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# MEMORANDUM

**To:** BC First Nations
**Date:** January 31, 2023
**Re:** FNHA's UNDRIP Compliance

## BACKGROUND

- In early 2022, First Nations Health Authority (FNHA) retained Gowling WLG to conduct an assessment of whether FNHA's governance structure and service model are compliant with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The results of this assessment are summarized in this memorandum.

- The assessment looked at the question of UNDRIP compliance from two angles: whether Canada and the Province could be said to be satisfying their UNDRIP obligations through the establishment and financing of FNHA, and whether FNHA itself complies with UNDRIP principles.

## MAIN FINDINGS

### FNHA Complies with the Principles of UNDRIP

- UNDRIP is directed at national governments and FNHA does not currently have any formal legal obligations to implement UNDRIP in B.C. or federal law. Nevertheless, UNDRIP has come to be broadly recognized as an important international minimal standard for governments as well as quasi-governmental, non-governmental and private organizations. As such, it represents a critical benchmark to assess FNHA's structure, governance, and operations, as well as Canada and BC's relationship with (and funding of) FNHA.

- UNDRIP can also be used to interpret the content of other documents that are binding, such as: historical treaties (for B.C.: Douglas Treaties, Treaty 8), the Tripartite Framework Agreement, or section 35 of the *Constitution Act, 1982* (including both historical and modern treaty rights as well as inherent Aboriginal rights). In this way, UNDRIP can still have a powerful effect on government obligations.

- We conclude that the design and governance structure of FNHA complies with the principles of UNDRIP and, in fact, is frequently referenced as a model for the implementation of UNDRIP



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regarding Indigenous healthcare. By placing the governance, decision-making, and delivery of Indigenous healthcare in the hands of BC First Nations, FNHA, in many respects, represents a national and international "gold standard" regarding UNDRIP compliance and implementation for the provision of Indigenous healthcare.

- FNHA operates within a broader context, however, in which the structures of colonization continue to operate. Changes to those structures are for the most part outside of FNHA's control, and individual Nations are all on their own unique path in re-defining and re-claiming their tribal identity and means of governance. Nevertheless, FNHA could take steps that would make space for and validate, on a nation-by-nation basis, post-colonial models of decision-making and governance, within its own structure. We set out recommendations in this regard, below.

- Canada and B.C. have worked toward implementing – **but not fully satisfying** – their obligations under UNDRIP with regard to First Nations health by establishing and supporting the tripartite health model. However, to the extent FNHA is underfunded and/or limited by factors within the control of Canada and B.C., those governments have outstanding UNDRIP obligations regarding First Nations healthcare in B.C.

## INTRODUCTION

### UNDRIP as a Global Standard for Indigenous Rights

- UNDRIP was adopted in 2007 by the United Nations General Assembly after generations of work led by Indigenous communities and leaders. Although UNDRIP is not an international treaty and as such is not legally binding on Canada or other UN member states, the adoption of UNDRIP marked an important advancement in international law, human rights law, and global Indigenous rights. UNDRIP is now recognized in Canada and internationally as the minimum standard for the recognition, protection, and implementation of Indigenous rights.

- UNDRIP contains internal limits: under Article 46(2), UNDRIP's rights can be limited by a state in specific and compelling circumstances.

- After initially being one of only four countries to vote against the adoption of UNDRIP, Canada eventually fully endorsed UNDRIP in 2016.

- It is important to note that UNDRIP is directed at national governments rather than organizations such as FNHA. Nevertheless, UNDRIP represents an important benchmark to assess FNHA's structure, governance, and operations, as well as Canada and BC's relationship with (and funding of) FNHA.

### UNDRIP in Canadian Law

- Under Canadian law, an international agreement or declaration such as UNDRIP does not have full binding force unless it is formally adopted into law. Although both Canada and BC have adopted "UNDRIP" laws, those laws do not themselves create any direct UNDRIP obligations; they only provide for a process to develop "road maps" to do so, which have not yet been meaningfully developed.

- With that said, and as noted above, it is clear that UNDRIP establishes an international "minimum standard" norm that Canada and BC are expected to follow, and against which their conduct will be assessed. UNDRIP can also be used to interpret the content of other documents that are binding, such as: historical treaties (Douglas Treaties, Treaty 8), the Tripartite Framework Agreement, or section 35 (including historical or modern treaties, as well as inherent Aboriginal rights). In this way, UNDRIP can still have a powerful (indirect) effect on government obligations.

**FNHA's UNDRIP COMPLIANCE**

- There are two broad aspects of UNDRIP significant to FNHA: health-related provisions, and general governance/self-determination provisions.

  **Health**

  - Articles 21 (right to improvement of health conditions), 23 (right for Indigenous peoples to determine/develop/administer health programmes), and 24 (right to traditional medicines/health practices) are the key health-related UNDRIP provisions relevant to FNHA.
    - FNHA can be characterized as an "effective measure" that Canada, BC, and BC First Nations have taken towards improving the health conditions of Indigenous peoples, which is consistent with Article 21.
    - FNHA's internal governance is structured to ensure First Nation representation in its decision making, crucial to Article 23.
    - In accordance with Article 24, FNHA's latest program and services guide makes various references to traditional medicines and culturally-appropriate health practices.
  - Regarding the health provisions of UNDRIP, **FNHA has been described as an "innovative model of primary-care provision that address[es] health inequalities" and go toward implementing UNDRIP** (Scallan and Wilson 2019).

  **Governance**

  - Articles 4 (right to autonomy/self-government), 19 (governments must consult with Indigenous peoples through their own representative institutions to obtain free, prior, and informed consent (FPIC)), and 33 (right for Indigenous peoples to determine identity/membership in accordance with their own customs/traditions) are the key governance provisions of UNDRIP relevant to FNHA.
    - FNHA's existence as a "representative institution" of BC First Nations is consistent with these governance articles. In particular, FNHA's legal structure provides that its mandate can only be changed with the consent of all parties, including FNHA, which complies with the self-determination and FPIC principles of UNDRIP.

- Further, FNHA's governance structure provides for substantive representation by member First Nations, consistent with the governance articles of UNDRIP.

- In this regard, we conclude that FNHA's representative structure and BC First Nation-led governance model conforms with UNDRIP standards.

- UNDRIP does not require any single, specific model of Indigenous governance; there can be a range of different models that could be adopted and that would be compliant with UNDRIP.

- In particular, UNDRIP in our view does not require that each individual First Nation have direct and full control over healthcare-related decision-making; such control can be exercised through the BC First Nation health governance structure as set out in the Tripartite Framework Agreement. Under such a structure, individual members may from time to time disagree with certain FNHA decisions or practices. However, this does not detract from FNHA's UNDRIP compliance. What matters is that the mechanisms exist through which disagreements over policy or delivery issues can be addressed within FNHA's operational and governance structure.

- Similarly, FNHA may not be able to implement every service-delivery request from member Nations (especially where such requests are inconsistent with FNHA's legal obligations, such as its funding arrangements or compliance with FNHA bylaws), but that inability, in our view, does not detract from FNHA's fundamental UNDRIP compliance.

## RECOMMENDATIONS

Notwithstanding FNHA's broad UNDRIP compliance, FNHA operates within a broader context, in which the structures of colonization continue to operate. FNHA could take steps that would make space for and validate, on a nation-by-nation basis, post-colonial models of decision-making and governance, within its own structure.

In this regard, consideration could be given to dialogue related to the following recommendations:

### #1: Create a mechanism/process to recognize new or restored BC First Nation self-governance and post-colonial representation models

What constitutes the appropriate representative body for a particular community is a complex question of utmost importance. To that end, it may be beneficial for FNHA to establish mechanisms (including a deliberative process) that allow for a range of entities to be recognized within the FNHA/FNHC structure, beyond *Indian Act* bands. It should remain open to each Nation to define for itself and choose its own form of collective organization for the purpose of representation within the BC First Nation health governance structure and health service delivery model. Such mechanisms could be developed through the FNHC, regional caucus and/or regional partnership tables. This would provide for regional evolution and provide for alternative ways for BC First Nations to be represented and reflected within the FNHA service model.

**#2: Modify the boundaries of FNHA's service delivery regions**

FNHA's present operations and governance structure mirrors the provincial health regions (Coastal, Island, Interior, Fraser, and North), which were delineated by the province with little or no regard to how First Nation communities in BC are constituted and where they are located. Accordingly, a Nation may find itself straddling two or more health regions. Member Nations might consider whether the boundaries of FNHA's service delivery regions should be modified to better reflect the pre-contact political arrangements of First Nations in BC. FNHA has mechanisms in place to ensure the delivery of health services to BC First Nations is not limited by regions delineated by provincial health authorities. Nevertheless, FNHA could look at strengthening these mechanisms and/or ways in which these boundaries could be modified – particularly as regards governance. We understand this may be a concrete problem in at least one specific circumstance, with one Nation even falling into three regions, which has made prompt and efficient emergency response difficult.

**#3: Budget for service delivery at the level of individual Nations**

There may be a gap between the resources needed and the resources actually available. Closing this gap is essential to Canada and BC's compliance with UNDRIP. In this regard, budgeting for service delivery at the level of individual Nations (or small groupings of Nations) rather than regions may better: (i) reflect the needs of each community; and (ii) identify where funding from BC and Canada is inadequate (for example, we understand that current funding models are based only on registered status Indians, which can be underinclusive or discriminatory in various ways). Exploring alternative mechanisms to increase the dialogue with BC First Nations can only strengthen and improve FNHA's service delivery model.