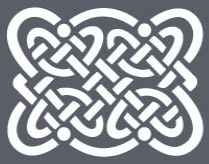

CALEDON
INSTITUTE OF SOCIAL POLICY

A Second Look at the *First Nations Control of First Nations Education Act*

by

Michael Mendelson

August 2014

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This paper was immeasurably improved by the comments I received on earlier drafts from Julie Jai, Harvey McCue, John Richards, James Wilson and several others. As always, Ken Battle and Sherri Torjman of the Caledon Institute of Social Policy have added both substantively and editorially to the quality of this paper. However, I remain personally and solely responsible for all the views in this paper.

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Ottawa's 2013 draft of a new *First Nations Education Act* landed with a thud. Almost every First Nations Chief across Canada roundly denounced it, including Assembly of First Nations National Chief Shawn Atleo. Little noticed outside of policy circles, this was not an official statute sent to the House of Commons for first reading. Rather, it was a draft posted on the Department of Aboriginal Affairs and Northern Development's website in a discussion paper called *Working Together for First Nation Students: A Proposal for a Bill on First Nation Education*.

Releasing a draft law to the public before tabling it in Parliament is extraordinarily unusual. To observers knowledgeable about the ways of Parliament, this in itself delivered a message that the government was open to change. To make the point clearer, each page of the draft law included a note saying: "The wording of a final bill is subject to change based on further review and based on feedback received on this proposal" [Aboriginal Affairs and Northern Development 2013].

For those familiar with 'government speak,' all this was like a bright neon sign proclaiming: "Negotiations welcome!" But most First Nations are no more expert on Parliamentary procedures or on the language of government than other Canadians, so the draft was seen almost everywhere as the government's all-but-final position. And that position was entirely unacceptable to First Nations. Among many other deficiencies, as we discuss later in this paper, the draft law included no assurance of adequate financing for First Nations schools on reserve.

With Prime Minister Harper and National Chief Shawn Atleo together in South Africa as part of Canada's delegation to the Mandela funeral, the Assembly of First Nations convened a Special Assembly of First Nations chiefs to discuss the government's proposal for an Education Act. As expected, the Special Assembly rejected the proposal as it stood, but it went on to pass resolution 21/2013 setting out five conditions for a *First Nations Education Act*: 1) First Nations control of education; 2) assurance of stable and adequate funding; 3) recognition of the importance of First Nations language and culture; 4) jointly determined oversight of First Nations education rather than unilateral federal oversight; and 5) ongoing meaningful engagement between First Nations and Ottawa on education matters. While these conditions were demanding, they formed a realistic basis for negotiations. Still in South Africa, Harper and Atleo received a report of the results of the Special Assembly and agreed to press towards a mutually acceptable *First Nations Education Act*.

Aboriginal Affairs Minister Bernard Valcourt's team and Atleo's team, with the mandate from the Special Assembly, got down to hammering out a new Education Act. The outline of the new Act was unveiled in early February 2014 by Prime Minister Harper and Chief Atleo. This was followed in April 2014 by the introduction of Bill C-33, the *First Nations Control of First Nations Education Act*, in the House of Commons. To their surprise, instead of universal acclaim for the new legislation – which both Harper and Atleo saw as laying the foundation for a vastly improved First Nations education system – the new Act attracted a gathering storm of dissent. Eventually Chief Atleo resigned in the face of insurmountable opposition and Minister Valcourt put the new *First Nations Control of First Nations Education Act* 'on hold.'

But political responses aside, the Act really does represent something different: It is a truly *negotiated* statute with the wording worked out jointly by representatives of the Assembly of First

Nations and the federal government. Notwithstanding the drubbing Chief Atleo received from his critics, he is a tough negotiator. He obtained substantial – some might say path-breaking – concessions from government. And the government showed itself willing to accommodate many First Nations' requirements. These were negotiations in good faith on both sides.

Due to the intense reactions to the Act, important developments in the *First Nations Control of First Nations Education Act* have been shunted aside without careful analysis. Even if, on balance, some aspects of the Act proved unacceptable to the majority of chiefs, there are other aspects of the legislation that offered major gains for First Nations and a reasonable response by Canada. At the very least, there is much to be learned for the future. The purpose of this paper is to review in depth four key contentious issues where the provisions of the Act deserve a closer look. The paper does not attempt to resolve these issues – only to analyze them as objectively as possible.

Treaties and legislation

A perceived clash with treaty rights was one of the main reasons for opposition to the *First Nations Control of First Nations Education Act*. The issue of treaty rights is not merely legal or technical. All Canadians are beneficiaries of the treaties between First Nations and the Crown. If we want ours to be a society of law and justice, we must honour the treaties that built Canada.

That there is a treaty right to education should not be in doubt. The obligation to provide education is spelled out, for example, in the numbered treaties signed in the late 1800s and early 1900s. A typical numbered Treaty, No. 9, says: "His Majesty agrees to pay such salaries of teachers to instruct the children of said Indians, and also to provide such school buildings and educational equipment… ." Canadian courts can be expected to interpret the treaties in a modern light as the educational equivalent for 2014 of the commitment in 1905 which, at the least, is a K-12 education equal to that of other Canadian children.

So how could the proposed federal Education Act conflict with this treaty obligation and similar obligations to support education arising from other treaties?

Some may argue that *any* federal legislation is unacceptable because education is a treaty right. This, however, is a misunderstanding of the relationship between laws of Parliament and treaty obligations.

All government spending must be authorized by a law passed by Parliament. Even when Canada is required under the Constitution to make payments, the federal government must still have a law to govern how, when and what amount will be paid. For example, the Constitution requires equalization payments to the provinces:

> Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation [Section 36 *Constitution Act* 1982].

Nevertheless, equalization payments still require authorization through an Act; in the case of equalization, the *Federal-Provincial Fiscal Arrangements Act*. Treaties are the same. Treaties create a right to education, but the spending and the rules to fulfill the Crown's obligation must be spelled out in legislation.

Since all spending needs to be authorized by laws passed by Parliament, there must be laws governing the education payments being made today to First Nations. Most commentators assume that current support for First Nations education is authorized by the *Indian Act*. This assumption is not correct. The *Indian Act* does not allow for agreements with First Nations (only with groups such as churches), and it has no financial sections that would permit today's First Nations education programs on reserves. Rather, current First Nations education programs are authorized under a hodge-podge of financial acts, such as the annual *Appropriations Act* and the *Financial Administration Act*. Some critics might even contend that the legal basis for current First Nations education programming is questionable.

What cannot be in doubt is that this hodge-podge of laws has nothing at all to do with the substance of education. Ottawa's current laws provide no guarantees of adequate or reasonable financial support for First Nations education. They place no limits at all on the Minister's authority over First Nations. They give neither First Nations governments nor First Nations citizens any legal recourse or rights. They provide neither direction nor constraints from Parliament upon the government of the day. In short, the current laws authorizing federal support for First Nations education are grossly inadequate and certainly do not require the federal government to meet treaty obligations – or any reasonable standards for laws on education.

So if treaty rights to education are to be met, including secure funding, there must someday be legislation that gives the government of the day the authority to do so. It is certainly legitimate to question whether the *First Nations Control of First Nations Education Act* meets treaty obligations – to understand that we have to look more deeply at the content of the Act as well as the consultation and negotiation process leading to the Act. But the point here is that the mere *existence* of an Act does not contravene treaty rights. Quite the reverse, an Act (or Acts) will always be necessary to fulfill treaty obligations.

Another point of contention is the claim that the proposed *First Nations Control of First Nations Education Act* removes treaty rights. However, treaty rights are enshrined in Section 35 of the *Constitution Act* of 1982. If there is a conflict between treaty rights and an Act of Parliament, treaty rights prevail and the courts would order that the Act has to be changed, not the treaty. No law can remove treaty rights, but for extra certainty, the proposed Act contains a non-derogation clause stating that:

> For greater certainty, 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 section 35 of the *Constitution Act*, 1982 [Section 4 *First Nations Control of First Nations Education Act* 2014].

This is the formulation developed by Aboriginal organizations with substantial high-level legal input during the Charlottetown constitutional negotiations. From a legal perspective, it is 'watertight.' But a legal perspective is not all that much help if the justice process takes a decade or more and costs millions of dollars. A government initiative may be dragged through the courts, eventually found to contravene treaty rights and thereby be invalidated, but in the meantime a generation or more could have passed through school and the First Nation sponsoring the challenge could have gone broke. As an especially egregious example, the whole residential school system almost certainly contravened treaty rights, since the treaties stated that schools would be built on reserve, but this did not do much good in practice. The legal system is obviously much fairer and more accessible to First Nations today, but the courts still take a long time and a lot of money, so it remains relevant to ask in what ways the Act could contravene treaties.

There are three ways in which Ottawa's *First Nations Control of First Nations Education Act* may conflict with treaties. It might be argued that the substantive content of the Act does not meet treaty obligations to support First Nations education because it does not provide sufficient financial, governance, cultural or other supports, or because it does not give First Nations sufficient autonomy to run their own school system. We discuss these issues below in other sections of this paper. But it could also be argued that the government did not meet the requirement to consult with First Nations – a claim that has been raised by many voices in the First Nations community.

Canadian law imposes an obligation on the government to consult and, where possible, accommodate Aboriginal interests with respect to any changes in programs, policies or laws that may adversely affect Aboriginal or treaty rights. Education is clearly a treaty right, so government has a 'duty to consult.' The question is: how and with whom?

From the government's perspective, it did consult widely. In cooperation with the Assembly of First Nations (based upon a resolution passed at its general assembly), Ottawa convened a National Panel on First Nation Elementary and Secondary Education for Students on Reserve. According to the National Panel's report:

> The Panel met with hundreds of people including students, parents, Elders, First Nation educators and leaders, representatives of provincial education systems and the private sector. We conducted 8 regional roundtable meetings and a national roundtable meeting, visited over 30 First Nation communities and 25 First Nation schools. We also received multiple submissions from interested parties through our website and directly during visits and meetings [Haldane, Lafond and Krause 2011: vi].

As discussed above, the government then released an unprecedented draft Act and sought feedback. Most important, Ottawa not only consulted on the final version of the Act, it actively negotiated with the Assembly of First Nations based upon a resolution of the Chiefs in Assembly. First Nations have always demanded a hand in drafting legislation affecting them and this time they – or at least the Assembly of First Nations – did participate in drafting the law.

However, there is another perspective. The National Panel was boycotted by many First Nations, including provincial level organizations in Saskatchewan, Ontario and Quebec. According to

a newspaper report at the time "about 230 native groups have refused to participate in the panel process, citing a lack of consultation and concerns that it will diminish the rights of aboriginal people to control their own education" [Galloway 2011].

Many First Nations argue that the duty to consult on issues affecting their treaties could not be satisfied by the educational panel or by national-level negotiations. These First Nations point out that they have never delegated their rights to consultation to the Assembly of First Nations. They believe that the duty to consult demands nation-to-nation consultation and negotiation. If the consultation process is going to be consolidated into larger groupings, the formal consent of each First Nation included in the consolidated group must be obtained. The duty to consult First Nation 'A' cannot be satisfied by consulting First Nation 'B.'

The government responds that the expectation of nation-to-nation consultation and negotiation is impractical and cannot ever be satisfied, or at least cannot be satisfied without taking many more decades and spending millions of dollars on consultations – funds that could instead be spent on improving First Nations education now.

This debate is especially difficult because there is validity on both sides. If this debate is ever to be resolved, the first step is for both First Nations and Ottawa to recognize the legitimate concerns underlying each party's point of view and openly explore ways of addressing their concerns. It should be obvious to everyone by now that a process of consultation and negotiation satisfactory to both government and First Nations needs to be worked out, not just for the sake of the Education Act but for all national and regional initiatives.

First Nations and the federal government need to work together to find a way to structure consultations and negotiations that would be both acceptable and practical within a realistic framework and cost. In the meantime, Ottawa might consider revising the Education Act, or some future version of it, so that First Nations can opt in or out. This would mean that only those First Nations that have had satisfactory input and agree to the Act would come under its terms. *The First Nations Land Management Act* (1999) is a good example of an Act that has been successfully implemented based upon First Nations having the choice to opt in or out.

Financing

If there is one overwhelming requirement of any new First Nations education legislation, it is that it must provide adequate funding for First Nations education on reserve. And it is not only the amount of money which must be adequate; the financing must also be reliable, predictable and sustainable over time.

Although it is not possible to generalize across every First Nation in every province, the consensus among those who have studied this issue is that schools on reserve are generally not adequately or reliably financed. (Drummond and Kachuck Rosenbluth 2013 provide a thorough and up-to-date summary of the evidence on this issue.) The origins of the deficiency in funding of on-

reserve schools goes back to the 1980s and likely even earlier, and has never been rectified. In fact, the gap in funding of on-reserve and similar off-reserve schools may have grown over the last decade as provinces have rapidly increased core funding, while most increases in on-reserve school funding have been mainly in special application-driven program funding, which is time-limited and cannot be used for core functions such as paying regular teachers.

Without a strong guarantee of adequate funding, any new *First Nations Education Act* will be dead in the water. This is exactly the fate of the first proposal posted on the Departmental website. That proposal's financing section said only that: "The Minister must pay to a responsible authority… the amounts determined in accordance with the methods of calculation prescribed by regulation…" and then it failed to establish any guidance at all for the regulations [Aboriginal Affairs and Northern Development 2013: 25]. This means that the Minister could write the regulations to pay whatever he wanted, however he wanted. This lack of a financial guarantee condemned the whole proposal no matter what else it contained (although it should not go unnoticed that the existing funding arrangement permits the Minister to do exactly that – pay whatever he wants, however he wants).

Something different was needed, and it was delivered. The funding provision in the *First Nations Control of First Nations Education Act* differs 180 degrees from the previous proposal. It says:

> 43. (1) The Minister must pay to a responsible authority, in respect of each school year and at the time and in the manner prescribed by regulation, the amounts determined in accordance with the methods of calculation established in the regulations for providing access to elementary or secondary education in accordance with this Act.
>
> (2) The methods of calculation must allow for the provision under sections 32 and 33 of services to each First Nation school and to persons referred to in section 7 attending such a school that are of a quality reasonably comparable to that of similar services generally offered in a similarly sized public school that is regulated under provincial legislation and is located in an analogous region.

In addition, the Act goes on to ensure that funding includes amounts for First Nations language and culture:

> (4) The amounts payable under subsection (1) must include an amount to support the study of a First Nation language or culture as part of an education program.

One can search through many laws before finding another that says "the Minister *must* pay" and then sets out clear criteria for determining what he must pay. Even the *Federal-Provincial Fiscal Arrangements Act* authorizing equalization says "there *may* be paid to a province a fiscal equalization payment" [Section 3, italics added]. The *First Nations Control of First Nations Education Act* places a financial obligation on the federal government, making the payment to First Nations statutory and non-discretionary. More importantly, Section 43(2) defines precisely a standard that must govern the regulations, and which the Minister is obliged to follow when calculating the financial support for First Nations schools.

The Act sets out, for the first time, objective criteria for measuring the adequacy of federal financial support and enshrines the criteria in law. The regulatory powers of the Minister are prescribed by the Act. Were the Act to be passed into law, the only way to change this would be to take the public and difficult step of returning to Parliament to amend or replace the Act.

There are also institutional consequences. The law implies that government would have to set up an ongoing mechanism to compare First Nations schools quality to equivalent provincial schools in order to fulfill the requirements for the regulations under the Act. As Peter Drucker famously said: "What gets measured, gets managed" – meaning that this requirement in the Act will shine a continuous spotlight on the resources available for First Nations' education and create unavoidable pressures for improvement where needed.

The strength of these funding sections is likely a result of spirited negotiations and represents a complete about-face from the previous draft proposal. These sections provide for a statutory payment tied to a formula that will reflect changed funding needs over time. The financing provisions in the *First Nations Control of First Nations Education Act* are among the strongest statutory obligations for funding found anywhere in Canada – ranking right up there with inviolable commitments such as Canada's payments on its public debt. If there is ever to be acceptable statutory funding for First Nations education, it will have to look something like the financing provisions in the *First Nations Control of First Nations Education Act*.

Much has been made by those opposing the Act of the 'override' in Section 45 which permits the government to limit the amount paid out in total in any given year, despite the financial sections cited above [for example, Rae 2014]. Like it or not, an override provision is to be expected in any law that demands statutory payments. Too much importance can be vested in this override. If used, government would, in effect, be saying publicly that it is not paying a 'reasonably comparable' amount for First Nations education.

How the override provision would be used in practice is not possible to predict with certainty, but it seems most likely that it would be used only in dire circumstances. A government might be able to get away with this once or even twice, but not year after year, at least not without paying a heavy political cost. The 'override' clause may be compared to Section 33 of the Charter: the 'notwithstanding' clause that allows governments to override the rights and freedoms in the Charter through legislation. As with the notwithstanding clause, it is likely that Section 45 would be used extremely rarely if at all. It is like the fire alarm cover that says: "In case of emergency, break glass."

But seemingly in a kind of parallel dimension to the statutory commitment in the Act, we have Ottawa's commitment of $1.9 billion for First Nations education, with the new funding to begin in 2016.

While $1.9 billion is a very big number, it is impossible to make clear comparisons to current funding to calculate exactly what increase this amount would imply. The amount adds up approximately to the current funding level of about $1.55 billion (see *http://www.aadnc-aandc.gc.ca* "Elementary/Secondary Education Programs" accessed on 9 July 2014) plus more or less a

continuation of existing infrastructure funding, while building more funding into the base for everyday operations. The commitment seems to entail some increase, but it is difficult for an independent observer to identify the precise amount. This uncertainty is undoubtedly one of the causes of discontent among First Nations.

However, confusedly, the $1.9 billion commitment was made well before the negotiations that resulted in the financial provisions of the new proposed Act. The financing for First Nations education under the new Act should be set according to the statutory obligations in the Act, not a specific amount announced prior to the Act even being written. Unless the government would continuously invoke the limits in Section 45, the funding of First Nations education should be determined by law, namely Section 43 – not by government setting out arbitrary amounts. This is the power and the implication of statutory funding.

A careful analysis of the financing provisions of the new Act shows that the government did accommodate the need for adequate and stable financing of First Nations schools. But the government unnecessarily obscured the underlying principle of guaranteed comparable funding by setting out a specific dollar limit ahead of time. Either funding is set according to the rules and regulations under the Act or it is an amount government unilaterally sets according to whatever criteria it adopts at the time. It cannot be both.

Once the new Act was negotiated, the government could have avoided confusion by emphasizing the statute and acknowledging that the $1.9 billion was a place-holder until the new Act kicked in. It could have gone further – recognizing the distrust that had been accumulated over many decades – and committed to a clear and quicker increase in funding for participating First Nations in 2015.

Aside from confusion caused by the seeming contradiction between statutory funding according to the Act and the prior $1.9 billion commitment, much of the criticism of the financial sections of the Act seems to come down to 'provide more funding now.' While a strong case could certainly be made for a quicker infusion of added funding for First Nations schools, a simple one-time payment or even a one-time increase permanently built into the base budget does little over the long run. As inflation and demographics eat away over the years at the real value of financing, First Nations would soon be right back where they are now.

In addition, a big one-time increase is what is called *ex gratia* – in other words, a voluntary payment not required as an obligation under law, which is not the reliable, predictable and sustainable funding that is needed for First Nations schools. Moreover, such a payment has the look and feel of charity, and First Nations education funding is not charity: It is a treaty right. It is the right of First Nations children and families to have an adequately funded education system, just as it is for all children and families in Canada. This is an obligation which Parliament should impose upon the government of the day through law, regardless of which government happens to be in power, and not leave up to the goodwill (or otherwise) of whomever is in office in Ottawa.

There is another dilemma associated with 'just paying more money': deciding how to divide the extra money up among First Nations schools. What is little understood is that core First Nations education funding is allocated along with other funds to Aboriginal Affairs and Northern Development's seven regional offices across Canada. These regional offices have the responsibility to then juggle their total funds as best as they can to meet First Nations' needs. There is a lot of juggling going on.

To their credit, regional offices have often been able to meet priority requirements, but this kind of shuffling has resulted in many differences in funding levels for specific services among regions over time. This is especially exaggerated because the funding each region gets is based largely on the funding the year before, so regional differences tend to get baked-in over time. The implication is that education in some regions and some schools is more seriously underfunded than others. Just spreading around money evenly will not resolve this issue. The process in the new Act would have required each school's funding to be compared to that of surrounding provincial schools and, over time, this should have resulted in more equitable funding of all First Nations schools.

But a law is only as good as its implementation. Arriving at the amount of funding for an on-reserve school that would be sufficient to provide for education of a "quality reasonably comparable to that of similar services generally offered in a similarly sized public school that is regulated under provincial legislation and is located in an analogous region" [Section 43 cited above] is no simple or clear-cut task. Ottawa and the Assembly could also have considered ways to increase confidence in the implementation of the financing provisions of the Act.

One alternative would have been to take a page from provincial financing of hospitals in the early days of public hospital insurance, by setting up an independent commission to assess the financing entitlements under the Act and make public recommendations to both the First Nation where the school is located and the government. Such an independent financing commission was recommended by Drummond and Kachuck Rosenbluth [2013]. This would be a function best kept separate from the work of the Joint Council, discussed below, due to its specialized nature and to prevent conflict with the other roles of the Joint Council. The financing commission could have been given an initial five-year lifespan, after which the financing methods may have become sufficiently routine to revert to an in-house process as happened with hospital finances.

At the same time, First Nations need to be realistic about financing (one prominent chief spoke in a TV interview of needing an additional $7 or $8 billion for education). There are an estimated 65,000 to 70,000 students in schools on reserves. Even at an average of $20,000 per student, this amount would total a little less than $1.5 billion. To provide a concept of the scale involved: The Waywayseecappo First Nation in rural Manitoba joined the provincial system so that it could go from $7,300 per pupil funding to $10,500 per pupil funding as part of the local provincial school board [Sniderman 2012]. This additional amount paid on behalf of Waywayseecappo students is substantial (and speaks to the underfunding of First Nations schools in Manitoba), but a similar $3,000 increase to each and every First Nations student in every First Nations-run school on reserve would cost only about $200 million in total for all of Canada. This, to put it colloquially, is 'pocket-change' for Ottawa.

The Assembly of First Nations estimated that the total funding shortfall in 2010-11 fiscal year was about $750 million [cited in Drummond and Kachuck Rosenbluth 2013]. This is a huge sum of money for any individual, but it is not large at all in relation to overall government budgets – or to the social and economic costs of not improving First Nations' schools. The sums needed to achieve equity in financing for First Nations schools on reserve are readily affordable, even within current financial constraints of the Government of Canada.

The Joint Council

Had the *First Nations Control of First Nations Education Act* been passed into law, it would have resulted in the creation of a board called the 'Joint Council of Education Professionals.' The Joint Council was to consist of five to nine members, with half the members appointed directly by the federal government and the other half appointed by Ottawa but nominated by First Nations.

But nominated by which First Nations? This raises the familiar challenge of how to structure input from more than 600 diverse First Nations.

The drafters of the Act likely intended that the Assembly would nominate on behalf of First Nations. However, the Act leaves this issue unresolved by assigning this responsibility to "any entity representing the interests of First Nations that is prescribed by regulation." In other words, the government punted the question of how First Nations would be asked to provide nominations into the future writing of the regulations. The First Nations 'entity' designated by the regulations under the Act would not only provide nominations for four members, but also be consulted by the government before it appointed the Chair of the Joint Council.

The Joint Council was not meant to be a national school board with politicians as its members. Sitting politicians in Ottawa or in any province or territory were excluded from the Joint Council, as were all First Nations council members. Instead, the Joint Council was to consist of educational professionals, as the Council's full name suggests, with the Act requiring that all members of the Joint Council have "knowledge of or experience in elementary or secondary education."

The Act defines the role of the Joint Council as follows: "to advise the Minister, councils of First Nations and First Nation Education Authorities on any matter relating to the application of this Act." The Act goes on to say that "the Minister must seek the advice of the Joint Council when required to do so by this Act."

The Joint Council is not a mechanism for First Nations (or at least those on the Joint Council) to take over full responsibility for administering the Act, but neither is it a mere showpiece. In reality, it falls between these two extremes. The Joint Council is neither powerless nor all-powerful: It mandates some independent oversight of the administration of the Act, but decision making ultimately remains with the Minister.

What makes the Joint Council different and potentially more important than most other advisory boards? The Act makes the advice of the Joint Council a legal requirement, not an option. The Council cannot simply be annulled or ignored; it must be involved fully in the implementation of the Act. Most important, the Joint Council must be consulted on the drafting of any regulations under the Act. This means that the Joint Council would have to review and provide advice on the regulations governing financing under the Act as well as on all other matters. What sets the Council apart from most other advisory bodies, and makes it uniquely potent, is the obligatory and non-discretionary role it would have in obtaining information and providing advice in the administration of the Act.

In addition to providing input into the regulations, the Minister is required to consult the Joint Council before designating or revoking the designation of a First Nation Education Authority; before employing a special advisor to investigate a First Nations school's situation; before appointing and terminating a temporary inspector; and before entering into an agreement regarding funding with a province or provincial school board.

The Act also requires the Joint Council to undertake a review of the entire operation of the Act five years after it is passed and every five years thereafter. This is not intended to be just a two-page report to be tabled and forgotten. Instead, it is meant to be a substantial and public review, with the report tabled in the House of Commons.

None of these activities of the Council is discretionary on the part of either the Council or the Minister. If the Minister fails to obtain the advice of the Council in those areas in which he or she is obligated to do so under the Act, the subsequent decisions of the Department will not be legal. In this respect, the Council provides a guaranteed mechanism for non-governmental input, including by at least some First Nations educators, into the administration of the Act.

The Joint Council is meant to be an intermediary governance arrangement for the Act, so that the education programs under the Act would have at least some aspect of shared administration rather than only unilateral administration by the government. The Joint Council was the negotiators' answer to the Special Assembly of Chiefs resolution which called for "mechanisms to oversee, evaluate, and for reciprocal accountability and to ensure there not be unilateral federal oversight and authority" [Special Chiefs Assembly 2013]. Had the Joint Council been established, it might have grown and evolved over time to become a critical national institution – or it might have turned out to be just another advisory group with little or no impact.

But the Joint Council is in a 'damned if you do and damned if you don't' position. On the one hand, it may be seen as ultimately powerless because the Minister can just turn down its advice. On the other hand, if it really does have power, who does it represent? What role do individual First Nations have on the Joint Council? For some First Nations, the concept of an unelected group on which they may not be represented coming between them and the Minister may be viewed as a step backwards, not a step forwards.

The Joint Council is designed in the Act as an administrative body. This did reflect the resolution of the Special Assembly, but it may not have been a viable option. An alternative would be

to establish it (likely with a different name) as a purely professional institution, which would provide advice as educational experts both to government and First Nations, not act as an intermediary advisory body embedded within the decision-making process. A national First Nations education institution could provide support for, and draw on the expertise of, the many regional First Nations education resource centers that already exist. As discussed further below, an agency of this kind could have provided the institutional resource for a voluntary alternative to some of the detailed mandatory requirements for First Nation built into the *First Nations Control of First Nations Education Act*.

As to the administrative role contemplated for the Joint Council, if there is to be a *First Nations Education Act* or even several *First Nations Education Acts* – in the previous section we have shown why there should be such a law or laws someday – there needs to be a deeper discussion with First Nations as to whether a form of joint or shared administration represents an improvement for them over direct administration by the Department. If there is a form of joint administration, both its powers and its representation need to be carefully worked out. The proposal for the Joint Council provides a starting point to begin consideration of this issue.

First Nations control

Ottawa's earlier proposal for an Education Act was called '*The First Nations Education Act*.' But after the government sat down to negotiate with the Assembly of First Nations, what emerged was formally called "*An Act to Establish a Framework to Enable First Nations Control of Elementary and Secondary Education and to Provide for Related Funding and to Make Related Amendments to the Indian Act and Consequential Amendments to Other Acts*" or for short: "*The First Nations Control of First Nations Education Act*." The change of title to include "First Nations Control" was meant to deliver a message. The preamble to the new Act stated that: "First Nations education systems should be designed and implemented in accordance with the principle that First Nations have control of their children's education." This reflected the Assembly's demand for "*Indian Control of Indian Education*," in the words of the seminal 1972 policy paper by what was then called the National Indian Brotherhood and later the Assembly of First Nations [National Indian Brotherhood/Assembly of First Nations 1972].

I have argued elsewhere [Mendelson 2009] that communal control over education is as Canadian as hockey. But in the First Nations case, communal control is made all the more significant because of the legacy of residential schools and the explicit use of education as a tool – not for allowing young Aboriginals to fulfill their potential, but as an instrument of cultural obliteration and assimilation.

For these reasons, facilitating First Nations control of their own education system would certainly have been a central goal for the Assembly negotiators. It is therefore surprising that of the four critical issues reviewed here, the *First Nations Control of First Nations Education Act* is most ambiguous on the question of who controls the education system and what that really means.

There is a long list of the sections of the Act that set out mandatory requirements for First Nations schools – 7, 8, 21, 25, 32, 33, 34, 35, 36, 37, 39 and 40 as well as several other sections – in addition to broad regulatory powers defined in Section 48. The odd thing about these requirements is that most of them are relatively innocuous items that almost any school system would have to do anyway. For example, Section 31(1) sets out a long list for which the principal of a First Nations school is to be responsible including: implementing the school's education programs; planning extracurricular activities; planning the school's daily schedule; and supervising teachers. Every principal would do all this anyway and those few principals who did not would likely have much deeper problems. In the latter case, the school authority should not need a law to tell them that something is seriously wrong.

Why would items of this nature be in a national *First Nations Education Act* at all? Perhaps the negotiating partners thought these requirements were so obvious that they would be non-objectionable and make the Act appear more substantive? Or perhaps this was an attempt to reflect the kinds of requirements commonly found in provincial education laws? But a *First Nations Education Act* is not the same as a provincial education act: Rather it is, or should be, an enabling act to establish the framework between Ottawa and First Nations for Ottawa's support and First Nations authority over their children's education.

Whatever the intent of the government and the Assembly negotiators was, in this instance, it backfired. The sheer length of the list of mandatory requirements seemed to confirm that Ottawa meant to keep a tight hold over First Nations schools, notwithstanding the name of the new Act. This looked like a government effort to control every detail of their schools, all but down to the colour of the paint on the walls.

Yet, amidst the many otherwise bland requirements are those of a more substantive and controversial nature. The following is a list of some of the mandatory requirements in the Act that go beyond the administrative and impose substantive demands on First Nations that they might not otherwise meet. Note that this is *not* a list of items we are proposing: It is simply an attempt to separate out the 'wheat from the chaff' and inventory contentious items among the Act's mandatory requirements.

- Section 7(3) – The education obtained in a First Nations school must enable a student to obtain a provincial high school diploma or equivalent (e.g., an International Baccalaureate diploma);

- Section 21(2) – The language of instruction must be English or French and may, in addition, be a First Nation language;

- Section 35(2)(c) – Teachers and principals must have a teaching certificate in good standing issued by a province or a recognized Canadian teacher certification authority;

- Section 36 – Every First Nations school has to have a 'school success plan' which would include preparing students to obtain a provincial high school diploma and which would be submitted to Ottawa;

- Section 37 and 38 – A qualified school inspector has to conduct school inspections and submit a report to the First Nation authority responsible for the school as well as send a copy of the inspector's report to Ottawa;

- Section 40 – As noted, the Minister may appoint a temporary administrator to take over a school (after getting the advice of the Joint Council); and

- Section 48 – The Minister is given very powerful regulatory powers in respect of almost all sections of the Act setting out a requirement for First Nations schools, even those which have been described here as non-objectionable. For example, Section 36 required every school to have a school safety plan. It is not clear why this needs to be a mandatory requirement in a national *First Nations Education Act*, but surely no one would object to a school safety plan. However, the Minister is then given unrestricted powers to set out what must be in a school safety plan, so who knows? Even this non-objectionable item might end up creating unforeseen problems for First Nations.

Realistically, government is not going to just hand over a cheque without asking for some important commitments in return. And even if some government did just send a cheque without requirements, we can be sure that this would not last for long – at the first hint of scandal, there would be political demands for a response. The result would likely be an over-reaction, thoughtlessly imposing too many requirements and too much paperwork.

Even the existing legislation implementing self-government agreements, which did not include clear financial obligations for government, contained requirements for First Nations. For example, the *Mi'kmaq Education Act* includes the requirement that:

> The educational programs and services so provided must be comparable to programs and services provided by other education systems in Canada, in order to permit the transfer of students to and from those systems without academic penalty to the same extent as students can transfer between those other education systems.

Similarly, the *First Nations Jurisdiction over Education in British Columbia Act* (2006), which also has no financial provisions, requires that:

> A participating First Nation shall provide, or make provision for, education so as to allow students to transfer without academic penalty to an equivalent level in another school within the school system of British Columbia.

The *First Nations Control of First Nations Education Act* over-reached. The sections setting out the job description for principals and other details are not necessary in a national act, yet by their very detail added immeasurably to the perception that government intended to run First

Nations schools remotely through the Act. As an alternative, the Joint Council, or more acceptably a professional First Nations education agency, could have been asked to come up with voluntary 'models' for First Nations in most of these areas. Meaningful but non-coercive assistance for schools to improve their quality would doubtless be welcome by First Nations, and likely immeasurably more effective than mandatory requirements which would probably end up as nothing more than trivial bureaucratic checklists anyway.

It is worth recalling that the Department of Aboriginal Affairs has little educational expertise. The Department does not now have anything approaching the capacity to review the thousands of reports and documents First Nations would have been required to submit. Building such capacity takes time and money. Meanwhile, checking off a box that a report has been received and then abandoning it on a dusty shelf is not useful to anyone. Mandatory reporting requirements are only as good as the ability to act on what is reported.

An alternative for government could have been to keep First Nations mandatory requirements to the minimum that are really needed. The contentious items listed above might make a reasonable starting point for negotiations. In addition, what was oddly missing from the mandatory requirements was the need for reporting on outcomes to First Nations communities and the development of reliable data on educational results so that First Nations, Parliament and all Canadians could know what progress was being achieved.

For First Nations, the question of acceptable 'mandatory' requirements might be boiled down to the question: What do you want to do in your schools and is there anything in the mandatory requirements that would prevent you from doing this? The truth is, despite the long and detailed list in the *First Nations Control of First Nations Education Act*, it is difficult to think of anything that a First Nation might have wanted to do that it could not because of the Act. For example, there is nothing in the Act that would have prevented land-based learning or half-day teaching in a First Nations language. While teachers would be required to have provincial certification, this would not be required of teachers' assistants and elders working in the schools. The abstract issue of 'who has authority over what' might be considered in the more concrete context of 'can you do what you want to do?' The question then becomes: What do First Nations want to achieve in their schools and would they have the authority, financial means and other support necessary to make it happen?

Conclusion

There are lessons to be learned from the controversies surrounding the *First Nations Control of First Nations Education Act*. This paper does not set out to resolve those controversies, but it does attempt to point out some important ways in which compromise and accommodation may be possible. These lessons should not be lost. Now both First Nations and governments are discouraged and disheartened by the dramatic failure of the *First Nations Control of First Nations Education Act*. Nevertheless, First Nations and all Canadians cannot afford to let the current *status quo* remain for long due to a stalemate. We must gather our resolve, learn lessons from what went wrong, and try again to revitalize and renew Canada's support for First Nations education.

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