



Assembly of First Nations

Submission to the Standing Committee on Official Languages

RE: Bill C-13 *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*

October 31, 2022

Summary

Proposed amendments to the *Official Languages Act* are expected to create barriers for First Nations in accessing positions—particularly senior positions—within the federal government and on the Supreme Court of Canada. First Nations are already underrepresented in these institutions. Additional bilingual requirements are expected to prevent new First Nations applicants, and federal First Nations employees seeking advancement, from accessing federal positions.

Privileging English and French over Indigenous languages ignores the foundations of the Canadian state. Indigenous languages are the original languages of what is now called Canada. Through Treaties and other agreements, First Nations and the Crown made commitments with a view toward peaceful coexistence, mutual respect, recognition and the equitable sharing of lands and resources. This includes equal recognition of languages.

Upholding First Nations Inherent, Treaty, and Aboriginal rights to language does not detract from French language rights. Both Indigenous and French language rights can be equally protected and upheld simultaneously; they are not mutually exclusive.

First Nations Peoples should not be forced to learn additional colonial languages to be eligible for positions within federal institutions. Not only is this contrary to the *United Nations Declaration on the Rights of Indigenous Peoples*, but it is a modern reflection of the Crown's assimilatory approach to First Nations. It perpetuates the intergenerational traumas experienced by Indigenous Peoples through Residential Institutions, the Sixties Scoop, and other racist policies, and overlooks the significant value of First Nations representation.

Bilingual language requirements under Bill C-13 will limit First Nations eligibility to these positions to 10 percent of the First Nations population. This is the portion of First Nations Peoples who speak both English and French. Contributing to this low number are the federal government's discriminatory First Nations education programs.

Indigenous Services Canada—and its previous iterations—have acknowledged for decades that First Nations operated schools lack sufficient resources, including second-level services, curriculum development, teachers and teacher training, and adequate infrastructure. As a result, thousands of First Nations students do not have the opportunity of choosing between Indigenous, French, and English language courses.

To ensure First Nations representation, the amendments to the OLA should include exemptions for Indigenous Peoples. This approach is in keeping with the Government of Canada's commitments under the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Introduction

Indigenous languages are the original languages of what is now called Canada. Since time immemorial, First Nations have had their own languages, laws, legal orders, and governance structures. When Europeans arrived, many Indigenous Constitutions already existed from coast to coast to coast.¹

As a result of their prior occupation, First Nations have a special relationship with the Crown. This special relationship is grounded in First Nations Inherent and Aboriginal Rights and Title, Treaties and negotiated agreements with a view toward peaceful coexistence, mutual respect, recognition and the equitable sharing of lands and resources.

Many Treaties, reflected in written documents, wampum and oral understanding, were entered into between First Nations and the British Crown (the Government of Canada after Confederation) between 1701 and 1923. Further, modern treaties and settlement agreements have been signed. Treaty promises and agreements include non-interference, protection of hunting and fishing rights, sharing of lands and resources, health and education benefits, economic tools, and benefits for the duration of the Treaty relationship.

The relationship between First Nations and the Government of Canada, however, has been fraught with broken promises, violence, cultural genocide, and even the murder of children at Residential Institutions (schools). Consecutive Canadian governments have sought to assimilate and eliminate First Nations through racist and discriminatory policies, which have had devastating intergenerational effects on First Nations.

Recently, the Government of Canada has committed to reconciling its relationship with First Nations. As part of this commitment, the federal government enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*² and the *Indigenous Languages Act*.³ Both recognize the importance of Indigenous languages, which are essential to the health, well-being, and prosperity of First Nations.⁴

Thus far, the Government of Canada's approach to languages has privileged English and French over Indigenous languages. This is a modern reflection of Canadian colonialism's exclusion of Indigenous Peoples. Changing this approach is an important step toward

¹ See John Borrows, *Canada's Indigenous Constitutions* (Toronto: University of Toronto Press, 2012).

² *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

³ *Indigenous Languages Act*, S.C. 1019, c. 23.

⁴ See R Bethune, et al, "Social Determinants of Self-reported Health for Canada's Indigenous Peoples: A Public Health Approach" (2019) 176 *Public Health* 172; Fariba Kohlahdooz, et al, "Understanding the Social Determinants of Health among Indigenous Canadians: Priorities for Health Promotion Policies and Actions" (2015) 8:1 *Global Health Action* 1; Dr Rose-Alma J McDonald, *First Nations Languages and Culture Impacts on Literacy and Student Achievement Outcomes Review of Literature* (Akwesasne Mohawk Territory: Assembly of First Nations, 2011).

reconciliation. Recognizing only two official languages ignores Canada's foundations, which include its relationship with First Nations.

The protection of minority language rights, including French, is an important obligation. Approaches to language that promote one at the expense of another, however, are problematic. Language rights, and human rights more broadly, should not be conceived of as a "pie" whereby providing rights to First Nations means that there is one less piece for everyone else. First Nations and French language rights are not mutually exclusive; both can be simultaneously protected and upheld.

Bill C-13, an *Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts* continues the federal government's approach of privileging English and French while devaluing Indigenous languages. Proposed amendments to the *Official Languages Act* (OLA) are likely to create barriers for First Nations individuals seeking employment or advancement in federal institutions.

First Nations Peoples are already underrepresented in the federal public service, particularly at the highest levels.⁵ For example, of the 335 assistant deputy ministers, only nine are Indigenous (2.7 percent).⁶ Statistics Canada reports that only 10 percent of First Nations individuals speak both English and French; only 5 percent speak French as their colonial language; and 85 percent speak only English.⁷ As a result, 90 percent of First Nations Peoples will not be able to fill senior positions within the federal government because they are not bilingual.

AFN Language Resolutions

In 1998, the First Nations-in-Assembly declared a state of emergency on First Nations Languages through Resolution 35/1998 *First Nation Languages*. That resolution called on the Government of Canada to act immediately to recognize, officially and legally, the First Nations languages of Canada and to commit to providing the necessary resources to reverse First Nations language loss.

In 2017, the First Nations-in-Assembly passed Resolution 77/2017 *Support for the continued co-development work on the Indigenous Languages Act* directing the AFN to remind the government of its constitutional obligation to engage in extensive

⁵ Andrew Griffith, "What new Disaggregated Data tells us about Federal Public Service Diversity", *Policy Options* (October 21, 2020) < <https://policyoptions.irpp.org/magazines/october-2020/what-new-disaggregated-data-tells-us-about-federal-public-service-diversity/> >

⁶ Ibid.

⁷ Statistics Canada, "Percentage Distribution of the Population by Knowledge of Official Languages for selected Aboriginal Identity Categories, Canada" (2011) online: *Statistics Canada* <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011003/tbl/tbl02-eng.cfm>>

consultation based on the standard of free, prior, and informed consent on the proposed languages bill upon its availability.

Resolution 35/2021 mandates the AFN to advocate for exemptions from English-French bilingual language requirements in the federal public service.

On December 9, 2021, the First Nations-in-Assembly passed Resolution 35/2021 at the AFN Virtual Special Chiefs Assembly.

AFN Resolution 35/2021 mandates the secretariat to:

- (1) Support the initiative to seek a legislated exemption for Indigenous Peoples, pursuant to the Public Services Employment Act, SC 2003, from any employment or appointment criteria that may require Indigenous Peoples to be bilingual in both French and English in order to:*
 - a) be hired for positions within the federal public service or other government offices;*
 - b) hold key positions such as Governor General of Canada; or*
 - c) be considered for judicial appointments to Canadian courts, including the Supreme Court of Canada*
- (2) Direct the Assembly of First Nations to provide political advocacy, which includes writing letters to the Commissioner of Official Languages, the Federal Minister of Official Languages and the Prime Minister of Canada.*

United Nations Declaration on the Rights of Indigenous Peoples Act

The *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) affirms Indigenous language rights and the rights of Indigenous Peoples to fully participate in the economy, without discrimination.⁸

The *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) commits the Government of Canada to fully implementing the UN Declaration.

Section 5 of the UNDA states that:

The Government of Canada must, in consultation and cooperation with Indigenous [P]eoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.⁹

The UN Declaration includes several language and economic rights.

Article 5 states that Indigenous Peoples retain the right to participate fully in the economic life of the State. Under Article 8, Indigenous Peoples have the right not be subjected to forced assimilation.

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, A/Res/61/295, UN General Assembly, October 2, 2007.

⁹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14 at s. 5.

Article 13 affirms the rights of Indigenous Peoples to revitalize, use, develop, and transmit languages to future generations. Article 13 requires states to take effective measures to ensure that the right to language is protected.

Article 14 provides that Indigenous Peoples have the right to establish and control their educational systems and institutions and receive education in their own languages. Article 14 requires states to take effective measures to ensure First Nations have access to an education in their own language.

Article 17(3) affirms the rights of Indigenous Peoples “not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.”

Under Article 18, Indigenous Peoples have the right to participate in decision-making in any matters affecting their rights, including language and economic rights.

Articles 38 and 39 require states to take appropriate measures, including legislatively, to achieve the ends of the UN Declaration through consultation and cooperation with Indigenous Peoples. This includes access to financial and technical assistance from States.

Section 35 Language and Culture Rights

Indigenous languages and cultures are protected by section 35 of the *Constitution Act, 1982*.¹⁰ The Supreme Court of Canada addressed culture in *R v. Côté*. In that case, the Court stated:

In the [A]boriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of [A]boriginal practices, customs and traditions, a substantive [A]boriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.¹¹

This statement implies that the right to pass on practices and customs includes a right to do so in Indigenous languages. The Supreme Court of Canada has recognized this close relationship between language and culture, stating:

...any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.¹²

¹⁰ *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Caring Society*].

¹¹ *R v Côté*, [1996] 3 SCR 139 at para 56.

¹² *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 26.

Further, there is arguably no element that satisfies the “integral to a distinctive culture” test more so than language.¹³

The Government of Canada has also recognized that language is an Aboriginal right. Section 6 of the *Indigenous Languages Act* states:

The Government of Canada recognizes that the rights of Indigenous [P]eoples recognized and affirmed by section 35 of the *Constitution Act, 1982* include rights related to Indigenous languages.¹⁴

Canada’s Approach to Language Rights

English-French bilingualism is a colonial construct that ignores the foundations of the Canadian state.

First Nations and First Nations languages were here long before Canada and Quebec existed. First Nations have occupied their territories for centuries. Consequently, First Nations, as the original stewards of this land, have a unique and special relationship with the Crown and the people of Canada as set out in the Royal Proclamation of 1763 and manifested in Treaties, Peace and Friendship Treaties, military alliances, and modern self-government agreements. This is recognized in Canada’s own constitution.

English, French, and Indigenous languages are all constitutionally protected. Sections 16–23 of the *Canadian Charter of Rights and Freedoms* set out English and French language rights,¹⁵ while Indigenous languages are an Aboriginal right under section 35 of the *Constitution Act, 1982*.

Yet, despite this constitutional recognition, the Government of Canada has taken an approach to languages that purposely and systematically privileges English and French and devalues Indigenous languages. This approach flies in the face of the honour of the Crown. The honour of the Crown is a foundational principle governing the relationship between the Crown and First Nations.¹⁶ This principle requires that the Crown act honourably in all of its dealings with First Nations.¹⁷ It is based on the assumption that the Crown always intends to keep its promises.¹⁸

The disparities between English-French language rights and Indigenous language rights are obvious in the stark contrast between the OLA and the *Indigenous Languages Act*.

¹³ Karen Drake, “Language Rights as Aboriginal Rights: From Words to Action” in Kiera Ladner & Myra J Tait, eds, *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal* (Winnipeg, Manitoba: ARP Books, 2017).

¹⁴ *Indigenous Languages Act*, SC 2019 c 23 at s. 6.

¹⁵ *Canadian Charter of Rights and Freedoms*, ss 16–23, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁶ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 21.

¹⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17.

¹⁸ *Ibid.* at para 20.

The *Indigenous Languages Act* is largely permissive in nature, while the OLA creates strict commitments.

With respect to the OLA, the Government of Canada has cited goals for the substantive equality of English and French.¹⁹ Proposed amendments to sections 41 and 42 of the OLA include commitments with respect to the promotion of French (41(2)); and to the advancement of opportunities for linguistic minorities to receive instruction in their language (proposed 41(3)).²⁰

In contrast, the *Indigenous Languages Act* contains no language on advancing equality. In fact, when describing commitments to Indigenous languages, the Act uses language such as “to help promote” and “support efforts.”²¹ With respect to education, the Act states that the Minister “may” cooperate with provincial or territorial governments and Indigenous governments/entities to provide Indigenous language programs and services.

The Government of Canada has committed to helping maintain, revitalize, and promote Indigenous languages through the *Indigenous Languages Act*. They have also committed to implementing the UNDA and the Truth and Reconciliation Commission’s Calls to Action.

Call to Action 14 states:

We call upon the federal government to enact an Aboriginal Languages Act that incorporates the following principles:

- i. Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them.
- ii. Aboriginal language rights are reinforced by the Treaties.
- iii. The federal government has a responsibility to provide sufficient funds for Aboriginal-language revitalization and preservation.
- iv. The preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities.
- v. Funding for Aboriginal language initiatives must reflect the diversity of Aboriginal languages.²²

¹⁹ Tabling of the improved Bill entitled *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, Canadian Heritage. <<https://www.canada.ca/en/canadian-heritage/news/2022/03/tabling-of-the-improved-bill-entitled-an-act-to-amend-the-official-languages-act-to-enact-the-use-of-french-in-federally-regulated-private-business.html>>

²⁰ Bill C-13, *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, 1st Sess, 44th Parl, 2022.

²¹ *Indigenous Languages Act*, supra note 12 at ss 5, 23.

²² Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg, Manitoba: Truth and Reconciliation Commission of Canada, 2015) at 2.

As part of these commitments, the Government of Canada should be ensuring that the OLA is compatible with the *Indigenous Languages Act* and the UNDA, including any proposed amendments. This should be part of the federal government's respective implementation process.

Effects of Bill C-13

Bill C-13 creates additional unnecessary and arbitrary barriers for First Nations individuals who wish to work in federal institutions, where they are already underrepresented.

The *Use of French in Federally Regulated Private Businesses Act* will potentially impact First Nations individuals employed within regulated private businesses within Quebec and any areas that are deemed prescribed regions. Requirements under the Act create an incentive for federally regulated businesses to prioritize French or functionally bilingual candidates.

Section 36(1) of the proposed amendments would require federal institutions operating within the National Capital Region or other prescribed region to:

(d) ensure that,

(i) if it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, **managers and supervisors** are able to communicate in both official languages with employees of the institution in carrying out their managerial or supervisory responsibilities... (emphasis added).

The emphasis on bilingual parties to fill supervisory and managerial roles creates barriers for new First Nations candidates and First Nations candidates seeking advancement in the federal government. These requirements are contrary to the Government of Canada's commitment under the UNDA to implementing the UN Declaration, which upholds First Nations rights to participate fully in the economic life of the State (Article 5), and which prohibits discriminatory conditions of labour (Article 17).

Additionally, proposed amendments to section 16 would remove an exemption for jurists on the Supreme Court of Canada to be functionally bilingual in English and French. This potentially limits the pool of Indigenous Supreme Court candidates who would otherwise make excellent jurists and is occurring at time when legal scholars are calling for greater Indigenous representation on the Supreme Court.²³

²³ The Current, "Supreme Court needs at least 3 Indigenous Justices—Even if that means a Bigger Court, says Lawyer" (22 August 2022) online: *Canadian Broadcasting Corporation* <<https://www.cbc.ca/radio/thecurrent/the-current-for-aug-22-2022-1.6558261/supreme-court-needs-at-least-3-indigenous-justices-even-if-that-means-bigger-court-says-lawyer-1.6558547>>.

Measures imposed by the Government of Canada should be rationally connected and proportional to the intended outcomes. French language rights can be enforced and upheld without forcing First Nations to learn additional colonial languages. Only 22.2 percent of the Canadian population speak French as their only language.²⁴ With a range of technological supports at their disposal, the federal government has the tools to uphold French language rights while also promoting Indigenous representation.

To ensure that language requirements do not pose a barrier to First Nations individuals or perpetuate Canada's long history of forced assimilation, First Nations must be exempted from bilingualism requirements for positions in federal institutions. This would promote greater First Nations representation, particularly in levels of government responsible for the government's direction. The theory of representativeness posits that a public service that reflects the population it serves is better situated to address the needs of, and make decisions for, that population.²⁵

Arguments against First Nations exemptions, such as "floodgate" arguments or arguments that Indigenous language rights take away from French language rights are unfounded. "Floodgate" arguments, which are frequently invoked against First Nations to undermine Aboriginal rights and title, are intolerable in today's era of reconciliation.²⁶ In fact, First Nations exemptions promote reconciliation and are in line with the Crown's fiduciary duties.

Further, exemptions from bilingual requirements are not unprecedented. The *Public Service Official Language Exclusion Approval Order* SI/2005-118, regulations passed pursuant to section 20 of the *Public Service Employment Act*,²⁷ provides latitude for those hired within the public service to achieve official language proficiency status where it is a requisite for the position at issue within two years from the date they commenced their position.

The Effects of Bill-C13 Compound Historic Discrimination Against First Nations

From the time that settlers arrived, First Nations have been subjected to discrimination at the hands of the state. Through policies of assimilation and elimination, successive governments' approaches have failed First Nations and frequently resulted in intergenerational trauma, inequity, and violence.

Through the Residential Institutions (schools) system—and other racist practices like the Sixties Scoop—First Nations children were forced to learn colonial languages under

²⁴ Statistics Canada, "While English and French are still the main Languages Spoken in Canada, the Country's Linguistic Diversity Continues to Grow" (17 August 2022), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/daily-quotidien/220817/dq220817a-eng.htm>>.

²⁵ Gregory Inwood, *Understanding Canadian Public Administration: An Introduction to Theory and Practice*, 4th ed (Toronto: Pearson Canada, 2012) at page 277.

²⁶ *R v Desautel*, 2021 SCC 17 (Factum of Bruce McIvor).

²⁷ SC 2003 c. 22.

a false guise of European superiority. Between 1831 and 1996, over 130 Residential Institutions operated in Canada from coast to coast to coast. These institutions forbade Indigenous children from speaking their language or practising their culture, which has resulted in the loss and rapid decline of Indigenous languages.

The Government of Canada has spent billions of dollars trying to destroy First Nations languages and culture. Now, the federal government perpetuates these efforts by forcing First Nations Peoples to learn two colonial languages in order to hold positions within federal institutions.

Further, historical traumas have quite likely contributed to First Nations lacking opportunities to develop functional bilingualism to the level of the Canadian population. Much like the child welfare system, which the Canadian Human Rights Tribunal found discriminated against Indigenous children,²⁸ the government has systemically underfunded First Nations education and education services.

In fact, the Government of Canada has discriminated against First Nations children and youth through its purposeful and systemic underfunding of First Nations education. In a briefing note prepared for Indigenous Affairs Minister Carolyn Bennet, the government acknowledged that First Nations-managed schools and communities used a single-school model that did not have educational systems due to a “persistent federal funding gap and lack of structures and resources.”²⁹ The briefing note also highlighted the absence of “proper curriculum development, teacher training, testing and quality assurance or the support structures available to non-Indigenous schools such as a school board, elected trustees, or an education Ministry.”³⁰

In 2016, a briefing note marked SECRET from Aboriginal Affairs and Northern Development Canada (AANDC) indicated that education had “insufficient on-going base funding to keep pace with costs and cost drivers, provincial/territorial expenditures and service levels.”³¹ At a meeting of the Standing Senate Committee on Aboriginal Peoples in April 2010, the Assistant Deputy Minister of Education and Social Development Programs of AANDC stated that AANDC “could not provide the level of expertise provided by the province” and “does not claim to have huge expertise in post-secondary or kindergarten-to-Grade 12 education.”³²

Many federally funded First Nations schools do not have adequate resources to provide students with the full suite of mandatory courses, let alone French, English, and

²⁸ *Caring Society*, *supra* note 8.

²⁹ Ron Phillips, “A Commentary: Education in Canada—Does Anyone Read our Constitution?” (2019) 28:2 Brock Education Journal 4 at 5.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

Indigenous language instruction. In many cases, “First Nations children will never attend a school equipped with libraries, science and technology labs or athletic facilities.”³³

First Nations individuals should not be punished as adults for federal policy failures that impeded their access to language education as children. The Government of Canada needs to invest in rebuilding education and languages for First Nations. Restoring First Nations languages is a critical component to advancing reconciliation.

Recommendations

- Incorporate Indigenous languages as official languages within the context of the OLA.
- Incorporate the *Indigenous Languages Act* within the context of the OLA’s provisions on recourse and remedy to the federal court.
- Create an Indigenous exemption on bilingualism requirements for all positions within federal institutions, including senior management, federal courts, and the Supreme Court of Canada.

The Assembly of First Nations

The Assembly of First Nations (AFN) is a national advocacy organization that works to advance the collective aspirations of First Nations individuals and communities across Canada on matters of national or international nature and concern. The AFN receives mandates and directives for the organization through resolutions directed and supported by the First Nations-in-Assembly (elected Chiefs or proxies from member First Nations). In addition to the direction provided by Chiefs of each member First Nation, the AFN is guided by an Executive Committee consisting of an elected National Chief and Regional Chiefs from each province and territory. Representatives from five national councils (Knowledge Keepers, Youth, Veterans, 2SLGBTQQIA+ and Women) support and guide the decisions of the Executive Committee.

The AFN supports First Nations by coordinating, facilitating, and advocating for policy change. Chiefs, and the First Nations they represent, are an integral part of meeting the challenge of sustainable, transformative policy change. The AFN has been acting on this responsibility by leading discussions on environment at the regional, national, and international stage.

Recognizing the historic discrimination faced by First Nations individuals, the First Nations-in-Assembly passed Resolution 35/2021 at the AFN Virtual Special Chiefs Assembly in 2021. Resolution 35/2021 *Indigenous Peoples Exemption: Federal Bilingual Requirements* directed the AFN to advocate for exemptions from English-French bilingual requirements in the federal public service.

³³ Ibid at 6.