1764-1959 Marine Drive
North Vancouver, BC V7P 3G1 *Telephone: 604 924 3844*

September 9, 2021

Honourable Murray Rankin
Minister of Indigenous Relations and Reconciliation
Parliament Buildings,
Victoria, BC
V8W 9E2
Via email: ABR.Minister@gov.bc.ca
declaration@gov.bc.ca

Re: First Nations Energy and Mining Council submission to the draft action plan on the Declaration on the Rights of Indigenous Peoples Act

Dear Minister Rankin,

Attached is an updated version of the First Nations Energy and Mining Council's submission on the British Columbia *Rights of Indigenous Peoples Act* which received Royal Assent in 2019. I congratulate you and your government for taking this bold step to align all the laws, regulations, policies, and practices with the United Nations Declaration on the Rights of Indigenous Peoples.

There are six items identified in our priorities and only one is identified in your draft action plan which relates to our priority list: *4.34: Engage First Nations to identify and support clean energy opportunities related to CleanBC, the Comprehensive Review of BC Hydro, and the B.C. Utilities Commission Inquiry on the Regulation of Indigenous Utilities*. It is important that all these items detailed in this submission are included, especially a complete re-write of the *Mineral Tenure Act.* This Act is an antiquated law which continues to force First Nations to use the Courts to protect their lands from the actions by mineral exploration companies.

Another important action item is the Indigenous Protected and Conserved Areas & Indigenous Guardians. The successes from the Australian experience, which started a decade ago, could be replicated here in British Columbia. Such a commitment will highlight progress toward the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

I have sent several requests for meetings to discuss these matters with you and my offer still stands. Please have your office contact paul.blom@fnemc.ca to arrange a meeting at your convenience.

Sincerely,

Dave Porter, CEO

Cc: First Nations Leadership Council
Don Bain, Deputy Chief of Staff to Premier Horgan

1764-1959 Marine Drive
North Vancouver, BC V7P 3G1 *Telephone: 604 924 3844*

Version: September 9, 2021

Submission to MIRR on Declaration on the Rights of Indigenous Peoples Act priorities in the energy and mining sectors

Executive summary

FNEMC was requested to prepare a submission to the Ministry of Indigenous Relations and Reconciliation on informing the implementation of the *Declaration on the Rights of Indigenous Peoples Act* (2019). There are a number of priority laws, regulations, policies, and practices which we recommend MIRR consider changing in order to support First Nations in British Columbia.

These include:

- *Mineral Tenure Act*
- BC Environmental Assessment Revitalization Act regulations and policies
- BC Hydro Phase 3 consultation
- Bill 17: *Clean Energy Amendment Act, 2020*
- Bill 6: *Mines Amendment Act, 2020*
- Indigenous Protected and Conserved Areas and Guardians

As an immediate priority FNEMC recommends the FNLC and BC draft a legally binding memorandum of understanding which commits the Government of BC to collaborate in full partnership with First Nations on any proposed amendments to laws, regulations, policies, and practices which may impact their rights. The co-development of the *New Relationship Trust Act (2006)* is an example of such a partnership where a law was jointly drafted with First Nations and the Provincial government.

A case study on the BC EA Act describes the details surrounding the re-drafting of a piece of legislation including the time and costs involved in such an initiative is another example.

The First Nations Energy and Mining Council mandate

The BC First Nations Energy and Mining Council (FNEMC) was created to facilitate, advocate for, and support BC First Nations to achieve their goals and objectives in relation to energy, mining, and climate change, without compromising the rights and authority of First Nations with respect to their territories and resources. It is an essential support organization to First Nations and Indigenous political organizations in BC.

A major legislative initiative commenced in 2015 as a component of the FNLC-BC Commitments Document. The Commitments Document promised "a government-to-government relationship based upon respect, recognition, and accommodation of aboriginal rights and title and to the reconciliation of Aboriginal and Crown titles and jurisdictions." One of the priority actions from the Commitments Document was reforming the environmental assessment process in British Columbia. Through resolutions at the Union of BC Indian Chiefs, First Nations Summit, and BC Assembly of First Nations the First Nations Energy and Mining Council was asked to support environmental assessment reforms.

BC Environmental Assessment Revitalization Act – Case Study

In 2015 the First Nations Leadership Council and the Government of BC met in Vancouver at the All Chiefs-BC Cabinet meeting. In recent years, this 3-day annual event has resulted in a number of positive opportunities for First Nations. During the 2015 event the FNLC and Chiefs in Assembly proposed that environmental assessment reform should be a priority because much of the litigation surrounding natural resources resulted from this poorly designed act. The environmental assessment process has been the focal point of much of the natural resource litigation by First Nations in BC.

Throughout the elected mandates of two successive provincial governments the First Nations Energy and Mining Council, under the direction of the FNLC and First Nations, collaborated with the BC Environmental Assessment Office to make changes to the BC Environmental Assessment Act. It is estimated that $3 million[1] was spent on this initiative including 9 regional and province-wide workshops, regular updates at the Union of BC Indian Chiefs, First Nations Summit, and BC Assembly of First Nations meetings, committees, reports, and participation in the review of the legislation.

The new EA Act was received Royal Assent prior to the *Declaration on the Rights of Indigenous Peoples Act.* While it did not achieve everything, we sought it is a better piece of environmental assessment legislation than the previous 2002 act. One notable shortfall was the commitment to consent in the environmental assessment when the Crown and First Nations don't agree on the result of a review. The new Act commits to 'seeking consensus' instead of consent of the impacted First Nation. During a meeting with the First Nations Leadership Council in October 2018, the Premier committed to re-visit the new EA Act after the Declaration of the Rights of Indigenous Peoples Act (if both bills were passed into law).

A major disappointment occurred during the drafting of the regulations when BC developed the regulations though a technical indigenous advisory committee (IIC). Many of the FNLC concerns regarding the regulations were outlined in letters and ignored by the BC Environmental Assessment Office. The result is a fairly progressive act with poorly developed regulations. Some of these regulations are still being drafted unilaterally by the BC Environmental Assessment Office.

The following is a flow chart describing the development of the EA Revitalization Act.

[1] This amount was provided by then BCEAO Associate Deputy Minister, Kevin Jardine.

MINISTER OF ENVIRONMENT & CLIMATE CHANGE STRATEGY + FIRST NATIONS LEADERSHIP COUNCIL

Timing: January -February
Activities/Outcomes:

- Collaborate (FNEMC-EAO joint technical team) on development of revitalized EA process, including:
  - Process & materials for engagement with First Nations (for example, PowerPoint presentation for workshops)
  - Assist independent chair/co-chairs by developing additional background materials for EA Advisory Committee
  - Develop draft process diagram of the Revitalized EA Process (straw dog)

EA ADVISORY COMMITTEE

Timing: February to April 2018
Activities/Outcomes:

- Review and provide feedback on draft process diagram and any background materials
- Focus on Enhancing Public Confidence; Protecting the Environment and Supporting Economic Growth

FIRST NATIONS

Timing: February to April 2018
Activities/Outcomes:

- Co-led (EAO/FNEMC) First Nations regional workshops
- Province-wide event for First Nations to engage on EA revitalization
- Joint engagement with specific First Nations as requested by First Nations

STAKEHOLDER ENGAGEMENT

Timing: February to April 2018
Activities/Outcomes:

- Joint engagement with key stakeholders as requested by stakeholders

MINISTER - BC FIRST NATIONS LEADERSHIP COUNCIL

Timing: May 2018
Activities/Outcomes:

- Collaborate (FNEMC-EAO joint technical team) on revitalized EA process and issues paper for public comment, based on:
  - proceedings/outputs from First Nations workshops
  - EA Advisory Committee feedback
- Meeting with Minister and Regional Chief (on behalf of FNLC) to confirm issues paper for public comment

PUBLIC COMMENT

Timing: Commencing June 2018
Activities/Outcomes:

- Public engagement and submissions on issues paper (through multiple formats/opportunities)

Other Provincial acts, regulations and policies requiring immediate attention:

1. Mineral Tenure Act

   FNEMC has engaged with EMPR since 2018 to discuss reforms to the outdated *Mineral Tenure Act*. This included the joint development of a concept paper and package of legislative reforms. In January 2019, this process was abruptly terminated by EMPR. FNEMC then presented a plan for a revised process – modelled on the successful Environmental Assessment Revitalization.

   In September 2019, then Minister Mungall advised that EMPR was putting the *Mineral Tenure Act* reform process on hold pending passage of the *Declaration Act* because *Mineral Tenure Act* reforms need to consider the free, prior and informed consent of Indigenous nations. In response, EMPR instead advanced its unilaterally developed *Mines Act* Intentions Paper process that resulted in Bill 6; there is no commitment to continue with *Mineral Tenure Act* reforms. FNEMC has consistently indicated that no legislative changes should proceed unless they are developed consistent with the *Declaration Act*.

   FNLC wrote to Premier Horgan regarding the inconsistency of both Bill 6 (*Mines Act* amendments) and Bill 17 (*Clean Energy Act* amendments) with the *Declaration Act*. FNLC requested that these flawed processes be remedied and that no further steps be taken until the changes proceed in a manner consistent with the *Declaration Act*.

   It is concerning that individual ministries continue to act unilaterally in direct contravention of the *Declaration Act*. Both Bill 6 and Bill 17 were advanced unilaterally. In fact, FNEMC had expressly asked that the Bill 6 changes be deferred until consultation had taken place; and UBCIC received written correspondence acknowledging that there had been no consultation whatsoever on Bill 17. Meaningful implementation of the *Declaration Act* requires that this unilateralism end and that there be a shared government to government process in place for every circumstance where the BC government considers legislative changes.

   One option to address these inconsistencies across the BC government would be for FNLC to establish legal working groups that can identify, keep track of and proactively engage in legislative and policy initiatives. There could be two legal working groups – one for social ministry issues and one for natural resources ministry issues. Such an approach could help ensure that FNLC is applying a consistent and coordinated *Declaration Act* lens to proposed changes across key ministries. This would also support FNLC in proactively ensuring that Indigenous priorities are addressed.

   ### Recommendations:

   - reiterate its concerns about current legislative changes by EMPR being advanced with no consideration of the *Declaration Act;*

- prioritize long sought-after mining reforms to BC's *Mineral Tenure Act* as part of Action Plan development;
- ensure that no further reforms be initiated in relation to electricity or energy unless and until additional analysis is conducted by FNEMC (similar to that which FNEMC has undertaken in relation to mining).
- Support the development of a protocol with EMPR (see appendix A).

2. British Columbia Environmental Assessment Revitalization Act regulations and policies

   The case study on the new BC EA Revitalization Act references a number of the regulatory concerns. After the Act was passed in 2018 the BC Environmental Assessment Office took control of the jointly appointed Indigenous Implementation Committee (IIC). This committee of 14 environmental assessment 14 was co-chaired by the EAO assistant deputy minister and a member of the IIC. The result of six months of discussions was extremely disappointing as the regulations were unilaterally drafted by the EAO. Despite a series of interventions from the First Nations Leadership Council the concerns raised were ignored. The new Act came into force in January 2020 even though some of the regulations and policies were still not drafted (ex. Dispute resolution).

   Recommendation:

   - Appoint an environmental assessment team and re-open the regulatory and policy discussions with the BC Environmental Assessment Office.

3. BC Hydro Phase 2 consultation process

   FNEMC and FNLC have concerns with the Phase 1 and Phase 2 reviews of BC Hydro, which, in our view, have been uncoordinated and ineffective. While the current review process is nearly complete, it has not met the standard of consent in the United Nations Declaration on the Rights of Indigenous Peoples nor the minimum threshold of consultation that dates back to the 2004 Supreme Court of Canada decisions in *Haida Nation* and *Taku River Tlingit.*

   The First Nations Leadership Council highlighted their concerns with the current process in letters to British Columbia dated May 27, 2020, April 16, 2020, and October 18, 2019. After many meetings between the First Nations Energy and Mining Council (FNEMC) and representatives of the Ministry of Energy, Mines, and Petroleum Resources (EMPR) there was no agreement on how to effectively collaborate (in a similar manner to the environmental assessment reform).

   The BC Hydro review process commenced two years ago, and recent demands were imposed on FNEMC to respond to the series of provincially drafted reports within an unrealistic timeline. Much time was spent on attempts to set a fair process in place for First Nations to respond to this review, particularly important in the midst of a global

pandemic. The resulting impasse led to EMPR's insistence that the very minimal funding offered ($50 000) was to be used for a review of both the interim and final reports. It was a take-it-or-leave-it offer and very different from environmental assessment reforms.

The major issues requiring discussion include:

1. Resetting this process to ensure it is consistent with the recently passed *Declaration on the Rights of Indigenous Peoples Act*;
2. Resource revenue sharing on BC Hydro projects;
3. Compensation for the impacts of past infringements;
4. Ownership in:
    a. Transmission lines
    b. Independent power projects
    c. Other utilities, such as the local distribution system;
5. Participation in governance, employment, and contracting with BC Hydro;
6. Transition from diesel to renewable power generation in remote First Nations communities in BC;
7. Legislative, regulatory, and policies amendments to achieve the above; and
8. Other issues, as determined by the parties.

Recommendations:

- Formal appointment of a political oversight committee that includes the FNLC and Ministers of MIRR and EMPR;
- A technical working group to coordinate the new process;
- Joint drafting of a report;
- Jointly coordinated First Nations province-wide virtual meeting to review the report and receive feedback;
- A process to amend legislation, regulations, and policy; and
- Full funding to ensure appropriate participation.

4. Bill 17: *Clean Energy Amendment Act, 2020*

This bill was introduced to the British Columbia Legislature on June 23, 2020 without any consultation with First Nations. Bill 17 came at a surprise to us and officials in the Ministry of Energy, Mines, and Petroleum Resources confirmed that no consultation took place with First Nations. Government staff have informed us that the bill was introduced due to the compressed timelines to debate new legislation during the summer session and the interest of BC Hydro to use the recommendations in the development of the Integrated Resource Planning Process. We have also been informed that the BC government does not consult directly with First Nations on the drafting of legislation.

Recommendation:

- Appoint a working group to develop priorities and a plan to jointly draft amendments to a new bill.

5. Bill 6. 2020: *Mines Amendment Act, 2020*
   In the fall of 2019, the *Mines Act* Intentions Paper was released by the Ministry of Energy Mines and Petroleum Resources (MEMPR). The FNEMC provided a submission to EMPR on November 28, 2019. FNEMC indicated that the release of last fall's *Mines Act* Intentions Paper was inconsistent with, and should be recalibrated to, align with the *Declaration Act*.

   The previous EMPR Minister, Michelle Mungall committed to working toward mining reforms in partnership with FNEMC and FNLC. These commitments appear to have been largely ignored despite FNEMC's ongoing engagements with EMPR staff. We are disappointed to learn that EMPR appears to be advancing its policy and legislative agenda work from a "business as usual" perspective, despite the *Declaration of the Rights of Indigenous Peoples Act* ("*Declaration Act*").

   It appears that none of this is reflected in either the process or the substance of Bill 6 – there has been no government to government approach, no response to FNEMC's submission on the Intentions paper, nor has there been advance notification of the tabling of this bill.

   Recommendations:

   - We recommend that further steps in relation to Bill 6 be paused until we have had an opportunity to meet with you to discuss our concerns and ensure that next steps on this Bill proceed in a manner consistent with the *Declaration Act*.

   - FNEMC had recommended that the process be recalibrated by engaging the FNLC through FNEMC on the next steps, including inviting FNEMC to contribute to the review of consultation results and collaborative drafting of legislative amendments, as was done with Bill 51, BC's new *Environmental Assessment Act*.

6. Indigenous Protected and Conserved Areas & Indigenous Guardians:
   Good for the Land, Good for the People, Good for the Economy

   Indigenous Leadership Initiative Submissions on the *Declaration on the Rights of Indigenous Peoples Act* Draft Action Plan

I. Introduction – Undoing the Colonial Harm

The province of British Columbia ("BC" or the "province") has committed to "undo[ing] 150 years of colonial harms that continue to be felt to this day".[2] They have committed to doing this important and necessary work by implementing the objectives set out under the *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration") pursuant to the *Declaration on the Rights of Indigenous Peoples Act* ("DRIPA").

One of the initial steps required under *DRIPA* is to develop an action plan collaboratively with Indigenous peoples in BC.[3] On June 11, 2021 BC released a draft action plan ("DRIPA Action Plan" or "Action Plan" or "Draft Plan") that was developed with some First Nations and organizations, but not all. In lieu of full participation in the development of the Draft Plan, BC has provided assurance that any priorities identified by Indigenous peoples or organizations in the subsequent consultation period will be represented in the Action Plan moving forward.[4]
The purpose of these submissions is to clearly set out the Indigenous Leadership Initiative's ("ILI") priorities to ensure that BC integrates them into the final Action Plan and meaningful action moving forward.

II. ILI's Mandate and Priorities

Our submissions begin with an introduction to ILI's mandate, priorities and team, followed by an overview of IPCAs and Indigenous Guardians. This will be followed by key recommendations for strengthening the Action Plan, along with the rationale for doing so.
ILI – Advancing Nationhood through IPCAs and Indigenous Guardians
The ILI is an Indigenous-led organization dedicated to advancing the role of Indigenous Nations in deciding the future of their traditional territories. The ILI is comprised of Indigenous leaders with decades of experience on the land, in Indigenous leadership and governance, in territorial and provincial government, in Parliament and federal cabinet, and in national commissions and international arena.

ILI draws on this expertise to foster Indigenous Nationhood. ILI takes a holistic view of Nationhood and believe healthy lands support healthy individuals, families and communities, leading to healthier cultures, economies and Nations.

More specifically, ILI's priorities are aimed at advancing Indigenous Protected and Conserved Areas ("IPCAs") and Indigenous Guardians programs because they foster, and are an expression of, Nationhood. They also help solve threats like climate change and loss of biodiversity. And they help prepare a path toward reconciliation, Nation-to-Nation relationships, and a better

[2] BC Ministry of Indigenous Relations and Reconciliation, "Province seeks input from Indigenous peoples to shape future of reconciliation", June 11, 2021 – retrieved from: https://archive.news.gov.bc.ca/releases/news_releases_2020-2024/2021IRR0028-001139.htm
[3] *Declaration on the rights of Indigenous Peoples Act,* S.B.C., c.44 ["DRIPA"] - s. 4(2): The action plan must be prepared and implemented in consultation and cooperation with the Indigenous peoples in British Columbia.
[4] Ibid, "the finalized action plan [will] appropriately represent their [Indigenous peoples'] priorities." [bracketed language added for clarity].

foundation for BC and Canada – one which recognizes Indigenous Nations as rights holders and decision-makers within their own territories.

ILI's BC Team

While ILI works to advance IPCAs and Indigenous Guardians nationally, there is an ILI team dedicated to advancing IPCAs and Indigenous Guardians here in BC. These members are introduced below.

Dave Porter

Dave Porter is currently the CEO for the BC First Nations Energy and Mining Council. Previously, Porter served 10 years as the Chair of the Kaska Dena Council and as Chief Negotiator for the Council. He also has experience as an elected executive member of the BC First Nations Summit Task Group.

Dave is a member of ILI's Leadership Team.

Bev Sellars

Bev Sellars is a former chief of the Xat'sull First Nation and was an advisor for the BC Treaty Commission. Sellars is the author of numerous publications, including the award-winning They Called Me Number One.

Bev is a member of ILI's Leadership Team.

Dr. Frank Brown

Dr. Frank Brown is a Hereditary Chief of the Heiltsuk Nation. Brown was the founding director of the Heiltsuk Integrated Resource Management Department and director of Land and Marine Stewardship for the Coastal First Nations – Great Bear Initiative. Brown co-developed and is implementing an Aboriginal Eco-Tourism training program with the Heiltsuk Tribal Council, Vancouver Island University and North Island College. He also supported the development of an Indigenous Guardians training program with Coastal First Nations – Great Bear Initiative and Vancouver Island University.

Frank is a member of ILI's Leadership Team

The work of the ILI BC team is supported by the rest of ILI and guided by ILI director, Valérie Courtois.

Moving forward, we expect the province to directly engage with us to implement the recommendations outlined in these submissions.

IPCAs and Indigenous Guardians

The concepts of IPCAs and Indigenous Guardians are not new. Over the years however, the concepts have steadily gained momentum and appeal here in BC, Canada and internationally as an effective tool for addressing both Indigenous rights issues and conservation needs, in addition to social, cultural and economic needs.

i. IPCAs

In 2017 the federal government commissioned a report to specifically look at how IPCAs could be used to achieve Canada's international biodiversity commitments and targets ("ICE Report").[5]

[5] "We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation" – retrieved at:

In that Report the Indigenous Circle of Experts set out a definition of IPCAs that is now widely understood and accepted in Canada:

> "IPCAs are lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems."[6]

While IPCAs can take a variety of shapes and forms, they share these common elements:

- They are Indigenous-led;
- They represent a long-term commitment to conservation;
- They elevate Indigenous rights and responsibilities;[7]
- They are a practical expression of the rights set out under the Declaration, including free, prior and informed consent ("FPIC").

IPCAs, particularly when combined with Indigenous Guardians programs, provide wide-ranging benefits to Indigenous communities while also providing an effective model for responding to and mitigating climate change and biodiversity loss, the results of which provide considerable benefits for everyone.

Knowing the potential of IPCAs and Indigenous Guardians in addressing key issues facing all levels of government, the ICE Report made several recommendations which call upon on all levels of government to recognize and support IPCAs and Indigenous Guardians programs.

ii. Indigenous Guardians

Indigenous Guardians are "a modern take on an ancient tradition of caring for the land."[8] There are more than 30 teams of Indigenous Guardians across Canada that work to conserve and manage their territories. In caring for their territories – though monitoring (the land, water, wildlife and development), patrolling, responding to climate impacts, implementing restoration initiatives, providing educational opportunities for Indigenous youth, community members and the broader public, gathering necessary information for informed decision-making, and being the "eyes and ears" on the ground - Indigenous Guardians programs have proven to be an excellent model for enhancing the social, cultural, environmental and economic well-being within First Nations communities.[9]

Broad Support for ILI Mandate and Priorities

In addition to the ICE Report and recommendations that call on all levels of government to support IPCAs and Indigenous Guardians programs, the ILI and other First Nations and

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https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf

[6] Ibid at p. 35.

[7] Ibid at pp 5-6.

[8] A National Indigenous Guardians Network Backgrounder by ILI – retrieved at: https://www.ilinationhood.ca/publications/backgrounder-a-national-indigenous-guardians-network

[9] Ibid. The ICE Report also sets out 29 key recommendations for all levels of government to take action to support and recognize IPCAs, along with Guardian programs at pp 56-67.

organizations have worked persistently to advance recognition and support for IPCAs and Indigenous Guardians programs.[10]

Following the receipt of a resolution supported by the Assembly of First Nations ("AFN"),[11] ILI secured a commitment of $25 million in budget 2017 to establish a pilot program for Indigenous Guardians initiatives in Canada. With further support from the AFN, and building on the success of existing and developing Indigenous Guardians and Indigenous-led conservation initiatives, ILI has continued to work with the federal government to secure further funding for Indigenous Guardians and the establishment of IPCAs. This resulted in the recent announcement on August 12, where the federal government dedicated $340 million in new funding over five years to support Indigenous-led conservation and stewardship. This investment includes more than $173 million for Indigenous Guardians programs and the First Nations National Guardians Network. It also includes over $166 million for IPCA's.[12]

While the new funding commitment is a step in the right direction, it still falls short of what is required to achieve our collective vision of ensuring that every First Nation has the opportunity to establish IPCAs and Indigenous Guardians programs here in BC. To achieve that, we need legal recognition and sustained support from BC moving forward.
Bearing that in mind, ILI makes the following recommendation for inclusion into the final Action Plan.

Recommendation 1.0: revise the Draft Plan to include action items that provide for:

- Legal recognition and support for IPCAs in BC;
- Legal recognition and support for Indigenous Guardians in BC;
- Legal recognition and support for the rights of Indigenous Nations to manage, protect and make decisions with respect to their territories.

Recommendation 1.1: revise the DRIPA Draft Plan to include action item(s) aimed at addressing the legal and political barriers in the way of IPCA and Indigenous Guardian recognition and support – for example, addressing statutory requirements to compensate tenure holders when IPCAs are legally designated.

The remainder of these submissions will make it clear as to why these recommendations are so crucial and necessary in addressing the colonial harm felt by Indigenous peoples and will set out

[10] Assembly of First Nations Special Chiefs Assembly, December 2015, Resolution no. 60/2015; Assembly of First Nations, Annual General Assembly, December 2020, Resolution no. 17/2020; UBCIC, Chiefs Council June 2021, Resolution no. 2021-38. While ILI has a special interest in having IPCAs and Indigenous Guardians recognized and supported, it is important to note that this priority is broadly shared by First Nations here in BC and across Canada.
[11] Assembly of First Nations Special Chiefs Assembly, December 2015.
[12] The Government of Canada, Environment and Climate Change Canada, "Government of Canada announces $340 million to support Indigenous-led conservation" (August 12, 2021). Retrieved at: https://www.canada.ca/en/environment-climate-change/news/2021/08/government-of-canada-announces-340-million-to-support-indigenous-led-conservation.html

further recommendations to ensure that action towards recognition of IPCAs and Indigenous Guardians is meaningful and effective.

III. Undoing the Colonial Harms

In order to undo the "150 years of colonial harms" to properly address ILI's and other First Nations' priorities in the Action Plan, it is important for the province to understand how its conduct has and continues to harm Indigenous peoples.

From ILI's perspective there is a unifying thread in the colonial harm inflicted upon Indigenous peoples, which is the ongoing and explicit use of law to sever First Nations' relationships to their territories.

The harm is particularly acute here in BC, where despite clear instructions set out in the Royal Proclamation of 1763 to seek treaty or other arrangements to secure land from First Nations,[13] the province simply assumed ownership of the land without entering into treaty with the majority of First Nations in BC, or any other type of agreement, or compensating First Nations for taking their land. Instead, BC initiated a reserve creation process that relegated First Nations to tiny reserves while enacting laws to encourage settlement of larger pieces of land for non-Indigenous people.[14]

To encourage settlement, BC employed an "exclusion and containment" strategy, which contained First Nations to small reserves while excluding them from the benefits offered to non-Indigenous settlers.[15] This was done by enacting the *Pre-emption Ordinance, 1866* (in place until 1953), which opened up land for non-Indigenous families while expressly excluding Indigenous people from being able to pre-empt land.[16] The practical effect of this was that non-Indigenous families were eligible to receive 320 acres per family as a way of encouraging settlement, while the total land surveyed for Indian reserves in BC amounted to less than 1 acre of land per Indian.[17]

Efforts by First Nations to have reserves enlarged were largely unsuccessful. In 1913, a Royal Commission began to address Indian reserve issues,[18] but rather than address First Nations' concerns, the Commission resulted in a further reduction of over 36,000 acres of land from reserves all across BC. This was done by enacting the *British Columbia Indian Lands Settlement Act of 1920*, which gave BC the authority to take these lands without consulting or compensating First Nations, effectively circumventing the requirements set out under the *Indian Act*.[19]

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[13] "any lands whatever, which, not having been ceded to or purchased by us,…are reserved to the …Indians"
[14] *Indian Reserve Ordinance*, 1869, R.S.B.C 1871, c. 125.
[15] Legislating British Columbia: A History of BC Land Law, 1858-1978 by Michael Begg, 2007.
[16] *Pre-emption Ordinance, 1866*.
[17] Legislating British Columbia: A History of BC Land Law, 1858-1978 by Michael Begg, 2007.
[18] McKenna–McBride Royal Commission
[19] *The British Columbia Indian Lands Settlement Act* S.C. 1920, c. 51

In response, First Nations tried to pursue land claims to have their land rights recognized. Rather than negotiate with First Nations however, the Crown simply made it illegal for First Nations to hire lawyers to pursue land claims.[20] This prohibition was in effect between 1927-1951. At this time it was also illegal for First Nations to engage in the most important aspects of their legal systems and cultures (from 1880-1951), First Nations were stripped of their traditional governance systems, children were being taken from their communities and forced into residential schools (from 1867-1984 in BC),[21] and all of this was taking place while the province severely regulated Indigenous hunting and fishing, expressly prohibiting First Nations from using traditional harvesting methods and means.[22]

Once the bar against hiring lawyers was finally removed – after large tracts of land in BC had been taken for settlement - First Nations sought recognition of land rights and self-determination in every possible way - through submissions to the House of Commons,[23] Aboriginal rights and title litigation,[24] development of international Indigenous human rights, and grassroots movements, including what is now known as the Constitution Express which successfully brought about the inclusion of Aboriginal rights in the repatriated Constitution, 1982.

Despite the constitutional recognition of Aboriginal rights however, the reality is that the province has simply not given legal effect to those rights. This is reflected in the overall lack of Indigenous land ownership across BC. Since 1982, legal recognition of Indigenous land rights in BC has been extended to less than 0.4% of BC's entire land base (with Treaty Settlement Lands making up 0.2% and Aboriginal title lands making up less than 0.2%), in each case taking First Nations decades to negotiate and litigate, and costing millions in legal fees. This is not because BC doesn't have the land base. To the contrary, according to its most recent Crown land statistics report, BC continues to own 93.8% of the entire land base in BC as Crown land (14% of which are designated as Parks or Protected Areas), while the federal Crown holds approximately 1% of land, whereby only 0.4% of that is comprised of Indian reserves.[25]

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[20] *Indian Act*, R.S.C. 1927, s. 141.
[21] *An Act Further to Amend The Indian Act*, 1880, S.C. 1884, c. 27.
[22] *Salmon Fishery Regulations for British Columbia, 1888* states: Fishing by means of nets or other apparatus without leases or licences from the Minister of Marine and Fisheries is prohibited in all waters of the Province of British Columbia. Provided always that Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than with drift nets, or spearing.
[23] In 1960 Secwepemc leader George Manuel and Nisga'a leader Frank Calder presented a brief to the Joint Committee of the Canadian Senate and House of Commons advocating for Aboriginal title recognition and compensation.
[24] In 1969 the Nisga'a initiated litigation, leading to the 1973 Calder decision (*Calder et al. v. Attorney-General of British Columbia,* [1973] SCR 313), where the Supreme Court of Canada recognized that the Nisga'a held title to their land before BC was established.
[25] Crown Land: Indicators & Statistics Report, 2010 (FLNRO). Retrieved from: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown_land_indicators__statistics_report.pdf

Indigenous rights are also largely disregarded in legislation and policy governing resource-use and development, resulting in a situation where BC "holds all the power" to make decisions for activities within First Nations' territories, with little to no say by Indigenous peoples.[26]
The consequence of such an approach is that out of the 200 First Nations here in BC, the Crown does not recognize a single Nation's ownership and decision-making authority over their territories, or even a majority of their territories, or even 1/10th of their territories – notwithstanding the recognition of Tsilhqo'tin Aboriginal title, which extends Aboriginal title over approximately 5% of their entire territories.

The situation is so dire that Kwikwetlem First Nation has sued the province for breaching their Charter rights under section 15, arguing that it is discriminatory for BC to offer timely and effective means of recognizing non-Indigenous property rights while not offering the same to Indigenous people in recognizing theirs.[27]

Even when BC does recognize Aboriginal rights proven in court or recognized by a treaty, they continue to unjustifiably infringe those rights – even after the enactment of *DRIPA* - as shown most recently in the *Yahey v. BC* ("Blueberry River") decision, whereby the court concluded that the "tipping point had been reached" and that Blueberry's treaty rights "have been significantly and meaningfully diminished" by extensive Crown authorizations within Blueberry River's territory without due regard for Blueberry River's treaty rights.[28] And again in the *Ahousaht et al* decision, whereby the five Nations went through more than 18 years of litigation to prove their rights to fish and that those rights are being infringed by the Crown. The litigation finally came to an end in April, 2021, ultimately forcing the Crown to address the infringements and to allow the Nations to exercise their fishing rights.[29]

Since its inception BC has unjustly enriched itself at the expense of Indigenous peoples. Crown laws and policies have caused significant harm to Indigenous peoples, removing us from our territories and our rights to make decisions with respect to those territories, prohibiting the exercise of our cultures, governance systems and ways of life. All of this has had crippling impacts on Indigenous peoples in BC, where statistics continue to show how First Nations suffer from disproportionate rates of poverty, homelessness, unemployment, incarceration, child apprehension, violence, suicide, and continue to face discrimination in every sector of society – which are all direct consequences of being displaced from families, cultures, communities, territories, and the ability to fulfill the roles and responsibilities therein.

IV. Addressing the Harm to Recognize and Restore Rights

Much of the harm caused is rooted in the belief that Indigenous peoples are inferior to non-Indigenous peoples, calling into question our cultures, our governance systems, our abilities to

[26] *Blueberry River*.
[27] *Kwikwetlem v. BC* https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/indicators-statistics-report
[28] *Blueberry River* at para 1116.
[29] *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2021 BCCA 155 (CanLII)

manage our territories, and forcefully disrupting them in favour of European ways. This not only caused harm to Indigenous peoples' cultures, territories, and ways of life, it enabled the destructive and unsustainable resource development that has led to the environmental crises we all face today.

Recognizing and supporting IPCAs and Indigenous Guardians will help reverse both environmental and colonial harms because they restore Nations' abilities to take care of their lands like their ancestors successfully did for thousands of years.

The DRIPA framework is a good place to start this important work. To assist BC in strengthening the Action Plan to fulfill its commitment of undoing the colonial harm, we provide the following observations and recommendations – in addition to the recommendations above.

Strengthening the Action Plan

Out of the 79 action items set out in the Action Plan there are none that deal specifically with IPCAs or Indigenous Guardians or otherwise address the need for legal recognition and support for Nations to uphold their rights and responsibilities within their territories.
Although the province's stated goal is for Indigenous people to be able to "exercise and have full enjoyment of their rights, including the rights of First Nations to own, use, develop and control lands and resources within their territories in B.C", the Action Plan does not create enforceable action items needed to accomplish that goal. Instead, the Action Plan provides the same discretion for BC to negotiate section 7 agreements with First Nations, if it chooses to, while offering fragmented ministerial engagement on broader environmental and conservation issues. The problem with this approach was recently noted in the *Blueberry River* decision,[30] wherein the court criticizes BC's regulatory regime for inadequately considering and addressing cumulative impacts to Aboriginal and/or treaty rights:

> Delay in dealing with these matters and the continuation of the status quo has benefitted the Province. While interim measures can be helpful, they are only so if permanent measures are developed in a timely way. In the end, these processes are at the discretion of the Province and its agencies, with no clear ability for Blueberry to enforce its treaty rights. **That has to change… The Province continues to have all the power, and ultimately little incentive to change the status quo**. **There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights. The delay in implementing such legally enforceable commitments must therefore come to an end**.[31] [emphasis added]

As noted in the decision, the province's current approach for recognizing and protecting Aboriginal and treaty rights in BC is fragmented, discretionary, costly, lengthy, and rife with legal uncertainty. At present there is simply no legally recognized ways for Nations to enforce and protect their rights in timely or cost-effective ways.

[30] 2021, BCSC 1287
[31] At paras 1416-1417.

The guidance given by the court in *Blueberry River* is important and incredibly useful in this process and should be heeded in the development of the Action Plan and provincial action moving forward.

Recommendation 2.0: revise the Draft Plan to ensure that action items provide clear, timely and legally enforceable ways for achieving BC's stated goals with respect to the recognition of Aboriginal rights and title, and the right to self-determination.

Recommendation 2.1: under the Aboriginal rights and title theme, revise the Draft Plan to reflect BC's commitment to a clear and timely process for legally recognizing and supporting IPCAs and Indigenous Guardians, as an expression of Aboriginal rights and title.

Recommendation 2.2: revise the Draft Plan to remove unilateral processes where BC has sole discretion and authority to determine how action items are carried out and replace with clear language that supports collaboration and shared authority.

In order for BC to accomplish its stated goals, it must enact clear, timely and legally enforceable ways of recognizing Aboriginal rights and title. Anything short of this will simply replicate the issues noted in the *Blueberry River* decision and perpetuate the colonial harm, whereby the province continues to "hold all the power" at the expense of Indigenous peoples, their rights and their territories.

V. IPCAs and Indigenous Guardians are an Expression of Aboriginal Rights and Title

Determining the future of traditional territories is at the root of Indigenous Nationhood and the highest expression of Aboriginal rights and title. With IPCAs, Indigenous Nations hold the pen when lines are drawn on the map, sit at the table when decisions are made, and are on the ground caring for lands and waters through Indigenous Guardians programs.
Fortunately, the legal basis for doing this work is there and provides a foundation to build upon and inform the work moving forward.

i. Right to Territories

The UN Declaration clearly states that Indigenous peoples have the right to own their territories and that states should legally recognize those ownership rights:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[32]

The right of territorial land ownership has also been confirmed by the Supreme Court of Canada by the Tsilhqo'tin decision, wherein the Court concludes that Aboriginal title includes "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[33]

ii. Right to Conservation and Protection of Territories

The UN Declaration also states that Indigenous peoples are entitled to protection and conservation of their territories:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.[34]

Similarly, the constitution aims to protect Aboriginal rights and territories by constraining Crown decision-making in consideration of those rights - by imposing the duty to consult anytime the Crown contemplates a course of action that has the potential to adversely impact Aboriginal or treaty rights, even when those rights have yet to be "proven" or otherwise resolved;[35] by imposing a fiduciary duty on the Crown in relation to Aboriginal rights;[36] and by requiring Crown justification for any conduct or decision that infringes or denies Aboriginal rights.[37]

iii. Right to decision-making in relation to rights and territories

Lastly, Indigenous peoples have the right to be involved in decision-making, including the right to give or withhold their free, prior and informed consent for matters that impact their rights.[38] These rights are recognized and protected by the constitution whereby section 35 acknowledges the constitutional authority of Indigenous peoples to govern themselves and their territories, just as sections 91 and 92 provide the federal and provincial governments with governance authority to govern their respective territories.[39]

It is therefore important for **all work to advance IPCAs and Indigenous Guardians programs to be grounded in these rights, which includes the right to own, use, develop, protect and make decisions with respect to one's traditional territories**.

[32] *UN Declaration*, Article 26.
[33] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ["Tsilhqot'in"] at paras 73, 88.
[34] *UN Declaration*, Article 29.
[35] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73
[36] *Guerin v. The Queen*, 1984 CanLII 25 (SCC)
[37] *Tsilhqot'in* at para 119.
[38] *UN Declaration*, Articles 18, 19, 32.
[39] The Inherent Right of Self-Government: Emerging Directions for Legal Research, by Kent McNeil (2004).

Anything short of this, falls below the minimum standards required for the survival, dignity and well-being of Indigenous people and prevents the full expression of Aboriginal rights and title.[40] It also perpetuates the colonial harm and legal uncertainty we currently face, whereby the province yields all the power and control over First Nation's territories, forcing Nation's into courts and continued conflict to have their rights recognized.

Recommendation 3.0: revise the Draft Plan to link action items under the Aboriginal rights and title theme to provide for First Nations' rights to own, use, develop, protect and make decisions with respect to their traditional territories – specifically, action items regarding IPCAs and Indigenous Guardians.

Recommendation 3.1: revise the Draft Plan to explicitly include the words territories or traditional territories as the spatial unit to which Aboriginal rights, title and UNDRIP rights apply – and more specifically, the places where authority for IPCAs and Indigenous Guardian are exercised and grounded.

VI. IPCAs and Indigenous Guardians Programs: Good for the land, good for the people, good for the economy

IPCAs and Indigenous Guardians programs have proven to be successful in addressing rights-based issues, as well as in promoting social, cultural and economic well-being within Indigenous communities and beyond. The case for supporting IPCAs and Indigenous Guardians programs has already been made clear by numerous reports and studies.
Here in BC a business case analysis was recently conducted by looking at some of the oldest and most well-established Indigenous Guardian programs on the North and Central coast of BC.[41] A key finding in that report was that:

> "investments in Coastal Guardian Watchmen programs generate significant value for their Nations and communities. When net value generation is calculated across affected Nation-held values [Taking Care of Territory, Governance Authority, Community Wellbeing, Cultural Wellbeing, Community Capacity, Economic Opportunity], Coastal Guardian Watchmen programs achieve, at the low end, a 10 to 1 annual return on investment for the Nations that have the programs. In other words, for each dollar invested in a Guardian Watchmen program on an annual basis, the respective First Nation benefits at least 10 times that amount. On the high end, some Nations experience a 20 to 1 return on investment each year."[42] [emphasis and language added for clarity]

Another recent study was also conducted in the Northwest Territories with respect to the Lutsel K'e and Dehcho Guardian programs, the results of which showed a 2.5 return on 1 of

[40] Ibid, Article 43.
[41] Valuing Coastal Watchmen Programs: a Business Case (2016), prepared by EcoPlan International Inc. for the Coastal Steward Network and TNC Canada.
[42] Ibid at p. 3.

investment, with the likelihood of increasing over time.[43] The report indicated that an initial investment of $4.5 million in the Lutsel K'e and Decho Guardian programs has generated $11.1 million in social, economic, cultural, and environmental value, along with a profound positive effect on the Indigenous people, communities, governments and other stakeholders involved.[44] In a more recent report canvassing Indigenous Guardians programs across Canada, it was reported that Indigenous Guardians programs are also effective in:

- protecting and restoring natural and cultural resources;
- providing social, economic, health, cultural and educational benefits to Indigenous communities;
- enhancing capacity for Indigenous self-governance;
- providing significant net economic benefits to society as a whole; and
- enhancing understanding and respect between Indigenous people and governments. [45]

International studies have also been conducted in Australia to show that with government recognition and support, Indigenous Protected Areas and associated Guardians programs ("Indigenous Rangers") yield significant benefits for Indigenous communities, government and stakeholders, while also achieving large scale conservation outcomes.[46] The efforts in Australia has resulted in the creation of 78 Indigenous protected areas, covering over 74 million hectares of land and sea (and comprising of 46.53% of the National Reserve System), with many of these areas being effectively managed by Indigenous Rangers.[47] Researchers have measured the benefits of these initiatives and concluded that **for every $1 spent, these programs return more than $3 in social, economic and cultural values**.[48]

Recommendation 4.0: revise the Draft Plan to provide a clear mandate for BC to work collaboratively with Indigenous Nations to implement existing and proposed IPCAs and Indigenous Guardian programs, including the necessary resources to support this work.

Implementation of existing and proposed IPCAs and Indigenous Guardians programs should be conducted in parallel with the development of a framework that provides for the long-term legal recognition and support for IPCAs and Indigenous Guardians.

These reports and First Nations' experiences show that IPCAs and Indigenous Guardians programs are not just good ideas on paper, but in practice are shown to be good for the people, good for the land, and good for the economy.[49]

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[43] Analysis of the Current and Future Value of Indigenous Guardian Work in Canada's Northwest Territories, 2016.
[44] Ibid at p. 5.
[45] The Case for a Guardians Network, University of Victoria Environmental Law Centre, (2020).
[46] Consolidated report on Indigenous Protected Areas following Social Return on Investment analyses (2016), commissioned by the Department of the Prime Minister & Cabinet.
[47]National Indigenous Australians Agency, Indigenous Protected Areas (IPAs), (2020) – Retrieved from: https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas
[48] Ibid at p. 30.
[49] The Case for a Guardian Network Initiative, UVic Environmental Law Centre (2020) - retrieved at: http://fnemc.ca/wp-content/uploads/2015/07/The-Case-for-a-Guardians-Network-July-2020.pdf

VII. The Way Forward: Legal Recognition and Support

The opportunity for recognizing and supporting IPCAs and Indigenous Guardians is greater now than ever - with support from First Nations, the federal government, and an alignment of objectives shared by BC and First Nations to recognize Aboriginal rights and title and "undo the harm", along with mounting pressure from BC courts to properly recognize and enforce Aboriginal rights and title – now is the time to work together for the good of the people, the good of the land and good of the economy.

As a starting point, ILI's recommendations must be incorporated into a revised DRIPA Action Plan, along with a serious commitment to work together to recognize and support IPCAs and Indigenous Guardians in BC.