federal responsibility. Funding comes solely from federal sources, not provincial, and the province constitutionally has no jurisdiction over or financial responsibility for First Nations education. If INAC were to formally demand that First Nations fully comply with the PSA, it would in effect be declaring authority over First Nations education and would therefore have to fund it adequately. There is a substantial vacuum between what *is* and what *should be* happening.

The federal government, while maintaining overall control of the finances and policies that constrain First Nations education, has pushed administrative control of education down to band levels without ensuring that that proper safeguards and measures are in place to ensure that

education on First Nations meets any standards. At a local level, in accepting administrative control of education (a small step on the long road to self-governance), First Nations have generally failed to implement accountability measures that could ensure that we have meaningful control of our own education institutions. Papers put forward by the national organization that represents First Nations leadership, the Assembly of First Nations (AFN, 2005) and the National Indian Brotherhood (NIB, 1972) (*First Nations Education Action Plan*; *Indian Control of Indian Education*) addressed the control of First Nations education, but fell short on addressing this jurisdictional gap, focusing instead on implementation, curriculum, and the language of sovereignty. What we need are legislation and institutions that support our sovereignty.

Historically the education of First Nations people has progressed through four phases: informal education; church and state efforts toward assimilation; transition; and the current state of "band-controlled" education (Goddard, 1993). Some have proposed that the fifth phase should focus on educational partnerships between First Nations and provincial school boards. However, if we want to address the real causes of the current crisis, the fifth phase must include resolution of jurisdictional conflict.

Effects of Jurisdictional Gray Zone

In Manitoba today it is not uncommon for band-controlled schools to operate under conditions that would not be acceptable for a public school in the province. Why is this so? Why do we hear about qualified teachers at First Nations schools being fired to hire non-qualified family members, about administrative decisions being overturned by politicians, or other stories that suggest political nepotism in First Nations schools? Why are the yearly operating budgets of First Nations schools significantly lower than those of provincial schools? For example, as of September 2006, Frontier School Division receives \$10,000 per year per student, whereas Opaskwayak Educational Authority receives \$5,200 in a province where the average expenditure per pupil in the public system is \$8,950. The high school completion rate for registered Indians sits at 48.8% today, well behind the Canadian norm of 68.7% (Statistics Canada, 2001). Dropout rates are elevated, and curriculum lags behind.

Currently if a First Nations school submits a school plan that acknowledges the provincial curriculum, it is good enough to receive transfer payments from INAC. In some First Nations, the entirety of the transfer payments may not be applied directly to education, with some percentage taken off by the band for "administrative fees." The money earmarked for education by already insufficient funding formulas gets moved to general operating costs of the band at large. This practice is normal operating procedure and generally encouraged because schools tend to operate at or under budget, whereas other band entities operate over budget. Unlike

provincial schools, if there are funding shortfalls a band-operated school cannot levy local taxes to make up the difference.

In a legal sense, Section 88 of the Indian Act (General Application), which states that those laws not covered in the Indian Act will become provincial responsibilities, do not apply to First Nations education, because this area is directly within federal jurisdiction. The average band-controlled school receives approximately \$1,000-\$4,000 less per student per year than its provincial counterparts (Manitoba Association of School Trustees, 2006). Funding levels are not determined by nominal rolls that fluctuate and increase with population growth rates, but are fixed at a 2% maximum increase per annum funding agreements. This practice prevails in spite of the fact that First Nations people are the fastest growing segment of the population in both Manitoba and Canada.

These budget constraints affect First Nations schools in (at least) three ways. First, most First Nations schools do not have the financial resources to pay their teachers' wages comparable to provincial school division rates, and as a result the most experienced and qualified teachers at First Nations schools are often lured away to teach in public schools. Second, financial constraints often leave First Nations with inadequate space and facilities to teach on-reserve students. For example, on my reserve there are currently 1,100 kindergarten through grade 12 students in a building built originally for 600. Overcrowding like this is commonplace. Third, financial constraints make it difficult for school staff and administration to keep current in curriculum implementation and development.

In addition to budgetary effects, jurisdictional gaps negatively affect policies and procedures in First Nations schools. Because First Nations have administrative control of education, schools typically rely on their local First Nation's policies in areas such as human resources. Chiefs and councils and school administrations can get away with practices that would contravene collective agreements in a provincial system. For example, a teacher or administrator can be fired on the spot without any legal or union representation to ensure that proper dismissal procedures are followed. If an appeal is launched through federal arbitration, the band chief and council can BCR (Band Council Resolution) the teacher off the reserve. Teachers in this situation have no recourse because BCRs take legal precedence over provincial legislation.

The number of teaching days per year that a school is open is another contentious factor that is exacerbated by a lack of oversight. In Manitoba, provincial schools are required to provide 196 instructional days each year. There is no such provincial requirement for First Nations schools. Although INAC's regional education management office does impose a mandatory minimum number of instructional days, it is not effectively enforced. As a result, First Nations schools have been open as few as 72

days in an academic year. Obviously students suffer the consequences of this lack of oversight.

Various special interest groups have proposed ways to address these obvious inadequacies. At a national level, the Assembly of First Nations has released several policy papers that present their vision of the direction First Nations education should take (1972, 1988, 2006). However, no model that would ensure that First Nations students have meaningful access to educational opportunities equivalent to those available to mainstream Canadians was presented in any of these documents.

At a provincial level, Manitoba First Nations Education Resource Centre (MFNERC, 2004), on behalf of the AMC, is working "to help First Nations to improve education for all learners." MFNERC provides services such as curriculum development, professional development, and other initiatives that support family and community involvement in First Nations schools. This approach has brought valuable supports to First Nations schools. Politically the AMC, the Southern Chiefs Organization, and Manitoba Keewatinowi Ininew Okimowin are collaborating on a Framework Agreement Initiative for education. However, to date jurisdictional issues remain unresolved.

We must fill the jurisdictional gap for the sake of our students. The current vacuum of authority over First Nations education presents a prime opportunity for First Nations to assert their authority over education and create measures that guarantee education standards and accountability in our communities. Including accountability and oversight procedures in local education acts may cause particular bands and band leaders difficulty (because they will lose their ability to influence education practices arbitrarily), but it will positively influence the education of generations to come. By responsibly asserting our own authority over education and implementing standards in areas such as minimum number of teaching days, certification of teachers, and curriculum standards, we will move beyond the rhetoric of position papers into practice.

Current Approaches

It has long been known that First Nations people should control Native education in Canada. From the NIB's (1972) paper *Indian Control of Indian Education*, through many other policy papers since, First Nations people in Canada have asserted their right to control First Nations education. Despite this, most of the change that has occurred to date has been in administrative protocols rather than the structure of First Nations education.

In New Brunswick the provincial government passed the Miq'Maw Education Act. This is quite possibly the first attempt at addressing the jurisdictional education gap in eastern Canada. Although the Act itself was a monumental success and the result of much negotiation and action, in itself it has no teeth. It is brief and as stated, was passed by the provin-

cial government. By being initiated by the provincial government, the Act will not meet the test of supporting First Nations self-governance, and it is my view that it will not be supported politically by First Nations communities.

In British Columbia, First Nations have taken a new approach to regain control of and local responsibility for education on reserves. In summer 2006, the First Nations Education Steering Committee (FNESC) signed an agreement with both the provincial and federal governments that empowers First Nations in BC to pass band-level acts (BCRs) that legally supersede provincial acts and legislation covering on-reserve K-12 education:

Jurisdiction over education is formal recognition, through signed Agreements, by the federal and provincial governments of a First Nation's right to make decisions about the education of its children. BC First Nations have been seeking recognition of their jurisdiction over education for decades.

On July 24, 2003 First Nations representatives, along with representatives of the federal and provincial governments signed a Memorandum of Understanding (MOU) outlining the elements of First Nations education jurisdiction. Over the past three years negotiations have continued and in November 2005, the negotiators initialed the respective agreements. An official signing of the package of Agreements by BC First Nations, BC and Canada took place on July 5, 2006 at the Xweme'Ich'stn Estimxwawtxw School in North Vancouver. (FNESC.ca)

In consultation with the federal and provincial governments, FNESC is currently working out funding agreements that ultimately will determine whether the local acts will be meaningful and capable of having a direct, positive, and measurable effect on First Nations education.

So far no First Nations acts are in place, but this initiative could have great ramifications for First Nations education throughout Canada. For example, the Kahnawáke First Nation in Quebec and INAC are currently drafting an agreement that clarifies jurisdiction over education and that will supersede provisions in the Indian Act (INAC, n.d.). The progress of the process needs to be monitored closely by First Nations in Manitoba.

The last federal election also brought other interests into the scope of this jurisdictional dilemma. The Conservative party ran with an election promise to have First Nations funding "follow the student" and allow First Nations parents to choose the schooling their children receive: "A Conservative government will [l]et Aboriginal parents choose the schooling they want for their children, with funding following the students" (*Stand Up for Canada*, Conservative Party, p. 38. 2006). Whether funding would follow students into First Nations schools at the same rate as it follows them out of First Nations schools remains to be seen. Currently there is a significant discrepancy (to the disadvantage of First Nations schools) between these rates.

Options for Manitoba First Nations

The failure of the First Nations Governance Act (FNGA), which attempted to address some of the governance problems occurring on First Nations, is a reminder that the process involved in creating a First Nations Education Act is as important as the Act itself. By creating the FNGA for First Nations, the Liberal federal government of the day pushed First Nations into a defensive posture. Because the process denied First Nations power and the recognition of their inherent rights to self-government, they had no recourse but *not* to support the Act.

Similarly, the creation of a First Nation Education Act provincially would never be accepted by local, regional, or national First Nation organizations because it would directly threaten First Nations authority over education as guaranteed in the treaties. Education is a First Nations responsibility. The possibility of ratifying the provincial Public Schools Act exists, but to do so would deny significant political incentives for First Nations.

First Nations should create their own Education Acts for three reasons: (a) to assert our authority over First Nations Education; (b) to assert self-governance in practice and; (c) to ensure that future generations of First Nations youth receive the education they deserve. The process of developing Education Acts must build on the lessons learned from the failure of the FNGA, from the history of our dealings with the federal and provincial governments, and from current initiatives taking place across Canada. It is my recommendation that a draft Act be drawn up by bands, with input from federal and provincial representatives and with consideration of what can be learned from the FNESC in BC. A First Nations Education Act will succeed only if it comes from us.

Although not as significant as the process itself, the content of the act(s) is essential to the long-term success of First Nations education. For this reason the Act must define terminology, initiate frameworks, transfer authority and rules to First Nations, and outline the repercussions of non-compliance.

Conclusion

Given the jurisdictional vacuum in First Nations education, it is a prime opportunity for First Nations, working in collaboration with the provincial and federal governments, to pass education acts at band, regional, and provincial levels that finally recognize and support First Nations' full jurisdiction over First Nations education. Decisions about who controls First Nations education must not be decided by torts (law cases). It is crucial that First Nations take the initiative to develop these acts. The acts must detail specific and measurable ways to create responsibility and accountability in First Nations education on our terms. If we do not, control of First Nations education will remain in the hands of others, and the young people in our communities will continue to suffer. This is a

prime opportunity for Native leadership to initiate sovereignty practices that will help to ensure that as individuals, communities, and Nations, we survive and thrive.

References

- Assembly of First Nations. (1988). *Tradition and education: Towards a vision of our future*. Ottawa: Author, Education Secretariat.
- Assembly of First Nations. (2006, April). *Assembly of First Nations calls on Government of Canada to address First Nations education crisis*. Press release. Available: <http://www.afn.ca/article.asp?id=2499>
- Assembly of First Nations. (2005). *First Nations education action plan*. Ottawa: Author.
- Conservative Party of Canada. *Stand up for Canada: Conservative Party of Canada Federal Election Platform*.
- First Nations Education Steering Committee. www.fnesc.ca
- Goddard, T. (1993). Band-controlled schools: Considerations for the future. *Canadian Journal of Native Education*, 20, 163-167.
- Goddard, T. (2000). The flight of the middle class from public schools: A Canadian mirage. *Canadian Journal of Educational Administration and Policy*, 18.
- Health Canada: First Nations Inuit Health Branch. (2003). *A statistical profile of the health of First Nations in Canada*. Ottawa: Author.
- Indian and Northern Affairs Canada. (2005). *Education action plan, April 2005*. Ottawa: Author.
- Indian and Northern Affairs Canada Web site. (2005). *Comparison of socio-economic conditions: Registered Indians, Registered Indians living on reserve and the total population of Canada*.
- Indian and Northern Affairs Canada. (2006). http://www.ainc-inac.gc.ca/pr/trts/hti/bib/edu_e.html
- Indian and Northern Affairs Canada. (n.d.). *Renewed relationship between the Mohawks of Kahnawake and the Government of Canada*. Retrieved September 4, 2007, from: http://www.ainc-inac.gc.ca/pr/agr/jpr_e.pdf
- Manitoba Association of School Trustees. (2006). http://www.mast.mb.ca/news_views/Publications.htm
- McPherson, D.H. (1997). *Transfer of jurisdiction for education: A paradox in regard to the constitutional entrenchment of Indian rights to education and the existing Treaty No. 3 rights to education*. Unpublished master's thesis, University of Ottawa.
- National Indian Brotherhood. (1972). *Indian control of Indian education*. Ottawa: Author.