

FIRST NATIONS LEADERSHIP COUNCIL

Memorandum



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TO: BC FIRST NATIONS CHIEFS AND LEADERS
FROM: First Nations Leadership Council
DATE: April 19, 2021
RE: *Declaration on the Rights of Indigenous Peoples Act Update*

The purpose of this memo is to provide a current status update from the First Nations Leadership Council's (FNLC) perspective on the implementation of *Declaration on the Rights of Indigenous Peoples Act (Declaration Act)*.

There are four distinct key aspects to the *Declaration Act*:

- Alignment of laws – ensuring that the laws of BC are made consistent with the UN Declaration (s.3)
- Action Plan – developing an action plan to identify clear goals and actions that advance Indigenous human rights (s.4)
- Agreements – enables agreements between the province and Indigenous Governing Bodies (ss.6 & 7)
- Annual Report – deliver an annual report to the Legislature on progress made in *Declaration Act* implementation (s.5)

There has not been sufficient progress on *Declaration Act* implementation for reasons including the COVID-19 pandemic, the provincial election, and the comprehensive changes needed to how the provincial government operates. It is critical that this year brings significant positive results and delivers on the provincial government's commitment in the 2021 Speech from the Throne that, "our future must be one where we share decision making and prosperity with the Indigenous peoples who have exercised their inherent rights on their respective territories since time immemorial."

To support *Declaration Act* implementation, the FNLC and the provincial government have agreed to meetings every two months between the FNLC and the Minister of Indigenous Relations and Reconciliation, supported by monthly meetings of the respective senior officials. This does not in any way replace the government's obligations to engage directly with title and rights holders. It is intended to support oversight, accountability, and resolution of issues and barriers to accelerate meaningful progress that enables Nations and First Nations people to exercise their rights as described in the *United Nations Declaration on the Rights of Indigenous People*. The FNLC have been directed by resolutions passed at the BCAFN (07/2020), FNS (#1020.04) and UBCIC (2020-20) to continue working on implementation issues and will continue to report back to leadership.

1. Alignment of Laws

Alignment of laws is a distinct and positive obligation on the Province, meaning that it applies now to BC's legislative process and calendar.

First Nations have emphasized the importance of "decolonization" of the provincial legislative process by establishing new processes that appropriately provide for their participation, and which account for Indigenous rights and the

articles of the *UN Declaration*. In the coming weeks, a workshop amongst Indigenous and non-Indigenous legal experts will be held to unpack major barriers embedded within the current provincial legislative process and discuss options for resolving these barriers.

First Nations have also identified priorities for legislative reform, such as the Heritage Conservation Act and many lands and resources statutes (i.e., forestry, mining, etc.). It is important and helpful for First Nations to continue to share and press the provincial government for action on these priorities.

Finally, First Nations have raised significant concern that legislation continues to be introduced into the Legislative Assembly that are not appropriately aligned with the *UN Declaration*. This demonstrates that many parts of the provincial government are not structured, knowledgeable, or capable of including First Nations in their processes and upholding obligations under the *Declaration Act*. At the fall assemblies of the BCAFN, FNS, and UBCIC, the Chiefs passed resolutions directing the FNLC to ensure that all legislation is aligned with the *UN Declaration*. Therefore, the FNLC has advanced feedback about aspects of those laws not aligned with the *Declaration Act*. The FNLC again drew attention to the need for a full transformation of the legislative process to involve First Nations early in the planning and development of laws. The FNLC is working to identify efficient and streamlined approaches to implementing the *Declaration Act*, such as embedding standardized language across provincial legislation for simplicity and consistency.

To reinforce the provincial government's obligations under the *Declaration Act* and increase accountability, the FNLC has proposed exploring a new mandate for the Attorney General to assess and account for whether new or amended laws will impact on the human rights affirmed by the UN Declaration. We note that the mandate letter for the Attorney General already points to implementing the Declaration Act specifically directing the Attorney General to "support the Minister of Indigenous Relations and Reconciliation to deliver the action plan required under the Declaration Act to build strong relationships based on recognition and implementation of the inherent rights of Indigenous peoples protected in Canada's constitution.

2. Action Plan

The Province must develop an action plan in consultation and cooperation with Indigenous peoples. This action plan is intended to describe strategic-level and transformative commitments, intended to support – and which will not get in the way of – work that Nations are doing in their territories. The FNLC have continued to push for release of the draft action plan to be done as quickly as possible, and ideally prior to the end of the last fiscal (March 31, 2021); however, we are hearing that it is more likely for the action plan to be released in June.

Although this is a provincial government obligation, the FNLC sought to inform this work by circulating a discussion guide for First Nations and First Nations Organizations. The FNLC also developed and shared with First Nations a summary of advice provided by First Nations Organizations on the action plan which was adopted by resolution of the BCAFN, FNS and UBCIC.

The Province also undertook engagement on the action plan with Ministries, a range of Indigenous organizations, the Métis Nation British Columbia, and directly with First Nations. The Province is merging this input into a "consultation draft" of the action plan that is being reviewed internally to the provincial government. It is expected that this action plan will then be issued publicly for review and comment in June.

Although all Indigenous persons in BC will have an opportunity to comment on the action plan through a public portal being established by the provincial government, the FNLC has clearly

noted the requirement for specific engagement with title and rights holders, and that the input from title and rights holders must take precedence, particularly on actions related to lands, resources, and territorial matters. The FNLC will seek to host a dedicated all-Chiefs session on the consultation draft of the action plan when released, and it is anticipated that the provincial government will make adjustments based on the input received, and release the final action plan in the Fall.

Chiefs in BC must be aware that their review and contributions to the draft action plan is necessary and critical to ensure the proper title and rights holders influence the draft action plan. There will be many other stakeholder groups providing input, but the perspectives of the title and rights holders must be paramount. The FNLC suggests to Chiefs to also press the provincial government to ensure the views of title and rights holders from First Nations in BC are transparently sought and properly addressed in the action plan, which should be released as soon as possible.

3. Agreements

Section 6 of the *Declaration Act* enables the Province to enter into agreements with Indigenous governing bodies to address various collaborative initiatives that are not specific to shared decision-making, and section 7 enables the Province to enter into shared decision-making agreements with Indigenous governing bodies.

To reinforce the provincial government's obligations under the *Declaration Act*, the FNLC has proposed exploring changes to the *Interpretation Act* to enable statutory decision-makers to negotiate, conclude and implement section 7 agreements pursuant to their governing legislation, in accordance with the *Declaration Act*, and eliminating the need for statute-by-statute amendments. Further discussions are pending. Some First Nations have indicated to the FNLC that they have not been able to advance discussions on section 6 and 7 agreements, and that officials of the provincial government indicated that this was due to legislative barriers.

There have also been questions about the definition of Indigenous Governing Body (IGB) and some confusion, misinterpretation, and communication to the effect that organizations such as the Métis Nation of BC, or some of the First Nations Organizations, are IGBs in the context of the Act. The Province has provided internal guidance to the public service that it is for Indigenous peoples – not the Province – to determine what entity constitutes an IGB, and that further, who constitutes an Indigenous people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982* is a matter that has been answered through the evolution of the law. The law tells us the proper title and rights holder is rooted in the lands, laws, histories, cultures, and traditions of Indigenous peoples – which in BC, is First Nations.

4. Annual Report

An annual report must be prepared and submitted by the Minister to the BC Legislature on or before June 30 of each year, and cover progress made to implement the *Declaration Act* during the previous fiscal year. The FNLC had a number of concerns with the first annual report as it included many initiatives that pre-dated, and were not directly related to, the implementation of the *Declaration Act*. It was written mainly from a communications perspective rather than as an accountability report.

Since there remains no action plan under the *Declaration Act*, we are concerned that again this year's report will be largely a promotional exercise. We will continue to press for the annual report to factually report progress against the *Declaration Act* – about alignment of laws, agreements with Indigenous governing bodies, and the action plan. Concluding the action plan will be key to ensure that the annual report has something concrete to report against.

5. Secretariat

The 2020 NDP election platform, and now the mandate letter of the Minister of Indigenous Relations and Reconciliation, includes a commitment to, “create a dedicated Secretariat...to coordinate government’s reconciliation efforts and to ensure new legislation and policies are consistent with the Declaration on the Rights of Indigenous Peoples Act.”

First Nations have long pushed for the BC Government to become better organized for a relationship with First Nations that aligns with the legal pluralism that exists under the *Constitution Act* and First Nations’ inherent jurisdiction and self-determination rights. The *Declaration Act* requires the BC Government to get appropriately organized if they are going to achieve literacy and competency within the machinery of government regarding the standards and objectives of the UN Declaration, Indigenous rights, Crown obligations, and carrying out steps to fulfilling these commitments.

The FNLC therefore views the concept of a Secretariat as a positive development. However, it must be appropriately structured and positioned within the provincial government, and the process to create a Secretariat proposal should not take until December 2021.

Critically, the Secretariat needs to hold responsibility for matters that are focused on changing and improving the processes and machinery across the BC Government, including associated mindsets, and compelling compliance and accountability for results. The mandate of the Secretariat needs to be characterized by work that is strategic and cross-government/systemic in nature.

The Secretariat must support proper and enhanced engagement between the Province and Nations directly regarding the implementation of the UN Declaration in BC. As an internal part of the machinery of government, the Secretariat must not put in place measures that limit or interfere with the work First Nations are doing to self-determine or rebuild their governments or Nations.

To be effective, it is critical that the Secretariat is part of a central and powerful office within government (i.e. Premier’s office), and be directly connected and accountable to key Cabinet committees. It must include senior and experienced individuals with a proven history of achieving results, including in the eyes of First Nations.

Minister Rankin is leading the work of the provincial government to develop the Secretariat, and has indicated agreement that the Secretariat be placed centrally in government, focus on alignment of laws, and be in place as soon as possible.

6. Métis Nation British Columbia and the Declaration Act

At the recent assemblies of the BCAFN, FNS, and UBCIC, BC Chiefs passed resolutions acknowledging that, while First Nations are committed to working alongside Métis people on issues of shared concern, First Nations and Métis people have different rights and histories in BC. These resolutions rejected recent claims of the Métis Nation British Columbia (MNBC) of Métis Aboriginal rights in BC, and erroneous claims that the MNBC constitutes an Indigenous Governing Body under the *Declaration Act*.

Pursuant to these resolutions, the FNLC has called on the provincial government to apply a principled and accurate assessment of these claims made by the MNBC, and to uphold the

distinctions-based requirements of the *Declaration Act* in order to prevent unfounded assertions of Métis rights that would infringe or interfere with the original, inherent Indigenous title and rights holders in B.C. The provincial government has indicated that they remain committed to working with the Métis as an Indigenous peoples, while also recognizing that there are no land rights for Métis people in the Province of British Columbia and that First Nations are the proper title and rights holders.

7. *For further information*

Updates on *Declaration Act* implementation will be scheduled during the upcoming Assemblies of the Union of BC Indian Chiefs (June 2-3), First Nations Summit (June 9-11), and BC Assembly of First Nations (September 14-16), and provide an opportunity for discussion and dialogue. Nations are also encouraged to share their views and priorities directly with the provincial government.