

MEMORANDUM

To: Negotiating First Nations
From: Morgan & Associates, legal counsel for FNEC
Date: November 5, 2019
Re: First Nation Education Law-Making Protocol models

GENERAL BACKGROUND

As part of an initiative to enable First Nations in BC to implement jurisdiction over education, the Education Jurisdiction Framework Agreement (“Framework Agreement”) was signed by the federal Minister of Indian Affairs and Northern Development, the Premier of British Columbia and the First Nations Education Steering Committee (“FNEC”) on July 5, 2006. This agreement was extended by agreement for five years in 2013 and a further three years in 2018. As you know, the Framework Agreement establishes a process for recognizing First Nation’s jurisdiction over education and sets out the parties’ responsibilities in supporting the exercise of jurisdiction over education.

Several documents are appended to the Framework Agreement, including the template Canada-First Nation Education Jurisdiction Agreement (“Education Jurisdiction Agreement”, and the template Canada-First Nation Education Jurisdiction Funding Agreement (“Funding Agreement”). The Negotiating First Nations (NFNs) have worked jointly to update the two templates over the last few months. These updated templates are now in the process of being formally approved through an amendment to the Framework Agreement.

The current proposed steps are for Canada to provide a formal funding offer (based on the scoping document you have already received). Following receipt of an offer, each NFN can then initial the Education Jurisdiction Agreement and the Funding Agreement for their First Nation. Following the initialing of the two agreements, Chief and Council should be asked to approve the Funding Agreement and you can begin the ratification process set out in Part 10 of the Education Jurisdiction Agreement for approving the Education Jurisdiction Agreement and a First Nation Education Law-Making Protocol (the “Protocol”).

If both your Education Jurisdiction Agreement and Protocol are approved through the ratification process, you will be added by a federal Order in Council to the schedule to the federal enabling act and can pass education law(s) and begin exercising your jurisdiction over education.

FIRST NATION EDUCATION LAW-MAKING PROTOCOL

The Protocol is intended to be a simplified constitution setting out the process through which your education laws will be made and administered. **You cannot pass an education law and exercise jurisdiction over education without first passing a Protocol, so this is an essential component of implementing your jurisdiction.** Without the Protocol, the process for passing the law would be uncertain, as your education law is not an *Indian Act* bylaw.

The Education Jurisdiction Agreement sets out the required elements of a Protocol:

“2.11 The Jurisdiction contemplated by this Agreement will be exercised by the First Nation Council following adoption of a First Nation Education Law-Making Protocol, which will provide for the following matters:

- a) procedures for the passage and amendment of First Nation Education Laws;
- b) challenging the validity of First Nation Education Laws;
- c) the amendment of the First Nation Education Law-Making Protocol;
- d) conflict of interest rules; and
- e) other matters, as determined by the Participating First Nation.”

You are required to address the above matters in their Protocol, but are otherwise able to customize your Protocol to meet your interests and needs and reflect your voting customs and practices.

MODEL FIRST NATION EDUCATION LAW-MAKING PROTOCOLS

FNESC has developed model Protocols that you may choose to use as a starting point (see attached). These models include examples of ways to address the required matters set out above. So long as the required matters are addressed, these models can be amended and adapted to your needs. Alternatively, you may choose not to use a model, and may instead design your own Protocol.

FNESC has developed two different model Protocols – under the “model A” Protocol, your Council would vote to approve the education law, while under the “model B” Protocol, a binding referendum would be required. Other than this key distinction (and related consequences), the two models are identical.

Both models address the matters that must be addressed (as set out in section 2.11 of the Education Jurisdiction Agreement), with a focus on the procedures for passing and amending education laws. In addition to the required matters, the models also address requirements regarding the making of regulations and the registration of laws and regulations.

Within each model, FNESC has provided a number of “sub-options”. For example, you will need to determine the percentage of members or Council (as the case may be) required to vote in favour of the draft education law in order for it to pass. If using the “model B” Protocol (binding referendum), you will also need to determine whether it would be useful to incorporate a role for a “Referendum Officer” to assist in the oversight of the referendum. While the models set out various options, keep in mind that you are not limited to these options and may instead choose to use an option other than those provided in the model.

To help you determine which model to use, we have set out some considerations regarding the “model A” and “model B” Protocols below.

“MODEL A” PROTOCOL VERSUS “MODEL B” PROTOCOL

Under the “model A” Protocol, after community engagement and consultation, your Council would vote on whether to approve the draft education law. Under the “model B” Protocol, after community engagement and consultation, a binding referendum would be held where eligible voters (members over a certain age) would vote on whether to approve the draft education law.

Using the “model B” Protocol (binding referendum) may result in an education law that is better supported by the community than an education law passed in accordance with the “model A” Protocol (Council vote). On the other hand, holding a binding referendum will likely require more time and resources than a Council vote.

Furthermore, a binding referendum is a higher hurdle to overcome than a Council vote. Depending on the percentages you choose for: (a) members required to participate in the referendum, and (b) members required to vote in support of the draft education law, your First Nation could find itself in a position where it has jurisdiction over education (e.g. you have approved and signed an Education Jurisdiction Agreement and have been added to the schedule of “Participating First Nations”) but are unable to exercise that jurisdiction (e.g. are not able to pass an education law). This situation could arise under either model, but is more likely to arise under “model B.”

Another consideration is that the “model B” Protocol (binding referendum) does not address the details for holding a binding referendum. Details such as voting procedures are left to the Council to determine. This may not be problematic if you already have voting procedures that you regularly employ. However, if a Council does not want to use existing procedures, developing new rules may require additional time and resources.

The “model A” Protocol provides Council with discretion to include additional steps to the process for passing an education law – including holding additional community meetings, information sessions, or a binding or non-binding referendum. In contrast, the “model B” Protocol requires a binding referendum. If you are not sure whether you want to use a binding referendum, we recommend using the “model A” Protocol as a starting point as it provides for the flexibility of incorporating a binding referendum, without locking you into that requirement.

NEXT STEPS

We are asking for feedback on the model protocols. We would like your advice on the following issues:

- Are there any additional matters (i.e. in addition to the required matters) that you would like to see included in the models?
- Are there any additional sub-options that you would like to see added to the models?
- Is the “model B” Protocol (binding referendum) useful?

- Are there other models you would like to see developed?
- Would you want to see a different approval process used for the initial law and then a different one for amendments to that law?
- Are there any concerns with the wording in the models?
- What changes would you like to see, if any, made to the models?

Based on your feedback received during today's meeting and through written feedback, we will provide you with revised models in September.

Once finalized, we recommend that you provide your Chief and Council with copies of the model Protocol(s) for their review. Chief and Council will be required to determine whether they want to use one of the models, amend or customize one of the models, or choose not to use either of the models. Even if your Chief and Council decide to use one of the models without amending or customizing it, they will still need to determine which of the various "sub-options" would work best in your community. You may also wish to contact your First Nation's legal counsel to ask them for advice on the two options.

If your Chief and Council choose to customize or develop their own Protocol, the options for customization or drafting are limitless. The only requirement is that each of the matters set out in section 2.11 of the Education Jurisdiction Agreement (replicated above) be addressed. Customizations may be made to better reflect community interests or best practices. As examples, you may:

- set out in your Protocol that members may introduce a proposed education law (either a single member or a minimum number of members),
- increase the number of readings or required rounds of community consultation,
- use two different processes for passing and amending an education law, or
- use two different processes for passing and amending the Protocol.

Because members are required to vote on the Protocol at the same time that they vote on the Education Jurisdiction Agreement, you may want to seek legal advice on customizing or drafting your Protocol soon after initialing your agreements.