

Preliminary Analysis

Proposal for a Bill on First Nation Education

“Working Together for First Nation Students”

Department of Aboriginal Affairs and Northern Development Canada

October 2013



Ontario Native Education Counselling Association

By

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Introduction

This is a very early review of the content of the “Proposal for a Bill on First Nation Education” by the Department of Aboriginal Affairs and Northern Development Canada. Preliminary comments are offered along with questions designed to initiate discussions among First Nation Governments, First Nations educators, parents, students and other stakeholders in First Nations communities.

Further and deeper analyses will follow of legal and educational perspectives by First Nations organizations and it is anticipated that allied associations will also weigh in to add their perspectives to the discussions.

The preliminary analysis presented in this document reviews the proposed national First Nation Education Act from the perspective of accommodating Indigenous rights, inherent rights and Treaty rights and First Nations jurisdiction over education.

In the Discussion Guide released in December 2012 and the Blueprint for Legislation released in July 2013, the government of Canada presented its work to unilaterally reform First Nations education without First Nations leadership at the table in full partnership as a third order of government. Certainly the current title of “working together” is misleading. Consultation sessions with First Nations and stakeholders were “information sessions” at best.

The intent and tone of the Proposal can be summarized in Section 34 (p) of the Proposal,

“The Minister may make any regulations that are necessary for carrying out the purposes and provisions of this Act, including regulations

(p) prescribing anything that by this Act, is to be prescribed.”

It is disheartening to witness the paternalistic tone of the Proposal that reaffirms total control over jurisdiction of First Nations education and decision making in the hands of the Minister of AANDC and the government of Canada while relegating the administration of First Nations education to First Nations Governments or First Nations Education Authorities or provincial School Boards.

This version of the First Nation Education Act effectively makes the Minister of AANDC a national Minister of Education, however, lacking the highly specialized support in the education division that would be similar to a Ministry of Education.

Since the legislative development process began with intent on March 29, 2012 there has been a profound lack of any conciliatory moves on the part of the Government of Canada to approach First Nations in a partnership to co-create an Act that would serve the interests of First Nations children and youth and ultimately be in the best interests of the Canadian economy.

Without a doubt, First Nations welcome reform in the education systems but not in circumstances where rights, jurisdiction and self-determination are under threat by the federal government.

The government of Canada is reforming the Indian Act, sections 114-122 by the establishment of the national First Nation Education Act. There is, however, no mention of reform for the bureaucracy that is responsible for First Nations education at AANDC. The education department of AANDC is not a Ministry of Education.

The Proposal begins with summary statements in an Introduction and Walk Through that serves as context for the draft law. Although key concepts are mentioned, AANDC fails to include these concepts in the draft law:

- “a legislative base that respects Aboriginal and treaty rights”
- “enables First Nation control over First Nation education”
- “First Nations will continue to be able (to) exercise their rights over education by running community operated schools”
- “clarifying service levels, Improving the funding mechanism”
- recognize the “importance of provisions relating to education in historic treaties, in land claims and in self-government agreements”
- offer a commitment to “working with First Nations to develop a First Nations Education Act to support improved quality of education and better results for First Nation students on reserve”
- “provide a structure for the exercise of First Nation control of First Nation education”
- “the Act enables First Nations to strengthen access to quality education”
- “provide access to education for elementary and secondary students who live on their reserves”
- offer the “opportunity for communities to develop and implement language and culture programs suited to their needs”
- “provides First Nations the opportunity to structure the schools in a way that respects community and cultural concerns”
- develop “mechanisms that would involve First Nation representatives in a co-operative process of establishing these regulations”

It is clear that the narrative that precedes the draft law section of the Proposal contain terms that make the draft legislation more palatable but those same messages do not come through in reading the Proposal for a Bill in its present form.

The actions taken during what was termed a consultation phase of approximately one year beginning in December 2012 with the release of a “Discussion Guide” and subsequently 8 meetings across southern Canada for four months from January to April, 2013 followed by the release of the “Blueprint” have been little more than information sessions on the government’s intentions to define reform in the “Proposal For A Bill on First Nations Education.”

Powers of the Minister of AANDC

The Proposal for a Bill squarely places the Minister of AANDC as the epicenter of control as a national Minister of Education with little of the education accreditation for the AANDC department and describes his wide ranging powers as:

- Minister of AANDC is provided with full authority in making Regulations that have the force of law for carrying out the purposes and provisions of this Act: Section 34, Minister makes regulations for approving equivalent graduation certificates and diplomas, annual budgets, form of budget reports and annual reports, management of human resources, determining the qualifications for and the hiring of the Principal, Director of Education, Teachers, School Staff, approving school success plans, school programs, school safety plans, operations and maintenance of school property, community education committees, tuition agreements, schooling at home or elsewhere, instructional hours and instructional days, insurance, record keeping and submission to the Minister, school inspections, qualifications of the inspector, funding formulas, “prescribing anything that by this Act is to be prescribed” (Section 34)

In order to accommodate First Nations jurisdiction over education, the Minister should not be allowed unilateral power to make Laws or Regulations without the risk of infringing on First Nations rights to self-determination.

By defining the roles of Principal, Director of Education and the Community Education Committee in the proposed Act, the federal government has moved into the arena of First Nations governance. It is the right of the First Nation Government to define those roles and this right should be specified as part of the governance of the First Nations in their respective Constitutions and Education Laws.

The Proposal is not enabling legislation. It does not enable federal or provincial governments to recognize First Nations jurisdiction over education.

- Minister sets new governance systems in place for First Nations education by defining community independent schools, defining and authorizing new regional education authorities and thirdly, making available the option for First Nation governments to transfer jurisdiction of First Nations schools to School Boards of the province to run First Nations schools on reserve if the First Nation Government so chooses to sign away their jurisdiction to provincial law and school administration, curriculum, evaluation, standards, teachers and so on

The Minister of AANDC and the education staff of the Department of AANDC are not equivalent in accreditation or experience to the staffing of the Ministry of Education and their hundreds of specialized education staff. Yet AANDC is engaged in writing an Education Act for First Nations without First Nations at the table.

There are significantly mature systems of education on reserve supported by legislation, funding formulas, culturally and linguistically responsive education curricula and pedagogy and data systems. These systems should be used as models so that other First Nations can design their own nation based education laws and develop their systems on models actually producing outstanding academic results in First Nations.

- “Nothing in this Act is to be construed so as to abrogate or derogate from the protection provided for existing Aboriginal or Treaty rights of the Aboriginal peoples of Canada by the recognition and affirmation of those rights in s. 35 of the Constitution Act, 1982”.

This section should read as “there will be no abrogation or derogation from the rights themselves”

- Act is deemed not to apply to self-governing First Nations with laws in education, Mi’kmaq Education Act, First Nations Jurisdiction over Education in British Columbia Act, Sechelt Indian Band Self Government Act

While the draft explains that there will be a Schedule of Exemptions, the Minister has been quoted in news reports saying that the period of effect of those Acts will expire and then all First Nations will fall under the First Nations Education Act.

- Minister authorizes the Council of a First Nation to make by-laws like in the Indian Act,

The Minister does not offer the option for the development of Education Laws by the First Nation Government as a companion law to the First Nation Government Constitution.

The Minister does not mention establishing a First Nation School Authority to manage education for the community.

First Nation jurisdiction is much more than making by laws authorized under a piece of Canadian government legislation called the First Nation Education Act.

First Nations Governments have the right to make their own Constitutions, Education Laws, authorize First Nation School Authority to run education in the communities, select second level service organizations for specialized services and make partnerships for shared jurisdiction when necessary.

- Minister sets the budget for the year for the First Nations schools according to the formulas in the Regulations

It is disingenuous to state the responsibilities of First Nations Governments and First Nations Education Authorities without a discussion on funding models, formulas and mechanisms that will support the First Nations.

It is unfair to place the discussion on funding in the Regulations in a process that will be designed after the Act has been passed.

The Minister does not mention the obligation of the government of Canada to fund First Nations education.

- Minister is not liable in respect of anything done or omitted to be done by the Council of the First Nation or the First Nations Education Authority, Director of Education or Principal, or by any person or body authorized by them in the exercise of their powers or functions under this Act AND no action or other proceeding lies against Her Majesty, the Minister or any employee or agent of Her Majesty or the temporary administrator for anything done or

omitted to be done in good faith in the exercise or performance of their powers or functions under this Act

What law enshrines immunity from legal proceedings for those who fail in their duties?

- Setting in place provincial education standards.

Provincial standards are part of the problem. If 70% of First Nations live off reserve, then a significant number of students are already attending provincial secondary schools whether they have self-identified or not. The Ministry of Education has estimated that roughly 1500 students out of 7400 Aboriginal students have withdrawn/left/walked out/dropped out of school this past year. The drop-out rate for First Nations students hovers around 30%-40% in secondary school education.

Walking out or dropping out is a clear indication that Indigenous knowledge systems are not fully respected in the provincial curriculum, teachers need training in cultural competency, Indigenous languages need a place of respect like French language in the curriculum, social programming is essential and mentoring is critical to success for First Nations students.

It has been noted that graduation rates fell to the present rate at about the same time in 1996 when the government of Canada placed a 2% cap on federal education funding for First Nations. Despite the rise in First Nation student population and the rising rate of 4-7% budget increases in provincial education costs, the First Nations education costs have been capped at 2% for the past 17 years by the government of Canada using old BOFF formulas that were never meant to fund modern education systems.

First Nations hold the power to define their own educational standards and set additional standards as demanded.

- Making education funding dependent upon accepting the governance models in FNEA.

First Nations have worked diligently to design and operate their education systems on reserve and for those who have taken significant control of legislation, funding, curriculum, teacher hiring, capital construction and programming, there have been successes.

But success has not come from patterning after the provincial system of education or from generous federal support of First Nations' educational initiatives.

Success has come from strong parental engagement, local jurisdiction, culturally responsive curriculum, pedagogy and assessment, teacher cultural and linguistic competency, programming that is culturally authentic and historically balanced, and caring for the emotional well-being of students.

Success has been achieved by strong First Nations leadership ready to make a long-term investment in education and to negotiate with all levels of government to fight for the kind of education that is both culturally consistent and academically challenging.

- No discussion of funding mechanisms or modernizing existing funding formulas thereby moving this important discussion to the development of Regulations after the Act is passed into law.

It can be nothing but disingenuous to place responsibility on First Nations in new governance models, applying provincial standards, insisting on inspections yearly, establishing new service models and increasing reporting systems without a clear conversation about the nature of funding formulas to run a modern education system. The education system must be funded without caps, be needs based, culturally and linguistically founded, noting geographical remoteness factors, calculating additional funding as escalation factors to bring schools up to standard after years of crisis underfunding with funding assured on a foundation of a secure funding mechanism that is not annual project funding as in present federal methods.

- Little attention to protecting and enhancing Indigenous languages and cultures.

Marginalizing this foundational piece of First Nations education in the Proposal is a regression to the era of the Indian Agent who, supported by the RCMP, was able to fill the residential schools to “kill the Indian, save the child.”

As residential schools destroyed generations of First Nations children from 1840 to 1990's, so should a restoration of Indigenous knowledge systems occur under First Nations self-determination and jurisdiction.

The proposed Act must include a designation for funding language, culture and Cultural Education Centres, e learning institutions and other institutions clearly mandated for cultural revitalization of First Nations civilizations. Nothing less will fulfill the mandate for reconciliation.

Funding must be available to ensure the transmission of culture and language to the next generations and prevent assimilation.

- No mention of recognition of First Nations self-determination or jurisdiction over education.

The rights of the First Nations to self-determination and jurisdiction over education form building blocks for nation building. In this millennium, there is no meaningful progress in First Nations education without the recognition of First Nations jurisdiction over education supported by modern funding models and systems as the structure to hold the academic growth and social and emotional well-being of the child, the cultural and spiritual values and practices, history and oral traditions, Indigenous knowledge systems and land based learning.

The new First Nation Education Act must acknowledge and accommodate First Nations jurisdiction over education.

The Proposal is largely administrative in nature; seeking to create a system that government can understand and is defensible to Canadians if it is similar to their system.

Federal laws and provincial and territorial laws must realign to accommodate First Nations jurisdiction over education.

- Setting educational standards that all First Nations must achieve for continued funding.

Whose standards? Who designs the standards?

The First Nations education system does not have to look like the provincial system, but it does have to offer educational standards that serve the cultural and Nation needs of the community while ensuring academic capacity and social and emotional well-being. This is our challenge as First Nations.

After months of “consultations”, the Proposal consistently adheres to the government’s intended purposes expressed first in the “Discussion Paper” and expanded in the “Blueprint.” Little has changed in the “Proposal for a Bill” to accommodate the many recommendations and protestations of the First Nations especially around the primary issues of language and culture, funding and jurisdiction.

Governance

According to the Proposal, First Nations Governments have only three options for governance of their education systems of which they can select one under the new Act and inform the Minister of their decision:

1. Community Independent School
2. Regional First Nations Education Authorities
3. Agreements with School Boards of the province

The Discussion Guide was clear in stating that should a First Nation Government select **Option 1** then there would be no funds for education resources that would be similarly offered by a Regional First Nation Education Authority. The community school would not have access to administration dollars. Yet in the Proposal, the community school would be responsible for the provision of all education support services required by the new Act.

In the Discussion Guide, it is implied that no new community-operated schools would be considered for funding. In those First Nations where a school already exists, the school could operate as an independent school if it can offer all of the services specified in the new Act.

The federal government in the Discussion Guide would also have the right to close or not fund community schools that cannot meet the minimum standards set out in the new Act. No funding for education resources or administration would make it very difficult if not impossible for a community independent school to meet the minimum conditions of the Act. In this case, the government could close the school or not fund it.

The Proposal has now established an unworkable system for the existence of First Nations schools operated independently on reserve.

In effect, the rights of First Nations to self-determination have now been compromised by the government of Canada if it refuses to fund community operated schools, new or existing, when these types of schools are found to be the preference by the First Nation. The federal government has laid out its preferred methods of operating First Nations education clearly in the Proposal. Thus the government of Canada has effectively blocked the right of First Nations to govern their education systems in the method they prefer to meet the needs of the rights holders in their communities.

In **Option 2**, the First Nation Government will make an agreement for school administration and operations with its choice of the Regional First Nations School Authorities. The Minister has the

authority to define the nature of the Authority and recognize them and also terminate their designation as an Authority. The Authorities would have to demonstrate to the Minister that they have the capacity to meet the criteria and they must incorporate under federal or provincial laws of incorporation. In this case, the Minister defines the nature of the corporation and applies standards, management plans and governance.

Many First Nations now receive second level services from Authorities of their choice but these Authorities do not operate First Nations Schools. What is the authority of the First Nation Government once its authority is signed over to a RFNEA who communicates directly with the federal government on budgets and reporting? Option 2 infringes on the rights of First Nations Governments to maintain jurisdiction over the kind of education most suitable to their members and thus, infringes on the right to self-determination.

In **Option 3**, the First Nation Government will enter into an agreement with a School Board to delegate jurisdiction to the Board to operate the education system on reserve. This option effectively signs away all rights to the province for the education of First Nations students on reserve. The provincial Education Act, policies, funding formulas, standards and human resource policies will all apply. The federal government does not seem to have a problem with paying money to the province for First Nations students but has a real issue with paying First Nation Governments with appropriate funds to operate education systems on reserve.

Tuition agreements for students living on reserve and attending school off reserve would still be possible. This option leaves First Nations Governments and rights holders, parents and guardians with little control or influence over education.

Role of the First Nation Government

The Proposal for the new Act describes the role of the First Nation Government also called the **Council of the First Nation in the Act** and specifies its powers as:

- Selecting one of three governance options in this Act: administer the school(s) on reserve, aggregate with the First Nation Education Authority or transfer jurisdiction of the school to the local School Board to run the school on-reserve according to provincial standards, curriculum, and teacher hiring
- Ensuring that no tuition fees can be charged or other expenses related to attendance at the school
- Submitting an annual budget to the Minister
- Ensuring financial policies and procedures are in place according to the Act
- Employing a **Principal**
- Establishing the education program which may include language and culture
- Establishing school policies, registration and attendance policies
- Approving the School Success Plan
- Monitoring the quality of education in the schools
- Managing school property
- Approve the School Safety Plan
- Preparing the School's Annual Report and other reports required in the Regulations
- Submitting reports to the Minister and make them public
- Entering into tuition agreements with First Nations Education Authorities, School Boards
- Complying with the Minister's directives respecting tuition agreements

- Making by-laws for access to elementary and secondary education for children and youth resident on-reserve between the ages of 6-21 years
- Ensuring all education programming leads to a high school graduation diploma recognized by the Minister of Education for the province, an International Baccalaureate issued by the IB foundation or an equivalent certificate or diploma approved by the Minister of AANDC
- Programming for 4 or 5 year olds resident on reserve may or may not be offered depending on rural or remote locations, or if the First Nation is able to provide programming for this age group, or if the First Nation finds partners to offer the programming
- Ensuring that parents register their children at an approved school in a First Nation, at a provincial school, or at any other school (home school, private school) and make sure the First Nation Government knows of the location
- Ensuring that parents enable the child to attend school for the full year
- Making a by-law requiring persons ages 6-18 to register for school
- Making a by-law to set the school reference date as Sept. 1-Dec. 31 to reach the age to register in the First Nation school system
- Establishing a parent council called Community Education Committee to advise First Nation Governments, Principal and Director of Education on matters of school administration (not curriculum or pedagogy or evaluation or land based learning, language programming or cultural programs?)
- Consulting the community education committee for programming on culture and language
- Setting a fee for students to pay for optional activities or require a deposit to use educational materials and school equipment
- Making by-laws for persons not resident on reserve to recover education costs from the province or the families (this effectively excludes members living off reserve from attending school on reserve)
- Enabling home schooling according to the Regulations of this Act
- Parents must ensure that the home schooled child is registered at home or elsewhere and must ensure attendance; the entity administering the school must be responsible for the supervision of the schooling and may provide support for schooling
- Ensuring the First Nation Government provides students with instruction, educational materials, school equipment, transportation, services prescribed by Regulations to enable students to participate in the school program
- Providing to the school the management of human resources, information technology, finances and property, and other services prescribed in the Regulations that enable the schools to be managed and operated effectively
- Providing for insurance for loss and damage, liability insurance and any other insurance specified in the Regulations
- Employ a **Director of Education** to supervise the daily management and operations of the schools; implementing school policies; developing school policies for students with special needs; managing human resources; develop the school calendar, determine instructional hours and days, professional development days, holidays, length of the school term; establishing and maintaining a record of student registration, data management on students, staff and other teachers, collection and protection of such information; place students with special needs in programming suited to their abilities at no cost to the student on or off reserve; cannot serve on the First Nation Government if the Government is party to the agreement with the First Nation Education Authority or manages the school on reserve
- Employ a **Principal** to prepare and implement the School Success Plan after consulting with the Community Education Council; develop a school program including extra-curricular activities and physical activities; planning the school's daily schedule; supervising the

teachers; ensuring evaluation of students taking into account their culture; ensuring regular reports are sent to parents; implementing registration and attendance policies; preparing and implementing a School Safety Plan; providing a safe learning environment; ensuring maintenance of the school; attending to students well-being; providing information to the Director of Education or the Inspector any information they need to complete their work, cannot serve on the First Nation Government if that Government is responsible for the school or has made an agreement with a First Nation Education Authority

- **School Success Plans:** include the educational objectives and the schedule, preparing students for post-secondary education or the workforce, easing transitions to the provincial school system
- Employ a **School Inspector:** to conduct an annual inspection of the school, may come from another province or territory if the Minister chooses, must verify that the programs, policies, procedures and plans have been established and implemented, evaluate the extent to which the objectives of the School Success Plan have been achieved, perform functions specified in the Regulations, Director of Education, Principal, First Nation Government and First Nation Education Authority and their employees must provide the Inspector with assistance to enable the Inspector to perform their functions; School Inspector will report and include recommendations to remedy non-compliance; report will go to the First Nation Government if it runs the school or to the First Nation Education Authority if it runs the school and the Authority must provide the report to the First Nation Government
- Publish by laws on its internet site and in the local reserve newspaper
- Provide copies of the by-laws to its membership

The education departments of the First Nations in Contribution Arrangements for their education programming and school systems already accomplish much of this work. This is the kind of work that a First Nation School Authority or a First Nation School Board would be responsible to fulfill. The proposed Act does not mention the need for a School Authority but places all responsibilities for the operation of an independent community school on the First Nation Government that is called a Council of the First Nation.

Compliance with the Act

- The responsible authority, either the First Nation Government or the First Nation Education Authority will remedy the problems identified in the report; on request of the Minister, the responsible authority may employ a Special Advisor to provide guidance to remedy the problems; Minister may appoint a Temporary Administrator to administer the school for a period specified by the Minister if the Minister is not provided with an inspection report for two consecutive years
- After receiving two consecutive annual inspection reports that shows significant problems of non-compliance (safety issues, accountability, financial management, student outcomes are not addressed) with this Act, the Minister is of the opinion that adequate measure to remedy the problems have not been put in place, Minister may appoint a Temporary Administrator to administer the schools; the Temporary Administrator may exercise any power and perform any functions of the responsible authority that the Minister specifies and the responsible authority ceases to exercise those powers and perform those functions for which the Temporary Administrator is appointed; the Minister may remove the Temporary Administrator at any time; school staff, Principal, teachers, Director of

Education will provide assistance as required and comply with directions given by the Temporary Administrator

Does the Minister of Education for the province appoint Special Advisors or Temporary Administrators to administer the schools in the School Boards if there are funding problems or safety issues or issues with student outcomes?

- Temporary Administrator will submit a report to the Minister showing measures taken to remedy the problems, the results, and recommendations on future measures and a final recommendation to revoke the need for a Temporary Administrator

What are the qualifications of the Temporary Administrator regarding First Nations education principles, theory, pedagogy, cultural competency, linguistic competency, culturally responsive assessment tools and testing, cultural and historical context of the First Nation and Indigenous knowledge systems?

- Reports are submitted to the authority administering the school, to the First Nation Government, and to the Minister
- Minister may end the tenure of the Temporary Administrator if the Minister is satisfied that the problems have been remedied
- Minister may revoke the designation of a First Nation Education Authority

Is this standard applied in the provincial school system? Does the Minister of Education place third party management over School Boards and their schools?

Does the Minister of Education of the province have the authority to revoke mandate of the School Board that would be the equivalent of the First Nation Education Authority?

The level of authority of the Temporary Administrator and the Minister to impose third party management without other options being available is unacceptable.

The federal government must not be given the authority to make decisions regarding management of First Nations schools that have failed to meet performance objectives or to place such schools under third party management.

Jurisdiction over First Nations Education

The proposed Act will endanger First Nations' self-determination, jurisdiction and rights.

The proposed Act must acknowledge and accommodate First Nations right to self-determination and jurisdiction over education.

First Nations hold the inherent right and Treaty right to exercise jurisdiction over education as part of the right to self-determination and self-government.

- *These are rights specified in the Constitution, section 35*
- *Canada recognizes these rights*

- *Right to self-government is the same as the right to making laws*
- *First Nations Governments have the right to education for their people*
- *First Nations Governments are one of three orders of Government: Aboriginal, federal and provincial*
- *First Nations Governments should exercise inherent jurisdiction as a third level of government in Canada*
- *Jurisdiction includes the right to education, the right to make decisions on education, right to construct institutions to make decisions*
- *First Nations have the right to transmit culture, customs and traditions, knowledge systems*
- *First Nations have a right to develop their own unique delivery systems for education in their communities*
- *First Nations have a right to free, prior and informed consent in matters of education for the rights holders*
- *Education is pillar of self-government and self-determination*

The government of Canada uses terms such as “enabling legislation” but does not acknowledge the self-determination of First Nation Governments and the right to jurisdiction over education in the governance section of the draft legislation.

Enabling legislation enables the federal government to relate to First Nation Governments as equal partners.

Enabling legislation enables the provincial government to relate to First Nation Governments as equal partners.

Enabling legislation sets a partnership in place to enable First Nation Governments laws in education to have the same force of law as the provincial and territorial Education Acts and any other federal or provincial Acts that apply.

Federal laws and provincial and territorial laws re-align to accommodate First Nations jurisdiction over education and First Nations Laws in Education.

The government of Canada refers to recognizing historic treaties, land claims and self-government agreements that have references to education. The FNEA will recognize treaty rights to education.

Those First Nations who establish jurisdiction within the inherent right to self-determination and self-government affirmed in the Constitution, section 35 and international law will not be satisfied with this reference by the government of Canada.

UNDRIP in section 14 (1) affirms that Indigenous peoples have the right:

- “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs”
- “to establish and control their education systems and institutions in their own languages, in a manner appropriate to their cultural methods of teaching and learning”
- to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions”

None of the material on the Proposal for the First Nation Education Act acknowledges First Nations jurisdiction over education. The Discussion Guide mentioned exemptions for those First Nations who have self-government agreements in place under federal policy and have education laws.

The Proposal as it stands now ignores the First Nations inherent right to self-determination and self-government.

First Nations should design their own education laws, exercise their jurisdiction and opt out of the FNEA. Opting out of the FNEA should mean:

- *opt out methods not subject to AANDC approval*
- *access to sources of funding for education are available to those First Nations who opt out*
- *utilizing education law templates to begin the process of making nation laws in education*

Funding

The absence of a discussion on funding models and mechanisms in the Proposal is not acceptable. There are currently no committees in place that are partnerships between the First Nations and the government of Canada to discuss funding models. The reports from First Nations to the government of Canada on modernizing formulas to operate a 21st century education system have been ignored.

Without detailed knowledge of costs for certain kinds of programming First Nations may be charged own source revenue.

The dangers of the federal government capping funding are real possibilities that can force First Nations to pay for education programs and related services despite treaty and inherent rights.

The proposal states that funding calculations are located in the Regulations and First Nations know that Regulations will be developed after the First Nation Education Act is passed by Parliament. Once the Regulations on funding are formed outside of the discussions on the Act, First Nations are subject to federal government criteria and standards and off-loading to the provinces and territories.

Old funding models are not sustainable in the 21st century. New models that are reflective of geographical disparities, remoteness factors, escalation factors to bring First Nations systems up to standard after years of neglect, needs based formulas that accommodate classrooms with science labs, gyms, libraries, computer hardware and computer labs are required and have already been formulated by First Nations.

School Success Plans will be used to determine funding levels if all objectives are met according to the view of the Minister. This means that the federal government will make decisions regarding the management of First Nations schools. Those deemed by the Minister as failing to meet the performance goals set in the School Success Plans are in danger of the threat of third party management. The federal government should never be given such exclusive powers. Other options that are mutually agreed upon should be the first alternative.

Language in the proposed First Nations Education Act should include reference to the federal responsibility for funding First Nations education systems at a level that enables those systems to effectively graduate students wherever they are located in Canada with wide ranging options for

further technical training, internships, skilled trades or post-secondary level studies if desired. First Nations and the federal government must mutually agree upon funding formulas.

Any new services or requirements required in the new Act should be resourced properly. Current academic and financial shortfalls in First Nations education systems are a result of chronic underfunding noted as early as 1946 by a *Joint Committee of the House of Commons and Senate on the Indian Act*.

Education Standards

According to the Proposal for the FNEA, education standards will be set by the federal government for all First Nations schools. If education is to remain relevant to the First Nations student, then First Nations must establish their own education standards beyond those of the province and specify Indigenous knowledge systems including history and worldviews, cosmology and language and culture among other systems. With the experience of No Child Left Behind in the US, tribal languages and cultures reportedly did suffer with the new emphasis on numeracy and literacy in standardized testing where test results were key factors in determining funding levels for the coming academic year.

The legacy of assimilation from the residential school experience continues to be so damaging to First Nations that any effort by the federal government to enforce provincial standards to the detriment of transmission of Indigenous knowledge systems including language, spirituality and culture will be met with a backlash from First Nations. It is critical to the long-term process of reconciliation that the restoration of those systems destroyed by assimilation policies is a matter of urgency and proper funding is allocated as a priority.

The imposition of federal methods of preferred governance, curriculum, standards, evaluations or data collection will only serve to reinforce colonial power differentials.

First Nations must take control of curricula and ensure transferability according to their own standards in consultation with school jurisdictions in other regions of Canada. In some cases, such as immersion programming in the early grades, transferability may not be possible between Indigenous languages and French or English, much as in the case of transferability between French and English in early grades of immersion programs.

In many cases, shared jurisdiction is the reality in regards to accreditation of teachers, standardized testing, and so on. Setting education standards for First Nations; means exceeding those standards of the province within the context of First Nations knowledge systems.

Liability

The Proposal for the Act specifies that Her Majesty is not liable for anything omitted or done by the First Nation Government or the First Nation Education Authority, Director of Education, Principal or by any person authorized by them in the exercise of their powers or performance of their powers or functions under the Act.

“No action or other proceeding lie against Her Majesty, the Minister or any employee or agent of Her Majesty or the Temporary Administrator for anything done or omitted to be done in good faith in the exercise or performance of their powers or functions under this Act.”

What law offers immunity from bad performance that has long-term effects on a young person's life?

Where is the immunity for First Nation Governments or its agents?

Education Support Services

Although education support services are mentioned briefly in the Proposal, there is no firm discussion on what the services will be or their funding levels. The Blueprint indicates that the Regulations would set standards to ensure that certain education support services would be in place in First Nations schools.

No details were provided in the Proposal of how those services would be decided upon or the types of services or the funding allotment.

Review Every Five Years

The Minister must undertake a review of the provisions and operations of this Act every five years after the Act is passed. The Minister must give First Nations an opportunity to make representations.

The Minister must table a report one year after the review has begun in each House of Parliament.

It appears as though the review is focused on governmental decision-making and evaluations without real partnerships with those administering First Nations education. First Nations will be invited to "make representations."

The only real guarantees with the administration of the First Nation Education Act is the rise in the number of federal employees who will administer the budget reports, School Success Plans, School Safety Plans, reports of the Temporary Administrator, reports of the School Inspectors, annual reports and the thousands of reports on school data from First Nations who are among the most audited groups in Canada.

Transitional Provisions

Some exemptions apply to the First Nations of British Columbia who fall under the Tripartite Education Framework Agreement. The agreement expires in 2017.

In section 37 (1) , "the Minister has all the powers and functions of responsible authority under this Act in respect of a school that, on the coming into force of this section is being operated by the Minister under subsection 114 (2) of the Indian Act."

(2) The Council of the First Nation on whose reserve a school referred to in subsection (1) is situated is deemed to have complied with this Act.

Some First Nations schools in Ontario at Six Nations and Tyendinaga have not been party to devolution of control/administration and continue to fall under the auspices of the Indian Act, and AANDC administration.

(3) “The Council of the First Nation may develop a transition plan in which it indicates the day on which it intends to exercise an option under section 8 of the Act...and submit the plan to the Minister for approval.”

In this case the sections above in (1) and (2) will not apply to the First Nation.

In Section 38, it is stated that the Indian Act will continue to apply in sections 114-122 on education to those First Nations “*party to an agreement given effect by an Act of Parliament and listed in the schedule*” and in respect of “*Sechelt Indian Band Self Government Act.*”

Amendments to Indian Act

In Section 39, “Subsection 4(3) of the Indian Act is replaced by the following:

(3) Unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.”

And Section 40 states, “The heading before section 114 and section 114-122 of the Act are repealed.”

Coming Into Force

The First Nation Education Act will come into force on a day or days to be fixed by order of the Governor in Council.

Addendum:

Duty to Consult and Accommodate

“When the Crown is moving toward developing a law that can have a negative effect on First Nations rights, the Crown owes the First Nations a duty to consult and accommodate regarding the First Nation Education Act.

The government of Canada is planning the design of new national legislation in a federal First Nation Education Act that would impose governance models, provincial standards and federal control of education for First Nations.

- The duty to consult is triggered by “decisions with high level strategic consequences.” (Woodward, 2011), duty means a duty to consult with the intention of arriving at a solution that will accommodate First Nations rights and interests.
- Alberta Court of Appeal, Tsuu T’ina Nation vs. Alberta, “even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions.”
- First Nation Governments hold the inherent right to education and when future legislation stands to regulate or take control of this right, then the First Nations rights are in danger and a duty to consult and accommodate has been triggered.

- If the governance and administrative methods of the draft Act and the move toward provincial standards is not part of the way that First Nations deliver education services, then a regulation that denies First Nations their preferred methods of exercising those rights is deemed to infringe on education rights.”
(FNEC, 2013)