

Information about Canada's proposed First Nations Education Act

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On October 22, 2013, the Government of Canada released a document that contains the draft text of its *First Nations Education Act*. I will refer to this as the **Proposed FN Education Act**.¹ This memo provides answers to some general questions about the Proposed FN Education Act. It does not contain legal advice. Please contact OKT if you are looking for further analysis.

General Questions

What is this Proposed FN Education Act document?

It is a document containing the draft text of the *First Nations Education Act* proposed by the Government of Canada. AANDC says it is subject to further comments.

What did Canada do before releasing this Proposed FN Education Act document?

Last year, following the Canada-AFN National Panel on First Nations Education, Canada announced that it would introduce a *First Nations Education Act* by September 2014. It has taken a number of steps to "consult" about it. Releasing the Proposed FN Education Act is the latest step in that process. Previously, Canada released a Discussion Guide in late 2012, a Blueprint of the legislation in July 2013, and held several meetings and other sessions.²

What happens next?

The next step will be introducing the bill in Parliament. Since the Conservatives have a majority government, they will be able to pass it into law if they choose to.

Can our First Nation choose whether or not to participate in this new education law?

No. There is no opt-in or opt-out – this legislation would apply automatically to all First Nations across the board. The only exceptions are First Nations with self-government agreements dealing with education, listed in a special exemption clause. Over the long term, a way out of this FN Education Act could be to negotiate a self-government agreement on education.³

¹ The full title of the document is *Working Together for First Nation Students: A Proposal for a Bill on First Nation Education, October 2013*, available at: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-EDU/STAGING/texte-text/proposal_1382467600170_eng.pdf.

² For more information, see: <http://www.aadnc-aandc.gc.ca/eng/1382480394651/1382480470754>.

³ For example, Anishnabek Nation (UOI) negotiated an Education Agreement with Canada and Ontario, but it has not yet been ratified or come into force pending resolution of the financial arrangements. See: <http://www.anishnabek.ca/roj/education-overview.asp>.

Under this Proposed FN Education Act, there are a few minor details of the system that the First Nation could alter by passing a by-law. This memo does not go into those details.

Is Canada's proposal consistent with the recommendations of the National Panel?

No. The National Panel did recommend legislation, but said it should be "co-created", in partnership between First Nations and Canada. That has not happened. Many of the National Panel's recommendations about the content of legislation are also not followed, for example:⁴

- The National Panel said there needs to be a statutory funding formula built in to the Act, that ensures funding is "needs-based, predictable and sustainable". The Act does not contain any funding formula – it leaves that for the regulations, at the discretion of the Minister. Canada has been referring to "stable, predictable and sustainable" to describe funding, i.e. it took out "needs-based". So far, there is no indication this Proposed FN Education Act will remedy the problem of inadequate and unequal funding levels.
- The National Panel said the Act should provide "roles, responsibilities and accountabilities" for everyone in the system, including First Nations, provinces and territories, and the Government of Canada. However, the Proposed FN Education Act puts nearly all obligations on First Nations.
- The National Panel said the Act should enshrine rights for First Nations children, including rights to "cultural language and identity". However the Proposed FN Education Act has no rights for First Nations children, and leaves culture and language optional.

What are some of the concerns that First Nations have raised about this?

Many strong concerns have been raised. Probably the two leading concerns are:

- That it is being imposed, rather than developed in partnership; and
- That it sets many requirements for First Nations to meet, but hardly any for Canada. Federal accountability to ensure adequate funding has not been addressed. First Nations could be left unable to comply with the requirements, and meanwhile the underlying problems in First Nations education would not be solved if the problem of inadequate and unequal funding levels is not fixed.

⁴ See the Panel's report for more details: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-EDU/STAGING/texte-text/nat_panel_final_report_1373997803969_eng.pdf.

What does the Proposed FN Education Act say?

Note that the summary below sometimes refers to regulations, but the regulations have not been released yet. The Act gives a very broad regulation power to the Minister (AANDC) – regulations can easily be made or changed by the Minister, on a wide variety of topics, without necessarily much review. Unlike the Act itself, regulations will not go through Parliament.

Canada will be required to:

- AANDC (the Minister) is required to provide funding to the First Nation or its designated Education Authority in respect of primary and secondary education, in accordance with the regulations. As the regulations have not been released yet, we have not seen the formula. The Act does not set any standards about funding to hold Canada accountable, e.g. no standard that funding must be sufficient to ensure compliance with the Act, or that it must be adequate to provide education to meet or exceed comparable provincial standards, etc.⁵

First Nations will be required to:

- The First Nation must provide access to primary and secondary education to its residents ages 6-21, using one of these three options (or a combination):⁶
 - administering a school on reserve;
 - by establishing a First Nation Education Authority; or
 - through an agreement with a school board.
- A First Nation Education Authority can be established if:
 - One or more First Nations make an agreement and establish a corporation, meeting any conditions set in the regulations; and
 - A copy of the agreement is sent to AANDC, and the Minister agrees to “designate” that Authority.⁷
- If the First Nation or its Education Authority uses a tuition agreement with a school board to provide education, that agreement must comply with any “directives” issued by the Minister at AANDC.⁸
- The First Nation must ensure that the education program leads to a recognized high school diploma, meaning:⁹
 - a provincial certificate or diploma;
 - an International Baccalaureate (this is a high standard, known internationally); or
 - a certificate or diploma that AANDC recognizes as “equivalent”.

⁵ Proposed FN Education Act, s. 31.

⁶ Proposed FN Education Act, s. 6(1) and s. 8.

⁷ Proposed FN Education Act, s. 17.

⁸ Proposed FN Education Act, s. 13(2).

⁹ Proposed FN Education Act, s. 6(3).

- The First Nation or its Education Authority is required to fund the education system. (See comments above about Canada's funding obligation, which is left up to the regulations and has no standards.)¹⁰
- The First Nation or its Education Authority must, for each school it administers:¹¹
 - Establish an annual budget and submit it to AANDC;
 - Establish financial management policies and procedures;
 - Hire a principal (may be full-time or part-time, may cover one or more schools);
 - Establish the education program (language or cultural education is optional);
 - Establish school policies, including on registration and attendance;
 - Approve a "School Success Plan", submit it to AANDC, make it available to the public, and monitor its implementation;
 - Monitor quality of education;
 - Manage school property;
 - Approve a "School Safety Plan";
 - Prepare an Annual Report and any other report required by the regulations, submit them to the Minister and make them available to the public; and
 - Make any other information available to the public that the regulations require.
- The First Nation or its Education Authority must establish one or more community education committees (e.g. involving parents, community members). A committee has the right to be consulted about cultural programming and the School Success Plan.¹²
- The First Nation or its Education Authority must ensure students have the instruction, access to educational materials and equipment, and transportation required to participate in their education.¹³
- The First Nation or its Education Authority must provide management services (including human resources, information/IT, financial, property and others specified in regulations). It must also maintain insurance, as further required by regulation.¹⁴
- The First Nation or its Education Authority must have a Director of Education, who is not on Council. Certain duties of the Director are set out in the Act:¹⁵
 - Implement policies of the First Nation or its Education Authority;
 - Develop policies on special needs;
 - Manage human resources, including employing teachers who are certified by the province or by a "recognized Canadian teacher certification authority";

¹⁰ Proposed FN Education Act, s. 9.

¹¹ Proposed FN Education Act, s. 11(1).

¹² Proposed FN Education Act, s. 15 and s. 24(1)(a).

¹³ Proposed FN Education Act, s. 20.

¹⁴ Proposed FN Education Act, s. 21 and s. 22(1).

¹⁵ Proposed FN Education Act, s. 23(1), (2) and (5).

- Establish the school calendar, subject to a minimum number of instructional hours and days;
 - Keep the student registry (aka “nominal roll”) and submit it to AANDC;
 - Establish policies on information management and privacy; and
 - Any other function assigned by the First Nation or its Authority.
- The Director of Education must ensure that students with special needs can participate and have access to education that takes account their needs and abilities, at the First Nation’s school or elsewhere.¹⁶
 - The Principal cannot be on Council, and must meet certain duties set out in the Act:¹⁷
 - Prepare and implement a School Success Plan (approved by the First Nation or its Education Authority). The Plan must set out education objectives, the time in which they will be achieved, measures for preparing students for post-secondary education, and measures for student transferability;
 - Implement the education program (i.e. the curriculum);
 - Develop the school program (i.e. beyond the curriculum), including extra-curricular and physical activities;
 - Plan the school’s daily schedule;
 - Supervise the teachers;
 - Ensure evaluation of the students;
 - Ensure that regular reports on student progress are sent to parents;
 - Implement any applicable policies;
 - Prepare and implement a School Safety Plan (approved by the First Nation or its Education Authority);
 - Provide a safe learning environment;
 - Attend to students’ well-being;
 - Ensure maintenance of the school;
 - Provide information required by the Director of Education or an Inspector; and
 - Any other function assigned by the First Nation or its Education Authority.
 - The First Nation or its Education Authority must hire an Inspector qualified by the province or approved by AANDC. The Inspector must verify compliance with the Act. The First Nation, an Education Authority, the Director and all their employees must cooperate with the inspections. The Inspector’s report goes to the First Nation and any Education Authority, who are required to send it to AANDC within 10 days.¹⁸
 - If the Inspector’s report identifies issues, the First Nation or its Education Authority must ensure measures are taken to address non-compliance with the Act.

¹⁶ Proposed FN Education Act, s. 23(3) and (4).

¹⁷ Proposed FN Education Act, s. 24.

¹⁸ Proposed FN Education Act, ss. 25-26.

- *Minister can require "Special Advisor"*: On the Minister's request, the First Nation or its Education Authority must hire a Special Advisor to assist with compliance measures. There are no criteria limiting the Minister's discretion to do this.¹⁹
- *Minister can appoint "Temporary Administrator"*: Under specified conditions, the Minister can appoint a Temporary Administrator of a school. This is similar to third party management. The First Nation or its Education Authority cease to have the powers and functions that the Minister assigns to the Temporary Administrator, and the Director, Principal and other staff must cooperate.²⁰ The Temporary Administrator submits a report on the measures taken and may make other recommendations.

First Nation parents:

- Parents must register their children for school, and ensure that they attend regularly (for children ages 6-16, or a greater age range if increased by the First Nation).
- Parents have the option of "home schooling" their child. To do this, the parent must register the child with the school and meet conditions set out in the regulations or provincially, and can then educate the child at home "or elsewhere".

Provisions limiting Canada's liability:

- Canada will not be liable for the actions / inactions of a First Nation, its Education Authority, its staff, etc. taken under the Act.
- No one can bring a court case against Canada, the Minister, or any federal agent or employee "for anything done or omitted to be done in good faith" under the Act.

Other:

- The education provisions in the *Indian Act* (ss. 114-122) would be repealed.

For more information:

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¹⁹ Proposed FN Education Act, s. 27.

²⁰ Proposed FN Education Act, ss. 28-30.