



## CONSULTATIVE DRAFT

# FNLC PRIORITIES PAPER ON THE UNITED NATIONS DECLARATION ACT NATIONAL ACTION PLAN

March 2023



## **BACKGROUND**

On June 21, 2021, the Government of Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the “Act”). The Act requires Canada to, among other things, prepare and implement an action plan to achieve the objectives of the *United Nations Declaration on the Rights of Indigenous Peoples* (the “UN Declaration”) in consultation and cooperation with Indigenous peoples.

The Government of Canada, through the Department of Justice as the lead to implement the Act, committed to establishing a bilateral process with, among others, the First Nations Leadership Council (“FNLC”) on implementation of the Act. The bilateral process is intended to help facilitate the identification of the priorities and actions for UN Declaration implementation consistent with the direction of First Nations in British Columbia, including the co-development of the national action plan. As part of the bilateral process the Government of Canada “acknowledges that the FNLC is not a rights-holding entity and engagement with the FNLC is not a proxy for and does not fulfill the obligations of the Government of Canada to consult and cooperate with all First Nations in BC.”<sup>1</sup> The FNLC and its three member organizations, the Union of BC Indian Chiefs, the First Nations Summit and the BC Assembly of First Nations, are not aboriginal rights or title-holders. The membership of each organization are the rights and title-holders.

To contribute to the bilateral process, the FNLC has compiled guiding principles and priority actions to be included in the national action plan. These principles and priorities have been developed based on direction and input from First Nations in BC, including through resolutions of the BC Assembly of First Nations, First Nations Summit and Union of BC Indian Chiefs; circulation and review of the principles and priorities by First Nations and sectoral First Nations organizations; and dialogue at an All-Chiefs’ Assembly hosted by the FNLC. The priorities and principles in this paper should be read in conjunction with, and as a complement to, the direct submissions prepared by First Nations in British Columbia. The FNLC’s core role is to uplift and support BC First Nations, the sole rights holders in British Columbia.

## **THE DISTINCT CONTEXT OF FIRST NATIONS IN BRITISH COLUMBIA**

It is imperative that the national action plan recognize the unique historic and contemporary contexts and title and rights of First Nations in British Columbia.

While all First Nations in Canada have been subjected to oppression and colonization, some of the historic expressions of that colonization have been distinct in different regions. Most fundamental in this regard is that, unlike much of Canada, in British Columbia there are few treaties – the pre-Confederation treaties on Vancouver Island,

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<sup>1</sup> Letter from Minister Lametti to First Nations Leadership Council, February 16, 2023.



part of Treaty 8 and a handful of modern treaties. Given this reality, in British Columbia a primary focus of First Nation–Crown relations has been, and continues to be, completing the unfinished work of structuring proper relations that respect First Nations' sovereignty, including their governments, laws, jurisdiction and inherent title and rights. This necessarily requires some different actions and approaches than the work that is required in other areas of Canada.

An implication of this is that actions to meet the objectives of the UN Declaration – which include upholding the connections of Indigenous peoples to their ancestral lands – will, in some instances, need to be expressed in ways that are region specific. This includes, for example, the necessity for having specific mechanisms and processes supporting First Nations to exercise their inherent, constitutional and human rights, in addition to those for full and principled treaty implementation.

Further, while First Nations across Canada have participated in, and shared the burdens of, collective advocacy to address the legacy of colonization, racism and the marginalization of Indigenous peoples, this advocacy has resulted in some different contemporary outcomes among regions that are directly relevant to meeting the objectives of the UN Declaration. Most explicit in this regard is that First Nations in British Columbia co-developed the Government of British Columbia's *Declaration on the Rights of Indigenous Peoples Act* ("BC Declaration Act") two years prior to the federal *Act*. The *BC Declaration Act* is already being actively implemented, including through a co-developed provincial action plan.

Given this, it is fundamental that the Government of Canada, as part of meeting the objectives of the UN Declaration, ensures that what it is doing supports, advances, accelerates and moves beyond the actions already being taken in British Columbia to implement the UN Declaration. Canada was slow in passing the *Act* – Canada first announced in 2017 that it would support UN Declaration legislation but took four years to enact the *Act*. This delay, and the fact that Canada has a necessary and required role in meeting the objectives of the UN Declaration, meant there were artificial limits in what First Nations and the provincial government could include in the provincial action plan. Canada must now rectify this by co-developing an action plan that – to the degree it applies in British Columbia – meets and exceeds the standards and approaches taken in the provincial action plan and builds upon and beyond what could be achieved in that plan without Canada's participation. Canada has an active role in meeting the BC bar of UNDRIP success and further uplifting a jurisdiction consistent national action plan. There are positive obligations for progressive change.

## **GUIDING PRINCIPLES**

It is essential that the process and substance of the national action plan be fully consistent with and exceed the minimum standards of consultation, cooperation and



consent in the UN Declaration. As part of meeting these standards, the following principles must be reflected in both the co-development process and the substance of the national action plan.

## **1. *Comprehensive and Coherent***

The national action plan must lay out a comprehensive understanding and vision of Crown-Indigenous relations and what Canada looks like when the objectives of the UN Declaration are realized. The national action plan must lay out specific actions to reflect and achieve that understanding and vision.

While we acknowledge that, similar to the provincial action plan, the national action plan may not initially identify all of the actions necessary to achieve the understanding and vision, it must coherently demonstrate how the first foundational actions will advance us toward meeting UN Declaration objectives.

Further, if the national action plan will only articulate actions for an initial period of time, it must clearly stipulate how and when the national action plan will continue to evolve, including through updates and additions in the future.

## **2. *Progressive***

The national action plan must build upon and move beyond actions and measures that are already being undertaken or have been committed to. The national action plan is not a place to simply continue, restate or repackage what is already happening as part of other initiatives. While First Nations in British Columbia fully expect that commitments made elsewhere will be fully implemented, these commitments cannot be the basis of the national action plan. In more pointed words, the consultative draft national action plan represents a key failing in that a substantial amount of the action plan items are simply “continuations” of existing reconciliation work.

Specifically in this regard, the Calls to Action of the Truth and Reconciliation Commission and Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls must be fully implemented, regardless of the content of the national action plan. This must take place with Indigenous peoples in the ways called for by those reports, in alignment with the UN Declaration.

To be effective, the national action plan must coherently build upon and exceed the actions and efforts already in place in British Columbia to implement the UN Declaration.

### 3. *Clarity of Scope*

The wording of the *Act* is clear – the obligations to achieve consistency between the laws of Canada and the UN Declaration (section 5) and to have an action plan to meet the objectives of the UN Declaration (section 6) are distinct and separate statutory obligations on the Government of Canada. Further, Canada’s legal obligation to take all measures necessary to align laws exists as a present and ongoing positive obligation and cannot be delayed any further. The FNLC notes with discontent that the majority of legislative changes that have occurred since the *Act* came into force have not complied with the legal requirement to “consult and cooperate with Indigenous Peoples”.

As a result, the need to develop a national action plan to achieve the objectives of the UN Declaration is distinct from Canada’s obligations to align its laws with the UN Declaration. The action plan cannot be used as a pretext to delay measures to immediately and continually align federal laws with the UN Declaration.

For this basic reason, consistent with the *Act*, the priorities identified in this document do not include the urgent, critical and required work to implement section 5. That work must drive forward with haste and determination through new and effective processes and mechanisms of co-drafting, consultation and cooperation.

### 4. *Distinctions-Based*

The national action plan and its implementation must reflect, respect and be grounded in, a distinctions-based approach, including accounting for “the diversity of Indigenous peoples and, in particular, the diversity of the identities, cultures, languages, customs, practices, rights and legal traditions of First Nations, Inuit and the Métis and of their institutions and governance structures, their relationships to the land and Indigenous knowledge”.<sup>2</sup>

A distinctions-based approach includes explicitly recognizing and reflecting the following legal and historical realities:

- Not all rights are uniform or the same among or between all Indigenous peoples, or even all First Nations. These rights are diverse and distinct, under both domestic and international law, arising from and in relation to their unique histories and circumstance.
- First Nations have diverse languages, histories, customs and practices, and the traditional territories of First Nations include exclusive and shared title and

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<sup>2</sup> See the preamble to the *Act*.

rights. First Nations' title and rights are pre-existing, inherent, and proof of their distinctive societies that existed prior to the arrival of Europeans.

- There are distinctions among First Nations who are Treaty Nations, Modern Treaty Nations and inherent title and rights holders.
- As the Courts have confirmed, the purpose of protection of Métis rights is distinct from the purpose of protection of First Nations' title and rights. While First Nations' title and rights are protected out of recognition of the pre-existence of First Nation sovereignty, "the inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities."<sup>3</sup> While some Métis persons have immigrated to British Columbia, there has been no, and could never be a rightful, court decision confirming the existence of any identifiable historic Métis community or Métis homeland in what is now British Columbia.
- Consistent with self-determination and the inherent right of self-government, First Nations determine their own priorities through their own governance processes, have distinct governments and legal orders, and take diverse approaches to Nation-to-Nation and Government-to-Government relations with the Crown.

## 5. *Inclusivity*

As set out in the *Act*, the national action plan must be co-developed and implemented in an inclusive manner that recognizes that the legacy of colonization, racism and marginalization has had disparate and unique impacts on different populations. The national action plan must also ensure that the unique needs, experiences and knowledge of marginalized and vulnerable groups within Indigenous populations, such as Indigenous elders, women, youth, children, girls, 2SLGBTQQIA+ people and persons with disabilities, are heard and addressed.

## 6. *Integrative*

Meeting the objectives of the UN Declaration requires integrative and coordinated action and change across all spheres of Canadian society. The national action plan must be designed to reflect an integrative, distinctions-based approach. All actions must be understood as being co-dependent and interconnected. The Government of Canada cannot pick and choose between actions, and the action plan must be

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<sup>3</sup> *R v Powley*, 2003 SCC 43 (CanLII), [2003] 2 SCR 207.

organized internally to move the actions forward in an integrative manner.

## 7. *Measurable*

Progress in meeting the objectives of the UN Declaration must be measurable and assessed regularly so that achievements can be evaluated and necessary adjustments identified. First Nations must be included in determining these measurements and must be included in any assessments pertaining to those measurements and their outcomes.

To support this, actions must be stated and designed so that their implementation can be tracked. Further, the implementation of actions must be supported by evidence and unbiased, independent and disaggregated data collection so that transparent and accountable reporting, assessment and learning can take place.

## 8. *Expediency*

All of the work necessary to meet the objectives of the UN Declaration and in implementing these priorities must be undertaken in a timely, comprehensive and coherent manner. This work must not be bogged down by endless discussion and must aim to expediently action the priority items illustrated herein.

## **PRIORITIES**

The FNLC has identified five priority areas around which the national action plan should be organized:

1. Self-determination and the Inherent Right of Self-Government;
2. Lands, Resources and Territories;
3. Eliminating Indigenous-Specific Racism, Discrimination and Violence against First Nations People;
4. Social, Cultural and Economic Well-Being; and
5. Accountability and Implementation.

Each of these priorities must be framed around a clear and explicit vision of a Canada where applicable UN Declaration standards are being met and upheld. Each priority

area needs to articulate specific actions, reflecting the guiding principles, that will be taken.

Below we have identified elements of the vision and, at a high-level, the categories of actions for each priority area. *To be clear, these statements of action are only some of the critical themes around which specific and measurable actions must be defined through a process of co-development.*

Finally, consistent with the UN Declaration, the process of meeting the priorities and achieving actions must meet the standards of consultation and cooperation with Indigenous peoples. As such, processes of co-development, consultation, co-operation and consent should be presumed to apply in all instances, without being repeated each time.

### ***Priority 1 – Self-Determination and the Inherent Right of Self-Government***

The goal of this priority is to ensure a Canada where:

- Indigenous peoples exercise and have full enjoyment of their rights to self-determination and self-government, including developing, maintaining and implementing their own jurisdiction, laws, governing bodies, institutions and political, economic and social structures related to Indigenous communities.
- Colonial laws, policies and practices that have interfered with Indigenous peoples' self-government are repealed, including ensuring First Nations determine for themselves how, if and when they will remove the imposition of the *Indian Act*.
- Robust legal pluralism is active in Canada wherein the Crown's monopoly on jurisdiction is no longer presumed.
- Ensuring that Indigenous governments, like any order of government, have access to ongoing, long-term and stable fiscal mechanisms and revenues to fulfil their roles and responsibilities as governments, and ensure their citizens' well-being and ability to thrive. First Nations will retain the ability to apply for general Federal grants and programmes. Self-government and revenue sharing do not displace the right to apply for initiatives and programmes.

Illustrations of categories of actions to advance this priority include:

1. Formal revocation of the "Government of Canada's Implementation of the Inherent Right and Negotiation of Inherent Right of Aboriginal Self-Government" and all associated policies and practices.



2. Development of directives to the federal public service to respect and uphold Indigenous peoples' rights of self-determination and self-government, and the standards in the UN Declaration, in all their conduct and actions, supported by meaningful ongoing training to build understandings and competency on Indigenous rights and proper Crown-Indigenous relations.
3. Establishment of new pathways for First Nations to remove the imposition of the *Indian Act* that are principled, non-prescriptive, First Nations driven as well as determined, flexible, multiple and based on the full legal recognition of First Nations' governments, laws and jurisdictions.
4. Establishment of new, accessible, non-prescriptive and principled fiscal supports for Indigenous peoples as they advance the work of rebuilding their Nations and revitalizing their legal orders.
5. Supporting the establishment by Indigenous peoples of new Indigenous-led and controlled institutional supports – such as a commission – to support the work of governance and Nation rebuilding, including territorial boundary resolution, in accordance with Indigenous laws, customs and traditions.
6. Establishment of new fiscal and technical supports that assist Indigenous governments to determine, define and maintain their approaches, policies and laws, including for membership and citizenship and participation of members in self-determination and self-government processes. Self-determination and self-government must be defined by First Nations.
7. Funding supports for Indigenous youth, women and 2SLGBTQQIA+'s peoples and organizations to participate in self-determination and self-government processes. First Nations may determine how this funding is utilized.

### ***Priority 2 - Lands, Resources and Territories***

The goal of this priority area is to ensure a Canada where:

- Indigenous Peoples exercise and have full enjoyment of their inherent rights, including the rights of First Nations to own, use, develop and control lands and resources within their territories.
- Indigenous jurisdiction over lands and resources is fully recognized and implemented with processes for harmonization where necessary.
- The Government of Canada fully respects Indigenous title and rights including through its laws, policies and practices.

- There are accessible and effective processes and mechanisms for the resolution of disputes regarding the use of lands and resources that reflect and respect legal pluralism and Indigenous laws and jurisdictions. Part of this process would include the negotiation of Canada's redress for impacts upon Indigenous title and rights flowing from federal actions and practices.

Illustrations of categories of actions to advance this priority include:

1. Formal revocation of the "Comprehensive Claims Policy" and all associated policies and practices.
2. Development of binding standards and processes for the recognition of Indigenous title and rights and the return of lands to Indigenous peoples.
3. Establishment of mechanisms in law, policy and practice to affirm Indigenous peoples' right of free, prior and informed consent, including through the adoption of mechanisms that are the equivalent of section 6 and 7 of the BC Declaration Act.
4. Development of permanent structures and processes that uphold consent-based decision making concerning critical species, all fish, fisheries and aquatic habitat, and which recognize First Nations' jurisdiction over fish, fisheries, marine territories and aquatic habitat.
5. Development of a new fiscal framework between First Nations and Canada, including new approaches to resource allocation/distribution and associated formulas, to be applied to all revenues generated by the federal Crown, including as related to resource revenues generated from First Nations' territories in British Columbia and historical redress.
6. Removal of all existing legislative, policy and practice barriers that currently delay and complicate the return of lands to Indigenous peoples affirming title and rights thereto (regardless of the agreed land status), and establishment of a single approach to timely and effective land return on a fixed timeline inclusive of the polluter pays principle.
7. Elimination of the existing specific claims process, developing a new process such as through the creation of independent institutions for claims research and resolution, including to accelerate settlement through use of appropriate dispute resolution processes; reflect legal pluralism; integrate and apply Indigenous legal orders, laws and Indigenous Knowledge; remove arbitrary financial limits on compensation; and, reduce barriers to claimants including improved access to Crown-held records and data sovereignty thereto.

8. Establishment of a working group to support First Nations' development and maintenance of laws, policies, guidelines and compliance and enforcement systems for resource management within and between their lands and territories.
9. Development of a tripartite federal, provincial and territorial, and first nations government management framework,, that integrates Indigenous laws and knowledge and coordinates water management across the country to safeguard long-term water quality and quantity.
10. Support of Indigenous-led climate mitigation and adaptation strategies to reduce global greenhouse gas emissions and support resilient communities and clean economic opportunities for Indigenous peoples that benefit shared climate action, reduce climate impacts and advance reconciliation as further elaborated in the BC First Nations Climate Strategy and Action Plan.
11. Reform of federal emergency management laws, policies and practices to incorporate the principles of the Sendai Framework, support the exercise of First Nations' jurisdiction and the enhancement of Indigenous peoples' emergency preparedness and management outcomes, and uphold the rights and standards in the UN Declaration, in collaboration with Indigenous peoples and provincial and territorial governments.

### ***Priority 3 – Ending Indigenous-Specific Racism, Discrimination and Violence***

The goal of this priority area is to ensure a Canada where:

- Indigenous peoples fully express and exercise their distinct rights, and enjoy living in Canada without interpersonal, systemic and institutional interference, oppression or other inequities associated with Indigenous-specific racism and discrimination, wherever they reside.
- All peoples and sectors of Canadian society are aware of Canada's legacy of colonization, its enduring impacts, the diversity and distinctiveness of Indigenous peoples and the basic human rights of Indigenous peoples, and there are systems, structures and processes that uphold those human rights.

Illustrations of categories of actions to meet this priority include:

1. Establishment of inquiries into anti-Indigenous racism, and all forms of racism, in different sectors of Canadian society, governance and institutions.
2. Address the overrepresentation of Indigenous peoples in the criminal justice system through being full partners in the implementation of the BC First Nations Justice Strategy, and development of a National Justice Strategy that is consistent with and builds upon the First Nations Justice Strategy.

3. Support of non-stereotypical and non-prejudicial Indigenous representation in media such as by creating opportunities and providing funding to support Indigenous representation and Indigenous-created content; development of policy to ensure a minimum amount of Indigenous content on all Canadian broadcasting networks, digital media and print; and development of a strategy to meaningfully increase the inclusion and visibility of Indigenous women, girls and 2SLGBTQQA+ people.
4. Establishment of laws, policies and practices that support the collection and reporting of disaggregated, anti-racism data while respecting Indigenous data sovereignty. This must be predicated on investing in Indigenous-led data capacity at local and regional levels, and Indigenous-governed processes and institutions for the collection, use, sharing and management of Indigenous data as well as identification of regional and national indicators that illuminate inequities and demonstrate progress on eliminating racism and oppression.
5. Transformation of the federal public service including through targets for Indigenous representation at all levels and co-development of foundational, trauma-informed education and training requirements for all federal employees on Indigenous history and human rights, and addressing Indigenous-specific racism and all other forms of discrimination.

#### ***Priority 4 – Social, Cultural and Economic Well-Being***

The goal of this priority is to establish a Canada where:

- Indigenous peoples fully enjoy and exercise their distinct rights to maintain, control, develop, protect and transmit their cultural heritage, Indigenous knowledge, languages, food systems, sciences and technologies.
- Indigenous peoples are supported by initiatives that promote connection, development, access and improvement, as well as full participation in all aspects of Canada's economy.
- Indigenous peoples are thriving, including through connection to culture and community, the use of their languages and the expression of their spiritual heritage.

Illustrations of categories of actions to meet these priorities include:

1. Support of First Nation initiatives and education programs that teach First Nations skills, languages, legal orders and traditions, including family planning and parenting skills rooted in Indigenous values.
2. Support of First Nations with the development of regional models and the identification of regional funding needs for First Nations school capital, and the

co-development by First Nations and Canada of increased funding for First Nations school capital that reflects unique regional needs and priorities.

3. Regionalization of all federal education programs and funding, as set out in national First Nations Policy Proposals and reiterated through the development and implementation of regional First Nations education agreements.
4. Support of access to educational funding and scholarships for Indigenous persons by promoting educational funding opportunities, broadening the scope of eligibility criteria, and ensuring that applications are not unnecessarily onerous.
5. Establishment of federal employment equity programs for Indigenous persons focused on effecting long-term and enduring change, including through forecasting and new skills-training initiatives.
6. Adoption of an inclusive digital font to allow Indigenous languages to be included in communications, signage and official records.
7. Development of new systems of financial and economic modelling and monitoring which incorporate Indigenous values and worldviews and serve as the basis for a measurement of economic success.
8. Establishment of a national digital equity strategy focused on ensuring internet connectivity to all Indigenous communities in Canada.
9. Support of community-based initiatives to establish Indigenous youth camps and programs that pursue cultural activities, link youth with Elders, support transmission of traditional knowledge, skills and language, promote a healthy lifestyle and reduce isolation.
10. Establishment of laws, policies and practices that support the identification, location and repatriation of Indigenous human remains and cultural property from institutions both within and outside of Canada.
11. Establishment of a comprehensive regime of laws, policies and practices to provide for the protection of the intellectual property of Indigenous peoples.
12. Development of a distinctions-based Indigenous languages strategy and funding framework to maintain and strengthen all Indigenous languages in Canada.

### ***Priority 5 – Accountability and Implementation***

The goal of this priority is a Canada where:

- Treaties, agreements and other constructive arrangements with Indigenous peoples are fully affirmed and implemented.

- Indigenous peoples can expect and trust that the Government of Canada will honourably fulfill all of its common law, fiduciary and constitutional obligations and responsibilities.
- Indigenous peoples can easily access processes and mechanisms to ensure accountability on the part of Government of Canada in meeting the objectives of the UN Declaration and upholding Indigenous title and rights.

Illustrations of categories of action to meet this priority include:

1. Establishment of new institutions to protect the human rights of Indigenous peoples, such as an Indigenous human rights commission and tribunal, and a human rights ombudsperson.
2. Establishment of new dispute resolution mechanisms for the resolution of disputes between the Government of Canada and Indigenous peoples that are accessible, use multiple forms of appropriate dispute resolution, and are legally plural, independent, timely and fair.
3. Establishment of laws which ensure that Canada's conduct within Canadian common law judicial systems will uphold the objectives of the UN Declaration.
4. Development of mechanisms for accountability and remedy in the full implementation of treaties, agreements and other constructive arrangements.
5. Establishment of a formal process for Indigenous peoples and their representative institutions to participate in all stages of the Government of Canada legislative and policy development, change and amendment.
6. Development of assessment criteria and reporting mechanisms, using transparent and evidence-based methods and indicators of progress in relation to the implementation of the action plan and meeting the objectives of the UN Declaration.