

March 28, 2014

Submitted electronically to consultation-education@aadnc-aandc.gc.ca

Education Branch
Aboriginal Affairs and Northern Development Canada
15 Eddy Street, 6th floor
Gatineau, QC K1A 0H4

Re: First Nations Control of First Nations Education Act

Dear Sir or Madam:

As Kahnawakehró:non, people of Kahnawà:ke, we appreciate the opportunity to comment on the proposed First Nations Control of First Nations Education Act (“FNCFNEA,” also known as the First Nations Education Act (“FNEA”)),¹ as articulated by Prime Minister Stephen Harper on February 7, 2014 and in Aboriginal Affairs and Northern Development Canada’s October 2013 draft legislative proposal on First Nation education (collectively, the “**Proposal**”).²

This comment letter is intended to complement and supplement the official Kahnawà:ke position statement on the FNEA, as developed on December 18, 2013, and as submitted to the Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development, on January 21, 2014.³

¹ Canada has announced plans for both a First Nations Education Act and a First Nations Control of First Nations Education Act. It is not clear whether FNEA and FNCFNEA are separate proposals, or whether they are one and the same. For the purposes of this comment letter, “First Nations Education Act” and “First Nations Control of First Nations Education Act” represent the same draft proposal and are interchangeable.

² Stephen Harper, Prime Minister of Canada, “First Nations Control of First Nations Education Act” (Feb. 7, 2014), available at <http://pm.gc.ca/eng/news/2014/02/07/first-nations-control-first-nations-education-act> (accessed Feb. 10, 2014); Aboriginal Affairs and Northern Development Canada, *Working Together for First Nations Students: A Proposal for a Bill on First Nation Education* (Oct. 2013), available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-EDU/STAGING/texte-text/proposal_1382467600170_eng.pdf (accessed Feb. 10, 2014). At this time, since announcing FNCFNEA, Canada has only broadly shared the content of Prime Minister Harper’s announcement and has not been forthcoming about the substantive details of the proposed legislation, including the status of consultations. As such, this comment letter is solely based on Aboriginal Affairs and Northern Development Canada’s proposed FNEA, as released October 2013, and the broad content of Prime Minister Harper’s February 2014 announcement. This comment letter is limited to these two sources, and should not be construed as including commentary on any announcements or proposals that may subsequently be released. We reserve the right to be consulted on the FNCFNEA, to the extent that it is different from AANDC’s initial October proposal and raises new issues for which we have not been given the opportunity to comment.

³ A Kahnawà:ke position on the First Nations Education Act was approved at a Community Meeting held in Kahnawà:ke on Wednesday, December 19, 2013. See “Kahnawà:ke Position on the First Nations Education Act,” Dec. 18, 2013, available at <http://kec.qc.com/wp-content/uploads/2014/01/Kahnawake-Position-Statement-FINAL-COMMUNITY-APPROVED-131218.pdf> (accessed March 20, 2014).

The Proposal would create a streamlined federal framework for First Nations control of education on reserves and replaces education-related provisions in the *Indian Act*, without regard to the diverse circumstances and capacities of First Nations across Canada. It does so by establishing and imposing externally designed curriculum, operational, and certification standards and responsibilities that do not reflect the unique concerns and priorities of First Nations communities. With few exceptions,⁴ the Proposal would apply universally to First Nations, with no opt-out opportunities. While Prime Minister Harper has announced statutory funding commitments that would include core funding, infrastructure, and an FNCFNEA implementation fund, there is a lack of clarity as to how funds will be distributed to First Nations across Canada, whether the funding would close the education funding and performance gap between First Nations students and other Canadian students educated in provincial education systems, and whether First Nations would have the freedom to decide how to allocate funds based on local priorities.

The purpose of this letter is to highlight our key concerns with the Proposal and to provide recommendations.

I. Executive Summary

As part of our inherent right to self-determination as a distinct people, the Kanien'kehà:ka, "People of the Flint" or Mohawks, of Kahnawà:ke have the right to establish and control our education system. We have always claimed the right to educate our own children, and have reasserted this right in Kahnawà:ke since 1968. Canada recognizes that the inherent right of self-government, of which exercising jurisdiction over education is an aspect, is an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.⁵ Further, Canada has endorsed the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), which affirms and recognizes the rights to self-determination, self-government, and to indigenous control over education systems and institutions.⁶ Any federal legislation should reaffirm Canada's recognition and empower Canada's First Nations peoples to exercise these rights.

Kahnawakehró:non have a unique experience in managing education in Kahnawà:ke. Since 1968, Kahnawakehró:non have asserted control over education through the creation of culture-based schools and the establishment of the Kahnawà:ke Combined Schools Committee ("KCSC"), which was supported by a Mohawk Council of Kahnawà:ke ("MCK") resolution.

⁴ First Nations that have negotiated Self-Government Agreements will not be subject to the Act.

⁵ Aboriginal Affairs and Northern Development Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government," Sept. 15, 2010, available at <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> (accessed March 20, 2014) ("Recognition of the inherent right [of self-government] is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions...").

⁶ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), art. 1, 3, 14.

Since the 1980s, the KCSC has exercised jurisdiction and responsibility over Kahnawà:ke's education system.⁷ As part of its governance, KCSC abides by a set of documents collaboratively developed with parents and interested community members, including a Kahnawà:ke Education Responsibility Act governing education and a Constitution to guide the KCSC; the documents collectively outline community-defined priorities, responsibilities, and standards for various actors in the education system. To support sound administration, the KCSC created the Kahnawà:ke Education Center ("KEC") in 1980 to administer all education programs on its behalf.

In this context, the Proposal is a mismatch for Kahnawà:ke because our community already oversees the Kahnawà:ke Education System in accordance with robust governance policies and standards, ensuring that students have access to quality education. FNCFNEA should not apply to our community. The application of FNCFNEA to Kahnawà:ke would restrict, and effectively supersede, our control over education by requiring our school system to comply with requirements unilaterally developed by the federal government, given its failure to collaborate with First Nations in developing the initial Proposal. Application of FNCFNEA would destabilize a well-established and successful education system that generations of Kahnawakehró:non have developed and refined for decades, without any reasonable justification or tangible gains.

While the FNCFNEA should not apply to Kahnawà:ke due to fundamental concerns with the content of the proposal as a whole, we also are not satisfied with the process used to develop the Proposal and with many of the Proposal's individual substantive provisions. Specifically, the consultation process used to develop the Proposal was inadequate. Canada's decision to advance this Proposal does not meet the standard of free, prior, and informed consent, as articulated by UNDRIP,⁸ nor does it meet Canada's constitutional duty to consult. There is no indication that the initial consultation process was meaningful. For example, Canada has not been transparent in demonstrating how the Proposal responded to feedback and issues raised during the initial consultation process. Subsequent efforts to be more inclusive do not cure these initial flaws. Further, while the Proposal states that the legislation intends to affirm that First Nations control over education is an Aboriginal Right protected by section 35 of the *Constitution Act, 1982*, the Proposal is unduly restrictive and narrows the scope of First Nations control over education. As drafted, the Proposal does not empower First Nations peoples to exert control over First Nations education as envisioned in the *Indian Control over Indian Education* policy articulated by the Assembly of First Nations.⁹

⁷ More specifically, KCSC oversees Karonhianonhnha Tsi Ionterihwaienstahkhwa, Kateri School, and Kahnawà:ke Survival School. The 207 Longhouse and parents oversee Karihwanoron Mohawk Immersion and Indian Way School.

⁸ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 6, art. 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing *legislative* or administrative measures that may affect them") (emphasis added).

⁹ National Indian Brotherhood / Assembly of First Nations, *Indian Control of Indian Education: Policy Paper presented to the Minister of Indian Affairs and Northern Development by the National Indian Brotherhood / Assembly of First Nations* (1972).

Canada should abandon its current legislative proposal, and instead initiate a new process for developing federal education policy, by working collaboratively with First Nations in designing and implementing a consultation process and policy acceptable to First Nations which respects their jurisdictional control. Further, notwithstanding the official Kahnawà:ke position, we recommend the following changes to the Proposal:

- ❖ Create exemption from application of the Act for First Nations bands willing to either maintain existing financial and administrative arrangements with AANDC or negotiate separate education agreements;
- ❖ Clarify and limit the Minister's role to receiving and reviewing reporting, and to providing technical and financial support to First Nations for implementing administrative and operational responsibilities;
- ❖ Funding:
 - Statutory commitment to close the First Nations education gap within 10 years, both in terms of performance outcomes and funding disparities;
 - Statutory commitment to provide adequate FNCFNEA implementation resources, including funding based on real cost drivers to meet new and existing responsibilities;
 - Provisions clearly explaining how funding amounts are calculated;
 - Flexibility in funding administration;
- ❖ Recognize First Nations education and teacher certification standards, as well as eligibility criteria for access to education, in light of First Nations interests in incorporating language, culture, and indigenous approaches into education systems;
- ❖ Commitment to include within the scope of the legislation K-12, pre-K, and post-secondary education, and to protect existing First Nations education programs, including but not limited to the Post-Secondary Student Support Program and the First Nation Student Success Program;
- ❖ Given the mandatory nature of the Act, remove liability waiver provisions for Her Majesty, the Minister, any employee or agent of Her Majesty, and the temporary administrator.

II. Background

The Kahnawà:ke Education System consists of four elementary schools, Karonhianonhnha Tsi Ionterihwaienstahkhwa, Kateri School, Indian Way School, and Karihwanoron Mohawk Immersion, as well as a secondary school, the Kahnawà:ke Survival School. The Kahnawà:ke Combined Schools Committee, representing parents and other

stakeholders in Kahnawà:ke, oversees the Kahnawà:ke Education System.¹⁰ The KCSC is responsible for directing and, through the Kahnawà:ke Education Center, managing all education programs in our community. The KCSC is empowered by a parents' assembly, and guided by the Kahnawà:ke Combined Schools Committee Constitution, Kahnawà:ke Education Responsibility Act, and Kahnawà:ke Education Blueprint. These foundational documents articulate our community's vision for our education system, our interests and priorities, and the education system's actors' specific responsibilities toward our community's students.

Kahnawakehró:non have a longstanding tradition of being involved in our children's education. Despite numerous historical attempts by the Government of Canada, in concert with various religious organizations, to override our inherent right to educate our children through the use of measures designed to assimilate us into mainstream Canadian society, such as the residential school and federal Indian day school systems, we continue to retain an inherent right and shared responsibility for the upbringing and education of our children. Our community and extended families, including elders, aunts and uncles, and siblings, all continue to play an important role in raising new generations. Our unique worldview and holistic approach to education is unique to Kahnawà:ke, and reflected in our education system. It is not reflected in anybody else's curriculum and certification standards, including, among others, those developed by provincial ministries of education and the International Baccalaureate. The Proposal as currently conceived, which would measure our performance against education and teacher certification standards designed by outside actors who may not share the same values and priorities as Kahnawakehró:non, would adversely impact our education system.

Our collective community, and not external actors, is best positioned to act in the best interests of our children. We are ultimately responsible for ensuring that our children are educated with a strong sense of identity and embody Kanien'kehà:ka values, while also ensuring that students have access to a strong academic curriculum. The Kahnawà:ke Education System values superior education and learning opportunities, grounded in Kanien'kehà:ka language, culture, and values, and delivered with innovation and sound academic standards. Our education system has several goals: (1) to provide curriculum that instills students with skills and knowledge they need to thrive; (2) to ground students with a strong sense of identity and self-awareness; and (3) to provide students with the opportunity to communicate proficiently in three languages: Kanien'keha, French, and English. Given our proven record of success using a Kanien'kehà:ka- and Kahnawà:ke-centric education model, we believe that indigenous-centered systems of education provide the best opportunities for First Nations children to thrive, while maintaining their unique cultural identity.

III. General Response to Proposal

We strongly oppose the proposed application of the currently formulated Proposal onto our community because it would effectively replace the education system that Kahnawà:ke has developed and refined for nearly 50 years with an untested model designed without reference to our community's unique needs and priorities. The Proposal's application would be disruptive, by

¹⁰ More specifically, KCSC oversees Karonhianonhnha Tsi Ionterihwaienstahkhwa, Kateri School, and Kahnawà:ke Survival School. The 207 Longhouse and parents oversee Karihwanoron Mohawk Immersion and Indian Way School.

requiring an overhaul of our existing education system, and undermine our efforts to develop our own education system.

We have the right to continue exercising full control over our community's education system. Given Canada's past education policy towards Canada's First Nations peoples through the residential school system and federal Indian day schools, we do not believe that applying a federally devised education framework is in the best interests of our community or our students. In fact, in 1972, students from Kahnawà:ke refused to attend an off-reserve public high school because of its inability to provide culturally relevant curriculum, indigenous staff, and an indigenous school counselor, and created the first indigenous controlled high school in Canada. Because of the influence of education in shaping the identities of our younger generation, only Kahnawà:ke is equipped to develop a suitable education system based on our values and priorities.

Any federal education legislation must abide by the principles articulated in the Assembly of First Nation's *Indian Control of Indian Education* policy. These principles include:

- Preparation for total living;
- A means of free choice of where to live and work; and
- A means of enabling us to participate fully in our own social, economic, political, and educational advancement.

In furtherance of these principles, our education system must include culturally relevant curriculum that reflects and reinforces our culture and unique values.

As articulated, the Proposal is unduly restrictive, constraining First Nations' ability to truly exercise control over education. While we understand the Government of Canada's interest in ensuring that First Nations education systems are accountable and deliver quality education to students, we believe that those goals can be achieved in a way that also respects First Nations' right to establish and control education systems.

Further, we do not support the process used to develop the Proposal. AANDC unilaterally directed the process, as opposed to collaboratively designing a new framework for First Nations control of education with First Nations, thereby undermining the Government of Canada's stated goals of building strong partnership and fostering renewed relationships with First Nations. Further, the eight invite-only face-to-face regional consultation sessions, briefings, and online survey, which represent the extent of public engagement prior to AANDC's release of the Proposal, did not provide the 600+ First Nations communities and interested stakeholders with an adequate opportunity to meaningfully consult with the Government of Canada about their goals and interests. Canada's decision to advance this Proposal does not meet the standard of free, prior, and informed consent, as articulated by UNDRIP,¹¹ nor does it meet Canada's

¹¹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 6, at art. 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing *legislative* or administrative measures that may affect them") (emphasis added).

constitutional duty to consult,¹² which we believe is triggered in the legislative context¹³ and would require Canada to consult with all First Nations adversely impacted by proposed legislation.

While First Nations leaders and peoples have since been given the opportunity to provide feedback on the Proposal via the written submissions process, this does not absolve Canada from excluding First Nations representatives from the initial policy design process and process leadership. As such, the Proposal does not fully reflect First Nations peoples' priorities and policy design preferences for addressing First Nations education. Further, there are no procedural protections to ensure that First Nations comments on the Proposal will be meaningfully considered before the bill is introduced into Parliament. For example, there is no indication that AANDC will provide First Nations peoples with enough time to meaningfully respond to the Proposal, underscored by the absence of a transparent comment period deadline for First Nations stakeholders to submit comments for consideration.

We believe that it is in the Government of Canada's interest to collaborate with First Nations, engage in consultations, and to share any proposed federal education policy for public comment prior to changing the status quo. The Government of Canada has consistently articulated a desire to improve relationships with First Nations peoples through trust-building activities. Indeed, AANDC's failure to meaningfully engage with First Nations peoples in the development of the Proposal has created veritable opposition to the legislation and an atmosphere marked by distrust in the Government of Canada's intent. By not partnering with First Nations representatives to develop the Proposal, the perception is that the Government of Canada either does not trust or respect the capacity of First Nations peoples to be meaningful and productive partners in crafting a solution to the First Nations education crisis that plagues this nation. AANDC's development of the Proposal was a missed opportunity for Canada to meaningfully engage with First Nations peoples to develop an approach to implement the *Indian Control of Indian Education* policy that fully reflects the priorities of Canada's diverse indigenous population.

More generally, and in furtherance of its legal duty to consult, Canada can improve its relationship with First Nations peoples by proactively engaging and working collaboratively with First when taking action impacting First Nations rights and interests. AANDC's current

¹² In a series of landmark cases, Canada's highest Court held that the Crown has a duty to consult when the "Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 (Can.). The duty to consult is a legal requirement pursuant to section 35 of the Constitution Act, 1982. The duty is grounded in the "honour of the Crown" and involves a "meaningful process of consultation in good faith." *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 (Can.). The duty to consult must be in "good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples" and the Crown must always ensure that the interests of Aboriginal peoples "are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (S.C.C.).

¹³ The Supreme Court of Canada has left unanswered the question of whether legislative action triggers the duty to consult. See *Rio Tinto Alcan Inc.*, at para. 44 ("We leave for another day the question of whether government conduct includes legislative action").

consultation and accommodation policy is narrowly construed to meet minimum legal requirements. AANDC should manage litigation risk and develop better relations with First Nations peoples by adopting a broader consultation policy.

Canada should gauge First Nations consent by making efforts to ensure that First Nations in all regions support proposed federal action before acting. To do so, Canada should make use of the various regional First Nations assemblies by requesting resolutions in support of proposed action.¹⁴ Further, to ensure meaningful consultation, in the context of legislative, regulatory, and other federal action impacting First Nations peoples, Canada should make publicly available all comments received, publish a full response to issues raised during the consultation period, and issue an analysis and justification for federal action. Such a process would increase transparency about federal decision-making impacting First Nations peoples and increase Canada's accountability by ensuring that Canada meaningfully considers issues raised by First Nations peoples during the consultation process.

Canada should abandon its current legislative proposal, and instead initiate a new process for developing federal education policy, by working collaboratively with First Nations in designing and implementing a consultation process and policy acceptable to First Nations which respects their jurisdictional control. It could do so by setting up a special committee with both First Nations representatives and public officials responsible for developing education policy for public comment, meaningful consultations, and First Nations consent. AANDC might recruit First Nations representatives by partnering with provincial or regional First Nations organizations and issuing a call for applications.

IV. Recommendations

Notwithstanding the official Kahnawà:ke position, we recommend the following changes to the Proposal:

- 1. FNCFNEA should offer exemptions for First Nations communities from the application of the Act, whereby such First Nations could opt to either continue administering education under existing arrangements or negotiate separate education agreements with AANDC.**

While some First Nations may seek the legislative basis and standard setting provided by the framework, some communities may not need or want this framework. Kahnawà:ke, for example, would prefer an exemption from the Proposal's application, as currently construed, and to maintain existing education and financial arrangements with AANDC. In our view, the benefits under the Proposal do not outweigh the costs of foregoing the right to develop and be held accountable against Kanien'kehà:ka- and Kahnawà:ke-centric curriculum and certification

¹⁴ For example, the Assembly of First Nations of Quebec and Labrador hosts Chiefs' Assemblies for leaders of 43 communities in the region; these assemblies represent an opportunity for Canada to gauge regional support for federal initiatives.

standards. We believe our existing education system is designed for excellent student outcomes and that, with adequate funding, we could achieve those outcomes.

Since 1986, Kahnawà:ke has taken full responsibility in administering the Kahnawà:ke Education System. Since that time, the KCSC and Kahnawà:ke Education Center have developed the capacity to administer an education system with rigorous academic standards, which also integrates community values in developing self-aware, respectful, and independent students in the Kanien'kehà:ka tradition.

The KCSC effectively oversees the local education system. Kahnawà:ke has adopted key governance documents regulating access to education, governance, and school operations. Kahnawà:ke's existing comprehensive education governance framework addresses many of the Proposal's purposes, including responsibilities for setting curriculum standards, accountability, and transparency. For example, the Kahnawà:ke Education Responsibility Act identifies the Kahnawà:ke Combined Schools Committee as the body responsible for administering education.¹⁵ The KCSC is responsible for establishing curriculum, including core and elective programs consistent with the Kahnawà:ke Education System's goals, as articulated by parents and other community members. As part of its financial management activities, the KCSC is responsible for, among others, preparing annual budgets, managing accounting records and appointing an annual auditor, and issuing an annual report.¹⁶ Additionally, the KCSC, through the Kahnawà:ke Education Center, prescribes teaching standards, and requires an appropriate qualification certificate and teaching license. By creating its own standards, the Kahnawà:ke Education System is able to ensure that students have access to quality education with qualified teachers, while also supporting indigenous educators. This is particularly important for language, cultural, or vocational education, where teachers are qualified to teach these subjects, despite potentially not having relevant provincial certification.

The KCSC issues diplomas to students. Since 1979, Quebec post-secondary institutions have recognized and accepted these diplomas.

Kahnawà:ke's education system is successful because it was designed by the community, for the community. Students, parents, and educators are invested in Kahnawà:ke's education system because it was created specifically to meet community needs. By developing our own education and teaching standards, as well as a robust governance system, we are able to hold ourselves accountable to our communities. We do not believe that imposing an externally designed set of standards, as proposed, would be effective or in our community's best interest.

In sum, the Proposal should provide exemptions for First Nations communities like Kahnawà:ke, which has built the capacity to develop a strong education system with rigorous standards to deliver quality education to students. First Nations should have the option to opt-out of FNCFNEA's application, and to either maintain existing education administration and financial arrangements or negotiate separate education agreements with AANDC.

¹⁵ *Kahnawà:ke Education Responsibility Act*, art. 37–57.

¹⁶ *Id.*, at art. 68–76.

2. The Minister's role should be limited to receiving and reviewing reporting and providing technical and financial support to First Nations education systems.

Kahnawakehrónon strongly oppose the Proposal's conceptualization of the Minister as a direct overseer of First Nations education systems. In particular, we oppose the proposed use of school inspectors qualified by the province¹⁷ and the Minister's authority to appoint temporary administrators in the event of non-compliance with the requirements of the FNCFNEA.¹⁸ This conceptualization creates a hierarchical and paternalistic relationship, where the Minister is the person to whom First Nations education systems are ultimately accountable. The Minister's role, as conceptualized in the Proposal, reinforces the existing administration of First Nations education, which involves an administrative delegation of authority from AANDC to individual First Nations, and is in direct contravention of the concept of First Nations control of education.

The cornerstone of First Nations control of education is that First Nations are responsible and accountable for the administration and performance of their education systems. First Nations schools should be ultimately responsible to students, parents and to their communities, who are the parties best positioned to hold the schools accountable and who are the primary stakeholders of First Nations schools. In Kahnawà:ke, the Kahnawà:ke Combined Schools Committee is ultimately responsible to the community.

In that framework, the retention of a school inspector for the purpose of reporting compliance to the Minister is inappropriate. It is inappropriate not only on a fundamental level, but also because provincially certified school inspectors do not have the capacity to evaluate education systems different in approach (indigenous and culture-based) from the province. Rather, First Nations education systems should be able to hire a school inspector with the capacity to assess the performance of an indigenous school system for the purpose of internal performance review based on the indigenous education system, with the purpose of reporting to the relevant First Nations education authority.

We oppose the paternalistic role that the Proposal envisions for the Minister. We understand that, given Canada's financial support of First Nations education, there may be demands for accountability, transparency, and compliance with the FNCFNEA. However, under no circumstances should the Minister be in the position to penalize First Nations for non-compliance by appointing administrators to whom principals, directors of education, teachers, and other staff are responsible, or by revoking designation as a First Nation Education Authority.

We recommend that the Proposal be revised to envision the role of the Minister as a partner in First Nations education. First Nations should share information with the Minister on an annual basis, and the AANDC should provide technical support to assist First Nations in their

¹⁷ Aboriginal Affairs and Northern Development Canada, *supra* note 2, at s. 25–26.

¹⁸ *Id.*, at s. 27–30.

efforts to comply with the FNCFNEA's requirements. Under no circumstances should the Minister be in the position to penalize First Nations for non-compliance.

3. Statutory funding commitments should provide First Nations with adequate resources to close the First Nations education funding gap and to meet existing and new responsibilities introduced by FNCFNEA. First Nations should have the flexibility to use education funds to reflect local education priorities.

Given chronic funding shortfalls, we welcome Prime Minister Harper's announcement of a statutory commitment of a total of \$1.912B in funding, starting in 2015–2016, as a step in the right direction. We also welcome the elimination of the two per cent cap on annual increases in funding. While these statutory funding commitments are an improvement from the status quo, they are not sufficient to close the education funding gap or to meet the capital and operational needs of First Nations communities.

We would like to ensure that First Nations students receive funding based on real cost drivers and need. Adequate funding must be invested to support First Nations students in meeting the same educational outcomes as students in the Canadian public education system. There is a persistent funding gap between federally funded First Nations students and students educated in the provincial education system.¹⁹ As of 2010-2011, the funding gap was approximately \$620 million per year.²⁰ Conversely, the statutory commitment of \$1.25 billion in core funding over three years represents approximately \$416.7 million per year. The new funding commitments would close less than 70% of an ever-growing funding gap. Not only is there a persistent and growing funding gap between federally funded First Nations students and students educated in the provincial education system, but there is also a gap in educational outcomes. These funding and performance gaps both require influxes of investments to bring First Nations student outcomes to par with Canadian students. Canada should commit to close both outcome-based and funding-based education gaps.

Further, while there is a statutory commitment of \$160 million over four years to implement the Proposal, it is unclear how implementation funding will be distributed to First Nations and whether it will be adequate to meet existing and new responsibilities that First Nations will be assuming under the FNCFNEA, including school inspection, compliance activities, and other reporting requirements. All mandates within the new legislation should be

¹⁹ For example, in its report, the National Panel on First Nations Education noted that it "saw evidence of significant gaps in compensation of teachers and principals, a lack of equipment and supplies in libraries, shops, gymnasiums and technology, inadequate supports for special needs students, school facilities in disrepair or in portable units, and many other indications of gaps in funding." National Panel on First Nation Elementary and Secondary Education for Students on Reserve, *Nurturing the Learning Spirit of First Nation Students: The Report of the National Panel on First Nation Elementary and Secondary Education for Students on Reserve*, at 39 (2011), available at <http://www.aadnc-aandc.gc.ca/eng/1373075023560/1373075345812> (accessed March 13, 2014).

²⁰ Assembly of First Nations, "Fact Sheet: First Nations Education Funding," available at http://www.afn.ca/uploads/files/education/fact_sheet_-_fn_education_funding_final.pdf (accessed March 13, 2014).

fully funded. It would be unfair, to the extent that First Nations education and administration are underfunded, to penalize First Nations for failing to comply with a vast set of responsibilities, as described in Section 28-30 of the Proposal.²¹ Instead, in the event of non-compliance, the Minister should offer technical support to assist First Nations in complying with the FNCFNEA.

Finally, funding commitments to each First Nations community should be distributed in block grants, so that First Nations education administrators have the discretion to distribute and budget funds based on local needs and interests. For example, the Kahnawà:ke Education System ensures services to provide for special needs students, guidance counselors, curriculum development, language and culture, and nursery school. We would like to retain the ability to direct funds toward our priorities.

In sum, in addition to the announced statutory funding commitment, the Proposal should reflect a commitment to ensure that per capita funding for First Nations students is at least equal to per capita funding for students in the relevant provincial public schooling system within 10 years, and more where educational outcomes require such. The Proposal should also commit to providing adequate funding for First Nations to meet existing and new capital, administrative, and operational responsibilities. The Proposal should further be clear and transparent about the determination of funding amounts. Finally, the Proposal should provide First Nations with flexibility to use education funds to reflect local education priorities.

4. First Nations should have the right to develop minimum education standards, regardless of consistency with provincial standards, so long as diplomas are widely recognized.

First Nations schools should provide education that is equivalent or better than the quality of education that a student could attain by attending school off-reserve. It is important to develop standards to hold teachers and schools accountable to their students and to the community. We understand that the Proposal mandates certain minimum standards to ensure that students who attend First Nations schools are able to obtain diplomas recognized by post-secondary institutions. While we agree with these premises, the current Proposal takes a highly restrictive approach to education standards and does not provide First Nations with the flexibility to develop their own standards and creative solutions to achieve successful outcomes.

Education standards are crucial for holding educators responsible for delivering consistent and quality education to students. First Nations control of education includes the right to develop goals and priorities for curriculum. It is not appropriate to *require* First Nations schools to be assessed only on the basis of provincial education or International Baccalaureate (“**IB**”) standards, especially where First Nations have opted to develop their own education standards and curriculum. Provincial and IB education standards do not reflect the unique educational programming that some First Nations schools have developed from their perspective,

²¹ The Proposal empowers the Minister of AANDC to appoint an administrator to administer a school in the event that the Minister is either not provided with an inspection report for two consecutive years or inspection reports identify non-compliance with certain requirements under the Act.

such as language, culture, or history. They also do not reflect local circumstances. For example, the Kahnawà:ke Survival School issues different types of diplomas to reflect the different pathways of our students. The school issues an academic (secondary school) diploma, vocational certificate, and life / work skills certificates. If First Nations schools were judged solely on the basis of externally designed standards, AANDC would effectively incentivize teachers in First Nations schools to prioritize teaching those standards. As such, First Nations language and culture programming, which are not part of provincial standards, would be considered relatively less important than other courses. This could undermine First Nations priorities.

We believe that First Nations schools do not need to mirror provincial or IB curriculum standards to provide an education that is equal or better in quality than education programming at schools that adhere to those standards. Indeed, we believe that First Nations communities can provide quality education to their students by developing and adhering to their own standards, which reflect community priorities.

Related to standards, we recognize that diplomas on some First Nations reserves may not be widely accepted. Despite this concern, many First Nations have issued their own widely recognized diplomas, while also adhering to their own education standards. For example, Kahnawà:ke's high school, the Kahnawà:ke Survival School, teaches a Kahnawà:ke-developed curriculum and issues its own diplomas, which have been recognized by CEGEPs and Universities in Quebec since 1979. The curriculum includes quantitative skills development (mathematics, science), social studies, language arts, and both Kanien'keha and French language courses. CEGEPs have accepted the diplomas because they recognize the education provided by the Kahnawà:ke Survival School as equivalent to education provided by other schools in the province.²² First Nations who are able to negotiate for external recognition of their diplomas, based on their own standards, should have the right to do so.

We recommend that the Proposal be revised to affirm the right of First Nations to develop their own education standards, so long as they ensure that their diplomas are widely recognized. To ensure that schools are accountable, they will be assessed based on their own standards. In developing minimum education standards, First Nations may choose to develop standards based on the provincial standards or the International Baccalaureate, or they may develop their own standards.

5. First Nations should have the right to develop their own teaching certification standards, especially in light of interests in protecting language and culture instruction, and respecting cultural competence as a core skill.

Kahnawakehró:non oppose the requirement that teachers must have a “teaching certificate in good standing issued by a provincial education ministry or a recognized Canadian teacher certification authority.”²³ First, cultural competence is a critical factor that determines the

²² See *General and Vocational Colleges Act*, CQLR c C-29, s. 18–19.

²³ Aboriginal Affairs and Northern Development Canada, *supra* note 2, at s. 23(2)(c).

effectiveness of teachers in First Nations schools, and is a core skill required for teaching in First Nations education systems. External certification authorities do not include cultural competence as a key factor in their certification. As such, certification by one of these authorities does not adequately measure whether an individual is qualified to teach in a First Nations school.

Second, and related, a number of teachers who are culturally competent and uniquely qualified to teach certain skills, such as language or cultural instruction, do not have certification by external authorities. To impose an external certification requirement would effectively limit the ability of First Nations schools to provide immersion, language, and cultural instruction to students. Because language and culture are priorities for many First Nations communities, and particularly for those First Nations whose languages are endangered as a result of Canada's past education policy, First Nations communities should not be limited in their ability to provide such instruction.

We recommend that the Proposal respect the right of First Nations education systems to develop their own teaching certification standards, which may include cultural competence as a factor, to meet the unique needs of First Nations communities.

6. Proposal should recognize the right of First Nations to articulate eligibility criteria for education access.

An important principle of First Nations Control of First Nations Education is the ability of First Nations to determine and define the scope of the community's education system. Some communities embrace an education model focusing on primary and secondary education, whereas others envision a system of lifelong learning. For example, a community's education vision might also include language nests and pre-Kindergarten education. Similarly, First Nations may have different views about who has access to their education systems. Some First Nations may wish to make their schools accessible to community members, regardless of their residence.

The Proposal suggests that elementary and secondary education access is limited to those "who are ordinarily resident of a reserve of the First Nation and who are between the ages of six and 21 years." While this may be an appropriate minimum standard, particularly for the purposes of calculating the Government of Canada's financial commitment for First Nations education, First Nations may have an interest in providing education access to individuals beyond the stated age range. First Nations may also have an interest in making their schools accessible to individuals who do not ordinarily live on reserve.

To be consistent with the principles of First Nations control of education, the Proposal should acknowledge the right of First Nations to define the scope and access of their education systems, and to allocate funding based on their education system's vision. This would provide First Nations with the flexibility to design their education systems as they see fit, without being constrained by the FNCFNEA or earmarked funds.

7. Commit to protect existing First Nations education programs, including those that target pre-kindergarten and post-secondary education.

We are concerned that the Proposal is silent on pre-kindergarten and post-secondary education, as well as the status of existing education programs. AANDC's Post-Secondary Student Support Program ("PSSSP") currently provides financial assistance to First Nations students who are enrolled in eligible post-secondary programs, including CEGEP, undergraduate programs, and advanced or professional degree programs.²⁴ In 2011-2012, AANDC invested \$322 million into post-secondary education to support First Nation and Inuit students across Canada. First Nations and designated First Nations organizations administer this program and distribute funding to eligible students. In Kahnawà:ke, the Kahnawà:ke Education Center, with the KCSC's oversight, distributes funding to students. Similarly, the First Nation Student Success Program ("FNSSP") is a proposal-driven program that assists First Nation educators on reserve to improve school results and supports projects that increase students' achievement levels in literacy, numeracy, and retention.²⁵ Other important programs include the AANDC's New Paths for Education, Education Partnership, and Special Education programs, as well as Health Canada's Aboriginal Head Start On Reserve Program. The Proposal is silent on the status of these programs.

The Proposal would repeal sections of the *Indian Act* related to education. At the same time, FNCFNEA is meant to be the exclusive legislation governing First Nations education. This creates confusion on the status of pre-kindergarten and post-secondary education, as well as the status of existing programs supporting First Nations education.

We believe that the Proposal should be revised to clearly articulate that FNCFNEA includes within its scope pre-kindergarten and post-secondary education, and that FNCFNEA will protect existing First Nations education programs, including, among others, PSSSP, FNSSP, Special Education, Aboriginal Head Start, Education Partnership, and New Paths for Education.

8. Remove liability waiver provisions for Her Majesty, the Minister, any employee or agent of Her Majesty, and the temporary administrator.

As currently conceived, with few exceptions, the Proposal would apply universally to all First Nations communities. Further, First Nations would not be given the opportunity to opt-out from the legislation's application and to continue administering education under existing arrangements. Given the mandatory nature of the Proposal, vast new responsibilities for First Nations schools and administrators, authority of the Minister to intervene in the administration of and penalize First Nations schools under certain circumstances, and the lack of commitment to fund First Nations education based on real cost drivers and the desire to close the education gap, Canada should not be able to waive its responsibility for unknown negative impacts the

²⁴ Aboriginal Affairs and Northern Development Canada, "Post-Secondary Student Support Program," available at <http://www.aadnc-aandc.gc.ca/eng/1100100033682/1100100033683> (accessed March 23, 2014).

²⁵ Aboriginal Affairs and Northern Development Canada, "First Nation Student Success Program," available at <http://www.aadnc-aandc.gc.ca/eng/1100100033703/1100100033704> (accessed March 23, 2014).

legislation may have on First Nations students, schools, and communities. Rather, because the Government of Canada is spearheading this legislation, Canada should retain the risks associated with the legislation.

We recommend that the Proposal remove all liability waiver provisions.

V. Conclusion

Canada should abandon its current legislative proposal, and instead initiate a new process for developing federal education policy, by working collaboratively with First Nations in designing and implementing a consultation process and policy acceptable to First Nations which respects their jurisdictional control. Further, notwithstanding the official Kahnawà:ke position, we recommend the following changes to the Proposal:

- ❖ Create exemption from application of the Act for First Nations bands willing to either maintain existing financial and administrative arrangements with AANDC or to negotiate separate education agreements;
- ❖ Clarify and limit the Minister's role to receiving and reviewing reporting, and to providing technical and financial support to First Nations for implementing administrative and operational responsibilities;
- ❖ Funding:
 - Statutory commitment to close the First Nations education gap within 10 years, both in terms of performance outcomes and funding disparities;
 - Statutory commitment to provide adequate FNCFNEA implementation resources, including funding based on real cost drivers to meet new and existing responsibilities;
 - Provisions clearly explaining how funding amounts are calculated;
 - Flexibility in funding administration;
- ❖ Recognize First Nations education and teacher certification standards, as well as eligibility criteria for access to education, in light of First Nations interests in incorporating language, culture, and indigenous approaches into education systems;
- ❖ Commitment to include within the scope of the legislation K-12, pre-K, and post-secondary education, and to protect existing First Nations education programs, including, but not limited to, the Post-Secondary Student Support Program and the First Nation Student Success Program;
- ❖ Given the mandatory nature of the Act, remove liability waiver provisions for Her Majesty, the Minister, any employee or agent of Her Majesty, and the temporary administrator.

Thank you for your consideration of our comments and recommendations. Please feel free to contact Skawenní:io Barnes at sbarnes@jd14.law.harvard.edu with any questions about this submission.

Respectfully submitted,

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The Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development
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* This comment letter was written by Skawenní:io Barnes, a community member and graduate student at the Harvard Law School and the Harvard Kennedy School, with contributions by an ad hoc committee of the Kahnawà:ke Education Working Group (“**KEWG**”). KEWG was brought together by the Kahnawà:ke Combined Schools Committee (“**KCSC**”), the Kahnawà:ke Education Center (“**KEC**”), and the Mohawk Council of Kahnawà:ke (“**MCK**”) to analyze, share information, and facilitate the development of a community position on federal education legislation.