**UN EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES:**

**REPORT ON “ESTABLISHING MONITORING MECHANISMS AT THE NATIONAL AND REGIONAL LEVEL FOR IMPLEMENTATION OF THE UN DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES”**

**Inputs from the Assembly of First Nations (AFN) Canada**

The Assembly of First Nations (AFN) is pleased to submit inputs regarding the Expert Mechanism on Indigenous Peoples’ report on *“Establishing monitoring mechanisms at the national and regional level for implementation of the UN Declaration of the rights of Indigenous Peoples”.*

AFN is a national advocacy organization for First Nations in Canada. There are 634 First Nations in Canada, as defined under the *Indian Act*, with a combined population of over 1,000,000. First Nations, represented by their Chiefs, provide mandates to the AFN through resolutions passed at Assemblies. The AFN governance is guided by its Charter, and the purpose, authority, responsibilities, and jurisdiction of the AFN is derivative in nature and scope from First Nations.

The AFN hosts two national Assemblies a year where mandates and directives for the organization are established through resolutions directed and supported by the First Nations in Assembly (elected Chiefs or proxies from member First Nations). Resolutions reflect national consensus of the rights-holding First Nations on policy matters and direct the AFN to pursue specified advocacy approaches at the national level with the federal government. Resolutions do not replace or override First Nations’ authorities to set their own path forward on any issue.

In addition to the direction provided by Chiefs of each member First Nation, the AFN is guided by an Executive Committee consisting of an elected National Chief and Regional Chiefs from each province and territory across Canada. Representatives from five national councils (Knowledge Keepers, Youth, Veterans, 2SLGBTQQIA+, and Women) support and guide the decisions of the Executive Committee.

# PART 1—Adoption of National Implementation Legislation

Inputs provided in this document should be understood in the context of the early stage of implementation of Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act* (“UNDA”). This Act received Royal Assent on June 21, 2021, and came into force immediately. Through this Act, Canada is to work in consultation and cooperation with Indigenous Peoples to:

1. Take all measures necessary to ensure laws of Canada are consistent with the Declaration;
2. Prepare and implement an Action Plan to achieve the objectives of the Declaration; and,
3. Develop annual reports on progress and submit them to Parliament (the first Annual Progress Report, tabled in June 2022 can be found [here](https://www.justice.gc.ca/eng/declaration/report-rapport/2022/index.html))

The Act requires that the Action Plan include measures:

1. to address injustices, combat prejudice and eliminate all forms of violence, racism, and discrimination against Indigenous peoples, including elders, youth, children, persons with disabilities, women, men, and gender-diverse and two-spirit persons;
2. to promote mutual respect and understanding, as well as good relations, including through human rights education;
3. related to the monitoring, oversight, follow up, recourse or remedy or other accountability with respect to the implementation of the Declaration; and,
4. for monitoring the implementation of the plan itself and for reviewing and amending the plan.

Implementation of the Act is at a very preliminary stage. The [Department of Justice Canada](https://www.justice.gc.ca/eng/declaration/index.html) leads the coordination and development of the Action Plan. In December 2021, the Department of Justice launched a [two-phase](https://www.justice.gc.ca/eng/declaration/engagement/timeline-lignedutemps.html#t4) engagement process with First Nations, Métis and Inuit peoples to advance the development of the Action Plan to be completed by the June 2023 deadline required by the Act.

The Department of Justice shared a confidential draft Action Plan in late February 2023 with the AFN. The draft action plan was characterized as a compilation of recommendations received from Indigenous Peoples. However, the contents of the draft Action Plan reveal that the participation of select federal departments in the drafting, writing, and finalization of the Action Plan have been prioritized over the inclusion of recommendations and involvement from National Indigenous Organizations.

While the draft Action Plan has yet to be finalized, it is unclear how further feedback and input from Indigenous Peoples will be incorporated in the final plan.

**Simultaneously, the AFN is the midst of hearing First Nations’ experiences and priorities regarding the Government of Canada’s draft Action Plan process. To date, there have been significant concerns raised about the process, including around timelines, information-sharing, and resourcing for First Nations participation.**

# PART 2—EMRIP’s Thematic Areas

**2.1 Monitoring mechanisms and participation of Indigenous Peoples—*UN Declaration Act*:**

* Canada’s UNDA identifies the need for monitoring, oversight, recourse, and other accountability measures to implement the Declaration as well as to monitor implementation of the Action Plan.
* The Act requires that such measures be included in the Action Plan in consultation and cooperation with Indigenous Peoples to achieve the ends of the Declaration (Section 6(1)).
* The Action Plan must include measures related to monitoring, oversight, recourse or remedy or other accountability measures regarding the implementation of the Declaration (Section 6(2)(b)).
* The Act also requires that the Government of Canada prepare, in consultation and cooperation withIndigenous peoples, an annual report for Parliament (Section 7) on the measures taken to:

1. ensure that the laws of Canada are consistent with the Declaration (Section 5), and
2. prepare and implement the Action Plan (Section 6).

* Finally, the Act stipulates that the Government of Canada must make the annual report public after it is tabled to Parliament (Article 7(4)).

**2.2 Priorities of monitoring from an AFN perspective:**

Specific monitoring measures (inclusive of oversight, recourse, and other accountability measures) for inclusion in the Action Plan have yet to be determined, in cooperation and consultation with Indigenous Peoples. Below is a non-exhaustive list of some **potential monitoring priority areas** and First Nations priorities surfacing in AFN’s engagement with First Nations that are not yet being addressed or adopted by Canada:

**Rights-based consultation, participation, and co-development—**The protocols by which Indigenous Peoples are engaged by the federal government must uphold the highest standards and adherence to the rights affirmed in the Declaration, including free, prior, and informed consent (FPIC).Multiple articles in the Declaration require States to consult and cooperate with Indigenous Peoples, facilitate participation, develop mechanisms in conjunction with them, and obtain their FPIC**.** Full, early, and continued adherence to these principles is essential. The Government of Canada should ensure First Nations-led monitoring is built from the ground up and allows for iterative capacity growth.

**Adequacy and alignment of the Action Plan with the Declaration**—Mechanisms to monitor the adequacy of every measure in the Action Plan regarding alignment with the Declaration, along with effective implementation, will support transparency in reporting to rights holders, inform progress, and identify gaps and necessary adjustments to the measures where necessary.

**Consensus building and decision-making mechanisms**—Implementation of the Action Plan may require new or amended mechanisms for First Nations and Canada to meet, discuss, plan, build consensus, and reach conclusions on a wide range of complex issues throughout the implementation of the Declaration. Most measures tabled on June 21, 2023, are expected to require further analysis and consideration, discussion, and decision-making prior to their effective implementation (and/or enactment where a measure relates to legislation).

**Federal, provincial, and territorial cooperation mechanisms—**The UNDA is federal legislation. The Constitutional division of powers in Canada, however, means that federal, provincial, and territorial governments all exercise jurisdiction that can affect the First Nations rights. Compliance with the Declaration must engage federal, provincial, and territorial governments. New or amended pathways and mechanisms that support respectful Nation-to-Crown cooperation with First Nations and the advancement of First Nations rights across all jurisdictions will be key.

**Independent First Nations oversight, monitoring, evaluation and reporting—**As a matter of trust, transparency, and comprehensive and balanced assessment and reporting,it is essential that First Nations be directly involved in all aspects of oversight, monitoring, evaluation and reporting, including the legislated requirement of annual reports to Parliament. An independent, national oversight body with membership jointly appointed by the Government of Canada and the AFN could be one way to monitor and report annually to Parliament and the public in support of trust, transparency, and comprehensive and balanced information.

**First Nations rights indicators—**Such indicators are essential in the implementation of international human rights standards and commitments to support policy formulation, impact assessment, and transparency. Such indicators will need to be developed by First Nations and appropriately supported by the federal government. First Nations exercise of the right to self-determination in relation to associated data is an essential component of monitoring as set out in Section 3 below.

**Annual report to Parliament by the Government of Canada—**These reports are required to be developed in consultation and collaboration with Indigenous peoples. Protocols and processes should be considered to ensure reporting integrity and impartiality, and First Nations must receive capacity funding and support to meaningfully engage in this process.

**Investigative, enforcement, dispute, and conflict resolution mechanisms—**One or more mechanisms will be required to provide independent oversight of the Government of Canada’s obligations relative to First Nations rights consistent with Article 40 of the Declaration. This might include recourse and dispute resolution mechanisms, like tribunals or mediation processes, as well as auditing/evaluation mechanisms, reporting mechanisms, and investigation mechanisms with adequate representation by First Nations.

# PART 3 – Additional Input on Rights to Data Sovereignty

* Data sovereignty is a cross-cutting issue that impacts the implementation of every UNDRIP Article. This means that data sovereignty issues must be addressed simultaneously to, and as part of, honouring and recognizing other rights. It also means that data sovereignty must be considered across all legislation, federal departments, and agencies on a holistic and systemic basis. To date this critical issue has not been addressed by Canada.
  1. **Recognition of the rights of Indigenous Peoples to Data Sovereignty**
* The [First Nations Principles of OCAP](https://fnigc.ca/ocap-training/)® (ownership, control, access, and possession of First Nations data by First Nations) was adopted 25 years ago to express or assert First Nations’ rights to data sovereignty in alignment with First Nations’ distinct world views.
* First Nations have Inherent, Treaty, and Constitutional rights to data sovereignty. Data sovereignty is essential and integral to fully and effectively exercise rights to self-determination, autonomy, and self-government in internal and local affairs, rights to participate in decision making, and the protection of First Nations cultures, among others.
* First Nations data sovereignty means First Nations laws apply to First Nations data no matter where in Canada the data is located. This means First Nations legal orders, written or otherwise, apply to the collection, analysis, sharing, storing, interpreting, linking, mapping, publishing, displaying, repatriating, disposing of, and/or selling First Nations data, anonymized or not.
* The term “First Nations data” refers to First Nations’ individual and collective statistical data, information, intellectual, cultural, religious, and spiritual property, traditional knowledge, traditional cultural expressions, genetic resources, and human remains and genetic material. First Nations data is information in any form, tangible or intangible, that is: a) about First Nations citizens, for example statistics on First Nations health or birth rate; b) from First Nations citizens, for example First Nations’ artwork, languages, and intellectual property; and c) about First Nations reserve and traditional lands, waters, resources, and ecology.
* First Nations data sovereignty is consistent with Article 31 of the Declaration and should be read into the “right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures” affirmed and protected in that Article.
* Data is also an economic resource essential to the continued, self-determined improvement of the economic, social, and cultural conditions of First Nations (Articles 21 and 23). First Nations have economic rights in their data, as well as rights to define how economic value is ascribed to their data and how or if First Nations data is to be commodified.
* Canada must provide First Nations with access to First Nations data and other data currently held by federal departments and agencies to, among other things, a) fulfill the Crown’s duty to consult and cooperate; b) ensure First Nations can realize their rights to free, prior, and informed consent; and c) for repatriation of First Nations data as directed by right holders.
  1. **Exercising rights to data sovereignty in the Canadian context—An example of how rights to data sovereignty can be exercised: the First Nations Data Governance Strategy**
* First Nations are currently advancing data governance capacity through the implementation of a national [First Nations Data Governance Strategy](https://fnigc.ca/wp-content/uploads/2020/09/FNIGC_FNDGS_report_EN_FINAL.pdf) (FNDGS). The goal is to progressively establish a network of fully functional, First Nations-led, non-political information governance centers at the regional and national levels. These centres will be equipped with modern infrastructure needed to serve the data, information, and statistical needs of First Nations peoples, communities, their governments, and political and service delivery organizations—governed by and for First Nations, grounded in First Nations worldviews. The FNDGS is anchored in a vision that every First Nation will achieve data sovereignty in alignment with their distinct worldview, as an Inherent right. The creation of these data/information service centers is part of the Nation rebuilding effort, proposed to the Government of Canada in March 2020. The Strategy received federal funding in April 2021 to implement, in a phased approach:
* **Phase 1** implementation of the FNDGS extends over the next three fiscal years (2022-23 to 2024-25) and focuses solely on developing the **foundational elements or blueprints** that are required prior toproceeding with any permanent infrastructure or capacity building investments (i.e., *bricks and mortar*) in Phase 2.
* **Phase 2** (2025 to 2028 or beyond as needed) will be about establishing the infrastructure capacities (human and technical) based on **blueprints** **approved by leadership in** **Phase 1**. It is expected that Phase 2 will involve several sub-phases to allow for incremental implementation of data capacities over a longer period. Phase 2 could extend to 5-10 years as needed.
* **Phase 3** is the “evergreen” or **“end-state”** with a focus on continued improvements and alignment of the regional and national centres within a national network.

**Concluding remarks**

* The AFN believes that Indigenous-led monitoring and reporting—at the community, national and international levels—is essential to support, foster, guide, and enable tangible progress regarding the full implementation of the Declaration.
* The AFN is interested in further engagement with EMRIP and the United Nations Human Rights Office of the High Commissioner, including with respect to the development of indicators and the monitoring and accountability mechanisms that could help overcome entrenched disparities.