

***HISTORICAL HIGHLIGHTS LEADING
TO THE DEVELOPMENT OF FIRST
NATIONS EDUCATION LAW IN
CANADA***

ONTARIO NATIVE EDUCATION COUNSELLING ASSOCIATION



Historical Highlights Leading to the Development of First Nations Education Law in Canada

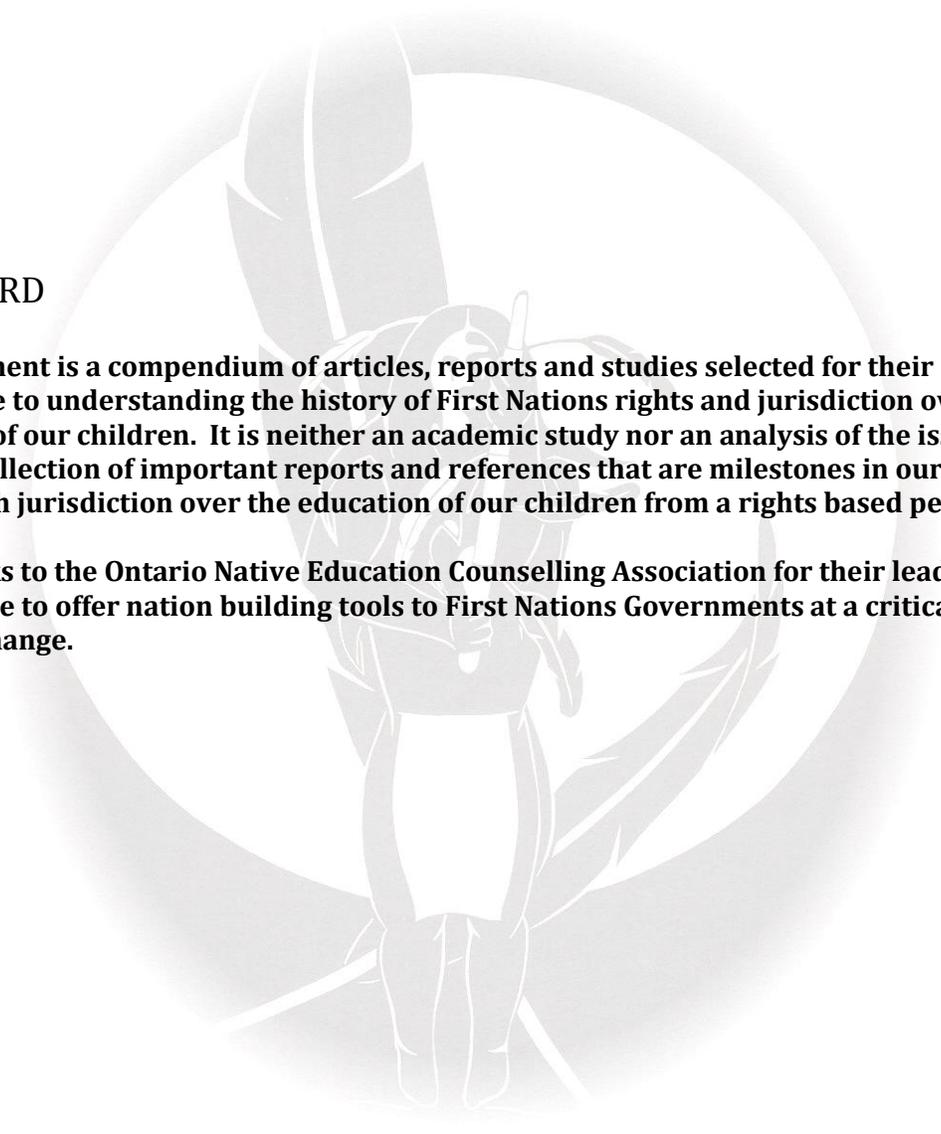
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FOREWORD

This document is a compendium of articles, reports and studies selected for their importance to understanding the history of First Nations rights and jurisdiction over the education of our children. It is neither an academic study nor an analysis of the issues, but simply a collection of important reports and references that are milestones in our journey to re-establish jurisdiction over the education of our children from a rights based perspective.

With thanks to the Ontario Native Education Counselling Association for their leadership and courage to offer nation building tools to First Nations Governments at a critical time of dynamic change.

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HISTORICAL HIGHLIGHTS LEADING TO THE DEVELOPMENT OF FIRST NATIONS EDUCATION LAW IN CANADA

Source of Sovereignty for Education: Sacred Spiritual Laws of Creation

“We, the First Nations, are the Peoples of vision, spiritual in nature and gifted with stewarding Creation in all of its magnificence. The homelands of Turtle Island are gifted to the Nations by the Creator in the oral traditions of the creation stories and songs and in the Original Instructions called our Sacred Laws.”

Each Nation occupying homelands and territories on Turtle Island and indeed throughout the Americas have ancient stories of the Original Instructions embedded within their cosmology, the history of creation, songs of the land, language, ceremonies, rites of passage, the establishment of life patterns and spiritual traditions. These laws are divinely given to the Nations and cannot be changed by human intervention. The sacred laws speak of the origins of life and creation and the evolution of human beings with their gifts, duties and responsibilities, moral and ethical codes of behavior, elements that are challenges to the human spirit, and ceremonies and medicines to strengthen one in the journey of life.

Spiritual Law is related to the Natural Law of Mother Earth as covenants that Indigenous Nations have accepted from the original time of creation to care for all mineral life, plant life, animal life, and human life to keep the world in balance with ceremonies of gratitude.

The obligations that accompany the Sacred Laws include the daily application of the teachings to the matters at hand, in one’s own life, with family, in the clan system, within community or Nation or in the workplace. Keeping a Good Mind with these teachings and codes yields mental acuity and clarity, a physically thriving body, a spiritually balanced and emotionally resilient First Nations member who can actively contribute to the building of the Nation. The Sacred Laws also embody the Natural Laws of Mother Earth and the Family Laws that apply the sacred instructions to the challenges of daily life. Sacred Law cannot be changed by human intervention.

The laws are significant in how their intentions function in political decision making, medicine, science, technology, engineering, health, transportation, food security, economy, weather readings, environmental concerns, mining, forestry, animal harvesting, fishing, water conservation, land restoration, climate change, kinship and social customs among other facets of life. The laws create a worldview and cosmology in synchronicity to sustaining life on the planet and these laws are as important today as eons ago.

For our purposes, the Sacred Laws given by the Creator provide an understanding of the sovereignty of Indigenous Nations in their homelands. The lands and creation therein are the sole responsibility of the Nation occupying the territory to safeguard, protect and ensure the continuance of life as a prime directive. The transmission of Nation traditional knowledge systems and languages, spiritual traditions, sacred mathematics, ecology, songs of the land, history of Ancestral civilizations, medicines and natural practices among other important issues are essential to maintaining the rich cultural and ancestral treasures for the enjoyment of future generations.

Education is the vehicle for such an important transmission process. Education also embodies the skills to reach one's goals in life in a modern context while building the social, emotional, cognitive and physical well-being of the First Nations student and guiding the student to reach a place of full potential. Education from the viewpoint of sovereignty ensures that the mind of the First Nations child includes knowing one's origins, kinship systems, homelands, language, ceremonies, songs, dances, history, prophecies and ancestral traditions.

First Nations education paradigms build First Nations members who are deeply connected to their homelands. Those who know their homelands will always stand to protect their lands.

Sovereignty is not assumed by holding land or political power. The Creator, Maker of Lands and all Creation gives sovereignty to those in His grand design who hold the duties of stewarding and sustaining creation for the coming generations. This fact is confirmed in the Original Instructions.

We, the Indigenous Nations of Turtle Island have never relinquished our sovereignty or sovereign lands. We have a continuing inherent right to autonomy in internal affairs, a right of self-determination and a right to self-government. The Indigenous right to self-government is the same as the legislative power to make laws for the benefit of all of our people.

Education is a pillar of sovereignty.

Sovereignty is brought to life by making Nation laws in education that assert our jurisdiction and manage the future of our Nation members for the highest quality of lifelong learning within the sacredness of our languages and living cultural civilizations across Turtle Island. Jurisdiction over education arises from the right to make decisions on education matters for First Nations. This leads to a right to have a political structure for making those decisions.

The next two diagrams are snapshots of the living sacred laws and rich governance and ceremonial traditions of the Haudenosaunee and the Anishnabek Nations. The traditions are based on sacred spiritual laws that form the Original Instructions and affirm the sovereignty of First Nations that are embedded in the oral traditions, assisted in oral tradition by mnemonic aids such as wampum belts and strings, condolence canes, birch bark scrolls, sacred bundles, drums, Pipes, and other sacred items. The elements of these Indigenous knowledge systems are as valid as the written word in European traditions. The continuance of ceremonial life, the living civilizations of First Nations in their homelands, speaking heritage languages, living in proximity with the Earth exists to this day.

Haudenosaunee Sacred Spiritual Laws

SACRED SPIRITUAL LAWS

Haudenosaunee Confederacy

CREATION STORY

ORIGINAL INSTRUCTIONS

THANKSGIVING ADDRESS
FOUR SACRED CEREMONIES

GREAT LAW OF PEACE

KARIWIO CODE OF HANDSOME LAKE (PROPHECY)

ANNUAL CYCLE OF CEREMONIES



© Onondaga Nation

Anishnabek Nation Sacred Spiritual Laws

Spiritual Laws

- Creation Stories
- Original Instructions
- Midewiwin Scrolls
- Migration Stories
- Seven Sacred Laws
- Prophecies
- Seven Rites of Passage



Source: Northern Superior Regional Chiefs Forum, Elders Council, and Pledge of Relationship, 2013

Anishnabek Nation and Haudenosaunee Confederacy Friendship Belt



Sovereignty in Action: Early Alliances of Nation-To-Nation Relationships

Inherent Rights

“The claim of First Nations to sovereignty is rooted in the political, legal and historical relationship between the First Nations and Canada. Today, many land claims and court cases have stemmed from the un-extinguished Aboriginal title and jurisdiction concerning those lands. By similar power and authority by right of their sovereign title, First Nations wish to exercise jurisdiction over education.” (Johnston, Longboat, 1986, Canadian Journal of Native Studies, p. 173-179)

The claim to sovereignty by First Nations is valid with supporting facts and truths evident in the First Nations-Canada relationship that is as true today as it was four hundred years ago.

History, told by the colonizer will always be one sided, however, there is an undeniable, consistent pattern of relationship between foreign Nations on our shores and the Indigenous Nations meeting them. International meetings were held with representatives of the Indigenous Nations and the foreign Nations to discuss land settlement and maintain peace.

Early Settler Nations were entirely dependent upon the political protection and social goodwill of the Nations near to their settlements for the first 200 years of occupation. Economic and political alliances were necessary to survival and were conducted on a Nation-to Nation platform. The foreign Nations who formed early Treaty covenants for peace and military alliances openly sought the benefits of friendly international relations with the host Indigenous Nations.

As time passed, the exploitation of Indigenous lands and resources was a direct result of the expansion of foreign Nations within Indigenous homelands. Surrender of sovereignty of Indigenous Nations to foreign powers never occurred. In fact, the opposite was true. Indigenous Nations consistently fought for their homelands and maintained their jurisdiction.

Tecumseh amassed great numbers of warriors from many Nations and fought against the US expansionist forces for years in the Ohio valley. In 1812, it was the fighting force under Tecumseh that tipped the balance in this war and has been credited as the deciding factor in the War of 1812. Canada has its boundaries today because of the fighting force of Indigenous Nations who fought to protect their homelands.

The Treaties and international relationships that formed before and after those wars reflect the need to maintain peace and alliance among military powers.

Many First Nations were approached with offers of international relationships and agreements because they were seen as holding legal rights that made their consent necessary in order to legitimize transactions concerning lands and resources. Sovereignty and jurisdiction discussions on education are embedded within this perspective.

Although certain rights were granted to Settler Nations through Treaty making, Indigenous Nations retained other rights and powers because those rights were never included in the agreements.

Unceded rights include the rights of Indigenous Nations to determine their own citizenship, property use, and domestic relations of citizens, justice, law enforcement, governance and education.

Today land claims and court cases on un-extinguished Aboriginal title and jurisdiction to the lands are occurring as a result of Canada claiming lands and settling lands without the procedures of Treaty making.

All of the original Indigenous sovereignty and legal interests over lands and resources that have not been properly surrendered or extinguished remain intact and available to Indigenous Nations.

Those same Nations have never stated that they relinquish their Nationhood or cultural identity to become Canadians. The Indigenous Nations have made every effort to keep their homelands intact, to maintain their governance structures, to speak their languages and practice their respective cultures despite the efforts of the Canadian government to impose its laws with external interference and exploitation aimed at undermining the sovereignty of Indigenous Nations.

The Indigenous Nations now located within the borders of the settler Nation claimed lands called the state of Canada remain distinct with languages, governments, and territories. This distinctiveness supports Indigenous claims to be recognized as Nations within the context of international law.

What is the source of power that enables First Nations to exercise jurisdiction over education?

The same power that First Nations access by which we lay rightful claim to our ancestral lands, fulfilling the sacred laws of the Original Instructions of Creation, by right of sovereign title and authority, divinely given.

Our path lays in the claiming of our sovereignty as Nations and Peoples within the context of international law for the purpose of self-reliance and self-determination.

Guswenta Wampum Belt, 1613: A Declaration of Sovereignty

Four hundred years ago, the Guswenta Belt formed the earliest agreement in North America between the Haudenosaunee Confederacy and the Dutch as an agreement of relationship with strong guiding principles intended to exist for all time. The Belt was later used in establishing Nation-to-Nation relationships with the Nations of Britain, France, United States and later Canada.

Pre-Confederation Treaties, Alliances, and Covenants are the best examples of Nation-to-Nation relationships, the commitments made by foreign powers in honour of the Crown they represented, the equitable relationship of sharing, the enduring elements of political protocol and the importance of nation agreements for land and resources.

The Onondaga Nation describes the story of the formation of the Guswenta Belt and its principles that are as important to understand and live by today, as they were those centuries ago.

“In 1613, the Mohawks had noticed people coming into the territory unannounced. They began to cut trees and clear land for their homes and farms. They had entered the lands of the Haudenosaunee and were now occupying some of our empty rooms (land). They dressed oddly and had hair on their faces. They had pots and pans and had their families with them. These people need a place to live. The Mohawks sent a runner to Onondaga to convey a meeting of the Haudenosaunee.

At the meeting it was discussed that a delegation must travel to where these people have settled to determine their intentions. It was difficult for the delegation. The people they met spoke in a language they have not heard before. It took much time and patience for the two people to begin to communicate.

After many discussions, we decided that we must have a way to greet each other when we meet. The settlers with their large sailed boat thought that they should be called “father” and the Haudenosaunee “son.” The Haudenosaunee said that this would not do. We shall address each other as “Brothers”. This relationship shows that we are equal to the other.

*As we discovered much about each other, there was an agreement made of how we were to treat and live together. Each of our ways will be shown in the purple rows running the length of the belt. In one row is a **ship** with our White Brother’s ways, in the other a **canoe** with our ways. Each will travel down the river of life side by side. Neither will attempt to steer the other’s vessel.*

*We agreed on three on three elements to make this treaty last. The first agreement was **friendship**; the Haudenosaunee and our white brothers will live in friendship. The second principle is **peace**; there will be peace between our two people. The final principle is **forever**; that this agreement will last forever.*

The Dutch recorded this agreement in paper and with three silver chains. Iron chains would not do because iron rusts and breaks over time. Silver can be polished and renewed when we meet. We agreed to call this the Silver Covenant Chain of Friendship.

The Haudenosaunee told the Dutch that we do not use paper to record our history. We make belts made of white and purple wampum shells, that we have made a belt to record this agreement. The belt is two purple rows running alongside each other representing two boats. In one, is the canoe with our way of life, laws and people. In the other is your ship with your laws, religion, and people in it. Our

boats will travel side by side down the river of life. That each will respect the ways of each other and will not interfere with the other. That together we will travel in Friendship, Peace, Forever as long as the grass is green, as long as the water runs downhill, as long as the sun rises in the east and sets in the west and as long as our Mother Earth will last.



(Source: onondaganation.org)

Other modern Nation-to-Nation declarations have formed in the last century to affirm common values embedded in spiritual traditions, millennia old, which include protection and care for creation and homelands. In Brazil, 1992 and later in Bali, 2002 the Indigenous Nations of the World gathered to express their views on sovereignty, lands, resources, cultural transmission, education, governance and the right to make laws and the right to maintain cultural ways of life in their homelands. The Kari Oca Declaration asserts these rights, makes a covenant, has signatories and stands as an international agreement among Indigenous Nations of the World. First Nations in Canada do not stand alone in the efforts for implementation of self-determination over homelands and territories, resources, Treaties, inherent rights, governance and the rights of Nations to care for their people.

International Position of Indigenous Nations of the World Kari-Oca Declaration

**Signed at Kari-Oca, Brazil on the 30 Day of May, 1992
Reaffirmed at Bali, Indonesia 4 June 2002**

We, the Indigenous Peoples, walk to the future in the footprints of our ancestors.

From the smallest to the largest living being, from the four directions, from the air, the land and the mountains, the Creator has placed us, the Indigenous peoples upon our Mother the Earth.

The footprints of our ancestors are permanently etched upon the lands of our peoples.

We, the Indigenous peoples, maintain our inherent rights to self-determination. We have always had the right to decide our own forms of government, to use our own laws, to raise and educate our children, to our own cultural identity without interference.

We continue to maintain our rights as peoples despite centuries of deprivation, assimilation and genocide.

We maintain our inalienable rights to our lands and territories, to all our resources-above and below-and to our waters. We assert our ongoing responsibility to pass these onto our future generations.

We, the Indigenous peoples, walk to the future in the footprints of our ancestors.

International Authorities, Instruments, Declarations, Covenants

There are a number of international instruments supporting First Nations jurisdiction over education of which Canada is a signatory and therefore an international treaty partner bound by international law.

These international instruments, of which Canada is a signatory, set a foundation for Canada to develop a respectful partnership with First Nations Governments and move towards the affirmation of the jurisdiction of First Nations governments over the education of their members.

The **United Nations Convention on the Rights of the Child** (1990) of which Canada is a signatory, states that, *“education of the child shall be directed to ...the development of respect for the child’s parents, his or her own cultural identity, language and values...”*

The Convention is an international human rights treaty for the protection of cultural rights of children among other rights. The signatories are bound by international law. The Convention commits Canada to providing education that affirms First Nations cultural identities, languages and values.

Section 29(2) of the Convention affirms that individuals and bodies have the liberty to establish and direct educational institutions with a view to the minimum standards of the government.

“No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.”

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls on Nations States to take measures to protect the rights of Indigenous peoples...*“to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, place and persons.”*

In addition, Nation States are called upon in the Declaration to work with Indigenous peoples (First Nations) to *“establish and control their education systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”*

UNDRIP contains provisions that affirm the Indigenous right to education and the Indigenous right of jurisdiction over education.

Article 14 (1) *This provision specifies that Indigenous peoples have the right to establish and control their education systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*

Article 14 (2) *emphasizes that Indigenous individuals have the right to all levels and forms of education of the State without discrimination of any kind.*

Article 14 (3) *determines that States shall, in conjunction with Indigenous peoples, take effective measures so that Indigenous individuals, particularly children, have access, when possible to an education in their own culture and language. It follows from the provisions that Indigenous peoples living outside their communities also have the right to have access to an education in their own culture and language, wherever possible.*

UNDRIP affirms that the Indigenous peoples “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs” and the right to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”

The **United Nations Report of the Expert Mechanism on the Rights of Indigenous Peoples** recognized the need for having legal provisions in place to affirm education systems that recognize traditional ways of teaching and learning through the establishment of Indigenous learning centres and organizations.

Section IV (56) *Examples of important existing education legislations include those recognizing the integration of Indigenous perspectives and languages into mainstream education, culturally appropriate curricula, mother tongue based bilingual and multilingual education, intercultural education and the effective participation of Indigenous peoples in designing education programmes. Policies of complementary education for Indigenous peoples permit the implementation of intercultural education in schools and colleges with the aim of moving towards multiculturalism and the recognition of the diversity of peoples.*

Section IV (60) *Allocating targeted financial resources for the development of materials, testing proposed culturally appropriate curricula, teaching Indigenous languages, providing support for training and incentives for teachers in rural school and developing education programmes in cooperation with Indigenous peoples are also effective initiatives. An equally important consideration for communities located in isolated and sparsely populated areas is that the allocation of funding for infrastructure should not be made on a school to population ratio.*

The **Report of the Expert Mechanism on the Rights of Indigenous Peoples** also affirms the goal of Indigenous education to be as follows:

Section II (6) *Education of Indigenous children contributes to both individual and community development, as well as to participation in society in its broadest sense. Education enables Indigenous children to exercise and enjoy economic, social and cultural rights, and strengthens their ability to exercise civil rights in order to influence political policy and processes for improved protection of human rights. The implementation of Indigenous peoples’ right to education is an essential means of achieving individual empowerment and self-determination. Education is also a means for enjoyment, maintenance and respect of Indigenous cultures, languages, traditions and traditional knowledge.*

Universal Declaration of Human Rights states in Article 26,

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental states. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The International Covenant on Economic, Social and Cultural Rights states in Article 13 that:

1. The States Parties to the present Covenant recognize the right of everyone to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic, or religious groups and further the activities of the United Nations for the maintenance of peace.
3. The States Parties to the present Covenant undertake to have respect for the Liberty of parents and, when applicable, legal guardians to choose for their own children schools, other than those established by public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

World Conference on Indigenous Peoples

Recommendations for the High Level Plenary Meeting of the General Assembly Of the United Nations for September 22-24, 2014

Alta Outcome Document of 2013

The Indigenous Peoples and Nations representing 7 global geo-political regions, including a women's caucus and a youth caucus gathered in the traditional territories of the Sami people in Norway on June 10-12, 2013. The meeting collected recommendations to take to the United Nations High Level Plenary Meeting of the General Assembly also called the World Conference on Indigenous Peoples that will convene on September 22-23, 2014. Some of their international position is as follows:

“As the original and distinct Peoples and Nations of our Territories we abide by natural laws and have our own laws, spirituality and world views. We have our own governance structures, knowledge systems, values and the love, respect and life-ways, which form the basis of our identity as Indigenous Peoples and our relationship with the natural world.

Indigenous Peoples have been instrumental in the advocacy for and recognition of human rights including the collective and individual human rights of Indigenous Peoples and have participated in international forums and processes. This has, among other things, resulted in the adoption of the ILO convention 169 and the UN Declaration on the Rights of Indigenous Peoples, the establishment of the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the Rights of Indigenous Peoples.

For centuries, we Indigenous Peoples have faced and continue to face colonization of our lands, territories, resources air, ice, oceans and waters, mountains and forests. This has resulted in patterns of domination, exploitation and subjugation of our Peoples. Such patterns can be traced to claims of discovery and conquest, papal bulls, royal charters, manifest destiny, and other erroneous and legally invalid doctrines.

These claims have manifested in colonial strategies, policies and actions designed to destroy Indigenous peoples thereby resulting in the ongoing usurpation of Indigenous Peoples' lands, territories, resources, air, ice, oceans and waters, and, mountains and forests: extensive destruction of Indigenous Peoples political and legal institutions; discriminatory practices of colonizing forces aimed at destroying Indigenous Peoples' cultures; failure to honour Treaties, agreements and other constructive arrangements with Indigenous Peoples and Nations; genocide, ecocide, loss of food sovereignty, crimes humanity, war crimes and the militarization of Indigenous Peoples and our lands; corporatization of and commodification of Indigenous Peoples and our natural resources; and the imposition of “development” models that are destroying the life giving capacities and integrity of Mother Earth and producing a range of detrimental impacts of which climate change could prove to be the most destructive.

The provisions of the Declaration that affirm the inherent rights of Indigenous Peoples to participate fully in decision making that affects us, will continue to guide and frame our work for the HLPM/WCIP.

We affirm further that nothing in this process or its outcomes may be interpreted as diminishing or eliminating any of the rights of Indigenous Peoples contained in UNDRIP, or any of the other

international standards which protect, defend and uphold the inherent economic, social, cultural, civil, political, educational and spiritual rights of Indigenous Peoples.

We affirm that the inherent and inalienable right of self-determination is preeminent and is a prerequisite for the realization of all rights. We Indigenous Peoples, have the right of self-determination and permanent sovereignty over our lands, territories, resources, air, ice, oceans and waters, mountains and forests.

Based on the right of self-determination, Indigenous Peoples have the right and authority to develop and implement on an equal basis with States the standards and mechanisms that will govern relationships between them and, with the full, equal and effective participation of Indigenous Peoples we recommend that:

a) States develop processes to ensure that regional, constitutional, federal/national, provincial, and local laws, policies and procedures comply with the Declaration (UNDRIP) and other international human rights standards that uphold the rights of Indigenous Peoples...

In Theme 4: Indigenous Peoples' Priorities for Development with Free, Prior and Informed Consent

Article 6. Recommend States with the full, equal and effective participation of Indigenous Peoples provide adequate resources that enable the empowerment of Indigenous Peoples to deliver and have access to high quality and culturally based education, health including mental health and housing to improve the well-being of Indigenous Peoples; and that Indigenous individuals are provided with appropriate health care on an equal basis;

Article 7. Recommend States take urgent action to adopt strategies that enable Indigenous Peoples to exercise their right to education particularly youth and children and their sovereign rights to establish their own educational system affirming the scholarship of their knowledge systems, sciences, technologies, intellectual property and cultural manifestations;

Article 8. Recommend States ensure meaningful and effective participation and the free, prior and informed consent of Indigenous Peoples in accordance with their protocols in order to reform the dominant education system to reflect the histories, identities, values, beliefs, cultures, languages and knowledge of the Indigenous Peoples to whom it is being delivered;

Article 9. Call on States to reaffirm the rights of Indigenous Peoples to their economic, social and cultural development with due regard to their freedom and identity and the recognition that the right to sustainable development is both procedural and substantive.

We further call upon States to ensure the full, equal and effective participation of Indigenous Peoples in the development of mechanisms to ensure that ecosystem based sustainable development is equitable, non-discriminatory, participatory, accountable and transparent with equality, consent and decolonization as important overarching themes that protect, recognize and respect the rights of Indigenous Peoples and that are in harmony with the sacredness of Mother Earth."

The Alta Document clearly specifies the work laying ahead for the international agenda in specific themes areas in preparation for the United Nations High Level Plenary Meeting of the General Assembly in 2014.

The right of self-determination and sovereignty are the foundation for action that many First Nations have chosen to take in the preparation of their own laws in education, exercising jurisdiction over education and in the development of systems of education.

Treaty Protection for Education Rights for First Nations

Treaties no. 1 to 7: Education as a Primary Tool for a New Era

(Source: A Treaty Right to Education, Sheila Carr Stewart, 2001)

The earliest Treaties between First Nations and the Crown of Great Britain are agreements between allied Nations for mutual aid, friendship, trade, allowing European settlements, military alliances, political alliances and peace. Commitments made in the Treaties were solemn binding agreements made orally, in written form, recorded in mnemonic aids such as wampum belts, sacred bundles, scrolls and above all, confirmed in ceremonies forming a spiritual covenant with the Creator to, not only share the land and resources, but to share equally the responsibilities for maintaining the integrity of creation.

In 1752, the Mikmaq Nation Confederacy Chiefs with Grand Chief Cope and His Excellency Peregrine Thomas Hopson on behalf of the British sovereign agreed to articles of peace and friendship in the Mikmaq Compact. The compact created protection as well as boundaries for communities that respected their autonomous political systems of governance, much like the Royal Proclamation of 1763 would establish some years later.

The later Treaties of the 1800's, as the numbered Treaties No. 1-7, became agreements that specified sharing of lands and resources in exchange for benefits for the members of First Nations to guarantee a comparable standard of living and prosperity for the First Nations as times changed and society shifted.

Education for First Nations was mentioned in the latter Treaties No. 1-7, as a means of establishing a platform for the changing social and economic conditions of Canada as a state and for the changing conditions for First Nations moving to settled lands and new lifestyles.

Sharing lands and the incredible resource base were believed by the Treaty signatories of the First Nations to support the transition of their people into a new age and guarantee the survival as Nations. Treaty No. 7 Elders have stated that education rights stemming from negotiations in the Treaty were established for a free education and lifelong learning in perpetuity in return for use of the land and its resources. The belief is that the Ancestors signing the Treaty could foresee the changes in lifestyle, land use and the challenges that their descendants would face. In preparation for such an incredible shift in the world, the Ancestors "pre-paid" for education by sharing their resources and homelands.

The education clauses in Treaties No. 1-7 clearly state that it is the Crown's responsibility to provide both, a building and the teachers, to "instruct" the people. The clauses also state that the provision of educational services whenever the Indians desired such services was mandatory and the Crown held the obligation to pay for such services. The decisions on education services, when and where they would be offered were left to the First Nations signatories.

In these latter Treaties, education was specifically mentioned as a treaty entitlement. Treaty No. 1 states that *'Her Majesty agrees to maintain a school on each reserve hereby made, whenever the Indians of the reserve should desire it.'* The Crown clearly had the fiduciary responsibility for funding First Nations education. The Treaties gave the First Nations the responsibility to make the decisions on education and initiate the schooling process when the "Indians desired it."

In Treaty No. 1 (1871) and No. 2, both the Commissioners and the representatives of the First Nations all referred to education for the future prosperity of the First Nations and referred to “a future of promise, based upon the foundations of instruction.” Archibald, the Treaty Commissioner for Treaty No. 1 and No. 2 stated that education should enable the First Nations to “live in comfort...so you can live and prosper and provide.”

The signing of Treaty No. 3 (1873) by Morris, the subsequent Treaty Commissioner stated that, “I will establish schools whenever any band asks for them, so that your children may have the learning of the white man. Whenever you go to a reserve, the Queen will be ready to give you a school and schoolmaster.”

Treaty No. 3 (1873), Treaty No. 5 (1875) and Treaty No. 6 (1876) state, “Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.”

Treaty No. 4 (1874) state “Her Majesty agrees to maintain a school in the reserve allotted to each band, as soon as they settle on said reserve, and are prepared for a teacher.” At the Treaty 4 gathering, Morris stated, “You are the subjects of the Queen...She is always just and true. What she promises never changes.” Morris also affirmed that “not for today but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.”

At the signing of Treaty No. 6, Morris told the First Nations that, “Your children will be taught, and then they will be as well able to take care of themselves as the whites around them.” At Treaty 6 during the signing, Morris wrote that the “universal demand for teachers was encouraging” and that the “government can supply” such a demand.

By the time the signing of Treaty No. 7 (1877) was negotiated, the Crown agreed to “pay the salary of such teachers to instruct the children of said Indians.” The commitments were shifting from providing schools to paying the cost of teacher salaries.

The commitments to education were not time sensitive, but were to be funded by the government and the quality of programs equitable in nature to those of non-Indigenous Canadians.

The land and its resources continue to provide Canadians with one of the best quality of life indicators on the global scale. The failure of our Treaty partner, Canada to uphold its commitments to First Nations has created a financial and environmental karma that will not easily be rectified.

Generations of Canadians have benefitted from the Treaty promises of the First Nations, while the First Nations have suffered genocide in their homelands. Defined in the **Genocide Convention adopted by the United Nations General Assembly in 1948**,

Article 2 states,

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole, or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

The history of Canada-First Nations clearly speaks for itself with regard to each of the five indicators of genocide.

The present reality is that the Crown has not fulfilled its constitutional obligations. It has chosen to fund limited educational services, programs and capital as a primary tool of assimilation under the auspices of its own legislation called the Indian Act, sections 114-122.

By placing First Nations education in the Indian Act, Canada deliberately situated education in a vulnerable position subject to Canada’s ability to fund First Nations education based on its economic viability and political trends and pressures.

By maintaining First Nations education in a newly forming First Nations Education Act scheduled to be implemented in 2014, the government of Canada continues this practice of subjugating First Nation education to the financial capabilities and policy decision making of a federal government department.

In taking such action, the state of Canada circumvented the Treaties and its constitutional responsibilities.

The Crown is not funding First Nations education as an Inherent Right or a Treaty Right.

Nothing less than a new political relationship with First Nations based on the recognition of Inherent rights, Treaty rights and jurisdiction over education is required to fulfill Treaty commitments. Federal, provincial or territorial Education Acts must be realigned to accommodate First Nations jurisdiction and new funding mechanisms.

The act of Treaty making occurs when there is recognition of sovereignty, Nationhood and jurisdiction.

Sovereign Nations sign Treaties.

Nations as Treaty Partners uphold Treaty agreements.

Nations assert jurisdiction.

Self-determining Nations exercise jurisdiction over education.

Declaration of Sovereignty and Jurisdiction over Education

There are some overarching principles that all First Nations governments can agree to and should formulate into a Declaration of Sovereignty and Jurisdiction over Education. Some thoughts on these guiding principles are offered here and are almost 30 years old, yet hold the intention for sovereignty and jurisdiction today as they did decades ago.

Each First Nation may choose to update and add to those elements presented herein.

A Declaration of Sovereignty and Jurisdiction Over Education

1. The right to education is a basic human right. The Universal Declaration of Human Rights of the United Nations (and now UNDRIP) confirm this right.
2. First Nations are part of the Indigenous Peoples residing within the borders of what is now Canada.
3. First Nations are Peoples by definition international law.
4. Peoples have specific collective rights that are separate from the rights of individuals.
5. Each People have the right to determine the education of its children.
6. Each First Nation has the right to determine the composition of its education system and must be exempt from federal and provincial legislation that affects any aspect of its sovereignty, jurisdiction or control over its systems.
7. Each Indigenous Nation is different. There are different languages, social and kinship systems, governance structures and cultures.

A system of education that respects diversity, nurtures differences and thrives on complexity would also have the flexibility to support each First Nation Government to determine the education of its children.

8. The sovereignty of each First Nation must be maintained to choose for their children the type of schooling that is in keeping with their historical, spiritual, cultural, and linguistic convictions.
9. The Government of Canada has the obligation to pay for First Nations education as a responsibility established through Parliament's legislative jurisdiction under the B.N.A. Act of 1867, Inherent rights and the Treaties.

The obligation to fund education for the members of First Nations is NOT the same as assuming the right to exercise control over First Nations education.

10. Equity requires that First Nations have funding allocations from the Government of Canada to supply learners with the programs, services and opportunities of access they require to achieve educational equity and educational attainment levels similar to that of Canadians.

11. First Nations education should be compatible with the goals of sovereignty and self-determination so that the school system contributes to upholding the culture, spiritual traditions, connections to the land, history, languages and life-ways of the Nation into the successive generations.

(Source: Johnston, Longboat, Sovereignty, Jurisdiction and Guiding Principles in Aboriginal Education in Canada, 1986)

Canada's Indian Policy: Assimilation through the Indian Act

From 1873 to 1876, David Laird was the Minister of the Interior for the government of Canada. His work was dedicated to formulating the Indian Act and ensuring its passage through Parliament. The new Indian Act merged all matters of lands and Indians in one framework without any reference to Inherent Rights or Treaty commitments. As Canada emerged into its statehood as a young country, its leadership was politically more interested in progress, building the economy, uniting the country with railroads and formulating a national Euro-Canadian identity.

Education for First Nations has been loosely described under Sections 114-122 of the Indian Act establishing full control in the hands of the government. As a result, the Government has interpreted its federal responsibility to provide education services to status Indians resident on reserve as educational policy but failed to provide programs and services equitable to those made available in the provincial school system whose services and funding fell under the Education Act of each of the provinces and territories managed by a Ministry of Education. The government of Canada has placed the management for the education of First Nations in a division of a federal department who oversees funding allocations, not quality of education.

Seventy-three years later, in 1946-1948 a **Joint Committee of the House of Commons and the Senate on the Indian Act** reported on the state of First Nations schools:

"Notoriously underfunded, poorly equipped and constructed, (and teachers were) paid less than their colleagues in neighbouring public schools. The residential schools attracted criticism because of their half day labour system (which) obliged the children to work in the fields, sew, clean, etc., for several hours a day, thereby greatly restricting classroom time." (McMurtry, 1985)

In **House of Commons debates** in 1946, the statement was made that,

"While there are about 130,000 Indians in the country, our education and training of these people take care of only about 16,000. Of the number enrolled, only 883 reach grade 7, 324 reach grade 8 and 71 reach grade 9. I notice in three of the provinces there are no grade 9 students." (p. 5489)

Sixty-five years later in 2013, the same story is as evident today as it was in the 1940's with chronic underfunding of First Nations education. The lack of significant capital investment in modern school buildings and attention to improving the quality of First Nation education guarantees a second-class education system.

The absence of equitable needs based funding formula to run modern school systems is visible today in ageing schools, portables serving as classrooms and long lists of schools in First Nations throughout Canada waiting decades to be renovated or constructed. So many schools are poorly equipped or in disrepair, largely lacking science labs, computer labs, gyms, sports fields, arts rooms, properly functioning washrooms, cafeterias, libraries and staff rooms for meetings and planning.

First Nations schools are staffed by dedicated but poorly paid teachers working at 30% to sometimes 40% less salary than their provincial school counterparts. Teacher benefit and retirement programs lag behind those of their colleagues teaching at the same level with the same professional qualifications as their counterparts in the provincial system. Federal funding scales (Band Operated Funding Formula) are not equitable to those of the province. Many schools use

their entire BOFF funding to pay their teachers and seek project funding to meet the rest of the needs of their education budgets.

Without a clear commitment to the preservation and revitalization of language, culture, spirituality and history of the First Nation, the school system, as we know it today, will find itself obsolete losing a third of its students as they simply walk out. Such a clear denial of the needs of the whole child to identity, as part of social and emotional well-being, is a further step toward assuring the goal of assimilation of First Nations.

The residential school policy began in the 1840's and was maintained after Confederation until the last school was closed in the 1990's.

Duncan Campbell Scott, Deputy Superintendent of Indian Affairs in the early half of the 1900's aggressively supported the policy of the Department of Indian Affairs as, "killing the Indian and saving the child." Despite the 30-50 % mortality rate in residential schools, Scott stated, "this alone does not justify a change in the policy of this Department, which is geared toward the final solution of our Indian problem." Scott lived during the time when the full implications of extermination were felt in World War II. Nazi Germany were also called their policy for extermination the "Final Solution."

Scott has been credited as the architect of 20th century Indian policy for the Department of Indian Affairs.

"It was a policy of assimilation, a policy designed to move Aboriginal communities from their 'savage' state to that of 'civilization' and thus to make in Canada but one community - a non-Aboriginal one. At the core of this policy was education. It was, according to Deputy Superintendent Duncan Campbell Scott, who steered the administration of Indian Affairs from 1913 to 1932, 'by far the most important of the many subdivisions of the most complicated Indian problem. In the education of the young lay the most potent power to effect cultural change a power to be channeled through schools and, in particular, through residential schools. Education would, Frank Oliver, the Minister of Indian and Northern Affairs, declared in 1908, 'elevate the Indian from his condition of savagery' and make 'him a self-supporting member of the State, and eventually a citizen in good standing.'" (Milloy, 1999)

Surely some of the categories of the United Nations description of the elements of genocide can be applied to the residential school system and its policies.

A poorly funded education system leads to one result, the guarantee of poverty for future generations.

Canada has consistently failed to honor its Treaty promises.

The right to education for Canadian citizens is entrenched in the Constitution and enacted through provincial and territorial education legislation.

The Treaty rights and Inherent rights for First Nations are entrenched in the Constitution of Canada, but not enacted in education legislation.

It is time for First Nation Governments to enact their own education laws to bring life to the treaty and inherent rights described in the Canadian Constitution, s. 35.

Constitution Act, 1982

Under s. 91 (24) of the Constitution, the federal government has jurisdiction over “Indians and lands reserved for Indians”.

In section 35, Aboriginal rights are recognized but the Constitution did not create these rights; the rights existed before the Canadian Constitution. Indigenous rights, inherent rights and Treaty rights bind the Crown.

35. (1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

(2) *In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.*

(3) *For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.*

(4) *Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

Under section 93, the provinces have the exclusive right to make laws for education. However, it is the federal government that has the right to make provisions for Indian education under both s. 91(24) of the Constitution and sections 114-122 of the Indian Act.

“At the national level, Canada’s continuing obligation to protect Indigenous peoples’ rights and interests, to ensure their welfare and to honour the treaties, was affirmed by Lord Denning in the High Court of the United Kingdom prior to the repatriation of the Canadian Constitution:

There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No Parliament shall do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada ‘as long as the sun rises and the river flows’. The promise must never be broken. “ (R. vs. Secretary of State for Foreign and Commonwealth Affairs, Ex p (Indian Association of Alberta) 1982, QB 892)

Current Canadian Context: Facilitating Change in First Nations Education

Two hundred years of religious denominational schooling and government authorized assimilation-based education for First Nations has severely impaired the exercise of jurisdiction over education for First Nations. The genocidal intent expressed in history coupled with decades of continuous underfunding of schools and teacher salaries, the lack of culturally relevant curriculum, the extinction of Indigenous languages and children living in an environment of relentless poverty has prevented the full participation of Indigenous people in the economy of Canada.

Colonial and systemic racism under the auspices of the government of Canada has been the keystone of First Nations education policy. History shows how socially engineered racism against First Nations has manifested in government whose legislation, regulations and policies continue to oppress and control the lives of First Nations while denying inherent rights and treaty rights. Lands and their resources have been legislated out of the hands of the stewards and into the corporate boardrooms.

The late Dr. John Mohawk, Seneca historian, writer, activist and traditionalist described the role of the colonizing state in the destruction of the education system of Indigenous peoples:

"[Colonizer States'] stated goal was the eradication of the Indigenous nations as nations by eroding all of the elements that make a distinct people a people: their history, their languages, their laws and customs. It took quite a while and a lot of boarding schools, missionaries, and corrupt public officials but the process - being colonized - has had an impact. When an individual loses his or her memory, they cannot recognize other people, they become seriously disoriented, and they don't know right from wrong. Sometimes they hurt themselves. Something similar happens when a people become colonized. They can't remember who they are because they are a people without a common history. It's not that they don't have a history, it's just that they don't know what it is and it's not shared among them. Colonization is a kind of spiritual collapse of the nation. This is one result of a colonial education based on canonical "great books" texts. Indigenous peoples' histories and cultures are not in those texts, and the life of the nation is not there, either." (Mohawk, 2004)

A rebuilding process is underway among First Nations who see Nation building with the essential tool of education under their jurisdiction as a means of reconstituting nationhood to recover what was lost, stolen and taken away.

Today, Provincial and Territorial governments are now coming to terms with the financial travesty of maintaining the status quo in First Nations education. Graduation rates are abysmal at only 7% for First Nations students' attainment of university degrees compared to 23% for Canadians. The social and economic costs to society involving the fastest growing segment of the youth population in Canada are devastating to consider in the next 20 years. It is estimated that closing the gap in graduation rates in one generation by a strategic investment in First Nations education would yield triple the income for every Aboriginal graduate and place \$400 billion into the Canadian economy as income tax and purchasing power while saving \$115 billion in social services. (AFN, 2011)

Society is changing quickly to a global platform that demands more studies in science, digital literacy and mathematics to enable youth to grasp the most desirable employment opportunities in engineering, business, medicine, research, information technology and computer technology and innovation.

Key risk factors that impact student academic achievement have been identified. They are poverty, isolation, and lack of opportunities for employment, inadequate housing, lack of IT access, household income level, parental partnership status and family occupation.

Yet there are also strong protective factors of resiliency that can overcome high risk and those factors are clearly present in First Nations communities. These factors can tip the balance of life outcomes if the protective factors are used in an authentic manner in an educational setting for youth.

First Nations students who embrace their heritage language and spiritual traditions form strong self-concept and exhibit greater resiliency and motivation leading to greater chances for academic success.

Mentoring youth is also a key protective factor. Having one adult who believes in the student's capacities and stands in to nurture the student will make the difference in life's trajectory of success.

Investing in First Nations education to create state of the art learning systems that support culturally responsive curriculum, pedagogy and assessment is the challenge of the present generation. Investment in First Nations education must begin at the community level in a nation building process to strengthen the infrastructure of the community.

Systems change is on the horizon. The increasing public awareness of Canadians to Indigenous issues within a social justice framework has been awakened through social media, ushering in a new era of transformation. The educational levels of the next generation leaders have been influenced by Indigenous Studies Programs in Universities and the environmental movement utilizing many types of Indigenous knowledge systems in their work.

It will not be business as usual among the youth who will form the next generation leadership in this country. The winds of change shifted societal attitudes when political advocacy and media attention began to focus on the rising Indigenous youth population and the appalling graduation rates in provincial school systems. Clearly provincial education standards and systems are not the answer. First Nations jurisdiction over education will provide an authentic historical context, and ensure high academic standards while protecting culture and language for transmission to future generations.

National attention has become international awareness leading to a serious questioning at the United Nations of Canada's treatment of First Nations. In the fall of 2013, James Anaya, Special Rapporteur for the United Nations visited Canada to meet First Nations and other organizations to discuss how Canada is fulfilling its inherent rights and treaty rights obligations to the First Nations and affirming the United Nations Declaration on the Rights of Indigenous Peoples.

The Government of Canada has been consistently embarrassed on the international stage by reports revealing statistics on economic and social well-being that severely compromised its premiere status once First Nation education statistics were added to the equation. Suddenly Canada's problem was no longer hidden within its borders but visible for the world to see. Canada's global reputation as a developed nation with high living standards and superior education of its citizens was degraded by these statistics that no longer placed the country near the top of the list for best places to live on the planet. Canada's methods of dealing with the issues of relationship with First Nations within its borders are now becoming matters of international concern.

The Royal Commission on Aboriginal Peoples of 1996 documented the level and type of education for First Nations students failed to provide equitable educational opportunities and consequently failed to foster economic prospects for First Nations people. (p.38)

Further RCAP stated that First Nations *“want two things from education...the skills they need to participate fully in the economy...along with the knowledge of their languages and traditions necessary for cultural continuity.”* (P.82)

First Nations jurisdiction over education is connected to the Inherent right to teach culture, customs and traditions. *“Education is the instrument through which cultures perpetuate themselves.”* RCAP stated that the *“destiny of a people is intricately bound to the way its children are educated. Education is the transmission of cultural DNA from one generation to the next.”*

In 2008, the **Council of Ministers of Education** (CMEC) developed a joint declaration as Ministers of Education for provincial and territorial governments. Their declaration called “Learn Canada 2020” affirmed the link between a well- educated population and a socially progressive, sustainable society. In the declaration, the Ministers committed themselves to *“...the objective of eliminating the gaps in academic achievement and graduation rates between the Aboriginal and non-Aboriginal students across Canada.”*

The CMEC engaged in a summit to *“establish new relationships among leaders in Aboriginal education that respects jurisdiction and develops consensus on shared opportunities.”* The CMEC met in 2009 to raise the profile of the urgent needs in First Nations education, to promote awareness of the need to eliminate gaps between Aboriginal and non-Aboriginal learners, to build partnerships with national and regional Aboriginal organizations, to identify areas of action, to engage the federal government on Aboriginal education to affect policy change and to build intergovernmental networks for future dialogue and collaboration.

Several themes emerged from those meetings for collective action:

- *Strengthening Aboriginal languages and cultures*
- *Enhancing quality in education*
- *Increasing access, retention and graduation to post-secondary levels*
- *Sharing responsibility and accountability*
- *Planning for seamless transition for learners*
- *Reporting success, data collection*
- *Providing programs and services*
- *Engaging all partners*

The CMEC also affirmed that Indigenous languages are the foundation for Indigenous culture. Learners must be affirmed in their culture and language to be successful in their educational pursuits. The Summit identified four pillars with building blocks citing language and culture as the key for curriculum, resources, cultural content, diverse perspectives, instructional methods, programs and services. (CMEC, Summit on Aboriginal Education, Strengthening Aboriginal Success Summary Report, Feb. 2009)

In cooperation with the **Canadian Council on Learning**, the Assembly of First Nations began a series of three community dialogues in 2009 on the challenge of producing a lifelong learning model. The model clearly states that,

“Lifelong learning for First Nations people is rooted in the individual’s relationships within the natural world and the world of people (self, family, Ancestors, clan, community, Nation and other Nations) and in their experiences of languages, traditions and ceremonies.

The model affirms the importance of integrating Western and Indigenous knowledge and approaches to learning. Thus the learning tree depicts the co-existence of Indigenous and Western learning within the root system, and their ultimate convergence within the trunk, the site where individual development and the process of lifelong learning is manifested.”

First Nations community discussions regarding the model confirmed the importance of land based learning with Elders occupying a role of supreme importance in sharing traditional knowledge in the respective languages of the regions. The community members cited the language usage, ceremonies, songs, cultural knowledge and wisdom, sacred sites, stories, kinship and clan systems, naming ceremonies and gathering medicines as important knowledge for children and the significance of this wisdom in the classroom setting.

By 2010, the Association of Deans of Faculties of Education in Canada formulated a historic **Accord on Indigenous Education** with vision, principles and goals guiding the research and work with First Nations on many fronts. The signatories committed to upholding First Nations values and the educational goals of the communities. The Accord clearly stated that its manifesto would perpetuate social justice for Indigenous peoples, create a respectful consultative process with knowledge holders while promoting multiple partnerships among educational and Indigenous communities and valuing the diversity of Indigenous ways of knowing. A commitment to advancing Indigenous identities, cultures, languages, values, and ways of knowing and knowledge systems as valid systems flourishing in all Canadian learning settings was also part of the Accord.

The Accord documented the work ahead as:

- Creating respectful and welcoming learning environments
- Respectful and inclusive curricula
- Culturally responsive pedagogies
- Mechanisms for valuing and promoting Indigeneity in education
- Culturally responsive assessment
- Affirming and revitalizing Indigenous languages
- Indigenous education leadership
- Non-Indigenous learners and Indigeneity
- Culturally respectful Indigenous research

The platform for change was clearly established by allied educational associations and provincial and territorial governments. Canadians were coming onside with the First Nations and creating new avenues for respectful relationships to unfold at the community level irrespective of government policy.

Buoyed by national fervor, the **Assembly of First Nations** updated the 38-year-old policy called *“Indian Control of Indian Education”* in 2010 and renewed the call to action in **“First Nations Control of First Nations Education”**:

“The purpose of the policy framework presented in this paper is to reaffirm the First Nations’ vision of lifelong learning presented in the ICIE 1972 policy and reassert First Nations inherent Aboriginal and

Treaty rights to education. This policy framework provides strategic recommendations that will enable the development and implementation of education legislation, governance frameworks, policies, programs and services for all levels of education for First Nations learners at all stages of lifelong learning. Key elements of First Nations' lifelong learning addressed in this paper include language immersion, holistic and culturally relevant curricula, well-trained educators, focused leadership, parental involvement and accountability, and safe and healthy facilities founded on principles that respect First Nations jurisdiction over education."

Addressing the United Way in 2011 in a speech entitled, **"Igniting the Need for Action"**, the National Chief, Shawn A-in-Chut Atleo stated,

"...by closing the education and labour market outcomes gaps in one generation, there is potential to generate \$400 billion in additional output and save \$115 billion government expenditures. And when we look at just one individual, the benefit is clear. When a First Nations young person graduates with a University degree, they triple their earning potential."

First Nations education had effectively emerged as a matter of national priority among all levels of government and professional, allied learning associations in Canada. The effort had begun to close the 28-year gap between the academic achievement levels of First Nations students compared to the academic performance of Canadian students.

By December of 2011, the report of the **Standing Committee on Aboriginal Peoples of the Government of Canada** was released and presented to the Chiefs of Canada at an Assembly of First Nations meeting. The report was titled, ***"Reforming First Nations Education: From Crisis to Hope."***

Four major recommendations emerged:

- *A First Nations Education Act is necessary as a legislative foundation for first Nations education beyond the minimal sections of the present Indian Act, 114-122*
- *Establish second and third level services for First Nations education similar to those offered by Boards of Education and a Ministry of Education*
- *Necessity of federal funding for First Nations Education Authorities for providing services in First Nations communities with a specific focus on language and cultural revitalization*
- *Create a jointly held Task Force of AANDC and AFN to oversee the work of Canada-First Nations Action Plan and report annually for the first five years*

For the first time, system wide changes were recommended with new legislation and institutional supports so desperately needed. The secondary and tertiary levels of support so enjoyed by Canadians in their provincial systems of education were finally acknowledged as missing from the education provided to First Nations. Second and third level support systems are deemed essential as pillars to a state of the art modern education system in all developed countries in the world.

In February of 2012, the **National Panel** released its report titled, ***"Nurturing the Learning Spirit of First Nations Students."*** The report was a joint effort of the collaborative work of the Assembly of First Nations and the Department of Indian Affairs and Northern Development. The work of the panel was to visit First Nations and also hear from Canadians on educational reform in First Nations education.

The Panel visited 25 First Nations schools, 30 First Nations communities and hosted 8 round table sessions in regions throughout Canada. Hundreds of people attended the sessions and meetings and many submissions were received on the web site.

The report asserted that,

“First Nations students are not failing. Rather, we are failing students through the impact of legislative provisions that are more than one hundred years old and linked to a period that we now accept as deeply harmful and destructive...the residential school era.”

“We have a duty to do better and an obligation to protect and support the rights of First Nations children to a good education that builds a strong First Nations identity, language and culture and ensure that these students are learning and achieving at the same level as non-First Nations students.”

The Panel identified three primary guiding principles for the reform process:

- First Nations education reform must be based on the child’s right to their culture, language and identity, and to a quality education that is appropriate to their needs. The First Nations child must always be at the centre of this effort through a “child first” commitment that is embraced by all.
- First Nation education reform must be undertaken in the spirit of reconciliation and collaboration among First Nations, the Government of Canada and provincial and territorial governments.
- First Nations education reform must feature a commitment to mutual accountability for roles and responsibilities as well as financial inputs and education outcomes.

Five major recommendations accompanied the framework of the principles:

1. Co-create a Child Centered First Nations Education Act

The Act includes an implementation plan and schedule. It also includes Treaty and self-governing rights, special powers and duties, performance measures, curriculum, accountability for assessment and testing, outcomes and policy and the accompanying regulations. The Act should specify the “right to cultural heritage and identity.”

2. Create a National Commission for First Nations Education to support education reform and improvement.

This Commission would replace DIAND in education matters except for the funding mandate of the Department. It is an independent body with its own Board of Directors.

In addition, the Panel recommended the development of a First Nations Centre of Excellence to provide research on First Nations languages, culture and identity, reform curriculum and assist with the training of teachers and Principals.

3. First Nations Education Organizations

Facilitate and support the creation of a First Nations education system through the development of regional First Nations Education Organizations (FNEO) to provide support and services for First Nations schools and First Nations students.

4. Funding System

Ensure adequate funding to support a First Nations education system that meets the needs of First Nations learners, First Nations communities and Canada as a whole.

5. Accountability Measures

Establish a reporting and accountability framework to assess improvement in First Nations education.

Proposed First Nations Education Act by Aboriginal Affairs and Northern Development Canada

By the spring of 2012, the newly named Aboriginal Affairs and Northern Development Canada publicly announced that plans for a national First Nations Education Act were underway. First Nations were dismayed at the Government's unilateral action of designing an education law to apply to all First Nations (except those Self Governing with education laws in place) without any indication of partnership. The action followed closely on the federal acceptance of the report of the National Panel that specified co-creation of such an Act with government and First Nations as equal partners. Clearly this action on the part of AANDC was a surprise to those from the First Nations who were deeply involved in the Joint Canada-First Nations Action Plan. AANDC made the public announcement in the budget statement of March 29, 2012.

AANDC has pressed on with its agenda to draft the FNEA despite resolutions passed at both the Assembly of First Nations, Special Chiefs Assembly on Education in October 2012 and again at the General Assembly in December 2012 and once more in July 2013 at the Annual General Assembly. The Assembly of First Nations rejected the consultation process of AANDC to develop a First Nations Education Act and asserted the jurisdiction of First Nation Governments. The First Nations leadership again sounded the call for equitable funding for First Nations education and support of First Nations Control of First Nations Education.

By December 12, 2012 AANDC released a *"Discussion Guide: Developing a First Nations Education Act"* for education from K-12. The guide was written solely by AANDC. A consultation process with First Nation Governments was also outlined that appeared more like information sessions than free, prior or informed consent in a meaningful consultation process with rights holders in First Nations offering a reasonable period of time for real dialogue.

With such action, AANDC failed to acknowledge the recommendation of the Auditor General of Canada to work with First Nations to develop a comprehensive plan in First Nations education, including clarifying the roles, responsibilities and accountability of the federal government.

AANDC also failed to listen to its own National Panel's recommendation that the federal government work with First Nations to co-create legislation and co-create funding mechanisms for First Nations schools and systems.

The action of AANDC contravened the international standards of free, prior and informed consent that are the right of First Nations. AANDC failed at the duty to consult to accommodate First Nations rights and interests. The Act and the Discussion Guide along with the information sessions called "consultation" by the federal government were in clear violation of Inherent rights and Treaty rights of the First Nations and the standards established in international law in UNDRIP. Without the proper consultation of rights holders in First Nations communities, the Treaty and inherent rights have been endangered.

Just as the government of Canada formed the Indian Act over a hundred years ago without consideration of Inherent and Treaty rights, that same federal government began enacting a new piece of legislation in a similar manner, repeating old patterns and neglecting the Nation-to-Nation relationship.

The federal government has the duty to consult all affected First Nations and their members who are rights holders. First Nations need to be deeply engaged in consultations on decisions that affect Treaty and Inherent rights. Co-creating the legislation is the only acceptable way forward. The new education legislation must recognize the Inherent right of First Nations over education, the Treaty right to education and the jurisdiction of First Nations over education.

First Nations hold the inherent right to exercise jurisdiction over education as an aspect of the Aboriginal right to self-government and self-determination. These are existing Aboriginal rights under s. 35 of the Constitution Act, 1982 and Canada recognizes them. The Aboriginal right to self-government is the same as the legislative power to make laws. (Hutchins Legal Inc., 2013)

First Nation Governments are one of the three orders of government in Canada, Aboriginal, provincial and federal. First Nation Governments have the inherent right to self-determination and the right to exercise jurisdiction.

Education is a primary element of self-government and self-determination. Jurisdiction over education arises from the right to education, the right to make decisions on educational elements such pedagogy, curriculum, language, and so on. First Nations also have the right to establish a structure to manage the decisions.

UNDRIP 14 (1) states that Indigenous peoples have the right to establish and control their educational systems and institutions in their own languages, in a manner appropriate to their cultural methods of teaching and learning. States governments must then recognize the right of Indigenous peoples to establish their own education institutions and facilities.

AANDC planned a tight schedule of meetings in eight regions throughout Canada from December 2012 to April 2013 where government representatives planned to seek submissions from First Nations on the proposed education law. The north was virtually excluded from AANDC visits.

AANDC made sure that they held sole rights of approval for the selection of the representatives of First Nations prior to the meeting. AANDC did not visit the rights holders in each First Nation to determine their educational concerns. Nor was the length of time provided to consult reasonable. AANDC controlled the agenda for discussion, selectively hearing from some First Nations only on the Discussion Guide not openly inviting First Nations concerns regarding governance, funding or quality of education.

AANDC approved of who would make the submissions in the morning session those being largely First Nations leadership with the afternoon left to individuals and organizations. A few hours for each session in a one-day meeting is not acceptable as duty to consult under international standards.

A web site was established by AANDC where submissions could be made electronically. There was no real way to verify who was filling out the forms on the web site to truthfully determine if they were status or not, resident on reserve or not or real stakeholders. The results of the consultations herein were not reported to First Nations.

The meetings themselves were not consultation according to free, prior and informed consent or duty to consult and accommodate using international standards. The meetings hosted by AANDC could only be determined to be "information meetings" with a set agenda and hosts who only

wanted to hear about their topics of discussion, not First Nations perspectives on quality education or necessary reforms and only hearing from those with prior approval from AANDC to be present.

The schedule for discussions on the First Nations Education Act was one of those heart-racing timetables of information sessions throughout the winter and early spring of 2013, drafting the Act in the late spring with an early framework called the “Blueprint” available for the Chiefs to review in the summer of 2013. The Blueprint was essentially the same formula as the Discussion Guide with a few comments on what AANDC representatives heard from First Nations.

The plan was for the Act to be introduced into Parliament in the fall session of Nov. 2013 with an anticipated vote in Parliament and passing into legislation by the spring of 2014. Subsequently, drafting regulations and policies would follow in the summer of 2014 with an expected date of application of the legislation to First Nations in September of 2014, a grueling schedule and one taking dozens of AANDC staff to meet the deadlines. However, by October 2013, the schedule shifted as the Minister of AANDC released a Proposal for a Bill on First Nations Education with an offer of 75 days to review the draft. No guidance was offered by the Minister on how the Proposal might affect the staged process of implementation by September 2014.

The **Discussion Guide** offered some key points characterizing the new First Nations Education Act and these provide a lens for First Nations to see the rationale of the federal government.

Here are some of the issues to be considered:

- The framework of proposed legislation is largely one of financial management, new administrative structures, reporting mechanisms, and data collection and accountability standards.
It is not a law defining a high quality lifelong learning system that is culturally and linguistically founded.
Most of the administrative and accountability structures are already in place in Contribution Agreements with First Nations who run their school systems.
- The Act will apply to all First Nations in Canada.
This means that existing systems supported by Memoranda of Understanding, Tripartite Agreements, provincial laws or other Agreements will be void once the life of the MOU runs out. Overriding decades of existing First Nations education systems that are actually functioning well is nonsensical and wasteful without considering the factors that contributed to raising education outcomes.
- Only those First Nations who have existing self-government agreements with education laws will be exempt from the Act.
How many First Nations in Canada would qualify for exemption under this condition as opposed to exerting their rights to sovereignty and jurisdiction?
- Funding for First Nations education is tied to acceptance of the new Act.
- First Nations heritage language programs are not given the same priority for funding as French language programs.
This action will ensure the extinction of many more languages in the next 25 years.

- Descriptions of funding systems use the terms, stable, predictable. There are no references to “needs based funding” or funding equity” to bring greater resources to bear in order to close the 28 year gap in student achievement identified by the Auditor General. There are no references to compensatory funding for the years of chronic underfunding of First Nations education systems. There are no references to the design of new funding formulas or mechanisms to update the system. Funding formulas and mechanisms will be found in the Regulations of the Act once it is passed by Parliament.
- The Act offers three governance models as acceptable:
 1. The community school presently known as a First Nations School may remain as an independent school. However, if it chooses to do so, it will not receive funds for administration or financial resources or education resources unless it aggregates.
 2. The First Nations School that elects to aggregate with a First Nations Education Authority by agreement for education resources, financial services, and administrative services is deemed to be an acceptable model of operation.
 3. The First Nations School may enter into an agreement with a provincial school board to operate the First Nation School on reserve. All aspects of the Education Act, provincial regulations and policies of the province or territory now apply regarding standards, testing, curricula, calendar, teachers, and so on.

Areas of Concern:

- The Discussion Guide contains no specifications on self-determination, self-government and education, constitutional obligations under section 35, Treaty rights, Inherent rights, or First Nations jurisdiction over education for its members
- The proposed First Nations Education Act undermines the jurisdiction of First Nations Governments by establishing the contractual relationship between AANDC and the First Nations Education Authority.
- The federal government imports provincial standards as the basis for First Nations education and this is problematic on two fronts. The first problem is that increased funding is required if First Nations schools are to meet provincial standards, and the second is that provincial standards do not meet the cultural or linguistic standards of the First Nations.
- Greater integration with the provincial system of education is not a guarantee of higher graduation rates for First Nations students. In fact, only 39% of First Nations students living on reserve and attending provincial schools graduated from grade 12 in 2009-1010.
- Requiring aggregation is not only geographically impossible and also largely culturally and linguistically incompatible. Aggregation only serves AANDC who wants to make one Contribution Agreement for 20 First Nations, not 20 separate ones.
- The new Act clearly disrespects the authority of First Nations governments to deal with provincial governments and education providers. The new Act requires the First Nation to sign authority for its education rights to an aggregated First Nations Education Authority in an agreement to manage its education system. Or the First Nation can sign over its

jurisdiction to a School Board of the province to bring the Education Act and all provincial standards and mechanisms to the First Nation for the daily functions of the school.

- Annual inspections of schools by a Superintendent from an AANDC approved list are required to ensure compliance with the new Act and its regulations. Not even the Province requires an annual inspection of schools. First Nations are not given free choice of Superintendents; they must select from the AANDC list of approved personnel and pay for the inspection.
- Education standards would be consistent with those of the provinces such as standards for teachers, curriculum, safety, assessments, daily operations and graduation requirements. Curriculum is allowed some adaptation for language and culture. No mention of funding is offered to bring the schools up to standard. Provincial standards are benchmarks but do not completely meet the education milestones of First Nations.
- The governance of First Nations Schools is prescribed by AANDC. If you are a small school operated by a First Nation, you must affiliate with a regional First Nations education authority (recognized by the Minister according to his rules) in order to get administrative services, financial services and other educational services.
- The Discussion Guide prescribes the federal preference for Regional Education Authorities to manage finances, accounting, human resources, information technology, programs, services such as language and cultural programming, teaching and pedagogical supports, planning, special education, curriculum adaptation, professional training, classroom teaching materials, and education resources for the delivery of education across a number of First Nations.
- The Minister would have the discretion to recognize the Regional Education Authority according to regulations in the Act.
- The REA would demonstrate that it has the size and capacity to meet the criteria in the regulations.
 1. A formal agreement of all parties and a dispute resolution mechanism
 2. Incorporation under federal or provincial law
 3. A plan showing how education support services will be provided including service agreements
- The Minister would have the discretion to recognize qualifying education authorities...allowing the Government of Canada to enter into a single funding agreement for the delivery of education and support services to all schools managed by the education authority.
- A school committee in each member First Nation in the Education Authority would be established to assist with community consultation, information sharing and reporting.
- The Minister will require all Education Authorities to incorporate under its federal or provincial laws

Outstanding Questions:

What would the face of education reform look like if First Nations were equal partners in the process?

What was the process used to incorporate First Nations concerns into the draft First Nations Education Act?

How does the process permit the federal government to report to First Nations Governments on the findings of the entire consultation process so that they can co-create the next steps?

How many First Nations voices should have been heard and were not? How would the consultation process have looked if First Nations had participated in the design of these meetings?

How will the new First Nations Education Act (FNEA) change the administration, reporting and funding levels at the community level for education?

What are the funding mechanisms that will create modern needs based, equitable sets of formula for First Nations education?

What services remain at the community level and what services are the responsibilities of the Regional Education Authority?

What is the service mandate for a Regional Education Authority? Is this a staged process or a single agreement? Are there capacity building funds?

Will First Nations mount a class action suit against the federal government for an injunction against the FNEA?

How does AANDC expect geographically diverse First Nations to aggregate? Does AANDC have a map on how the aggregation might occur?

Why would First Nations use provincial education standards from a system where 60% of its students do not graduate?

By July 12, 2013, AANDC released the *"Blueprint for Legislation"* as a summary of themes for the new law that they heard during the consultation phase for the development of a national First Nations Education Act. However, the Blueprint was more a reflection of the Discussion Guide than anything significantly new.

AANDC stated that a draft bill would be circulated in 2013 that will go to every First Nation and to the provincial and territorial governments for further input before prior to its introduction to Parliament in the fall of 2013. The Blueprint can hardly be considered a draft bill for discussion by First Nations leadership.

Proposed key sections are education standards, education services, governance, accountability, First Nations control and funding. The sections are described in general terms but leave out critical information such as a description of educational standards and under whose design, which services will be funded and which ones will not, what elements will support transitions and so on.

The Act will be introduced in Parliament in the winter of 2014 with a view to its passing into law by June, 2014.

“Areas of Concern:

- There are no references to UNDRIP, applicable Human Rights instruments or the Convention on the Rights of the Child that specifies availability, accessibility, acceptability, adaptability to ensure that the child has access to culturally and linguistically appropriate education, safe learning environments and healthy school buildings free from mould, no assurances that the legislation recognizes or affirms First Nations jurisdiction over education
- *“The proposed Act would outline that elementary and secondary education would be free to eligible students but would not prevent schools from charging modest fees for extracurricular or other programs as is common in other jurisdictions.”*

Does this mean that Government will cap funding and place First Nations in a position to seek “own source revenue?” What laws will cover lifelong learning?

- *“School Success Plans (will be required)... (systems will be) reporting on results.”* School success plans leave schools vulnerable to government definitions of success with continued funding tied to “success” thus leaving language and culture aside as teachers teach to the test. Success is a value-laden term with differing meanings between government and First Nations.
- The role of AANDC is unclear; the legislation says, *“First Nations Education Authorities would not be run by the federal government”* yet the financial and policy directives create a framework of government control
- The new law states, *“First Nations can develop or tailor programs and curricula ...subject to minimum standards.”* Who will determine those standards? What are the minimum standards? Will these standards limit the time allocated for teaching language and cultural programs? No Child Left Behind as a US education policy was destructive to the teaching of language and culture as teachers knew that continued funding of their school meant high marks on standardized tests, leaving “soft” language and cultural programs out of the classroom program
- *“Legislation would define roles and responsibilities for reporting on education outcomes and financial accountability for First Nations schools or First Nations Education Authorities and the government of Canada.”*

Top down decision-making appears once again with government in control of definitions of success and using funding as a tool of control. The vast majority of First Nations have been diligent in reporting in the past, why would this change now?

- Early learning systems would appear to be missing from this version of the Act even though all modern education systems in the developed world acknowledge the neuroscience of early learning as a platform for success in later studies

- Transitions are mentioned from secondary to post-secondary but not in the early learning sector to the elementary years or the elementary years to secondary programming
- What is the AANDC definition of “*recognized high school diplomas?*”
- Funding mechanisms are typically dealt with in Regulations that follow the Act’s acceptance in Parliament. However, in this case, clear intentions of the government of Canada to funding First Nations education need to enshrine in law to fulfill their constitutional obligations and address Inherent rights and Treaty rights.
- References to “*stable and predictable funding*” are not assurances of educational parity or equity or funding to restore the decades of neglect of underfunding of First Nations education systems
- Details are lacking in many key areas of the blueprint and especially the funding section. Funding is the pivotal element that is the fuel for the education engine yet no mention is made to proposed action in this section by AANDC.”

(Source: Assembly of First Nations, 2013)

National Efforts Lead by the Assembly of First Nations

The political momentum of the 1960's ushered in youth driven anti-war demonstrations across North America. The Black Panthers and the emergence of the American Indian Movement characterized strong civil rights movements in both Canada and the US. The occupation of Alcatraz lead by Richard Oakes was the longest running occupation in US history by American Indians. It helped create the momentum required to set the stage for new Indian Policy to form under President Nixon. The repeal of the Indian Termination Act and the issuance of the Indian Education and Self Determination Act, 1972 set a new platform for relations with sovereign Tribal Nations.

The resurgence of First Nations voices in Canada for political transformation regarding land and Treaty rights and jurisdiction over education emerged as part of this definitive wave for change. The political formation of many First Nations advocacy organizations was birthed earlier in the century but came into their own power in the 1960's.

By 1972, the National Indian Brotherhood released its milestone paper titled, "**Indian Control of Indian Education**" and paved the way for political strategizing around the issues of control and jurisdiction for a high quality, culturally and linguistically relevant, equitably funded and lifelong education system for First Nations students.

"We want education to give our children the knowledge to understand and be proud of themselves and the knowledge to understand the world around them.

We believe in education...as a preparation for total living...as a means of free choice of where to live and work...as a means of enabling us to participate fully in our own social, economic, political and education advancement.

The time has come for radical change in Indian education. Our aim is to make education relevant to the philosophy and needs of Indian people." (ICIE, National Indian Brotherhood, Ottawa, 1972)

Despite the education manifesto by the National Indian Brotherhood and its acceptance by the Government of Canada, little changed in Government offices where administration of First Nations education remained entrenched under the authority of the Indian Act. Devolution of authority called "local control" evolved as a policy through the DIAND mechanism of Contribution Agreements with First Nations. First Nations moved into the field of administration of education programming devised by government but with the caveat of following provincial curriculum and federal funding and policy guidelines of DIAND, the Indian Act and the federal Financial Administrative Act.

From the funding shortfalls identified by Parliament in the 1940's to the words of First Nations leadership in 2013, adequate resources to implement control of education by First Nations are still not available, either by design or the lack of political will.

Decades of underfunding means that First Nations education continues to fall behind that of the provinces with students mostly ill prepared to transition to provincial schools. For those who do manage, students still largely experience difficult times keeping up with the academic rigor in the provincial school system without the cultural and linguistic resources that nourish their interests and maintain their cultural rights to an education that enhances their identity as First Nations members. The graduation rates for First Nations students in the provincial school system still hover

around 48% depending on whose statistics are considered. Education program decisions are still mandated by a federal government department not a Ministry of Education. Of the current budget of \$1.5 billion for education, how much of these funds reach the student in the classroom after the massive allocation to AANDC for its national and regional operations takes funds first?

In 1988, the national evaluation of First Nations education was completed after a five year study process and produced a report titled, "**Tradition and Education: Towards A Vision of Our Future.**" The report stated emphatically that,

"First Nations declare their jurisdiction over the education of their people. Each First Nation will define a philosophy of education that is culturally appropriate for their own people. Each First Nation will determine the resources needed for quality education as defined by the First Nation. First Nations will negotiate directly with the Government of Canada through the Ministry of State for First Nations Relations under the bilateral process for resources required to meet their needs. The First Nations call for the establishment of a Conference Secretariat to support negotiations between the individual First Nations and the Government of Canada. First Nations will allocate and distribute resources to fund high quality local education programs to meet the needs of their people."

And further,

"Although the Government of Canada has enacted legislation, such as the Indian Act, that hinders the exercise of First Nations self-government, the federal government cannot extinguish the aboriginal rights of the First Nations through legislation.

The First Nations call for the Government of Canada to vacate the field of administering the First Nations education. First Nations demand radical reform of the Indian Act: repeal of all sections that promote paternalism, full recognition of federal obligations to resource First Nations education, and the establishment of a Ministry of State for First Nations Relations as recommended in the "Penner Report" to deal with the First Nations on a government to government basis. Unilateral decisions affecting First Nations education made by any level of government or education authority serving First Nations students are not tolerated.

The federal, provincial and territorial governments must relinquish their administrative and policy functions in First Nations education with the federal government retaining only its role as a funding source." (P.41)

In addition, the Declaration of First Nations Jurisdiction over Education also called for First Nations to occupy the field of jurisdiction by passing their own laws over education.

By February of 1992, the **Confederacy of Nations of the Assembly of First Nations** followed the report with an important resolution No. 14/92 stating the need for First Nation education law,

"That the First Nations structures and institutions for education are protected and affirmed under Section 35 of the Constitution Act, 1982, and therefore, that a National Education Act developed by First Nations be enacted by the federal government to facilitate the resourcing of our constitutionally affirmed right to education consistent with the spirit and intent of our inherent aboriginal rights and our treaties.

That new First Nations controlled structures for First Nations education be developed by First Nations governments. Further that the federal government has a fiduciary responsibility to provide adequate

resources for developing organizational structures, delivery costs, start-up costs, operational costs, revising and developing First Nations curriculum and policy.”

This process was ultimately overtaken by the Charlottetown Accord constitutional discussions for amendments to the constitution.

By 2010, the Assembly of First Nations was mandated by resolution 12-2010 from the Chiefs Assembly to update the ICIE policy statement of 1972. They produced, “**First Nations Control of First Nations Education.**”

Some of the jurisdiction statements are included below:

“All governments in Canada must fulfill their Constitutional, Treaty and international obligations to First Nations peoples by supporting the design and implementation of First Nations comprehensive learning systems with adequate and sustainable resourcing.

*It is imperative that the Government of Canada moves ahead with the commitment made by Prime Minister Stephen Harper, on behalf of the federal government, in the **Statement of Apology to Former Students of Indian Residential Schools** to “forg[e] a new relationship... based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.”*

In the spirit of reconciliation, and to ensure the needs and requirements of First Nations learners are met by federal, provincial, territorial and First Nations governments, it is essential that:

- i. Federal and provincial governments amend current laws affecting education and training that are inconsistent with the exercise of the Inherent and Treaty rights recognized and affirmed by the Constitution Act, 1982 and the United Nations Declaration on the Rights of Indigenous Peoples.*
- ii. The Government of Canada, in partnership with First Nations, take immediate steps to engage in the development of federal legislation that guarantees high quality, culturally relevant First Nations education programs and services, and full support for the comprehensive implementation of First Nations control of First Nations education at all levels of learning, including early learning initiatives, elementary and secondary school, adult and post-secondary education, and Language Nests.*
- iii. The Government of Canada upholds the Honour of the Crown and fulfills its fiduciary obligations with respect to First Nations education in a manner fully consistent with and in affirmation of First Nations’ Inherent and Treaty rights.*
- iv. Statutory funding arrangements be developed, in collaboration with First Nations, based on real costs, indexation, and appropriate treatment for Northern and remote communities.*
- v. Federal, provincial and territorial governments, in the Spirit of Reconciliation, immediately act upon the commitments made to First Nations in the **Statement of Apology to Former Students of Indian Residential Schools.***
- vi. Professional and accountable institutional supports be developed to ensure the delivery of*

second and third level supports including First Nation curriculum and immersion in First Nation languages.

vii. Linkages with the public and private sector be developed to foster collaborative investments in First Nations lifelong learning to enhance access to safe and healthy learning environments in our communities.

viii. Provincial and territorial governments must support the implementation of First Nations Control of First Nations Education, and in partnership with First Nations, incorporate First Nations Control of First Nations Education into their legislation, strategies, policies and practices.”

In 2010, the AFN had established a working relationship with the federal government on education that led to the formation of the National Panel on First Nations Elementary and Secondary Education.

A resolution of the AFN, 18-2011 mandated the “National Chief to work with the AFN Chiefs Committee on Education to develop a strategy for engagement with the Federal Government in anticipation of the completion of the report of the National Panel.”

The report of the Senate Committee on Aboriginal Peoples was released in December 2011. The report of the National Panel was completed in February 2012. Other First Nations political organizations also released education reports in the same period.

Momentum was building. On January 24, 2012 the Prime Minister and the Governor General and a number of Ministers met with First Nations leadership at a Crown First Nations Gathering. The outcome stated, “Upon mutual review of the National Panel’s report, First Nations and the Government of Canada will work to implement agreed upon recommendations as quickly as practicable and establish a process to work constructively through any areas of disagreement.”

At the time of the announcement of the budget on March 29, 2012, Canada stated its intention to develop national education legislation for First Nations education with a view to its full implementation by September of 2014.

“In response to the Panel’s report, the Government will work with willing partners to introduce a First Nation Education Act and have it in place for September, 2014. The purpose of this legislation is to establish the structures and standards to support strong and accountable education systems on reserve. This will set the stage for more positive education outcomes for First Nations children and youth. The Government will also work to explore mechanisms to ensure stable, predictable and sustainable funding for First Nations elementary and secondary education.”

The announcement did not have AFN agreement or consent.

The provincial and territorial First Nations organizations brought the issue of new national First Nation education legislation to their respective annual general assemblies across the country and a concerted effort began nationally to mobilize against the lack of consultation and unilateral government actions to assert total control over First Nations education.

In the Special Chiefs Assembly of the AFN in October 2012 and again in December, 2012, the AFN passed resolutions opposing the unilateral development of national legislation on First Nations

education. Resolution 41/2012 affirmed that the Chiefs in Assembly, *“Recognize and respect the authority and autonomy of all First Nations to direct and implement their own decisions on education for their peoples.”*

In July 2013 at the Annual General Assembly of the AFN in Whitehorse, Yukon Territory, Resolution 14/2013 was passed by consensus. The Chiefs in Assembly affirmed the priority of language immersion initiatives and institutions and demand that they be funded equitably with French immersion programs outside of Quebec, affirmed the need for education to be inclusive for special education students to receive such services in their home communities and that special education be funded equitably in First Nations communities, affirm the role of the federal government in First Nations education is to recognize the right of First Nations to fully implement the inherent and Treaty right to education through needs based funding with escalation factors, and among other statements,

“Mandate the AFN Chiefs Committee on Education (CCOE) supported by the AFN Secretariat, to develop supports for First nations to develop their own education legislation as a step in moving forward on First Nations Control of First Nations education.”

Work continues at the AFN Secretariat level on a national strategy for public education and a communications plan, a template for a nationally released letter signed by the Chiefs for reaffirming their support for the principles of First Nations control of First Nations education including a full rejection of the federal role of oversight of First Nations education and establishing options for direct action including legal action to facilitate a national movement in First Nations education to actively advance the issues in First Nations education jurisdiction, funding and the protection of language and cultural rights.

The Chiefs of Ontario: Charting Our Own Path Forward

(Source: Memorandum from the Regional Chief, Chiefs of Ontario, 2013)

Following the March 29, 2012 budget announcement from the Government of Canada announcing the intention to develop national First Nations education legislation, the Chiefs of Ontario, FNECU began a strategic campaign to respond to the federal government's unilateral development of legislation and posturing around a consultative process with First Nations.

AOCC Resolution 12-12 from the All Ontario Chiefs Conference mandated the Education Coordination Unit and the New Agenda Working Group to:

- Further analyze the delivery of First Nations education with a focus on the existing system and funding mechanisms which are not working and to provide recommendations to the Chiefs in Assembly before or on the date of the AOCC 2013 which embody the principles of the report, *"Our Children, Our Future, Our Vision-First Nations Jurisdiction Over First Nations Education in Ontario."*
- The Chiefs passed the resolution partly in response to the impending First Nations Education Act proposed by AANDC to take effect in September, 2014
- NAWG strategy focused on offering 3 focus group sessions in the winter and spring of 2013 and a symposium on First Nations education in May, 2013 in order to provide current advice to the Chiefs at the AOCC in 2013
- All participants in all sessions agreed on recommending to the Chiefs that First Nations in Ontario retain jurisdiction over the education of our own learners regardless of residency and that this jurisdiction must be asserted in a unified manner as we continue to chart our own path forward
- Focus Group participants and symposium participants called for political unity and the establishment of a representative working group to build on the work that has been done to date
- Themes emerged from the sessions and provided guidance for the way forward:
 - Assert jurisdiction over education
 - First Nations and their organizations must work together in unity on designing a more effective education system that includes more appropriate funding mechanisms
 - Build capacity at the community level to ensure fuller understanding of jurisdiction and the challenges we face
 - Jurisdiction is held at the community level
 - Move forward from the grassroots, community movement is recommended
 - Set a unified vision from a position of empowerment and strength based on our worldview and the needs of our children

Recommendations to the Chiefs at the 2013 AOCC

- Assert First Nation jurisdiction over education in unity as a Region
- Proceed to develop our own education system and laws on our own terms and demand appropriate funding based on the needs of our students
- First Nations education will be based on our vision and worldview and will be based on our languages and culture as deemed appropriate at the community level
- Eliminate the competitive environment and provide compelling evidence for new funding levels
- Build on the extensive work to date
- Strong political will is needed to defeat divisiveness created by government

Chiefs of Ontario-First Nations Education Update

Ontario Regional Chief, Stan Beardy on July 15, 2013, sent a memo to update all First Nations, Provincial and Territorial Organizations, Tribal Councils and First Nation Education Organizations on Ontario's position on the federal process to develop a First Nations Education Act and to describe the Ontario position to chart our own path forward.

Charting Our Own Path Forward in Education

The federal government is proceeding with the development of a national act to cover all aspects of First Nations education from governance, education standards, education services, funding, accountability and First Nations control.

FNECU is working hard to offer opportunities to First Nations in Ontario to articulate their needs as opposed to accepting the legislation proposed by government.

Actions Taken:

- A symposium called "Charting Our Own Path Forward" was held on May 7, 8, and 2013 in Toronto. The recommendations gathered at that time have been compiled into a report taken to the AOCC 2013 with three options for action.
- The AOCC in Manitoulin Island, June 25-27, 2013 passed a Resolution 13-14 titled, "Unity in First Nations Education." A mandate was given to the FNECU to establish a Unity Working Group to coordinate work in the areas of jurisdiction, funding, and systems for education beginning in September 2013.
- Unity Working Group is to ensure that a workable system and funding model is ready to present to the AOCC 2014 with interim progress reports to the Political Confederacy of the Chiefs of Ontario, subject to the assurance that any systems and funding models that propose aggregated coordination are proposed as opt in to allow First Nations to delegate specific education related functions to any collective entity of their choosing
- Scope of the Project: Terms of Reference and Work Plan for fall Special Chiefs Assembly, November, 2013
- Political Confederacy will ensure that the PTOs and IFNs are invited to participate and unite in a position on jurisdiction, possibly a declaration to support any education codes or laws currently in use or in development at the First Nations level

- A resolution was passed that recognizes the need for First Nations to develop their own education laws as one of the steps to support First Nations in building education capacity:
 - Recommends that ONECA and other relevant professionals have a role in the development of a draft template that will be distributed to First Nations to assist them with developing their own community education laws
 - Recognizes the development of First Nation education law templates pursuant to this Resolution shall be coordinated with other political actions in relation to the INAC Education Act and shall be without prejudice to First Nations undertaking education negotiations, First Nations rights and initiatives
 - The FNECU will draft a letter to AANDC on the shortcomings of the consultation process and articulate the preferred approach of First Nations in Ontario. FNECU will describe the charting our own path forward process and provide clear indications on how Canada can support the work

Canada's Next Steps in Consultation with First Nations on the First Nations Education Act

The federal government has completed engagement sessions throughout Canada and released on July 12, 2013 the document titled, *"Developing a First Nations Education Act: A Blueprint for Legislation"* as its next phase of "consultation."

The themes of the Blueprint will be followed in the production of the draft bill. The Blueprint states that the drafting of the legislation has now begun. The introduction to the document states that the approach is directly informed by the findings of the National Panel in 2012 and the results of the current consultation process with First Nations.

The Canadian School Board's Association *"Response to AANDC Initiated Consultations on the Proposed First Nations Education Legislation"* is a well-articulated discussion on the disparity between the Canada's proposed approach and the recommendations of the National Panel. Canada has conformed to its approach as expressed in the Discussion Guide on Developing First Nation Education Legislation used in the consultation sessions. What they heard from First Nations is not what they are proposing.

The Blueprint indicates that, *"the Government of Canada remains committed to sharing the proposed legislation with every First Nation community across the country and with provincial governments for further input prior to introducing it to Parliament in the fall of 2013."*

AANDC plans to release a draft Act for the review of the leadership in October before it is introduced to Parliament in the winter of 2014.

The federal government is also asking for comments to be shared online through their web site or in writing.

COO is committed to supporting the position of First Nations leadership in Ontario to oppose any activity related to the development and imposition of a government designed national First Nations Education Act. COO also encourages the AFN to take a more prominent role in opposing this federal process.

(Source: Chiefs of Ontario, 2013)

Summary Thoughts:

When the National Panel was established in 2011 to gather opinions from First Nations on where education might move in the 21st century, there was a landmark document, *"Report on Priority Actions in View of Improving First Nations Education"* by the Federation of Saskatchewan Indians, Nishnawbe Aski Nation and the First Nations Education Council of Quebec prepared and submitted to the government of Canada and to the Assembly of First Nations outside of the Panel process that bears witness to summarize the road ahead:

"The following are a series of recommendations that would support First Nations education systems. Both the federal and provincial governments along with First Nations have a role to play and a responsibility to act now. First Nations students, parents and communities have waited far too long and continuously experience profound inequalities in the area of education. The time is to act now and

listed below are a series of recommendations that must be supported and enacted upon;

8. The federal and provincial governments must respect First Nations' inherent rights, authorities, processes, experience and ability to educate their children. This lack of respect afforded to First Nations education is evident in the extent of resolutions, recommendations, position papers, studies and research reflecting First Nations' positions on education that have never been followed up on, which is the direct result of continuous assimilation policies (see First Nations Education Timeline – Linda Cree, AFN, A Work in Progress in appendix).

9. The federal and provincial governments must support First Nations to deal with the primary issue confronting First Nations education which is the chronic underfunding of First Nations education systems.

10. Federal and provincial governments must respect and engage First Nations' political, educational and community processes if a true transformational change is to occur in education.

11. First Nations have adopted resolutions at the community, regional and national level to endorse and support the document entitled "First Nations Control of First Nations Education." This document has numerous recommendations that must be implemented if First Nations students, parents and communities are to fully participate in their education.

12. Federal and provincial governments must understand and respect the legal rights of First Nations such as the free, prior and informed consent, as recognized under the United Nations Declaration on the Rights of Indigenous Peoples, to address inherent and treaty rights. Any legislation that will be developed without free, prior and informed consent will be subject to challenge.

13. That all federal law and policy regarding education for Aboriginal people be based on the explicit acknowledgement of Aboriginal peoples' inherent and treaty rights and jurisdiction over education.

14. That the Government of Canada recognize First Nations peoples' inherent jurisdiction over their own education by, as soon as practicable, entering into Nation-to-Nation negotiations with the view of transferring the governance, management, and administration of educational services to First Nations' communities that wish assume these responsibilities.

15. That the Government of Canada recognize First Nations Peoples' inherent and treaty education rights to education pursuant to the United Nations Declaration on the Rights of Indigenous Peoples and that current federal laws and policies be reviewed and, where appropriate, amended to ensure that they do not infringe or adversely affect the exercise of these rights.

16. That the Government of Canada recognize and fulfill its treaty obligation to provide education, contained in the texts, documents, and oral histories of the treaties, by supporting a full range of educational services, including post-secondary education.

17. The AFN National Chief, the Minister of Aboriginal Affairs and Northern Development Canada, and the Government of Canada must work hard to collaborate to achieve and implement the First Nations' vision and policy implementation recommendations outlined in the document First Nations Control of First Nations Education.

18. That the Government of Canada recognize that its constitutional obligation to ensure First Nations peoples' welfare includes the obligation to ensure that First Nations peoples have access to

educational services of at least equivalent quality to those provided in the public school systems of the provinces and that federal policies and funding formulas be amended to ensure that this is the case.

19. That no federal legislation regarding the education of First Nations peoples be developed or enacted without the consent of the Aboriginal peoples concerned.

20. That all parties – including First Nations, provincial schools, and the federal government - that allocate and receive education funding for First Nations students be transparent and accountable to First Nations communities. “ (Report on Priority Actions in View of Improving First Nations Education, p. 86, 87, 2011)

Final Thoughts:

Education reform is the work of First Nations that begins at the community level by rights holders and their representative First Nation Governments. Only when the community owns the process and the outcomes will meaningful change be possible. New processes to establish a working relationship with the federal government are required for true, equitable, respectful partnerships to fulfill the reform agenda.

The successful outcomes of Maori activism in education in Aotearo and the processes used to further their rights under their Treaty can assist First Nations here to see the parallels and some innovative ways to move the rights based agenda ahead in the next decade.

Government political will and First Nations political action in unity are now required to ensure the emerging generations of Indigenous children have access to the kind of education that truly prepares them for living to their full potential, fluent in heritage language, strong in cultural and spiritual identity, prepared for life with academic excellence, knowledgeable of their homelands and way of life, functioning at a physically optimum level, socially and emotionally resilient and ready to contribute to the Nation, to the global community and to Creation.

It is time to turn a new page in the history of relationship between the Crown and First Nations. With the development of international law on Indigenous rights, favourable court decisions within Canada, acknowledgement of Treaty, Inherent and Aboriginal rights in the Constitution, we must now collectively find the political will to acknowledge self-determination, self-government and jurisdiction of the First Nations over the education of our children.

Nothing less will be acceptable.

APPENDIX ONE: Two Excerpts from Legal Opinions on the Proposed AANDC First Nations Education Act

Nahwegahbow Corbiere Genoodmagijig Barristers and Solicitors

A Summary:

The legal opinion of Nahwegahbow Corbiere Genoodmagejig Barristers and Solicitors on June 14, 2013 is as follows:

- A. The First Nations Education Act, if enacted will infringe upon existing Aboriginal and treaty rights under the Constitution Act, 1982, s.35. The validity of the process has been compromised and cannot be rectified in its present state. In our opinion, the consultations in the present state will not comply with the honour of the Crown and the duty to consult.
- iii) The consultations undertaken by the Crown to date have not been adequate or meaningful because the rights-holders have not been properly consulted, the results of the online survey are unknown, the unilateral approach to drafting the legislation, and the timeframe for initial consultations was too short.
- iv) The concerns raised by First Nations in the FNEA enactment process have not been properly accommodated to date and we do not yet know if the concerns of the First Nations will be incorporated in the draft legislation.
- B. The term willing partners is analogous to the reciprocal duty on First Nations to engage in the consultation process, thus responses and engagement should be addressed if a legal remedy is to be sought at a later date.

There will likely be violations of First Nations jurisdiction with respect to the First Nations Education Act. We can surmise what the violations will be but are unable to complete an analysis until we see the First Nations Education Act in draft.

Hutchins Legal Inc.

A Summary:

Re: the Crown's Duty to Consultation & the proposed First Nations Education Act

First Nations' Right to Jurisdiction over Education

The following comments are summaries of the legal opinion offered by Hutchins Legal Inc. on March 15, 2013.

The Duty to Consult, Re: Legislative Action

Where the Crown is contemplating a course of action or a decision that could have a negative effect on established or asserted aboriginal rights, it must consult with the relevant aboriginal groups and, if appropriate, see to achieve a reasonable accommodation of their rights. Therefore to the extent that the Crown's contemplated education policy might adversely affect aboriginal rights, the Crown owes First Nations a duty to consult regarding the contemplated First Nations Education Act.

First Nations' Right to Jurisdiction over Education

First Nations hold the inherent right to exercise jurisdiction over education as an aspect of the Aboriginal right to self-government and self-determination. These are existing aboriginal rights under s. 35 of the Constitution Act, 1982 and Canada recognizes them as such. The Aboriginal right to self-government, "akin to a legislative power to make laws", has survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the Legislatures in 1867.

Indigenous peoples' right to govern their own educational systems is confirmed in Article 14 (1) of the United Nations Declaration on the Rights of Indigenous Peoples, which states that Indigenous peoples have the right "to establish and control their own educational systems and institutions in their own languages, in a manner appropriate to their cultural methods of teaching and learning." Education is a fundamental aspect and a crucial tool to Indigenous peoples pursuing the right to freely determine their political status and freely pursue their economic, social and cultural development and is necessary to Indigenous peoples' realization of their full right to self-determination.

Given First Nations' inherent right to education and the scope of their present authority over education, any future federal legislation that would regulate or restrict the exercise of this authority, or that would make it subject to federal oversight, would be *prima facie* infringement of the aboriginal right to self-government and self-determination. The proposed First Nations Education Act would inevitably affect the exercise of this right; therefore, by contemplating the creation of the Act, the Crown has triggered the duty to consult.

Scope and Content of the Duty to Consult and Accommodate

The First Nations Education Act could reshape how First Nations children are educated, setting mandatory standards, practices, and curricula. A regulation that denies aboriginal rights holders their preferred means of exercising their rights infringes on those rights. History sadly teaches that

unilateral federal action regarding First Nations education can cause significant non-compensable damage.

Therefore, in contemplating the adoption and implementation of the First Nations Education Act, the Crown owes First Nations a duty of deep consultation—that is, a duty to consult with the aim of arriving at a satisfactory solution to accommodate First Nations rights and interests.

The Timing of Consultations

The Crown is required to notify aboriginal peoples when it is contemplating a course of conduct or a decision that might negatively affect their rights or interests. This is when consultation begins. The Crown must initiate consultation early, before its decision making process has reached too advanced a stage. First Nations must also be given reasonable time to respond to notices and referrals for consultation.

Canada's Economic Action Plan 2012 committed the federal government to having legislation in place for September 2014. This was a unilateral commitment made by the federal government that, as set out by First Nations Chiefs sitting in a Special Assembly concerning education on October 3, 2012 did not take account of First Nations' priorities, decision-making and jurisdiction.

If requested, further consultations should be held.

It is critical at that phase that appropriate First Nations groups and representatives are given enough time to review the draft and that their feedback is seriously considered.

Acknowledgements of First Nations concerns by federal officials absent any commitments to reflect those concerns in the draft legislations would not be sufficient to discharge the Crown's duty to consult and accommodate.

Appropriate First Nations groups and representatives should also be given a chance to review and comment on the final version of the bill that will be tabled.

Acknowledging First Nations' Claims to Jurisdiction over Education

The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. This crucial step is notably absent from the consultation documentation that Canada has produced so far.

Nowhere does the Discussion Guide mention First Nations' right to self-government and self-determination, except to say that the new legislation would not apply to self-governing First Nations that have adopted laws related to education.

The closest the Discussion Guide offers to an assessment of First Nations right to and jurisdiction over education is the statement that the "Government of Canada recognizes that First Nations value education as a means for individuals to achieve personal and career goals, as a means to strengthen language and culture, and a way to build a sense of community. This fails to acknowledge the critical place that control over education, as a key element of cultural reproduction, plays in the effective expression of First Nations' right to self-government and self-determination.

Without acknowledging First Nations' right to self-government and self-determination and their inherent jurisdiction over education, the consultation process and subsequent legislation is doomed to falter...

In consulting regarding the First Nations Education Act, the federal government must explicitly acknowledge, respect, and accommodate First Nations' jurisdiction over education.

The Crown's Intention to Address First Nations Concerns

Whether the Crown's duty to consult a First Nation lies at the low or high end of the spectrum, the Crown must consult with the goals so substantially addressing the First Nations concerns. It is too early in the process to judge whether Canada will satisfy this obligation. Canada will have to demonstrate a willingness to amend the proposal based on feedback and to continue consultation throughout the legislative process.

Consulting the Right Group

Consultations must engage with First Nations representatives who are mandated by the community to speak to the issue at hand. The duty to consult is owed to First Nations communities as a whole, which hold rights collectively. The jurisdiction over and right to education is certainly a collective right.

The Crown should respect the position taken by First Nations and engage with them at the level that First Nations request. First Nations ought to be determining whom Canada will consult, and Canada ought to respect their decisions. The Crown's unilateral move to begin consultations, and the short time frame it has imposed, has made this difficult, if not unworkable.

The Crown's Representatives' Authority

The Crown's duty to consult cannot be boxed in by legislation or policy, those that conduct consultations on the Crown's behalf must have powers sufficient to ensure that the Crown's obligations will be met. These mandates ought to be disclosed to ensure the transparency of the consultation process.

It is our understanding that the Crown representatives facilitating the consultation sessions will be drafting the reports on those sessions, with the benefit of input from First Nations participants. How much influence these reports will have on the process of deciding what will go into the draft legislation remains a crucial unanswered question.

Good Faith

At all stages of consultation, good faith on both sides is required. If, during the consultation process leading to the First Nations Education Act, the Crown or its representatives prove intransigent, engage in "sharp bargaining", negotiate with an oblique motive or alternate agenda, or otherwise negotiate in bad faith, then this course of conduct could amount to a breach of the duty to consult and accommodate. Such a dishonourable course of conduct would be reviewable by the courts even where the Crown or its representatives had failed to make a decision. Though the Crown is not

bound by a duty to agree, it is bound to engage in a meaningful process with the intention of substantially addressing First Nations' concerns.

Serious Consideration of First Nations Concerns

In contemplating conduct such as the First Nations Education Act, the Crown is required to share all necessary information in a timely way so that First Nations have an opportunity to express their interests and concerns, and to ensure that First Nations representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

It is our understanding that the Crown has not developed a formal method for review and considering submissions during consultation. If possible, First Nations should be involved in developing such a methodology.

At the very least, to ensure that serious consideration is given to First Nations representation, all submissions made during the consultation process should be made public. Unless the Crown shares this information, it will be able to pick and choose the submissions it considers without any strict methodology or accountability.

Where, as here, a deep level of consultation is required, the Crown may be obliged to provide First Nations with written reasons to show that their concerns were considered and explain how they impacted the decision or course of action that was chosen. To ensure that submissions made by First Nations are seriously considered, this should be insisted on as part of the consultation process for the First Nations Education Act.

Funding

The Crown should provide adequate funding to ensure that First Nations can effectively participate throughout the consultation process. The provision of such funding would be in keeping with statements from the courts noting the importance of provision of capacity funding sufficient to ensure the success of consultations. The Federal Budget 2013 references the proposed First Nations Education Act, but earmarks no money for capacity funding to ensure the adequacy of consultations.

The provision of funding is particularly important in this case, as reviewing draft legislation will require both in depth analysis by legal and educational experts working under short timeframes as well as broad level community consultations and information sessions.

Minimum Requirements for the Consultation Process

- In consulting, regarding the First Nations Education Act, the federal government must explicitly acknowledge, respect and accommodate First Nations' jurisdiction over education
- Canada must acknowledge and respect First Nations' jurisdiction over education as part of the consultation process
- Where First Nations request an extension to the April 2013 deadline to provide input on the proposed legislation, the Crown should grant such a request
- First Nations ought to determine internally who Canada will consult, and Canada ought to respect their decisions

- Canada and First Nations should cooperate in developing a methodology for accessing and addressing submissions made during consultations before any further consultation sessions are held
- All submissions made during the consultations process should be made public
- When the draft legislation is produce, the Crown ought to provide written reasons to show that First Nations' concerns raised during consultation were considered and to explain how they impacted the draft text
- Meaningful consultation must continue after the draft legislation is produced and throughout the legislative process
- The Crown must provide adequate funding to ensure that First Nations can effectively participate throughout the consultation process

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