

# FIRST NATIONS LEADERSHIP COUNCIL



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February 10, 2021

First Nations leadership in BC  
Via email only

## **RE: First Nation-Provincial Health Officer COVID Information Sharing Agreements**

Dear First Nations leaders in BC,

As the First Nations Leadership Council, we write to you on behalf of Heiltsuk Nation, Nuu-chah-nulth Tribal Council, and Tsilhqot'in National Government (the "Nations"). Over the past six months, these Nations negotiated a COVID-19 information sharing agreement (the "Agreement") with BC's Provincial Health Officer ("PHO"). We are writing to you to:

- inform you about the type of COVID-19 case information available under the Agreement; and
- explain the steps your Nation can take to enter one of these Agreements with the PHO.

### **Type of COVID-19 Case Information Available under the Agreement**

The Agreement gives the signatory Nation access to COVID-19 case numbers in nearby and/or travel-connected "Proximate Communities." Each Nation's Agreement sets out a list of their own Proximate Communities in the Schedules.

The Nations will receive regular electronic reports from the PHO with the number of new COVID-19 cases in the Proximate Communities.

There are restrictions on what the Nation can say publicly using this information, depending on the number of COVID-19 cases in the Proximate Communities. See Appendix A: Summary of the Agreement.

### **Your Nation Can Seek to Enter into a Similar Agreement**

The Agreement was negotiated on the understanding that other Nations might wish to enter into the same or similar agreements. See Appendix C for a copy of the Agreement in template format, and see Appendix B for a list of practical steps your Nation can take to enter into a similar Agreement with the PHO.

Sincerely,

**FIRST NATIONS LEADERSHIP COUNCIL**

**On behalf of the FIRST NATIONS SUMMIT**



Cheryl Casimer



Robert Phillips



Lydia Hwitsum

**On behalf of the UNION OF BC INDIAN CHIEFS**



Grand Chief Stewart Phillip



Chief Don Tom



Kukpi7 Judy Wilson

**On behalf of the BC ASSEMBLY OF FIRST NATIONS:**



Regional Chief Terry Teegee

CC: Ng Ariss Fong, lawyers, on behalf of Heiltsuk Nation, Nuu-chah-nulth Tribal Council, Tsilhqot'in National Government

## Appendix A: Summary of the Agreement

**\*\*This is a [summary](#) of the Template Information Sharing Agreement. It is **not comprehensive** and is **not legal advice**. You may wish to seek legal advice on the Agreement prior to entering into the Agreement\*\***

### What is the Agreement?

This is a COVID-19 information sharing agreement that Tsilhqot'in National Government, Heiltsuk Nation, and Nuu-chah-nulth Tribal Council Member Nations have entered into, or are entering into, with the BC Provincial Health Officer ("PHO").

Other BC First Nations may seek to enter into a similar agreement with the PHO.

### What information will a Nation receive under the Agreement?

The PHO will provide the signatory Nation with regular reports that list the number of COVID-19 cases in specific nearby or travel-connected "Proximate Communities" (see Agreement, s 1, s 2, Schedules):

- Each Nation has negotiated its own list of Proximate Communities, which are contained in the Schedules to the Agreement. For example, Heiltsuk's Proximate Communities are: *Port Hardy, Haida Gwaii, Klemtu, Ocean Falls, Denny Island, Nanaimo, Campbell River, Prince Rupert, Bella Coola, and the Metro Vancouver Regional District.*
- Each PHO report will show the number of new COVID cases being reported under the Agreement that day for each Proximate Community (for example, it might show 5 new COVID-19 cases for Port Hardy, and 100 for Metro Vancouver Regional District).
- It will also show the total number of cases reported under the Agreement in the last 28 days for each Proximate Community as an aggregate number.

### How is this information different from what is available to the public?

The Nation will be receiving more detailed information than the public, and will receive that information on an almost-daily basis. Currently, the smallest geographical area for which BC publishes COVID-19 case numbers for the public is "Local Health Area" (a geographic designation that generally lumps several communities together), and BC only publishes that information once a week.

### Is this real-time information?

No, the information the Nation will receive is not real time cases. There will be a time lag of at least 6 days between when a person tests positive for COVID and when that new case is reported to the First Nation.

## **Who will receive the information, and how frequently will they receive the information?**

The Nation will designate an individual (the “Recipient”) to receive this information, and the PHO will send the report to them electronically. The PHO will provide reports as frequently as possible, likely on most weekdays (see Agreement, s 1, s 2).

## **What are the limitations on what the Nation can do with the information?**

There are important limitations on how the Nation can use the information.

The Nation’s government may use the information “internally” to make informed decisions about which safety measures to implement (Agreement, s 1, s 3).

The Nation’s designated recipient must keep the information confidential, and may not disclose or publish the information, except for three kinds of use (Agreement, s 1, s 4, Schedules):

*1. To disclose information to “health leaders”.* The Nation may disclose the information to a Health Leader (defined as a health care provider or other person who is advising the Nation on how to manage the COVID-19 pandemic) so that the Health Leader may provide advice about safety measures (or other “Permitted Purposes” listed in section 3 of the Agreement).

*2. To make public statements about COVID-19 risk to community members.* The Nation can use the information to make public statements about COVID-19 risk for community members. However, unless the number of cases in the Proximate Community passes a listed “Threshold” amount for the last 28 days, the Nation may not disclose the number of cases in the Proximate Community, or attribute the information to the PHO, or to BC, or to Agreement. For example, if a Threshold is 10, and a Proximate Community has 11 cases, the Nation could state that,

“[Nation] has assessed [Proximate Community] as COVID high risk, because there are 11 new cases today, according to information provided by the Provincial Health Officer. We ask that community members avoid essential travel to [Proximate Community] for the next 7 days if possible. If community members do need to travel to [Proximate Community] please take extra precautions including wearing adequate PPE.”

If a Threshold is not met for a Proximate Community, the Nation may instead state,

“[Nation] has assessed [Proximate Community] as COVID low risk, based on information available to us which includes information received from the Provincial Health Officer. We ask that community members continue to take appropriate precautions if travelling to [Proximate Community] for essential reasons, including practicing social distancing and wearing a mask in indoor spaces.”

*3. As required by law.* The Nation may disclose information where disclosure is required by law.

The Agreement requires that the Nation take reasonable security measures to protect the information from unauthorized access.

**What are the Thresholds under the Agreement?**

This number is 10 or more cases for a Proximate Community with a population of fewer than 20,000 residents; 5 or more cases for a Proximate Community with a population of greater than 20,000 residents, and any cases if the Proximate Community is Metro Vancouver Regional District.

**Duration of the Agreement:**

The Agreement will end immediately when the Notice of Emergency (issued by Dr. Henry on March 17, 2020) ends (Agreement, s. 8).

In addition, the Agreement can be terminated by either party, for any reason, by giving a notice of termination (Agreement, s 8).

If the Agreement ceases when the Notice of Emergency is rescinded, it is revived if a new public health emergency relating to COVID-19 is declared under the *Public Health Act* (Agreement, s 9).

## **Appendix B: How to enter into an Agreement for your Nation**

Here are the recommended basic steps to take to arrange for an Agreement.

1. Review the Agreement for appropriateness for your Nation.
2. Select the Proximate Communities for your Nation.
3. In lieu of being able to provide more specific contact information, contact the Office of the Provincial Health Officer via the BC Minister of Health ([HLTH.Minister@gov.bc.ca](mailto:HLTH.Minister@gov.bc.ca)) and Minister of Indigenous Relations and Reconciliation ([IRR.Minister@gov.bc.ca](mailto:IRR.Minister@gov.bc.ca)).
4. To prepare for the signing of the Agreement, arrange for
  - a. a designated recipient for information;
  - b. identify a computer to receive and store the information;
  - c. obtain a username and password for the designated recipient from the Ministry of Health (your Ministry of Health contact will provide you with the contact information for their technician).

\* You can contact Savannah Carr-Wilson at Ng Ariss Fong, Lawyers if you have any questions about the Agreement language (email: [savannah@ngariss.com](mailto:savannah@ngariss.com) )

## Appendix C: Template Information Sharing Agreement (First Nation – PHO)

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT dated \_\_\_\_\_, 2021 (the “Agreement”)

### BETWEEN:

**THE PROVINCIAL HEALTH OFFICER**

1515 Blanshard Street  
Victoria, British Columbia  
V8W 9P4

(the “Provincial Health Officer”)

### AND

**[INDIVIDUAL RECIPIENT]** on behalf of the **[NAMED FIRST NATION]**

(collectively the “Nation”)

### BACKGROUND:

- A. COVID-19 is an infectious disease, reportable under the *Public Health Act* S.B.C. 2008 c.28 and its accompanying Regulations.
- B. On March 17, 2020, the Provincial Health Officer for British Columbia, Dr. Bonnie Henry, provided notice that the transmission of the infectious agent SARS-CoV-2, which has caused cases and outbreaks of a serious illness known as COVID-19 among the population of the Province of British Columbia, constitutes a regional event as defined under section 51 of the *Public Health Act*, enabling the exercise of the powers in Part 5 of the *Public Health Act* (the “**Notice of Emergency**”).
- C. The Provincial Health Officer exercises control of all information collected for communicable disease management in British Columbia. The British Columbia Centre for Disease Control (“**BCCDC**”) has custody of the information for the Provincial Health Officer.
- D. The Provincial Health Officer recognizes that Indigenous communities in British Columbia have been seriously and negatively impacted by historical epidemics in the province. The Provincial Health Officer wishes to share information with the Nation in the spirit of

reconciliation, to realize self-governance and self-determination, and for the purpose of ensuring an effective public health response to COVID-19.

- E. The Nation wishes to protect their community members and specifically their elders, who are the knowledge keepers and some of the few remaining speakers of their unique language.
- F. Cooperation between all parties is necessary to effectively manage COVID-19 in British Columbia.
- G. This Agreement does not replace any other processes for identification, management or contact tracing respecting COVID-19, including processes of the First Nations Health Authority or the Nation's own government processes.
- H. The Nation assesses risk differently than the Provincial Health Officer, and it intends to make its own decisions in relation to COVID-19 issues based on the Information. In furtherance of this objective of making decisions that do not necessarily align with the assessment of the Provincial Health Officer, the Nation does not view this Agreement to provide satisfactory disclosure.
- I. The Provincial Health Officer and the Nation agree that the information disclosure in this Agreement does not satisfy the requests made by Heiltsuk Tribal Council, Nuu-chah-nulth Tribal Council and Tsilhqot'in National Government, and they view negotiating this Agreement to have been a long and frustrating process. The Nation is of the view that systemic change must occur in BC's healthcare system, including the Nation's view that new structures and protocols that support sufficient and timely information sharing with Indigenous governments during emergencies should be established with consideration to the *Declaration on the Rights of Indigenous Peoples Act* and the November 2020 report *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in BC Health Care*.
- J. The Nation wants to receive Information, and the Provincial Health Officer wishes to provide the Nation with the Information, on the terms and conditions below.

The Provincial Health Officer is prepared to provide the Information to the Nation on the following terms and conditions, which the Nation acknowledges and agrees to follow in exchange for receiving the Information:

### ***Definitions***

- 1. In this Agreement, unless the context otherwise requires, the following terms will have the following meaning:
  - (a) **"Case"** means a person who meets the COVID-19 case definition criteria established by the BCCDC that is published at <http://www.bccdc.ca/health->

professionals/clinical-resources/case-definitions/covid-19-(novel-coronavirus)/covid-19-(novel-coronavirus).

- (b) **“Health Leader”** means a health care provider or other person who is advising the Nation in relation to how to manage the COVID-19 pandemic.
- (c) **“Information”** means the information in a report generated by the BCCDC that identifies the number of Cases in each Proximate Community.
- (d) **“person”** has the same meaning defined in the *Interpretation Act*, R.S.B.C. 1996 c 238.
- (e) **“Proximate Community”** means a community that is set out in Schedule 1, 2 or 3 of this Agreement.
- (f) **“Public Health Surveillance”** means the Nation’s ongoing collection and analysis of data for the purpose of planning, implementation and evaluation of public health practice.
- (g) **“Threshold”** means that there have been:
  - (i) 10 or more Cases in a Proximate Community listed in Schedule 1;
  - (ii) 5 or more Cases in a Proximate Community listed in Schedule 2; or
  - (iii) any Cases in a Proximate Community listed in Schedule 3,

that are reported under this Agreement for the most recent 28-day period of time, calculated starting with the date the Nation discloses information as Day 1 and counting backwards. For example, for the Threshold to be met to authorize the Nation to disclose the number of Cases on December 1, 2020 for a Proximate Community listed in Schedule 1, there must have been at least 10 Cases reported in the identified Proximate Community since November 4, 2020.

### ***Frequency of Disclosure***

- 2. The Provincial Health Officer will provide the Nation with a report containing Information as frequently as reasonably practicable, which the Provincial Health Officer anticipates to occur on most weekdays.

### ***Permitted Purposes***

- 3. Subject to Section 4 below, the Nation will not use the Information for any purpose, except:
  - (a) for Public Health Surveillance in relation to the Nation;
  - (b) to communicate and coordinate with the Provincial Health Officer, the relevant regional health authority, or the First Nations Health Authority, as is appropriate in the circumstances;

- (c) to make informed decisions about providing extra supports and implementing safety measures to members of the Nation and residents in their communities; and
- (d) as otherwise designated in writing by the Provincial Health Officer.

(collectively “**Permitted Purposes**”)

For clarity, Section 3 above does not permit:

- (a) the use of Information in any manner that could reasonably enable the identification of an individual; or
- (b) any form of linking the Information with other information that could reasonably be expected to reveal the identity of a person who is a Case.

### ***Confidentiality Undertaking***

4. The Nation acknowledges and agrees to maintain the Information in confidence, and that the Nation will not publish, release, (expressly or implicitly) reveal or disclose – or permit to be published, released or disclosed – Information, except (during the term of this Agreement):
  - (a) to disclose the Information to a Health Leader for advice in relation to a Permitted Purpose;
  - (b) to make public statements about risks to Nation’s peoples or residents of their communities that relates to COVID-19, provided that if the Threshold is not met for a Proximate Community the Nation may not: (i) disclose the number of Cases in the Proximate Community; or (ii) attribute the Nation’s risk assessment solely to any one or combination of the Provincial Health Officer, the Office of the Provincial Health Officer, the Government of BC, or Information the Nation received under this Agreement; or
  - (c) as required by law.
5. The meaning of the phrase “to maintain the Information in confidence” in Section 4 above includes the requirement that the Nation must take reasonable security measures to protect the Information from unauthorized access, collection, use, disclosure, alteration or disposal, including that the Nation will:
  - (a) ensure that there are adequate physical controls and information technology controls over the Information, so the Information remains confidential and is not accessed by anyone except in accordance with this Agreement; and
  - (b) securely shred, delete, remove or otherwise destroy records containing Information when the record or Information is no longer required by the Nation.

### ***Document Retention***

6. Upon termination of this Agreement, the Nation may retain the Information, including internal documents the Nation has developed based on the Information for governance purposes, for future pandemic planning and Public Health Surveillance. The Information may not be used directly or indirectly to identify any individuals.

### ***No Representations or Warranties that the Information is Accurate or Complete; No Reliance***

7. The Nation acknowledges and agrees that the Provincial Health Officer is providing the Information on an “as is” basis (*i.e.* the reported Cases), which may be limited in its accuracy or completeness. The Nation agrees to waive any claim for damages relating to the inaccuracy or incompleteness of Information provided by the Provincial Health Officer. Additionally, the Nation acknowledges that the Information has limitations, including that:
  - (a) the attribution of location of a Case is based on a person’s reported address of residence, which may not reflect the actual location of the Case during their period of communicability, isolation and recovery;
  - (b) the submitted information about location of Cases does not include:
    - (i) the place where the person may have been exposed to SARS-CoV-2, which led to the COVID-19 infection;
    - (ii) the location(s) that person may have attended or travelled during their period of communicability; or
    - (iii) information about whether a person is still within the period of communicability; and
  - (c) the Information provided to the Nation will reflect Cases tested at least 6 days prior to the provision of the Information to the Nation, so the Information is not the “real time” Cases.

### ***Termination***

8. The Agreement terminates immediately:
  - (a) if the Notice of Emergency is rescinded; or
  - (b) upon one party providing the other party with notice of termination for any reason (or no reason).
9. Notwithstanding Section 8(a) of this Agreement, the Parties acknowledge their intention to revive this Agreement if a new public health emergency is issued under Part 5 of the *Public Health Act* in relation to COVID-19 after the Notice of Emergency is rescinded.

**Survival upon Termination**

10. Sections 4 to 7 of this Agreement are intended to survive termination of this Agreement, and they will continue in force indefinitely subject to any applicable limitation period prescribed by law, even after this Agreement ends.

<p>SIGNED on the ____ day of _____, 2021 by the Nation):</p> <p>_____</p> <p>Signature(s)</p> <p>_____</p> <p>Print Name(s)</p> <p>_____</p> <p>Print Title(s)</p>	<p>SIGNED on the ____ day of _____, 2021 on behalf of the Provincial Health Officer by her duly authorized representative:</p> <p>_____</p> <p>Signature</p> <p>_____</p> <p>Print Name</p> <p>_____</p> <p>Print Title</p>
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**SCHEDULE 1**

PROXIMATE COMMUNITIES WITH A POPULATION OF FEWER THAN 20,000 RESIDENTS

[INSERT]

**SCHEDULE 2**

PROXIMATE COMMUNITIES WITH A POPULATION OF GREATER THAN 20,000 RESIDENTS

[INSERT]

**SCHEDULE 3**

[INSERT]