Overview of the Benefits of First Nations Language Immersion, Wise Practices for Indigenous Language Immersion, and Provisions for Supporting Immersion Education in the First Nations Control of First Nations Education Act

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Abstract

In the wake of the Truth and Reconciliation Commission of Canada report into the ‘cultural genocide’ perpetrated by the State of Canada against First Nations, Métis and Inuit peoples, through the widespread use of Residential Schools, the federal government offered an apology and an apparent opportunity for reconciliation¹. Part of this programme was new legislation that would govern the relationship between First Nations and the federal government over First Nations education. Entitled the First Nations Control of First Nations’ Education (FNCFNE), the proposed bill promised a new deal and an apparent chance to renew a tarnished relationship. Yet in spite of its name, the bill offered very little in terms of progress. Indeed if it had been implemented, in many cases, the bill would have done little to increase First Nations’ control over the education of First Nations’ children and likely would have made effective language education extremely difficult. Indeed, this article’s analysis of the bill shows that, at its core, the law represents little more than the reinforcing of existing settler-colonial power dynamics. In particular, while it would have shifted virtually the totality of administrative responsibility for on-reserve education to First Nations it would have reserved ultimate power – manifest through control over funding – to Ottawa. As a result the FNCFNE would have represented a profound step in undermining First Nations language rights and language education in Canada.

Keywords: Language Rights, Indigenous rights, colonialism, education

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Introduction

Although language rights have yet to be enshrined in their own international law, they are a widely recognised basis for cultural integrity and wellbeing.² Moreover, with particular reference to children who are Indigenous, Article 30 of the UN Convention of the Rights of the Child (UNCRC) states:

[A] child...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 practise his or her own religion, or to use his or her own language. (United Nations 1989)

This recognition of the importance of ensuring children have the right to an education in their traditional language finds support in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2008). Article 14 establishes a responsibility on the part of States to “take effective measures” to ensure that Indigenous children have access “to an education in their own culture and provided in their own language.”

These international legal documents underscore that language rights are important both in terms of their inherent historical, social and cultural value but also in terms of their direct contribution to the health and happiness of Indigenous communities and individuals (Skutnabb-Kangas, Nicholas, and Reyhner 2016). Yet for minority populations everywhere, and particularly for Indigenous populations who have undergone – or continue to experience – colonisation, access to their traditional (or native) language is frequently denied as a matter of policy, either implicitly or explicitly.

In Canada, the recent report of the Truth and Reconciliation Commission (TRC year) into residential schools not only found that the Canadian state was responsible for “cultural genocide” it also recommended the Federal government acknowledge that “Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them” through enshrining their protection in law (ibid, 2015, p. 2). The TRC also found that contemporary Canadian education systems remain slow in moving towards decolonisation and indigenisation, much less reconciliation. More broadly, Canada – in a reflection of its settler colonial heritage - remains officially a bilingual state wherein Indigenous language rights remain unfulfilled.

This paper provides insight into the ongoing colonial relationship between Indigenous peoples and the Canadian state through an examination of the specific context of First Nations language rights. In so doing, this article tells the story of the Federal Government of Canada’s recent attempt to reduce First Nations control over their education via the misleadingly named “First Nations Control of First Nations Education (FNCFNE) Act” which was proposed in 2014, though it was ultimately prevented from passing.

It is important to note that a core characteristic of this discussion wrests on the fact that, while there is undoubtedly continuity in Canada's colonial relationship with Indigenous peoples within the borders it claims, the specific methodology of this dynamic has evolved over time. This is to say, while the federal government has moved beyond use of residential schools, its relationship with First Nations peoples – and specifically with respect to education and language rights – remains colonial. Indeed, since at least the early 1990s (possibly earlier), the chief form of control exercised by the federal government over First Nations education has been manifest through exacting paternalistic control over funding (Fallon and Paquette 2012). This form of control was evident at the very heart of the FNCFNE.

According to an early analysis by Rae (2013), the Act would have shouldered First Nations with almost all the responsibilities of running on-reserve schools but transferred control over funding and governance decisions to the Ministry. There was no guarantee that resisting it would have been to the long-term benefit of First Nations. Time and time again throughout the history of the relationship between the State of Canada and First Nations, the Crown has rowed back on its promises, undermined trust and used whatever powers it has had at its disposal to keep First Nations as weak as possible (see Finley 2013, *inter alia*).

Thus it is a consequence of settler colonialism that - either directly, or indirectly - First Nations have been repeatedly faced with the same essential question, again and again: do you challenge the federal government when it makes decisions on your behalf or do you support its actions – even when they are not in line with your own visions for the future or aspirations for your community – because it is known from past experience that the alternatives may be worse?

In the case of the FNCFNE, this question is more specific: should First Nations accept a flawed and, apparently, disingenuous attempt by Ottawa to reform an already problematic system, or do you risk angering the government, which also happens to be your primary source of education funding? In this case First Nations continued a long history of resistance and choose to, once again, take on the colonizing State. They who? prevented the Act from passing and, in the view of many, won a historic victory (cite). As a result of this resistance along with ongoing mindfulness and persistence, a historic opportunity may come to be realized to reshape First Nations language education in a good way. This article, in a small way, tells the story of why true First Nations control over education is essential and tentatively, and humbly, suggests a potential path forward. It provides a brief introduction to the benefits that immersive education may hold for both Indigenous students and their communities. Second it examines the ways in which this immersion can take place, including a summary of wise practices in the development of immersion programs. Third, it looks at existing barriers to success and, in particular, at recent efforts to hamper First Nations' "jurisdiction" or control over First Nations education. The article then moves on to look at the FNCFNE Act in detail, which was proposed by the Federal

government in 2014. In doing so, it constitutes the first major comprehensive analysis and response to the FNCFNE that has been published for widespread readership and it stands as a small example of the kind of difficult decisions facing First Nations on a regular basis. It also includes a suggested course of action for First Nations who were asked to respond to (i.e. support) the Act.

The Benefits of Language Immersion for Children, Youth and Community Wellbeing

Bilingual immersion programs are an effective tool for reviving and preserving Indigenous languages (Cummins 2009). Language immersion has also been found to be one of the most reliable methods for improving education outcomes for Indigenous students (Fontaine 2012). Early childhood immersion in First Nations languages has been linked to “higher income, better health, greater social and civic engagement, lifelong access to learning and less involvement with the justice system” (ibid, 10). In general, quality immersion programs that promote bilingualism provide students with “greater mental flexibility, enhanced abstract thinking skills, the ability to think independently of words, and superiority in concept formation,” as well as enhanced problem-solving skills, and more creativity (ibid, 2).

Children and youth in immersion programs where Indigenous communities have a greater degree of control over the development of curriculum and pedagogy go further with their education (Stiles 1997). Successful immersion programs also have a significant impact on broader social cohesion. They help to reduce gang activity, alcohol and drug abuse, suicide rates and high school dropout rates (Stiles 1997). Reported success rates from Indigenous immersion programs include, 1) 90% of students graduating and going on to postsecondary education compared to the average rate of 60%, 2) improved retention rates, and 3) better cognitive results across a range of topics (Fontaine 2012).

Indigenous immersion programs can also help to prepare students for greater success in mainstream society (ibid, 2012). These programs help students to develop knowledge about their traditions and culture, pride in their First Nation’s identity, as well as higher levels of “self-esteem, self confidence and cultural identity.” (ibid, 9) Immersion programs that promote bi-culturalism (discussed later in this article) tend to be the most successful as they provide students with an understanding of traditional First Nations and “Western” worldviews that can help them to competently and confidently bridge these two worlds later in life (Stiles 1997).

Background to Language Immersion

The term ‘language immersion’ is often used to refer to two different types of education programs: (a) planned programs of bilingual second language instruction with the goal of being able to speak two languages well (Cummins 2009, 2) and (b) “submersion” education, which generally has the goal of speaking the dominant language well.

Historically, submersion programs have been used to provide instruction in the dominant language to students who speak a minority or Indigenous language. Instruction is given entirely in the dominant language with the goal being for students to speak the dominant language well (Cummins 2009). This process is known as “subtractive” as the dominant language comes to displace, and eventually replace, the traditional Indigenous language of the speaker, effectively subtracting from the child’s linguistic repertoire (Bear Nicolas 2009).

Subtractive or submersion language programs are now known to contribute to educational failure, and social, cultural and mental harm, including social dislocation (Bear Nicolas, 2009, 5). Historically, children in these programs received no support and were often left to “sink or swim”, thus giving rise to the term submersion (Bear Nicolas, 2009, 5-6; Cummins 2009, 2). This approach was generally used in residential school systems where children were submerged in the dominant language and culture with little or no support or recognition of their own identities and languages.³

Well-planned immersion programs, however, provide an important tool to revitalize traditional Indigenous languages. The benefits of immersion programs as a means of language revitalization often depends on the approach and the amount of support students receive. Immersion programs that focus on the needs of students and have a structured and balanced approach that are led and supported by the First Nation community are the most successful ones (cite).

There are a number of different types of immersion programs that could assist in First Nation language revitalization, including middle immersion, late immersion and, in particular, early immersion overall (Cummins 2009). Early language immersion programs generally start in pre-school or kindergarten. Students in these programs are immersed in the First Nation language of instruction for two to three years until formal teaching in the dominant language (English or French) is introduced in grade two (Cummins 2009). Middle immersion programs generally begin in grade four or five with 50% of courses taught in the First Nation language and 50% in English. Late immersion generally refers to the incorporation of language immersion instruction into grades seven or eight.

Wise Practices in Immersion Programs

Studies of immersion programs around the world, including Indigenous language revitalization programs, have identified a number of ‘wise practices’ or core features that can support the development of success. The following list summarizes the wise practices in a selection of immersion programming in operation in First Nations communities across Canada. This list has been narrowed down to wise practices that fit within and support the mandates and goals for First Nations control of First Nation education as set out in the AFN’s 1972 and 2010 FNCFNE policies (AFN 2010) and AFN Resolution 21/2013 (AFN 2013).

1. Parent and community involvement: The most cited wise practice among Indigenous language immersion programs was the need for a high level of parent and community involvement (Pease-Pretty On top, 28; Stiles 1997). Ojibwe teachers found collaboration with “students, staff members, parents, community members, language learners, and language speakers” to be essential to learner success (McInnes 2013, p. 8). Use of the First Nation language at home and by parents is also essential. Some immersion programs have found success by offering parents language classes to help them support their children more in school (Pease-Pretty On top; Stiles 1997).

Moreover, planning and problem solving with the community, parental support, and community partnerships are essential elements in all of the successful Indigenous language immersion programs reviewed, including the First Nations immersion programs discussed in the next section (Pease-Pretty On top; Stiles 1997).

2. Primary language of instruction: The First Nation language of immersion should be the main language of instruction. The First Nation’s language should not be a “subject” as in monolingual or second language programs. It needs to be the language used to teach other subjects (Cummins 2009).
3. Bilingualism: Programs should aim for “additive” bilingualism where students learn the First Nation immersion language while continuing to develop their first language (English or French) (Cummins 2009). While standard early immersion and transitional programs often seek a 50/50 split between the First Nation immersion language and English, some programs such as the one at Kihew Waciston in Onion Lake support teachers and students in using Cree up to 90% of the school day.⁴
4. Bi-culturalism/culture in the curriculum: According to the Royal Commission on Aboriginal Peoples, “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.” (Hutchins Legal 2013, 4) This can be seen in how Western and Canadian culture is imbedded in provincial legislation.

Historically, the Canadian government has placed limits on the incorporation of First Nations culture into curriculum. However, the inclusion of culture in the curriculum of Indigenous immersion programs has been proven to be an essential element for program success (McInnes 2013). Failing to include culture in immersion programs may “doom” students to limited use of language (Stiles 1997, p. 148-262).

Success also requires that the inclusion of cultural programs extend far beyond having Elders teaching traditional crafts in the classroom. Cultural programming should be included as both a subject and an embedded learning experience. This means that First Nations’ culture needs to be included in the learning materials, curriculum, and pedagogy (McCue et al. 2012), in a manner appropriate to each First Nation’s culture. In this way First Nations culture becomes embedded in all aspects of the learning experience the same way that “Western” culture is embedded in provincial schools. This approach is called biculturalism. Indigenous language programs that combine

biculturalism and bilingualism as foundational goals have been found to be more successful than those that focus on language alone (Stiles 1997). This link is underscored by the UNDRIP, UNCRC, and other international instruments that identify the relationship between Indigenous culture and language education.

5. Literacy: The opportunity for students to use literature and resources in their Indigenous language is another powerful tool for immersion success. Literature in the traditional language allows children to immerse themselves more fully in the language and supports language development (Stiles, 1997; Pease-Pretty On top). Many programs offer students the opportunity to create literature and materials written in the Indigenous language and then use these as part of the curriculum. This helps to link language, culture, reading and writing and builds a library of resources for the school (Stiles, 1997; Pease-Pretty On top). Many programs have also found creative ways to link literacy, oral literature, and the arts (Pease-Pretty On top).
6. Support: Learners need to receive support for both the First Nation immersion language and their first language (Cummins, 2009). Many immersion programs also use language immersion camps, home-based learning and other forms of experiential learning to help support students (Pease-Pretty On top).
7. Learners: Learners begin the program with similar levels of ability in the immersion language (Cummins, 2009).
8. Teachers: Teachers are bilingual (e.g. speak both Ojibwe and English fluently), are committed to teaching the First Nation's language, and have the necessary expertise (Cummins 2009; Pease-Pretty On top). Whenever possible, teaching staff should include First Nations teachers, as well as Elders, traditional teachers, and community members (Pease-Pretty On top).
9. Teaching methods: The use of traditional teaching methods, including Indigenous ways of knowing, learning and being, as the primary teaching method produces greater success. Many successful immersion programs also use blended models that incorporate traditional First Nations with Western and other innovative teaching methods. Examples include Montessori pre-school learning strategies and "Total Physical Response" (TPR) methods for language learning (Pease-Pretty On top).
10. Technology: There is some controversy over the use of technology for Indigenous language learning when it takes away from hands-on direct learning. Technology is most successful when used to support immersion programs that lack funding for language resources and where there is a high degree of language loss (Pease-Pretty On top). Online resources can also help students link to dictionaries, games, puzzles, and other innovative resources and methods of computer assisted language learning.
11. Sustainable and Needs-based Resources: It is important that immersion programs have stable and adequate funding to support all aspects of the development and implementation of the program. This includes resources to conduct extensive and ongoing research into wise practices to help students learn their traditional languages

and cultures as well as funding to develop and continually update resources (Stiles 1997).

There are many other wise practices for the development of immersion programs that are beyond the scope of this paper to explore. Not all programs reviewed used all of the wise practices noted above. The choice of what wise practices to use depends on the type of immersion program a First Nation wants to develop, access to available resources, community and parental support, the level of control a First Nation has over decisions about curriculum, pedagogy, the extent of language use, and commitment from the Federal Canadian government that ensures sufficient, adequate and stable funding for, among other things, skilled teaching staff and the production of resources that most First Nations need to develop and implement successful and effective language immersion programs.

Barriers to success

One of the barriers for First Nations has been the lack of First Nations' control over assessment methods. Often provincial and other standardized tests are imposed on First Nations without being adapted to take account of the use of a First Nations' language as the primary language of instruction in schools (McCue et al. 2012, 19). This can result in low test scores that do not accurately reflect what students have learned, particularly learners in early immersion and transitional programs.

Other barriers include Federal education policies that continue to promote assimilation and require adherence to provincial curriculum. These policies undermine success in First Nations' education rather than supporting First Nations' to develop their own innovative, culturally appropriate and child centered curriculum (McCue et al. 2012). Success in First Nations' education has also been undermined by a consistent and historic lack of adequate, stable and needs-based funding that would support successful Indigenous language immersion and biculturalism (Haldane et al. 2011). Other resource barriers include the overall lack of culturally appropriate resources written in First Nations' languages, (Pease-Pretty On top) the dearth of fluent teachers with teacher training, and the need to comply with Canadian government standards for teacher training rather than First Nation standards (Stiles 1997).

There are also a number of social barriers that First Nation immersion programs on reserve may need to overcome. As a result of Canada's attempts at cultural genocide, many First Nations parents do not speak their traditional language, which makes it difficult for them to support children in the home. Some programs may also encounter an initial lack support for immersion programs because Elders and parents fear that their children will experience the same sort of oppression they experienced by the Canadian government for using their traditional languages (Stiles, 1997). First Nations children may also suffer from physiological and physical barriers to success including intergenerational trauma, learning disabilities, "fear, neglect, instability, hunger" and other negative influences (Haldane et al. 2011).

The “Cree Way Project”: A Successful Model of First Nations Language Immersion

The “Cree Way Project,” started by First Nations in Quebec, is one of the many examples of a successful language immersion program in Canada. This program was started in 1973 “in reaction to the inappropriateness of Canadian curriculum for Cree children” (Stiles 1997). The program uses culture and language to revitalize and validate Cree identity for learners, and focuses on “curriculum reflecting Cree culture and the Cree conceptual framework” (Stiles 1997). The program was initially developed by the Cree of Waskaganish but has since been adopted by at least seven other James Bay communities (Stiles 1997). It has also served as the basis for other Cree immersion programs across Canada. As a result of community commitment, over the past four decades, local community workshops have helped to develop over 500 textbooks in the Cree language that are used in the program (Stiles 1997).

One of the primary reasons for the success of the Cree Way Project is that the James Bay and Northern Quebec Agreement (1975) gives control and authority for schools directly to the First Nation through its school board (Stiles 1997). The Cree School Board is one of the very rare examples of a First Nation having almost total control of its children’s education (McCue 2012). Through the School Board the First Nation has the power to change curriculum, develop courses and texts, and decide what teaching materials are appropriate for Cree students (Stiles 1997; McCue 2012). As they have actual control over their education, the Cree also have the power to train their own teachers and to develop their own assessment methods (McCue 2012). The community has also managed to develop supportive collaborations with local universities that certify language teachers for the Cree Way Project (Stiles 1997).

A second reason for the success of the Cree Way Project is that the Cree School Board has been funded since 1978 “by a special funding formula agreed to by both the provincial and federal governments” (McCue 2012). Under this agreement the federal government pays 75% of the costs of education while Quebec covers the remaining 25%. What is even more rare is that the total amount of funding that the federal government provides to the Cree School Board exceeds that provided under the funding formula for other First Nations in Canada (McCue 2012). Having access to this type of stable and adequate funding, unlike most First Nations, has likely been instrumental in helping the Cree School Board develop appropriate resources and needed structures to support the successful immersion education of their students.

There are numerous other examples of successful First Nations and Indigenous immersion programs in Canada and around the world.⁵ These examples provide a framework for Indigenous language programs that First Nations communities and the Canadian government may wish to explore further.

Current Context: Recognition and limits of First Nations Control

Canadian Courts have recognized that First Nations are “free to control the education of their children” and to make arrangements for their own education programs (Hutchins Legal 2013, 5). While the *Indian Act* gives the Minister of Indigenous and Northern Affairs (previously, the Minister for Indian Affairs) the “statutory responsibility to ensure that appropriate educational facilities are available,” the *Indian Act* does not prevent First Nations from controlling how educational services are delivered in those facilities (Chadee v. Ross 1996). The courts have also held that Band Councils that exercise control over their own education can do so without “the direction or supervision of the Minister.” (Chadee v. Ross 1996)

The *Indian Act*, however, gives the Canadian government the ability to limit First Nations’ control over education at the Minister’s discretion. Sections 114-118 of the *Indian Act* gives the Minister, or Governor in Council, the authority to (1) enter into agreements with the provinces and others for the education of First Nations children, (2) make regulations about education standards (3) regulate attendance, and (4) determine which school an “Indian child... shall attend” (Indian Act, Section 114-8.). These powers are not mandatory; the *Indian Act* gives the Minister the choice not to use these powers (Chadee v. Ross 1996). When the Minister chooses not to exercise these powers then, in theory, First Nations are free to control those decisions over education themselves.

In practice, the Minister has used funding rather than the *Indian Act* to exercise control over First Nations since at least the early 1990s (Fallon and Paquette 2012). The vast majority of funding for on-reserve education comes from the Federal government through contribution or other funding agreements. The lack of independent funding has created a relationship of dependence between First Nations and the Federal government. As a result, the terms of these funding agreements generally give governance and managerial authority over First Nations’ education to the Minister, or others designated by the Minister, in exchange for funding to the First Nation to operate (administer) the educational services.

The FNCFNE Act offers the Minister the opportunity to avoid having to impose control over First Nation’s education through individual funding agreements or by using the *Indian Act*. Instead the Act transfers governance decisions and oversight powers to the Minister in a similar way as many education funding agreements. In exchange, the Act delegates limited control over administrative responsibilities to First Nations and guarantees some funding (FNCFNEC 2014). Since there is no opt-out option under the Act these conditions would apply to all First Nations in Canada at the same time, unless they are already exempted under the Act.

FNCFNE Act: Provisions for First Nations' Control Over Education

The FNCFNE divides jurisdictional and administrative control over First Nations' education between the Canadian government (i.e. the Minister of INAC) and First Nations governments (Band Councils). The Act gives limited control over the administration of education to First Nations and almost complete control over governance and regulatory decisions to the Minister. If the Act had come into force, First Nations would lose the ability to make decisions about jurisdictional (governance) issues that fall under the Minister's control.

Under the FNCFNE, First Nations would have been given limited powers to administer education on reserve (Sections 20-21). In most, if not all, cases these administrative powers are or can be limited by the Act or regulations. The Minister has complete control over regulations, which can be easily made or changed without much review (Section 48) (Rae 2013). There was also no requirement that Parliament or First Nations approve regulations or that the Minister consider any advice given by First Nations about the development of a regulation.⁶

The Act would have also granted the Minister the power to take away a First Nation's control over administration of education and give that control to a temporary administrator (Sections 40 to 42). This arrangement appears to be similar in concept to third-party management. This gives rise to the possibility that a First Nation placed under temporary administration could lose all control over education on reserve until such time as the Minister determines otherwise (Section 42(4)). The Act also leaves First Nations with little to no recourse regarding this type of decision, as it does not provide any method of appealing a decision of the Minister to appoint a temporary administrator.

Sections 20-27, and 30 set out the "governance" powers First Nations retain under the Act. The following is a summary of the powers that would have been granted to First Nations had it passed. The limited governance responsibilities given to First Nations under the Act allow a First Nation Band Council to:

1. Administer schools on reserve, in accordance with the functions set out in the Act and the regulations developed by the Minister (Sections 20-21).
2. Enter into contracts for the provision of certain services as set out in the Act (Section 22).
3. Enter into tuition agreements, subject to the regulations (Section 23).
4. Enter into agreements with another entity to administer the on-reserve schools in the First Nation, in accordance with the Act (Section 24)
5. Consult students, their parents and Elders about education as set out in the Act (Section 25).

6. Charge reasonable fees to students to participate in “optional activities” (Section 26).
7. Delegate the First Nation’s powers under the Act to a corporate entity, with the approval of the Minister (Section 27).
8. Make bylaws subject to limits set out in the Act and Regulations,⁷
 - a) about school attendance for students not ordinarily resident on that reserve (s. 30(1)) .
 - b) requiring individuals 4, 5, 17 and 18 years of age to attend school (s.8(3), (4), (6));
 - c) fixing the reference date for the school year (s.9(5)).

The Act also gives First Nations other minor administrative powers including the hiring of the principal, director and staff so long as it is done in accordance with the Regulations and the Act.

Devolution of Powers: Funding and Resource Issues

Given that First Nations already have an inherent right to make jurisdictional, as well as administrative, decisions about education it is debatable whether the Act actually devolves power to First Nations or takes power away from First Nations and allocates it to the Canadian government. In practice, the extent to which a given First Nation would have gained, or possibly lost, control over the administration of education would have likely depended on how much control they currently had under their existing contribution or other types of education agreements. Unfortunately, it is beyond the scope of this paper to explore this topic further but it is suggested that additional research be undertaken on this issue, in particular a comparative analysis of First Nation control under existing contribution agreements as compared to under the Act.

What the Act does is give First Nation’s almost all the responsibilities and obligations for the running of on-reserve schools but leaves the Minister control over funding and governance decisions (Rae 2013). The Act and regulations set out very specific requirements for how First Nations are to administer schools. This includes the requirement that curriculum and instruction meet Provincial, or other established, standards and the addition of new levels of bureaucracy and oversight. Meeting these and the other requirements set out in the Act would have required needs-based resources. Unfortunately, there is nothing in the Act that required Canada to consider the needs of First Nations when determining the funding formula or annual spending limit.

The Act also put no requirements on the Canadian government to provide sufficient funding for First Nations to carry out their responsibilities under the Act. The Act did provide that when setting the funding formula the Minister must “allow for” the costs of providing instruction and access to “educational materials, school equipment and transportation” and other services set out in the regulations at a “quality reasonably comparable to that of...a similarly sized [provincial] public school...located in a [similar]

region”⁸. The amount paid to First Nations to administer schools was also supposed to include funding to support the study of a First Nation language or culture, and to manage the property of the school being administered. However, there was no requirement that this funding amount be needs-based, predictable or stable, or fully support language or cultural education.

The Act also stated that the Minister was to provide funding for First Nations schools in accordance with the regulations made by the Minister (43(1)). This means that the Minister could set and change the funding formula without any requirement to consider the input of First Nations. Since the regulations had not been released, it is not possible to assess how the funding formula would have actually impacted the ability of First Nations to carry out their responsibilities under the Act. History, however, indicates that there may have been associated caps or other limitations that may have undermined First Nations’ access to stable and sufficient funding resources. This view is supported by elements of the Act that gave the Governor in Council the ability to set a limit on the amount of funding to be spent on First Nations’ education annually without the requirement to consider how much funding is actually needed for First Nations’ to deliver and administer a quality level of education on reserve, which includes traditional languages and cultures (Section 45[1]).

The Act also made First Nations responsible for administering education services even if they did not receive sufficient resources or funding from the Minister to carry out these responsibilities (Section 7). Further, the Act was devoid of mechanisms for First Nations to hold Canada accountable for not providing sufficient funding. In fact, the Act contained a clause in favour of Canada that limited its liability if a First Nation failed to fulfill their obligations under the Act, regardless of the cause (Section 46). Further research is needed to determine if this clause might have actually prevented legal action against Canada for anything it did or failed to do, including providing inadequate funding, so long as Canada could show it had acted in good faith, which likely would have been determined by non-Indigenous bodies.

The Act provided no such protection to First Nations against liability should they fail to carry out their obligations even if it was because of circumstances beyond their control (for example underfunding). It is recommended that further research and legal analysis be done to determine if the clause limiting Canada’s liability clause could have been used to protect Canada against legal claims for inadequate funding and the likelihood of Canada being successful with this argument.

Opportunities for Increasing First Nations Control over Education

Despite the fact that the FNCFNE failed to pass, it offers an opportunity to gain valuable insight into the nature of what the Federal Government sees as its vision for First Nations education. It is therefore a useful exercise to seek to understand the Act fully and use this knowledge as a basis for future interactions with the Canadian State on the issue of First Nations education.

Under the FNCFNE there would have been no easy way for a First Nation to regain control over decisions about education that are given to the Minister under the Act. The Act would have applied to all First Nations, unless they are among the few exempted under Section 5 and there is no opt-out option under the Act. It appears, if the FNCFNE had passed, there would have been only two ways a First Nation could be exempted and regain control over decisions given to the Minister. These are (a) sign a self-government agreement that includes education, or (b) lobby the Minister to pass legislation allowing the First Nation the power to make its own laws about education (FNCFNE 2014, section 5).

Curriculum Development under the Act

The Act would not have given any specific powers over curriculum development to First Nations. Instead it would have set standards for curriculum that on-reserve schools must meet, regardless of their relative applicability. Section 7 of the Act required that on-reserve schools provide a level of education that meets the standards set by (a) the Minister of Education of a province, (b) the International Baccalaureate foundation, or (c) any equivalent graduation certificate or diploma approved by the Minister (FNCFNE 2014, Section 7[3]). Yet, there was no requirement that the education provided in on-reserve schools meet any standards set by First Nations themselves.

Section 7 of the Act further suggests that the curriculum on-reserve must follow the curriculum set by the Province, an international body, or be approved by the Minister. The Assembly of First Nations' analysis of the Act indicates that reference to an "equivalent graduate certificate or diploma" may have been intended to be an option for First Nations-based curriculum development (AFN 2014). However, there was nothing in the Act that clearly articulated this principle or otherwise indicated that First Nations would have control, or even a say, in setting the requirements for the equivalent graduation diploma. Control over this was given to the Minister under the Act.

Section 21(c) of the Act might have been interpreted as providing First Nations with some control over curriculum under the auspices of their responsibility to establish an education program in any school that they administer. According to the Act, an education program "includes the subjects that are taught at a school as part of a course of study, the learning objectives and the manner of assessing the students' achievements of those learning objectives" (FNCFNE, Interpretation, Section 2). If the term "establish" was interpreted to include the development of education programs, rather than just the administration, then this section may have provided some measure of control to First Nations over learning outcomes, assessment methods, and possibly curriculum. However, any language programs developed would still have needed to meet the provincial and other standards set out in Section 7 of the Act (discussed above).

Powers to develop and implement cultural, language and traditional teaching programs

While the Act gave First Nations the option to include language or culture in education programs, it did not give First Nations any clear and direct powers related to curriculum or program development. There was also no mention in the Act about programs for traditional teaching, lifelong learning or alternative ways of knowing, although these could potentially have been interpreted as falling under the heading of culture.

There are only four sections in the Act that deal with language or culture. The following is a summary of each section along with an explanation of how these may have actually limited First Nations control in this area:

1. *Language of Instruction (Section 21(2)):*

This section required that the language of instruction be English or French. It also allowed a First Nation to include instruction in a First Nation language but this must have been in addition to instruction in either English or French. Given that the First Nation language is “in addition” to English or French, it is unlikely that a First Nations language would have been considered as the primary language of instruction. This could have been a barrier to language immersion programs where the First Nation language is used more than 50% of the time.

2. *Limits on the extent of instruction in First Nations' languages (Section 48(1)(d)):* This section gave the Minister the power to limit the extent to which a First Nation's language could have been used as a language of instruction through regulations. It also gives the Minister the power to define the term “language of instruction”. Since the Minister has complete control over regulations this means that First Nations can only teach First Nations' languages in on reserve schools to the extent the Minister allows it.

3. *Language and culture are optional programs (Section 21(3)):*

This section allows a First Nation to give learners the opportunity to study a First Nation's language or culture as part of an education program. This clause is optional, meaning there is no requirement for a First Nation to offer language or cultural programming. It is unclear whether the use of the term “or” means that the First Nation can provide *both* a language and culture program or just one or the other. It is also unclear if the culture program constitutes an “optional activity” for which First Nations can collect additional fees. If culture was seen as “optional” under the Act this may have resulted in limited Federal support for cultural programs.

4. *Community Participation (Section 25):*

This section requires that a First Nation provide students, parents, Elders and other community members with the opportunity to provide advice on education programs relating to First Nations languages or cultures. There is no requirement that the First

Nation or the Minister actually consider this advice when developing education programs or regulations.

As discussed above, any powers First Nations may have had over the development of language and culture programs are limited by the Act or regulations. While it is possible that the regulations may have provided First Nations with more control over curriculum development and language and culture programs, this is completely up to the discretion of the Minister to decide. As a result it is not possible to provide a clear assessment of how much, if any, control First Nations may have gained over the development of curriculum for language and culture programs since the regulations were never released. Even so, the Act would have provided little stability to First Nations' cultural or immersion programs since the Minister could change the regulations without review or approval by First Nations.

Possible limits on Immersion programs

There was nothing in the Act that guaranteed the ability of a First Nation to implement an immersion program. The Act gave the Minister complete control to decide the extent that a First Nations' language could be used to teach students in on-reserve schools. This means it would have been up to the Minister to decide if First Nations immersion programs would have been possible and, if so, what type of programs would have been possible (i.e. monolingual second language vs. bilingual and bi-cultural immersion).

The ability for a First Nation to implement an immersion program may also have been limited by the requirement that education programs follow the standards set by the province or the International Baccalaureate (Section 7). The Act also limited immersion programs by requiring that English or French be the primary language of instruction, while First Nations' language programs are envisioned as an additional option (Section 21(2)). This may have prevented the development of early immersion and transitional programs and would likely have limited immersion programs to at most a 50/50 split between the First Nations language and English or French. The lack of emphasis on culture in the Act also indicates potential barriers to implementing or continuing the bilingual and bicultural language programs that have been proven to result in the greatest success for Indigenous language learners.

The Act further required that the Minister include funding "to support the study of a First Nation language or culture as part of an education program" (Section 43(4)). Again, the Act made no requirement that this amount be needs-based or that the calculation provide funding equivalent to that provided for a language program of a comparable quality in a similar provincial school. The language of the Act also suggests that the funding amount only needed to cover a language "or" a culture program. This could have meant that if a First Nation that wanted to provide both types of programs may have only been eligible for funding for one or the other.

Discussion

The FNCFNE, if passed, would have presented a significant challenge to First Nations language education and education at large. At its broadest, it reinforced the settler colonial relationship between the State of Canada and First Nations in the area of education. Put simply, under the Act, First Nations communities would have been forced into accepting nearly all the responsibilities of administering education on reserve but without any real control over the creation or execution of education policy. In other words, despite containing various claims regarding the devolution of powers to First Nations, real power over First Nations education – specifically in terms of funding and curriculum – would have remained with the Ministry for Indigenous and Northern Affairs.

The FNCFNE failed to grant any additional powers to First Nations over the critical issue of funding. Rather it would have made the relationship between the Minister and First Nations even more obviously unbalanced. This is because it would have granted the Minister virtually unregulated powers over funding with no requirement to consider and address the need and priorities of First Nations. In spite of this, the Act would have legally protected Ottawa and continued to make First Nations liable for administering education even if the Ministry failed to provide appropriate funding.

The FNCFNE would have directly prohibited the ability of First Nations to use First Nations languages as the main language of instruction – insisting on English or French – and also would have undermined the possibility of teaching First Nations languages in a culturally and pedagogically appropriate manner. This effect largely stemmed from provisions that made the instruction of First Nations languages and culture ‘optional’ programmes, which perhaps can be interpreted as a reflection of the importance placed on these issues by the Federal government of the day. Moreover, in terms of the possibility of implementing an immersion programme, again the Minister would, ultimately, have all the power. The FNCFNE would have granted the Minister (or other outside bodies) power to decide if First Nations immersion programs would be possible and what form such programs would take, as the Minister would retain ultimate control through its power over funding.

As this analysis demonstrates, in spite of the rhetoric of reconciliation that emerged from the Government of Canada following the release of the Truth and Reconciliation Commission report into Residential Schools – including an apology and a promise of a new way forward by then Prime Minister Stephen Harper in June 2008 – the FNCFNE demonstrates that Ottawa remained committed to a top-down relationship with First Nations over education. In short, the FNCFNE shows that considerable work is still needed with political and administrative officials for them to fully recognise the value of Indigenous language and cultural rights. The Act thus indicates a lack of interest in genuine progress on either First Nations’ leadership over education or the proper implementation of effective Indigenous language instruction.

Conclusion

There are many benefits of First Nation immersion education for the health, wellbeing and economic development of First Nations individuals and communities. Numerous factors are needed to support the development and continuation of successful and sustainable immersion programs. This includes First Nations control over teacher training, assessment methods, pedagogy and curriculum development as well as stable, needs-based funding at a minimum. The *First Nations Control of First Nations Education Act* would not have provided much, if any, control to First Nations over these factors. This could have proven to be a significant barrier to the successful development and implementation of First Nations immersion programs.

Taken as a whole, the Act likely would have reduced First Nations' jurisdiction over primary and secondary school education in on-reserve schools. This is because the Act infringes on a First Nation's inherent right to plenary and governance powers over their education (Hutchins Legal Inc. 2013). The enforceable parts of the Act did not recognize or give any special protection to a First Nation's inherent right to control over education. Rather, Section 4 of the Act says that the Act, at best, it is not meant to overrule or take away from the "protection provided for existing Aboriginal or treaty rights" (emphasis added). The Act also would have placed clear limits on a First Nation's inherent right to control their education by giving power over governance and policy decisions to the Minister.

Since the Act clearly states that it only gives First Nations administrative control, further research is needed to determine if, overtime, the government could have claimed that the Act shows a "clear and plain intention" to limit control of First Nations education to administration. It is possible the Canadian government, if challenged, might also have claimed that the Act was a reasonable infringement on a First Nations' inherent right to control over education as the interests of providing standards for educating First Nations children takes primacy. If these arguments were put forth successfully this would further limit the options available to First Nations to regain control over decisions about education that the Act gives to the Minister. It is recommended that further research and legal analysis be done to determine if the Canadian government could put forward these arguments and what their likeliness of success would be.

Essentially, the enforceable parts of the Act infringe on a First Nation's inherent right to control education on its territory, gives oversight and governance powers to the Minister, and leaves the ability to administer education to First Nations (FNCFNE 2014, section 3). This limited control over administration is repackaged in the Act as a privilege extended to First Nations by the Minister. At the same time, the Minister would have retained the ability to take away a First Nation's administrative powers at his/her discretion. There is also little in the Act to suggest that there would have been any remedy for inadequate and unequal funding levels, the provisions of needs-based or sustainable

funding, or any guarantee of adequate support to develop and maintain language and culture programs and resources.

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Notes

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- ¹ “Prime Minister Stephen Harper's statement of apology”, CBC News, 11 June 2008
 - ² This paper originated from work produced by Tracy Coates for the *Mamow Ki ken da ma win* (Searching Together) project. The *Mamow Ki ken da ma win* project was a long-term partnership between First Nations Chiefs, community leaders, Elders and youth from northern Ontario and the North-South Partnership for Children, Ryerson University and various other Ontario universities as well as voluntary organizations from southern Ontario.
 - ³ Bilingual language immersion programs differ substantially from monolingual programs with a second language option. In monolingual (second language) programs the First Nations language is taught as a subject, while all other courses are taught in the dominant language. A study comparing children in the bilingual Mi'kmaq Kina'matneqey immersion program with children in the Mi'kmaq second language program found all students had the same level of English but that immersion students had significantly better Mi'kmaq language skills. Second language programs do not succeed as well as immersion programs because they lack the necessary planning and curriculum supports needed for First Nations learners to become fluent in their traditional language, learn about their culture, and to revive the use of First Nations languages in their communities (see Fontaine 2012, 12-6).
 - ⁴ Quote by Cort Dogniez (First Nations and Métis education co-ordinator for Saskatoon Public Schools) cited in Author (2010). “History of Cree Language programs.” Cree Beyond Words: Reviving the Cree language in Saskatchewan. Online at: <http://creebeyondwords.com/?p=322>.
 - ⁵ International examples include: Welsh, Irish (Gaelic), Māori and Kichwa as well as the examples from North American cited in this article
 - ⁶ The *FNCFNE Act* gives First Nations the “opportunity to make representations” to the Joint Council about regulations, and the Joint Council must consider these representations fully. The Minister, in turn, must seek the advice of the Joint Council on the development of regulations. However, there is no requirement that the Minister follow or even consider the advice of the Joint Council. *FNCFNE Act*, Section 48(1) and (2). Online at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6532106&Col=1>
 - ⁷ Section 47(6) states that Bylaws made by a First Nations Band Council are not statutory instruments for the purposes of the *Statutory Instruments Act*.
 - ⁸ FNCFNE 2014, Sec 32 and 43 [2]