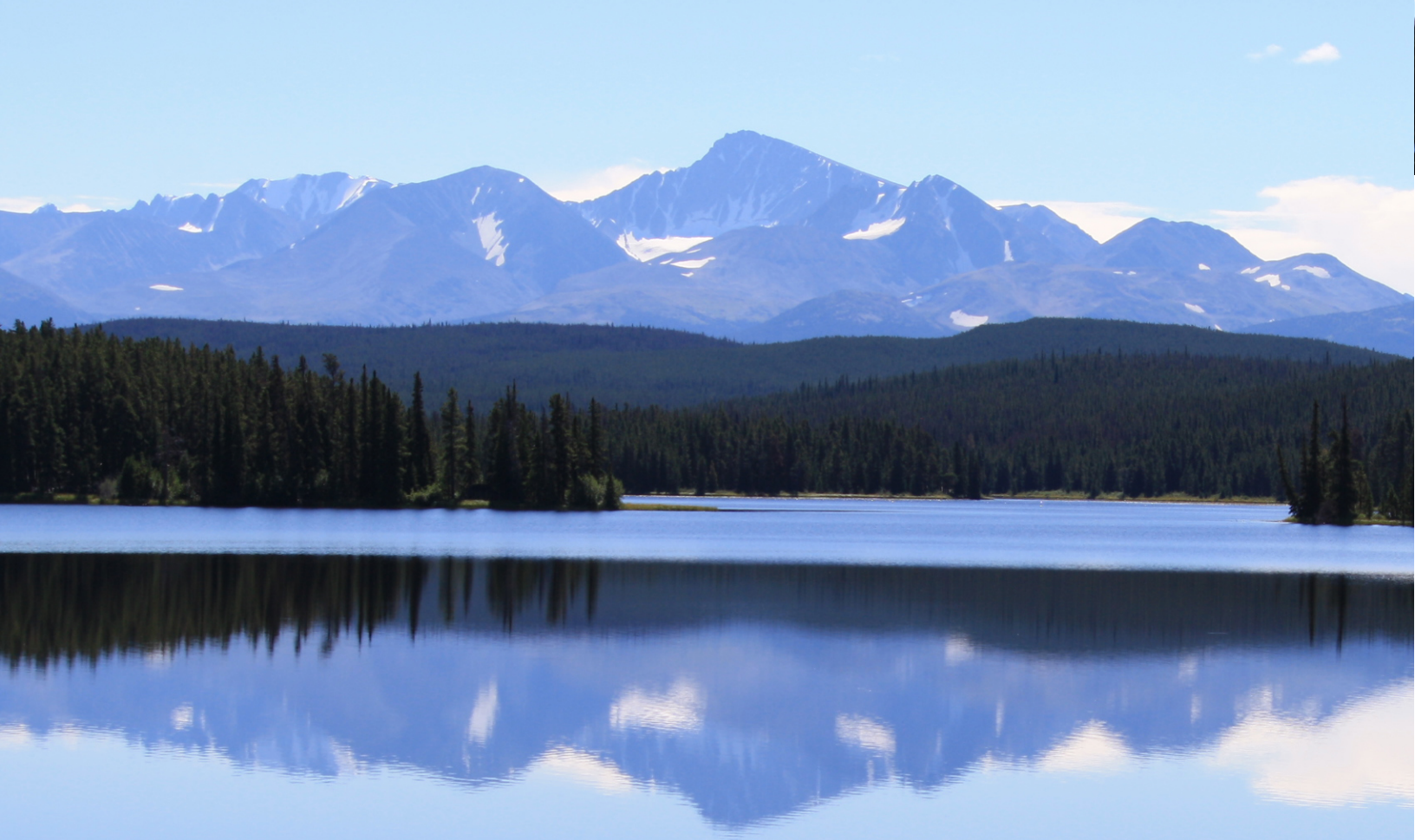

DIRECTION PAPER

Declaration on the Rights of Indigenous Peoples Act and High Priority *Water Sustainability Act* Reforms

September 2020

Direction Paper

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September 2020

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Water for Fish Initiative

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We thank Lydia Hwitsum (Cowichan Tribes) for strategic insights and guidance on this work.

The Water for Fish Initiative acknowledges the following core program funders:

About the FNFC Water for Fish Initiative and Direction Paper Background

Through the *BC First Nations Fisheries Action Plan*, British Columbia First Nations have directed the First Nations Fisheries Council of BC (FNFC) to support, protect, reconcile and advance Aboriginal Title and Rights and Treaty Rights as they relate to fisheries and the health and protection of aquatic resources. FNFC's priorities are to develop effective governance mechanisms, form collaborative relationships among First Nations organizations, and work together to build a cohesive voice on fisheries and other aquatic resource matters.

FNFC's *Water for Fish* freshwater initiative was launched in 2012 to advance objectives in the Action Plan under the theme of "Safeguarding Habitat and Responding to Threats." Through this initiative we work to support First Nations in their activities to advance freshwater governance, habitat protection and management. The intended impact of this program is for BC First Nations to be informed, resourced, and united to actively exercise governance and jurisdiction of fresh waters in their traditional territories.

In late 2017-early 2018, the UBCIC Chiefs Council, First Nations Summit and BC Assembly of First Nations passed a resolution agreeing to work together to co-develop a framework for First Nations to engage in the development of regulations pertaining to the *Water Sustainability Act* (WSA). In 2018-19, FNFC convened a working group of First Nations water leaders and experts to develop recommendations on improving First Nations engagement on the *Water Sustainability Act.* The final report—*Towards a* Water Sustainability Act *First Nations Engagement Framework: Working Group Recommendations for Collaborative Development of Regulations and Policies*—outlines seven recommendations that have the support of First Nations leadership through resolution by the Union of BC Indian Chiefs, First Nations Summit, and BC Assembly of First Nations. The first recommendation is for the *Water Sustainability Act* to be reformed to be consistent with the United Nations Declaration on the Rights of Indigenous Peoples. This paper is in response to, and provides direction on, this specific recommendation.

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Direction Paper at a Glance

Purpose:

The purpose of this paper is to provide direction on how the *Water Sustainability Act* needs to change to align with the *Declaration on the Rights of Indigenous Peoples Act* and the United Nations Declaration on the Rights of Indigenous Peoples. The paper:

- sets out why water and the *Water Sustainability Act* are a priority for legislative reform as contemplated by the *Declaration on the Rights of Indigenous Peoples Act*; and
- outlines necessary high-priority reforms to begin to make the *Water Sustainability Act* consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

This direction paper is intended as a resource to inform collaborative work by the Province of BC and BC First Nations to implement the *Declaration on the Rights of Indigenous Peoples Act* in the context of water law, policy, and governance.

Who it is for:

This direction paper sets out recommendations that are primarily directed at provincial government staff and decision makers. In particular, it is aimed at the Ministry of Indigenous Relations and Reconciliation and the two ministries with direct responsibilities for fresh water: Environment and Climate Change Strategy (*Water Sustainability Act* policy and regulation development) and Forests, Lands, Natural Resource Operations and Rural Development (*Water Sustainability Act* implementation). In addition, this paper will be of specific interest to First Nations communities and leaders as they pursue water management and governance activities in their territories and engage with the *Declaration on the Rights of Indigenous Peoples Act* and the *Water Sustainability Act.*

Note: FNFC is not a rights-holding organization. FNFC recognizes and respects the sovereignty and self-governance of all Nations as rights holders and supports their right to make their own decisions. The FNFC's role is to provide information and support First Nations' positions where their collective interests align. This paper does not represent a consensus First Nations perspective on the Water Sustainability Act *and/or UNDRIP, nor does it speak on behalf of any First Nations rights holders or satisfy government's legal duty of consultation.*

1. Introduction

On November 28, 2019, the *Declaration on the Rights of Indigenous Peoples Act* (*Declaration Act*)[1] came into force in British Columbia, establishing a statutory basis for provincial implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] The *Declaration Act* has three guiding purposes: to affirm the application of UNDRIP to the laws of British Columbia; to contribute to UNDRIP implementation; and to support the affirmation of, and develop relationships with, an Indigenous Governing Body. The *Declaration Act* is a critical mechanism to ensure that the Province of BC takes all necessary measures to make British Columbia laws consistent with UNDRIP.

Among the multiple pressing legislative amendments needed—spanning existing and future laws related to social, economic, health, environment, and other priorities—water and the *Water Sustainability Act* (WSA)[3] are imperatives for reform in the context of sustainability and First Nations self-determination and community health and prosperity. The *Declaration Act* offers new opportunities to redress the dispossession and denial that First Nations in British Columbia continue to experience in freshwater governance and management, and to advance reconciliation, by:

- requiring reforms to water legislation and policy to be consistent with UNDRIP; and
- enabling new forms of joint or consent-based decision making that could support First Nations to exercise jurisdictions, laws, titles, rights and knowledge systems in water governance, stewardship, and management.

This direction paper provides an initial exploration of the changes needed to make the WSA consistent with UNDRIP, including a set of high priority legislative reforms to begin the longer-term process of reconciliation and making UNDRIP reality in British Columbia.

2. Why the Water Sustainability Act is a Priority for Reform

> *The* WSA *does not reflect Indigenous Rights set out in the UNDRIP and does not respect or address our relationship to water, or right of Self-Determination in developing priorities and strategies for water. (Union of BC Indian Chiefs,* Water Act *Modernization Submission, 2013)*[4]

The WSA came into force in 2016 with an initial set of core regulations. The stated purpose of the WSA is to "ensure a sustainable supply of fresh, clean water that meets the needs of BC residents today and in the future."[5] While the WSA introduces a range of possible new tools to improve water management, it also extends a number of the problematic colonial features of the 1909 *Water Act.* For instance, it carries forward provincial government ownership of water and the 'first in time, first in right' licensing system, which continues to ignore First Nations as the first water users. As currently drafted, several aspects of the

[1] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.
[2] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).
[3] *Water Sustainability Act*, SBC 2014, c 1.
[4] Union of BC Indian Chiefs, *Response to British Columbia's Legislative Proposal for a Water Sustainability Act,* (2013), online: <https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/Union-of-British-Columbia-Indian-Chiefs.pdf>
[5] Province of BC, *Water Sustainability Act*, (n.d.), online: <https://www2.gov.bc.ca/gov/content/environment/air-land-water/water/laws-rules/water-sustainability-act>

WSA are inconsistent with UNDRIP articles and the legislative framework put in place under the *Declaration Act*.

BC First Nations have long raised fundamental issues with the WSA and water management regime, including as far back as early *Water Act* Modernization consultations in 2009.[6] Four key issues (expanded on in section 3) are how the WSA addresses, or fails to address:

- decision making, consent, and co-governance;
- proper acknowledgment of Aboriginal Title, Rights and Treaty Rights as they relate to water;
- ongoing engagement processes; and
- ecosystem protection and environmental flows.

Indeed, despite the fundamental importance of water to the exercise of Aboriginal Rights and to First Nations' health, well-being, culture, sustenance, economic opportunities, identity, and way of life, water law in BC has never been systematically or comprehensively reviewed to address Aboriginal Rights, Title, and Treaty Rights, or the priorities of reconciliation and self-determination.[7] With the exception of a few Government-to-Government agreements specifically related to water (e.g. in the Nicola[8] and Koksilah[9] watersheds), the WSA and water governance and management regime in British Columbia do not reflect government commitments to reconciliation and reforming relationships with Indigenous Peoples. The Province of BC's commitments to implementing UNDRIP, and to processes of reconciliation with Indigenous Peoples more broadly, have significant implications for freshwater use, stewardship, and protection.[10] Fully realizing UNDRIP requires deep reforms that go beyond WSA legislative amendments. However, reforming the WSA is a critical initial step without which improved engagement, relationships, and progress on reconciliation priorities will be stymied:

> *Without resetting the relationship on proper foundations of recognition and respect, First Nations in BC may be hesitant to devote limited time and financial and human resources towards participation in the implementation of an engagement framework while their legitimate concerns and objections to the existing* Water Sustainabilty Act *and priority regulations are not meaningfully considered and addressed.*[11]

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[6] Nadia Joe, Karen Bakker & Leila Harris, *Perspectives on the BC Water Sustainability Act: First Nations Respond to Water Governance Reform in British Columbia* (31 March 2017), online: *University of British Columbia Program on Water Governance* <http://hdl.handle.net/2429/61689>.

[7] Unlike other recent natural resource legislation—such as the BC *Environmental Assessment Act* or the federal *Fisheries Act*—which *have* given explicit attention to Aboriginal Rights, Title and Treaty Rights and Indigenous governance priorities.

[8] Nicola Watershed Memorandum of Understanding, (2018), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/nicola_watershed_pilot_mou_-_signed_2018.pdf>

[9] Ministry of Forests Lands Natural Resource Operations and Rural Development, *Partnership Supports Management of Koksilah Watershed,* (February 2, 2020), online: <https://news.gov.bc.ca/releases/2020FLNR0015-000248>

[10] BC First Nations Water Governance Roundtable, "Statement of Requirements on Water Governance in BC According to Crown Commitments to Reconciliation" (November 21, 2018) at p 1, online: *First Nations Fisheries Council of British Columbia* <https://www.fnfisheriescouncil.ca/wp-content/uploads/2019/06/Draft-Statement-of-Requirements-on-Water-Governance_Feb-1-2019.pdf>

[11] First Nations Fisheries Council of British Columbia, *Towards a Water Sustainability Act First Nations Engagement Framework: Working Group Recommendations for Collaborative Development of Regulations and Policies* (May 2019) at p 5, online: *First Nations Fisheries Council of British Columbia* <https://www.fnfisheriescouncil.ca/wp-content/uploads/2019/11/Letter-FNFC-to-BC_July-2019.pdf>

Prioritizing the WSA in the *Declaration Act* Action Plan

The *Declaration Act* (section 4) requires the provincial government—in consultation and cooperation with Indigenous Peoples—to develop an Action Plan to achieve the objectives of UNDRIP and to report annually on progress. The Action Plan is foundational in setting the provincial legislative and policy reform priorities and agenda (for further details see Appendix B). To begin the process of WSA reform, the Action Plan must therefore:

- place immediate priority and identify corresponding resources and clear timelines for reviewing and reforming the existing WSA and regulations and policies; and
- address the priority and corresponding resources and timelines for developing any new WSA regulations and policies.

3. IDENTIFIED ISSUES WITH THE WSA, RELATED UNDRIP and *DECLARATION ACT* PROVISIONS, AND REQUIRED REFORMS

This section outlines:

- four interlinked priority areas of concern with the WSA that First Nations in British Columbia have identified;
- related UNDRIP articles and *Declaration Act* provisions; and
- specific reforms required to address the issues and resolve the inconsistencies between the WSA and UNDRIP and the *Declaration Act*.

The reforms are not exhaustive but instead target many of the main problematic aspects of the WSA—areas that First Nations have clearly identified as concerns in past submissions and engagement with the provincial government, and WSA decisions and tools that have significant impact on water and potential impact on Aboriginal Rights, Title, and Treaty Rights. These reforms are not prescriptive: self-determining First Nations will identify specific arrangements and additional changes through Government-to-Government agreements in their territories (see box below). The table in Appendix A provides further details.

Note on Proposed Reforms: Immediate Legislative Changes and Detailed Place-Based Government-to-Government Agreements

The proposed reforms in this section are a starting point and intended as minimum provincewide requirements to shift the WSA to a basis of co-governance and Free, Prior, and Informed Consent, and to address cross-cutting fundamental issues with the legislation. These identified reforms should be implemented immediately to serve as a foundation, while more detailed local or regional Government-to-Government agreements regarding watershed governance, consent, and ongoing shared decision making and co-management are developed and implemented between the Province of BC and self-determining First Nations (as specifically enabled by the *Declaration Act* sections 6 and 7).

We recognize that the specific changes to water management and governance will necessarily be adapted within Government-to-Government agreements that are watershed- or territory-based, both because the watershed is the appropriate scale for decision making on water and because the self-determining First Nations rights holders in each region have distinct languages, cultures, customs, histories, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems that inform their specific priorities and direction.

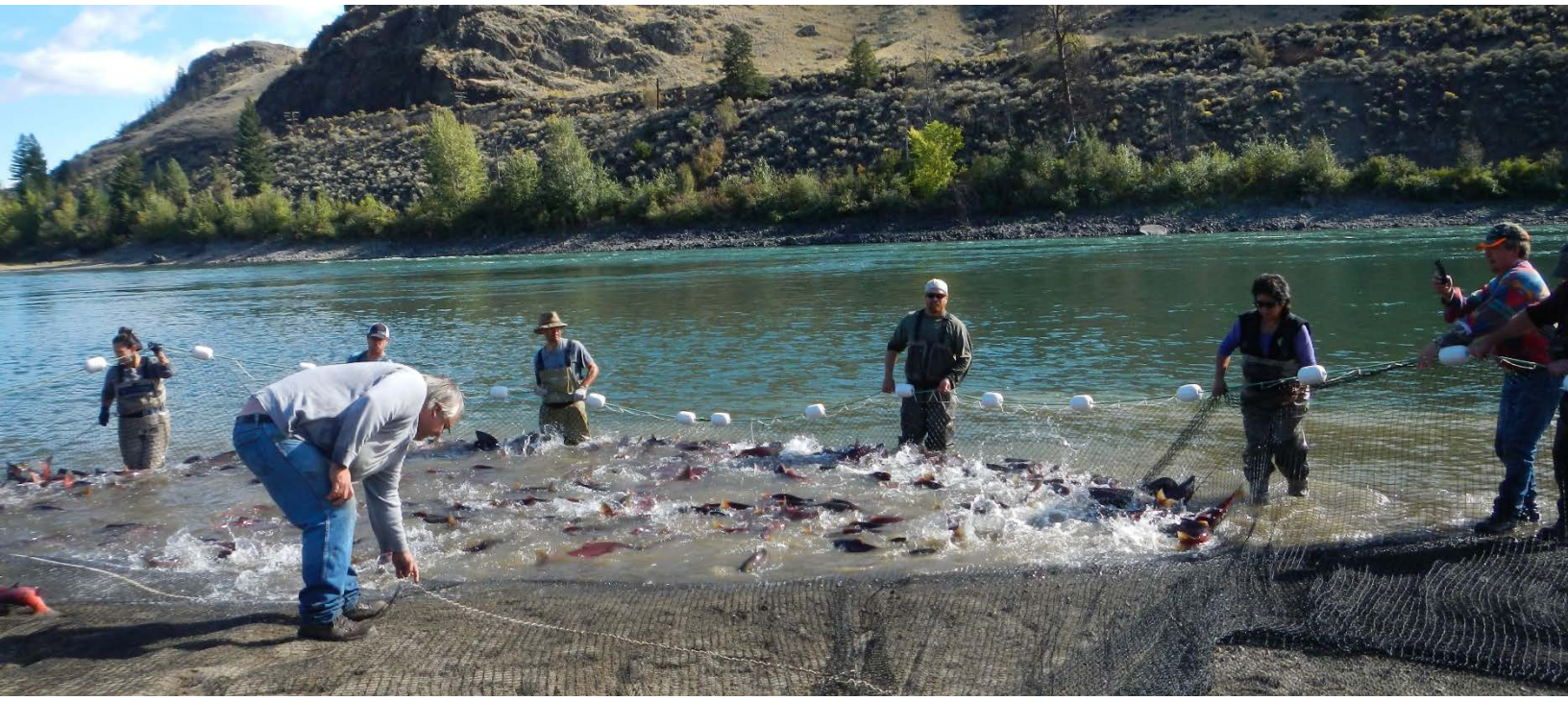

Photo by Secwepemc Fisheries Commission

3.1 PROCEDURAL ISSUES: *WATER SUSTAINABILITY ACT* ENGAGEMENT

*Instead of a continuation of the status quo characterized by the treatment of First Nations as mere stakeholders within a Crown process seeking to address Crown priorities and interests, the [*WSA*] Engagement Framework must contribute to a fundamental reorientation of First Nations-Crown relationships in BC...*
(First Nations Working Group Report on WSA *Engagement Framework, 2019)*[12]

Identified issues:

Many First Nations in British Columbia have expressed concern with the engagement process through which the Province of BC developed the WSA and priority initial regulations. Concerns include First Nations being treated as stakeholders, not rights holders, and the Province of BC not providing adequate (if any) resources for Nations to review and respond to consultation requests.

Why UNDRIP and the *Declaration Act* Require a Response:

Several UNDRIP articles focus on the processes and institutions through which Indigenous Peoples participate in decision making and legislation development and implementation, including the rights of Indigenous Peoples to:

- maintain and strengthen their distinct political, legal, economic, social and cultural institutions (Article 5);
- participate in decision making in matters that would affect their rights through their representative institutions and procedures (Article 18);
- free, Prior and Informed Consent in relation to legislative or administrative measures that may affect them (Article 19);
- determine and develop priorities and strategies for the development or use of their territories, including waters and water resources therein (Article 32[1]).

The *Declaration Act* requires the provincial government to have due regard for the diversity of Indigenous Peoples in British Columbia who have "distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems."

Developing WSA amendments and future regulation and policy requires a more sophisticated process in line with these UNDRIP and *Declaration Act* requirements. In particular, engagement processes must be undertaken in a manner that respects and ensures self-determination and the diversity of Indigenous Peoples.

[12] *Towards a Water Sustainability Act First Nations Engagement Framework: Working Group Recommendations for Collaborative Development of Regulations and Policies* (May 2019) online: <https://www.fnfisheriescouncil.ca/wp-content/uploads/2019/11/Letter-FNFC-to-BC_July-2019.pdf>

High Priority Reforms to Address WSA Engagement Processes

In 2019, a working group of First Nations experts and leaders developed a set of detailed recommendations for a reformed WSA Engagement Framework (provided in Appendix C). While incremental progress is being made to implement *some* of these recommendations, the provincial government must commit the necessary resources to fully realize the recommendations in the development and implementation of all WSA policy, regulations, and legislative reform processes.

3.2 RECOGNITION AND RESPECT FOR ABORIGINAL RIGHTS, TITLE, AND TREATY RIGHTS

Where Aboriginal Rights and Title have not been addressed, the Government of British Columbia does not have the title or jurisdiction to assert ownership, control or jurisdiction over water.
(Union of BC Indian Chiefs, Water Act *Modernization Submission, 2010)* [13]

The introduction of the water licensing system by the Province does not change the fact that Aboriginal Peoples of BC, and indeed across Canada, were the first users of the water, and continue to use water for the exercise of their constitutionally protected Aboriginal and Treaty rights.
(Union of BC Indian Chiefs, Water Act *Modernization Submission, 2010)*[14]

Identified issues:

The *Water Sustainability Act* fails to recognize and respect Aboriginal Rights, Title and Treaty Rights. For example:

- the Province of BC asserts ownership over all water in British Columbia, including groundwater;
- the WSA has no reference to, or acknowledgement of, Aboriginal Rights, Title, and Treaty Rights, or Indigenous laws, knowledge and authority;
- First Nations' water uses are not consistently acknowledged or prioritized in the 'first in time, first in right' water allocation scheme, which is deeply problematic and now extended to groundwater.

Why UNDRIP and the *Declaration Act* require a response:

UNDRIP has several articles pertaining to Indigenous Peoples' self-determination and rights to water, including rights to:

- determine and develop priorities and strategies for the development or use of their territories, including waters and water resources therein (Article 32[1]);

[13] Union of BC Indian Chiefs, *UBCIC WAM Submission,* (May 4 2010), online: *<https://engage.gov.bc.ca/app/uploads/sites/71/2013/10/Union-of-BC-Indian-Chiefs.pdf>*
[14] *Ibid.*

- maintain and strengthen their distinctive spiritual relationship with their territories, including waters and water resources therein (Article 25);
- own, use, develop and control their territories, including waters and water resources therein (Article 26[2]);
- legal recognition and protection by state actors of their territories, including waters and water resources therein, in a manner that respects Indigenous Peoples' customs, traditions and tenure systems (Article 26[3]); and
- redress for waters and water resources within their territories which have been confiscated, taken, occupied, used or damaged without Free, Prior and Informed Consent (Article 28).

High Priority Reforms to Address Aboriginal Rights, Title, and Treaty Rights

Key initial reforms to recognize and respect Aboriginal Rights, Title and Treaty Rights within the WSA include:

- Amend the Province of BC's assertion of water ownership. For instance, a qualifying statement could articulate that the provincial government has responsibility for water that is not ownership based, and will steward or co-govern water with First Nations.
- Introduce a purpose section to the WSA that includes supporting Indigenous Peoples' exercise of inherent jurisdictions, laws, title, rights and knowledge systems in the governance and management of water in a manner that aligns with key UNDRIP articles.
- Require attention to Aboriginal Title, Rights, and Treaty Rights to water in all decisions about authorizations for existing and new water uses.
- Recognize First Nations as first water users and affirm Aboriginal and Treaty Rights to water as priority rights within the 'first in time, first in right' system in the context of both surface and groundwater use and allocation.
- Require co-governance considerations of licence applications based on territorially-appropriate spatial and temporal scales so that First Nations can meaningfully assess whether proposed uses of water will have an impact on their Aboriginal or Treaty Rights. This could include, for example, a once per year evaluation on a territory- or watershed-wide basis.
- Replace the language of "private rights" with "licenses and authorizations" to recognize that conditions can be placed on licenced water use (a licence may be modified, for instance, if the water withdrawal it authorizes is impairing environmental flows and the ability to exercise Aboriginal Rights).

3.3 DECISION-MAKING PROCESSES FOR WATER AND TRIGGERING WSA TOOLS

The most important issue for our Nations is who owns the water and who has the right to determine access to the water for all possible uses.
(British Columbia Assembly of First Nations, Governance Toolkit, 2013) [15]

The Province must pursue a strategy…that promotes and supports the ability of First Nations to be full participants in watershed protection planning and implementation, and decision-making over land and resource use.
(First Nations Summit, Water Act *Modernization Submission, 2010)*[16]

Identified issues:

The WSA vests decision making authority exclusively with the provincial government. Provincial decision makers have not recognized or respected First Nations jurisdictions, laws, titles, rights and knowledge systems relating to water. For example:

- Only the Minster or provincial government statutory decision makers have the power to trigger important WSA water management and governance tools. Water authorization decisions are made by statutory decision makers in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development.
- Certain WSA decisions may be delegated to "another person or entity" (section 126). Delegated decision making, however, does not equate to, or satisfy the requirements of, joint or consent-based decision-making with First Nations.
- The Province of BC defaults to the section 35 *Constitution Act, 1982* consultation and accommodation framework on water licensing decisions, which is unacceptable because it relies on a licence-by-licence review. This approach is not only onerous, but fails to take a whole-system view and fundamentally limits a First Nation's ability to assess whether their rights are affected by the cumulative impacts of all licences issued and individual changes in a watershed.

Why UNDRIP and the *Declaration Act* require a response:

Ensuring that Indigenous Peoples can meaningfully participate in and enjoy their right of Free, Prior and Informed Consent in decisions that affect them, through their own representative Indigenous governing institutions, is central to respecting and upholding the right to self-determination and the implementation of UNDRIP (e.g. Articles 19, 32[2]). The *Declaration Act* now enables new forms of decision-making agreements to this end:

- Section 6 provides a broad mandate for the negotiation of agreements to further any purposes of the *Declaration Act*. A section 6 agreement could be pursued, for example, for the purpose of

[15] British Columbia Assembly of First Nations*, Section 3.31 'Water', Governance Toolkit: A Guide to Nation Building,* (2010).
[16] The First Nations Summit*, FNS submission re WAM Initiative*, (April 2010), online: <https://engage.gov.bc.ca/app/uploads/sites/71/2013/10/First-Nations-Summit.pdf>

affirming and developing relationships with hereditary governance bodies, or multiple First Nations agreeing to work together and coordinate the exercise of their respective jurisdictions. These are examples of what could be an "Indigenous Governing Body" as defined in section 1 of the *Declaration Act*.

- Section 7 enables the negotiation of agreements that provide for decisions under provincial legislation to be:
    - made jointly by relevant provincial decision makers and affected Indigenous Peoples through their representative Indigenous Governing Body; and,
    - subject to the Free, Prior and Informed Consent of affected Indigenous Peoples through their representative Indigenous governing institutions.

These enabling provisions provide concrete mechanisms for First Nations to express and implement their jurisdictions, laws, title, rights, processes and knowledge systems related to water governance and management—whether on an individual First Nation basis or among multiple Nations agreeing to work together at regional or watershed levels.

Ultimately for the WSA to live up to the goals and intent of UNDRIP, First Nations will determine—appropriate to their territories and circumstances—which WSA decisions must be made jointly or consensually.[17] This decision-making arrangement would be negotiated and contained within a Government-to-Government agreement between an Indigenous Governing Body and Province of BC (per *Declaration Act* section 7). However, for WSA decisions to be made jointly or consensually through a *Declaration Act* section 7 agreement, the WSA will first require related amendments to be passed by the provincial legislature (as outlined in the box below).[18] Ensuring the WSA is a priority in the *Declaration Act* Action Plan is therefore critical to fully realizing new forms of decision-making agreements for water.

[17] In some cases, an Indigenous Governing Body may decide that *all* WSA decisions must be made jointly or consensually. Or, it is possible that more minor operational decisions will remain the responsibility of either an Indigenous Nation or the provincial government, with an agreement to keep the other party informed and to regularly revisit the arrangement.

[18]The Province of BC has stated: "There must be authorities within other relevant legislation for the Province to enter into such joint decision-making or consent requirement agreements with an Indigenous government. This means there would need to be subsequent amendments to other legislation in many cases to allow for such agreements." The only exception is the few circumstances where provincial legislation *already* provides for certain joint or consent-based decision-making processes by agreement between relevant Provincial decision makers and affected Indigenous peoples. E.g. section 7 agreements directly or indirectly addressing water and water resource related issues in environmental assessment processes may be immediately available without the requirement for further legislative amendments given the enabling provisions for agreements with "one or more Indigenous Nations" under section 41 of the recently enacted *Environmental Assessment Act*.

High Priority Reforms to Address Decision Making Processes and Triggering WSA Tools

Territory and watershed-specific agreements that establish joint and/or consent-based decision-making arrangements (per the *Declaration Act* section 7) are a critical means to shift the WSA to a co-governance regime appropriate to different regions and First Nations' distinct priorities. These agreements, however, will take time to develop and establish. As an initial high priority reform:

- Split section 126 of the WSA into two parallel sections to specify that WSA decisions may not only be *delegated* (to non-Indigenous entities) but made through joint or consent-based processes with First Nations under *Declaration Act* section 7 agreements.

In the interim, to provide some basic requirements before Government-to-Government agreements are fully phased in:

- Amend the licence-by-licence consultation approach and engage in a co-governance relationship with First Nations about water licencing and other territory-specific permits or applications on a whole region or watershed basis.
- Require joint decision making in critical WSA decisions and processes of high impact on territory and rights, including, at a minimum, decisions about:
  - triggering, developing, and implementing water sustainability plans, including terms of reference and plan acceptance decisions (ss. 64-85);
  - setting territory-specific environmental flows (s. 15); and
  - triggering critical flow and fish population protection orders (ss. 86-88).
- Require a minimum of Free, Prior and Informed Consent or joint decision making in WSA decisions that have a likely significant impact on territory and rights, including decisions about:
  - establishing area-based regulations (s. 124);
  - developing water objectives (s. 43);
  - issuing licenses and permits (WSA Part 2);
  - designating sensitive streams and mitigation measures (s. 128 and s. 17); and
  - establishing water reservations (s. 39).

3.4 AQUATIC ECOSYSTEM PROTECTION AND ENVIRONMENTAL FLOWS

Many Aboriginal and Treaty Rights rely upon healthy and sufficient flows of water to sustain them, such as fishing, hunting, or other gathering rights, and spiritual practices. Indeed, it is nearly impossible to imagine an Aboriginal or Treaty Right that does not depend upon water.
(Union of BC Indian Chiefs, Water Act *Modernization Submission, 2013)*[19]

Within the Okanagan basin many of our streams and rivers are over allocated in terms of water licensing. The highly competitive nature of water allocation within our territory is harming our environment and way of life.
(Okanagan Nation Alliance, Water Act *Modernization Submission, 2013)*[20]

Identified issues:

Degraded water and watersheds in First Nations' territories are preventing Title and Rights holders from using and accessing water. In particular, environmental flows—the underlying condition required for the continuation of many Aboriginal and Treaty Rights (such as fishing for food, social, and ceremonial purposes)—do not receive adequate consideration and protection under the current provincial government Environmental Flow Needs Policy and approach. For instance, decision makers 'must consider' environmental flow needs when issuing new groundwater and surface water allocations; however, *what* they must consider, and how the priorities, concerns, and thresholds identified by First Nations are taken into account, is not transparent.

Why UNDRIP and the *Declaration Act* require a response:

Key UNDRIP articles related to ecosystem protection and decision making include the rights of Indigenous Peoples to:

- conservation and protection of the environment and the productive capacity of their territories, including waters and water resources therein, with assistance programs for Indigenous Peoples to be established by state actors for carrying out conservation and protection initiatives (Article 29[1]);
- determine and develop priorities and strategies for the development or use of their territories, including waters and water resources therein (Article 32[1]).

[19] Union of BC Indian Chiefs, *Response to British Columbia's Legislative Proposal for a Water Sustainability Act,* (2013), online: <https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/Union-of-British-Columbia-Indian-Chiefs.pdf>
[20] Okanagan Nation Alliance, *Submission Re: Water Sustainability Act Legislative Proposal,* (November 14,2013), online: <https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/Okanagan-Nation-Alliance.pdf>

High Priority Reforms to Address Aquatic Ecosystem Protection and Environmental Flows

The WSA has a range of tools that address aquatic ecosystem protection and environmental flows priorities. Consistent with the preceding sections, initial high priority reforms focus on joint and consent-based decision making to trigger and implement these tools:

- Expand the definition of environmental flows to more holistically encompass the multiple dimensions of flow regimes, including water quality and flows for First Nations' cultural and spiritual water values and uses.
- Embed environmental flow and critical flow thresholds defined by First Nations as a baseline for regional- or watershed-specific regulation or decision making:
  - Require joint decision making in establishing territory-specific environmental flows (s. 15);
  - Update the process to trigger temporary orders declaring significant water shortages and fish population protection orders such that First Nations can jointly issue these orders with the Minister of Forests, Lands, Natural Resource Operations and Rural Development (ss. 86-88); and
  - Require water sustainability plans to establish watershed-specific environmental flows and critical flows thresholds.
- Update the process to trigger other key sustainability provisions in the WSA (like water objectives and water sustainability plans) such that joint decision making is required.
- Expressly enable the development and implementation of water sustainability plans with First Nations through Government-to-Government agreements.

5. SUMMARY OF ACTION NEEDED

The current WSA is deeply inconsistent with UNDRIP and must be reformed in line with requirements under the *Declaration Act.* While legislative reform is only one step on the path towards making UNDRIP reality, in the case of the WSA it is a critical priority given First Nations' fundamental concerns and objections to the existing WSA and its impacts on Aboriginal Rights, Title, and Treaty rights, and First Nations' water access and use.

This direction paper by FNFC identifies specific, high-priority changes to the WSA that address key issues First Nations have identified with the legislation. Implementing these baseline reforms—which will necessarily be tailored and adapted within Government-to-Government agreements that are watershed- or territory-based—will begin to align the water management and governance regime in British Columbia with UNDRIP. As climate and hydrology change, and the potential for water conflicts escalates, these reforms are critical to ensure First Nations' rights, responsibilities, relationships, and use and access to water are recognized and respected, now and for future generations.

Appendix A: Table: Details on WSA Reforms

Note: these reforms are not exhaustive and do not address all decisions or issues with the WSA*. They are an initial starting point to begin to align the* WSA *with UNDRIP.*

WSA Element	FROM: Current WSA provisions	TO: Targeted Reforms for WSA Consistency with UNDRIP and the *Declaration Act*
Ownership of water (s.5)	The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations. The property in and the right to the use, percolation and flow of groundwater, wherever groundwater is found in British Columbia, are for all purposes vested in the government and are conclusively deemed to have always been vested in the government except insofar as private rights have been (a) established under authorizations, or (b) deemed under section 22(8).	—Amend the Province of BC's assertion of water ownership, e.g.: *The provincial government has responsibility for water that is not ownership-based, and will steward or co-govern water with First Nations.* —Introduce a purpose section to the WSA that includes supporting Indigenous peoples' exercise of inherent jurisdictions, laws, title, rights and knowledge systems in the governance and management of water in a manner that aligns with key UNDRIP articles. —Replace "private rights" listed in WSA s. 5 with "licences and authorizations"
First in Time, First in Right (s. 22)	The priority of water rights is based on date of first water use (extended to groundwater in 2016). First Nations water uses, however, are not recognized as priority rights in the 'first in time, first in right' licensing system.	—Recognize First Nations as first water users and affirm aboriginal and treaty rights to water as priority rights within the 'first in time, first in right' system in the context of both surface groundwater use and allocation.
Delegated decision-making (s.126)	—Ability to delegate statutory decision-making to provide specified powers and duties of the comptroller, a water manager, an engineer or an officer to another person or entity who is to exercise those powers and perform those duties.	—Split section 126 to specify that WSA decisions may not only be *delegated* (to non-Indigenous entities) but done through joint or consent-based mechanisms with First Nations under *Declaration Act* section 6 and 7 agreements.
Environmental flows (s. 15, ss. 86-88)	—Statutory decision makers must consider environmental flows when issuing new surface and groundwater licences (non-domestic uses) (s. 15) —If there is a drought or water shortage, the Minister can make a temporary declaration of "significant water shortage." This allows the Comptroller to make a Critical Environmental Flow Order and determine the "critical environmental flow threshold", which takes precedence over all water use licences, regardless of their precedence (ss. 86-87) —If the water flow in a stream is or is likely to become so low that it threatens the survival of a population of fish, the Minister (Forest, Lands, Natural Resource Operations and Rural Development) may make a Fish Population Protection Order that requires some or all users cease diverting water (s. 88).	—Expand the definition of environmental flows to more holistically encompass the multiple dimensions of flow regimes, including water quality and flows for First Nations' cultural and spiritual water values and uses. —Embed First Nations' identified environmental flow and critical flow thresholds as a baseline for regional or watershed specific regulation or decision making: — Require joint decision-making in establishing setting territory-specific environmental flows (s. 15). — Update the process to trigger a) temporary orders declaring significant water shortages and b) Fish Population Protection Orders such that First Nations can jointly issue these Orders with the Minister (ss. 86-88).

		—Require water sustainability plans to establish watershed-specific environmental flows and critical flows thresholds.
Water Sustainability Plans (WSP) (s. 64-85)[21]	WSPs are enforceable region- (watershed-) specific plans that can be triggered to prevent or address: -conflicts between water users -conflicts between water users and environmental flow needs -risks to water quality or aquatic ecosystem health. —The Minister designates a WSP but a third party can request —WSP development may be designated to another entity/person	—Require joint decision making in decisions about triggering, developing, and implementing water sustainability plans, including in plans terms of reference and acceptance decisions (ss. 64-85) –Include, as a water sustainability plan triggering condition: a concern or priority identified by a First Nation in their traditional territory. —Expressly enable the development and implementation of water sustainability plans with First Nations through Government-to-Government agreements.
Water licences, allocations and permits (WSA **Part 2)**	—Decisions are made by statutory decision makers in the Ministry of Forests, Lands and Natural Resource Operations and Ministry of Rural Development. —Significant decisions include: authorizations; short-term use approvals; changes in and about a stream; mitigation measures. —First Nations are consulted on individual water licences through referrals or on an ad hoc basis.	—Require a minimum of Free, Prior and Informed Consent or joint decision-making where agreed and appropriate in WSA licensing and permitting decisions that have a likely significant impact on territory and rights. —Require co-governance considerations of licence applications based on territorially-appropriate spatial and temporal scales so that First Nations can meaningfully assess whether proposed use of water will have an impact on their aboriginal or treaty rights. This could include, for example, a once per year evaluation on a territory- or watershed-wide basis. — Amend the licence-by-licence consultation approach and engage in a co-governance relationship with First Nations about water licencing and other territory-specific permits or applications on a whole region or watershed basis. —Require attention to Aboriginal and Treaty Rights to water in all decisions about authorizations for existing and new water uses.
Water objectives (s. 43)	—Water objectives can be set in regulation to sustain water quantity, quality, and aquatic ecosystems. Objectives are set for specific watersheds, streams, or other specified areas or features. —Land- and resource-use decision makers can be required to consider water objectives if they are making a decision that relates to the watershed, stream, or aquifer to which the objective is attached.	—Require a minimum of Free, Prior and Informed Consent or joint decision-making in decisions about establishing water objectives. —Specify that water objectives will be set on the basis of Indigenous knowledge and western science.

[21] See detailed analysis in Curran, D. and Brandes O.M, *Water Sustainability Plans: Potential, Options, and Essential Content*, (October 2019), *online*: *POLIS Water Sustainability Project and Environmental Law Centre*, <https://poliswaterproject.org/polis-research-publication/water-sustainability-plans/>

Area-based regulations (s. 124)	—Area-based regulations allow for the designation of specific areas and creation of thresholds and requirements related to those places.	—Require a minimum of Free, Prior and Informed Consent or joint decision-making where agreed and appropriate in decisions about establishing area-based regulations.

APPENDIX B: Additional Detail on the *Declaration Act*

Guiding Purposes

Section 2 of the *Declaration Act* establishes three guiding purposes for the legislation. These purposes are (a) to *affirm* the application of UNDRIP to the laws of British Columbia, (b) to *contribute* to the implementation of UNDRIP, and (c) to *support* the affirmation of, and develop relationships with, "Indigenous governing bodies". These three purposes are reflected in the other components of the *Declaration Act* as discussed more fully below.

These guiding purposes confirm that the *Declaration Act* is in the nature of enabling legislation. As the Minister of Indigenous Relations and Reconciliation ("**Minister**") explained in the provincial legislature during its second reading, the *Declaration Act* is not intended to give immediate legal force and effect to all UNDRIP Articles under provincial law but rather to provide a framework for incremental legislative and policy reforms to be pursued over time:

"The bill acknowledges the aspects of the UN declaration that already reflect international conventions or international customary law and that already apply to the laws of British Columbia. While this bill does not, in and of itself, give the UN declaration legal force and effect, it does not delay or affect that current application of the UN declaration.

The purpose of the bill is to affirm the application of the UN declaration to the laws of British Columbia. The declaration will be a foundational framework for the work that needs to be done in relation to our laws in British Columbia. I will add that within our commitment to implement the UN declaration throughout government, its application also extends to policies and operating practices. Over time as laws are built or modified, they will be aligned with the UN declaration… This legislation is enabling, so we won't see the world change overnight once it is passed. It is a measured step on the shared path to reconciliation."[22]

Interpretive Provisions to Protect and Respect Indigenous Rights

Section 1 of the *Declaration Act* contains important interpretive provisions that together are intended to protect and respect Indigenous rights in the enactment and implementation of the *Declaration Act*.

Diverse Indigenous Governing Institutions

As part of the exercise of self-determination, UNDRIP recognizes that Indigenous peoples have the right to maintain and strengthen their "distinct political, legal, economic, social and cultural institutions" (Article 5), and to participate in decision making in matters which would affect their rights through such representative institutions and their procedures (Article 18). It is through these representative institutions and procedures from who state actors, such as the Province of BC, must consult and cooperate with in

[22] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess, No 286, (30 October 2019) at 10371 (Hon D Plecas) ["October 30, 2019 Hansard"].

order to obtain Free, Prior and Informed Consent in relation to legislative or administrative measures (Article 19) and the approval of projects (Article 32).

Subsection 1(1) of the *Declaration Act* includes a definition of "Indigenous Governing Body" that allows for the Province of BC to establish legal relationships with forms of Indigenous governing institutions that exist independently of Canada's federal laws (e.g. *Indian Act*, RSC 1985, c I-5) or British Columbia's provincial laws (e.g. *Societies Act*, SBC 2015, c 18). Subsection 1(2) establishes a complementary interpretive provision that requires the Province of BC to have due regard for the diversity of Indigenous peoples in British Columbia who have "distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems." As acknowledged by the Minister, these provisions of the *Declaration Act* are critical for respecting Indigenous self-determination in the implementation of UNDRIP:

"The bill, and indeed the UN declaration, recognizes the importance of self-determination and self-government. It will allow us the flexibility to recognize more forms of Indigenous governments than we have been able to do in agreement-making.

This bill provides room for Indigenous peoples to make decisions about their governing structures as they attempt to move out from under the Indian Act. That could exclude [sic], for example, governing bodies such as traditional cultural entities, multiple Nations working together as a collective, hereditary governments or a combination of elected and hereditary governments. The important part is that it is based on what the nation chooses, and that supports a key element of the declaration around self-determination. That also provides clarity for government. I believe it will also provide more clarity for businesses and communities about who they should engage when working with Indigenous partners."[23]

Non-Derogation of Constitutionally Protected Aboriginal and Treaty Rights

Subsection 1(3) provides that nothing in the *Declaration Act*, nor anything done in its implementation, will have the legal effect of abrogating or derogating from any existing Aboriginal and Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*. This interpretive provision ensures that the protection provided for Indigenous rights under Canada's constitution will be respected and upheld while the Province of BC implements the minimum international standards recognized in UNDRIP pursuant to the *Declaration Act* which, as provincial legislation, is subordinate to Canada's constitution.

Preserving Potential Domestic Legal Force and Effect of UNDRIP

The domestic legal status of UNDRIP and each of its Articles in British Columbia, and in Canada more broadly, remains unsettled. Generally, the domestic legal status of UNDRIP and its Articles will affect how they will be applied by domestic courts when subject to judicial consideration. As discussed above, as enabling legislation, the *Declaration Act* does not on its own make each of the Articles of UNDRIP of legal force and effect in British Columbia. Subsection 1(4) of the *Declaration Act*, however, preserves the ability

[23] October 30, 2019 Hansard.

of domestic courts to give legal force and effect to UNDRIP or any of its Articles outside of the provisions of the *Declaration Act* upon judicial consideration.[24]

Procedural Obligations for Legislative and Policy Reform

The *Declaration Act* establishes three procedural obligations on the provincial government to support the implementation of UNDRIP in British Columbia. Section 3 establishes a general procedural obligation for the provincial government, in consultation and cooperation with Indigenous peoples, to "take all measures necessary" to ensure the laws of British Columba are consistent with UNDRIP. Section 4 establishes a specific procedural obligation for the provincial government, in consultation and cooperation with Indigenous peoples, to prepare and implement an Action Plan to achieve the objectives of UNDRIP. Section 5 establishes another specific procedural obligation for the provincial government to annually report to the legislature on the progress of measures taken pursuant to section 3 and the implementation of the Action Plan prepared pursuant to section 4. The Minister explained these procedural obligations as reflecting a measured approach that provides transparency and predictability:

"The bill requires government to develop an Action Plan. We will do that in partnership and cooperation with Indigenous peoples. The legislation will require annual reporting to monitor progress on the Action Plan, all in collaboration and consultation with Indigenous peoples. The Action Plan and reporting will provide transparency and accountability for the work ahead… Throughout this process, we are committed to being transparent and bringing all British Columbians along. We've been transparent getting to this point. Our commitment to implement the UN declaration is clearly stated in all ministers' mandate letters. We announced the intention to introduce such legislation a year ago. We reiterated that commitment in the budget and throne speeches this year.

We've engaged with First Nations, local governments, business, other stakeholders. That will continue as we move forward with aligning laws and developing the Action Plan. This work will be done in collaboration with Indigenous peoples, with opportunities for engagement with local governments, with industry, with business, other stakeholders and the public… [the *Declaration Act*] is not a switch that will change every statute and process in the government the day after this act is proclaimed."[25]

Together these procedural obligations of the Province of BC to provide a legislated framework for collaboratively and incrementally reforming provincial legislation and policies to bring the laws of British Columbia into conformity with UNDRIP. As has been discussed by others, aligning provincial law with UNDRIP as required by the *Declaration Act* "will require distinct processes and mechanisms for new laws and existing laws. While process may be put in place for the staged review of existing laws, a procedure will need to be put into place for ensuring alignment with proposed laws that move through the legislature in

[24] For more discussion of the ambiguous domestic legal status of UNDRIP and its Articles in Canada in relation to the comparable federal private members Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, see: Gib van Ert, "The Impression of Harmony: Bill C-262 and the Implementation of the UNDRIP in Canadian Law", 2018 CanLIIDocs 252 <http://www.canlii.org/t/2cvr>

[25] October 30, 2019 Hansard.

the near future."[26] The Action Plan required under section 4 will therefore be foundational in setting the provincial legislative and policy reform agenda with each piece of existing and future provincial legislation affecting Indigenous rights requiring either collaborative review, development or amendment as the case may be.

Enabling Provisions for New Decision-Making Agreements

Ensuring that Indigenous peoples can meaningfully participate in and enjoy their right of Free, Prior and Informed Consent to decisions that affect them, through their own representative Indigenous governing institutions, is central to respecting and upholding the right to self-determination and the implementation of UNDRIP. As the United Nations Expert Mechanism on the Rights of Indigenous Peoples has stated, operationalizing Free, Prior and Informed Consent should "correct de jure and de facto exclusion of indigenous peoples from public life or decision-making processes… [and] revitalize and restore indigenous peoples' own decisions-making and representative institutions that have either been disregarded or abolished."[27]

The *Declaration Act* now provides discretion for Ministers of the provincial government to negotiate and enter into new forms of agreements with Indigenous peoples though their own representative Indigenous governing institutions. Section 6 provides a broad mandate for the negotiation of agreements to further any purposes of the *Declaration Act*. A section 6 agreement could be pursued, for example, for the purpose of affirming and developing relationships with an Indigenous governing institution that exists independent of federal or provincial laws such as inherent hereditary governance bodies or multiple Indigenous Nations agreeing to work together and coordinate the exercise of their respective jurisdictions.

Section 7 of the *Declaration Act* provides a more specific mandate for the negotiation of agreements that relate to decisions made under provincial legislation "for the purposes of reconciliation". Specifically, subsection 7(1)(a) enables the negotiation of agreements that provide for decisions under provincial legislation to be made jointly by relevant provincial decision makers and affected Indigenous peoples through their representative Indigenous governing institutions. Subsection 7(1)(b) enables the negotiation of agreements that provide for the Free, Prior and Informed Consent of affected Indigenous peoples through their representative Indigenous governing institutions to decisions made by relevant Provincial decision makers under Provincial legislation. The Providence of BC has stated that these provisions for decision-making agreements under the *Declaration Act*, "will provide structure and add clear processes for how joint decision making would happen, with administrative fairness and transparency."[28]

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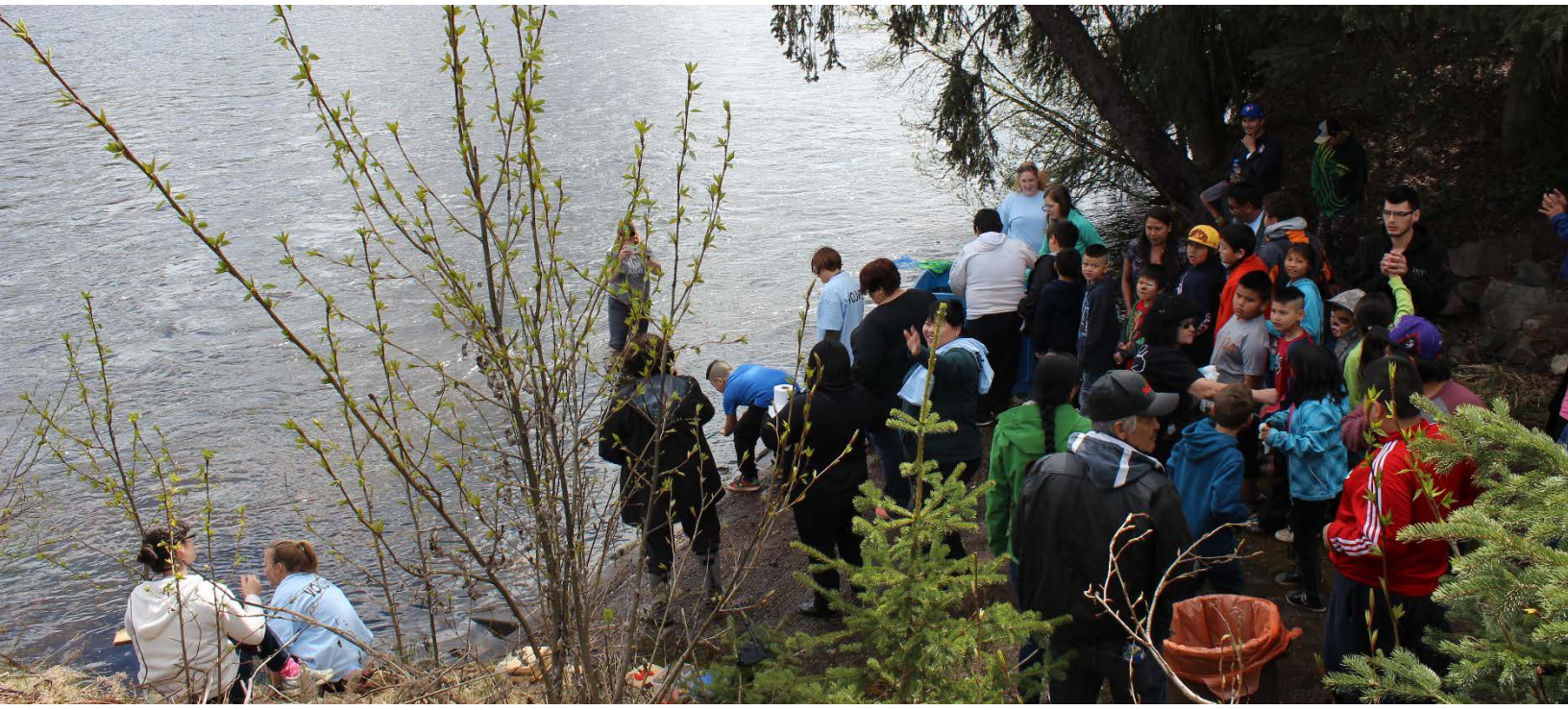
[26] University of British Columbia Residential School History and Dialogue Centre, *Summary Report: Special Dialogue on the Rights of Indigenous Peoples Act (DRIPA)*, (November 2019) at p 8, online: *University of British Columbia Residential School History and Dialogue Centre* <http://irshdc.sites.olt.ubc.ca/files/2019/11/SummaryReport_DRIPA_Dialogue_Nov2019.pdf>

[27] *Free, Prior and Informed Consent: A Human Rights-based Approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 39th Sess, UN Doc A/HRC/39/62 (2018) at p 5 <https://digitallibrary.un.org/record/1642281?ln=en>

[28] British Columbia, "*Declaration on the Rights of Indigenous Peoples Act* Factsheet (General)" online: *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/bc_declaration_act-factsheet-general.pdf>

In keeping with the principles of transparency and predictability throughout *the Declaration Act*, section 7 also establishes that the commencement of negotiations will be the subject of public consultations and any agreements concluded under section 6 or 7 will be made effective by being published in the provincial Gazette. While not explicit in the *Declaration Act*, the Providence of BC has also stated, "There must be authorities within other relevant legislation for the Province to enter into such joint decision-making or consent requirement agreements with an Indigenous government. This means there would need to be subsequent amendments to other legislation in many cases to allow for such agreements."[29]

In other words, in order for any decisions under provincial legislation to be made jointly or consensually through a section 7 agreement the particular provincial legislation at issue will first require related amendments to be passed by the provincial legislature. The only exception is the few circumstances where provincial legislation already provides for certain joint or consent-based decision-making processes by agreement between relevant Provincial decision makers and affected Indigenous peoples. Thus, setting the legislative reform agenda in the Action Plan under section 4 will be important to realizing new forms of decision-making agreements enabled by section 7.



[29] British Columbia, "*Declaration on the Rights of Indigenous Peoples Act* Factsheet (Business)" online: *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/bc_declaration_act-factsheet-business.pdf>

Appendix C: Summary of 2019 Working Group Recommendations on WSA Engagement[30]

1. Reset the Relationship Based on Recognition and Respect. The existing Act and priority regulations must be reviewed and reformed on the proper foundations.

2. Adhere to UNDRIP Moving Forward. The relevant minimum human rights standards for ensuring the survival, dignity and well-being of Indigenous peoples must be complied with at all times.

3. Enable Harmonious First Nations-Crown Governance and Management Processes. First Nations must be supported in developing and implementing their own laws and policies related to the governance and management of fresh water in their territories, and the Act should enable First Nations' own laws and policies to be exercised in a more harmonious manner and afforded due respect alongside BC laws and policies.

4. Enable Diverse, Flexible and Dynamic Options for Collaborative Development of Policies and Regulations. BC must enable and facilitate the participation of First Nations to the extent that they wish to participate and through processes and mechanisms of their choosing with no one option limiting a First Nation's ability to engage with the Crown through any means the First Nation may deem appropriate. Four options are recommended: (a) participation through existing or emerging First Nation-Crown Processes; (b) participation through a First Nations water caucus; (c) participation through regional advisory workshops; and (d) participation through a process of First Nations submissions.

5. Enable Early and Sustained Participation. Collaboration with First Nations is enabled at the very beginning of any regulation or policy development process and sustained throughout each stage of regulation and policy development under the Act.

6. Improve Transparency in Decision Making. First Nations must be able to understand how their collaborative efforts are demonstrably and substantively considered and addressed by BC throughout the process.

7. Provide Sufficient, Stable and Predictable Resources. First Nations must have sufficient, stable and predictable fiscal and human resources to meaningfully participate in the collaborative development of the regulations and policies under the Act, and to develop and implement their own water laws and policies.

[30] First Nations Fisheries Council of British Columbia, *Towards a Water Sustainability Act First Nations Engagement Framework: Working Group Recommendations for Collaborative Development of Regulations and Policies* (May 2019) at p 5, online: *First Nations Fisheries Council of British Columbia* <https://www.fnfisheriescouncil.ca/wp-content/uploads/2019/11/Letter-FNFC-to-BC_July-2019.pdf>