



Implementing the BC *Declaration on the Rights of Indigenous Peoples Act*

First Nations Finance Authority (FNFA) Presentation

**The Indigenous Business and Investment Council
Regional Programs & Engagement Branch
Ministry of Jobs, Economic Recovery and Innovation
Presented by Ernie Daniels, FNFA President & CEO**

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On behalf of our Chair, Chief Warren Tabobondung, and our Board of Directors and members of the FNFA I am pleased to be with you today and to provide some thoughts on implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the BC *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act).

I am aware that the Declaration Act mandates the provincial government, in cooperation with Indigenous peoples, to bring provincial laws and policies into alignment with UNDRIP and to develop an action plan. The Act also supports new agreements between the Provincial government and Indigenous governing bodies on decisions that directly affect Indigenous peoples. These, of course, could have a financial component.

The FNFA and the First Nations that govern it (47 of the 119 Borrowing Members of the FNFA are from BC) has an interest in ensuring that UNDRIP is implemented in such ways that will continue to support and expand the essential service that the FNFA provides to Indigenous governments. The FNFA, in its current form, has been in existence since 2005 and provides consistent and predictable access to low-cost public financing for Indigenous governments across Canada. Currently we have over \$1.3 billion in outstanding bonds.

We are certainly in exciting times. Indigenous peoples are rebuilding their governance structures within Canada based on their inherent rights and ancient legal orders. The FNFA is pleased to have been a product of this work as it relates to the needs of contemporary Indigenous governments to have access to the capital markets as do all governments in Canada, indeed, as do all stable governments, globally.

As a country and as a province, in order to support ongoing Indigenous governance reform and nation rebuilding we will, in fact, need more mechanisms and tools to support the transition to self-government based on the recognition of rights. UNDRIP and the Declaration Act, will help. For its part, the federal government will also need to continue to show leadership. Nationally, the government has introduced legislation like the Declaration Act, Bill C-15, which had first reading.

With respect to fiscal matters, the FNFA is an example of one of the earlier mechanisms that has been established to support self-government and was accomplished through the enactment of the *First Nations Fiscal Management Act* (FMA). I understand that you have already heard from the two other institutions that the FMA establishes: namely the First Nations Financial Management Board and the First Nations Tax Commission. All three institutions have our operations centered here in BC where they originated. The FNFA is located in West Kelowna given the origins of the FNFA through the work and leadership of Westbank First Nation.

As part of Indigenous nation rebuilding within Canada, there is an evolving fiscal relationship with the Crown as well as among Indigenous groups. Change has been incremental along a continuum of governance options for reform (e.g., *Indian Act* governance, sectoral governance initiatives, comprehensive governance arrangements). Today, as the Province considers its action plan to implement UNDRIP within the scope of its jurisdiction it is important that we all continue to build on our successes and not try to reinvent the wheel. We need to take stock of what has already been accomplished, and why, and build upon what is working.

In the early 1990s when the First Nation's fiscal institutions were being designed, the framers of the FMA were very cognizant that a UNDRIP was being contemplated. Early drafts of a UNDRIP were being circulated at the time. Everything was connected. It always has been. With a vision.

I say this, as it may not always be obvious where aspects of the nation rebuilding project have taken place over time in different parts of the country and with different people. The work may seem disconnected or separate. But it is not. For example, when the FMA was being framed it was always the vision of those leading the initiative that, over time, all First Nations would eventually, to some degree, be self-governing. So, while the FNFA borrowing regime under the FMA on its face might seem to be principally for *Indian Act* bands, the vision was never that its current members would remain under the *Indian Act* and that future ones would be under the *Indian Act*. Indeed, the long-term vision was that any recognized Indigenous government, or its institutions, would be able to benefit from collective borrowing through the FNFA. This is important to understand in terms of the larger process of nation rebuilding and the ongoing transition from governance under the *Indian Act* to something else contemplated by UNDRIP based on rights. It is important to understand this because the actions the BC government takes now can either hinder or support the nation building work that has been ongoing well before UNDRIP was adopted or the Province passed the Declaration Act.

I am sure many, if not all, of the presenters before me have already identified some of the most relevant articles of UNDRIP to this conversation on fiscal matters. So, I apologize if this next part of my presentation is a bit repetitive. I will provide our take on what these articles mean in practical terms for implementation and for the FNFA.

Article 38 sets out that:

“States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

This article is important because it means Indigenous people must be consulted but it also means that it is expected that states - and in this case we can read the national federal government along with sub-national governments such as a province - will take legislative measures. Not just overarching and general legislation such as the Declaration Act, but legislation on specific matters that require it. I am highlighting this because this is exactly what the FMA is, nationally. Federal legislation contemplated by UNDRIP to, in this case, create and support the establishment of three institutions, for which there was no other practical way to constitute them, then or now. Two of these are shared governance models, FMB and FNTC, and the third, the FNFA, is a not-for-profit special purpose corporation governed by its members – all First Nations. The legislation was necessary, and Parliament was the place to make it.

Article 3 is also a very critical article. It is the one that speaks to the right of self-determination:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 4 builds on this and sets out:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Read in conjunction these two articles speak to what we call in Canada the “inherent right of self-government” that is protected under section 35 of the Canadian *Constitution*. Article 4 also specifically addresses, “financing their autonomous functions.” Which, of course, is what the FNFA sets out to do in terms of financing autonomous functions through borrowing. Other financing mechanisms are also, of course, contemplated - taxation powers, revenue sharing and transfers between governments.

Article 5 of UNDRIP says:

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

While Article 5 speaks to what we could say is a right of independence for an Indigenous people (a group or nation) to organize, it also recognizes that an Indigenous people may desire to work with the state or other Indigenous groups. This is important because being distinct, does not negate the importance of interconnectedness and interdependency. Being a part of the national fabric and to work both with each other and other state actors (i.e., the federal government and provinces) is what cooperative federalism in Canada is all about. The FMA is an excellent example of this. A legislative mechanism to accomplish this goal, with the FNFA as an example of an institution that makes its members stronger financially by coming together than when they are acting on their own. While the FMB provides certification and, if needed, intervention services.

Article 19 is an article that is often referred to:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

There are several articles in UNDRIP that deal with Free Prior and Informed Consent and this is one of them. What is important to understand here with respect to the FMA and the FNFA is that using federal legislation to achieve our objectives in establishing institutions to support Indigenous governments was a deliberate and considered choice and an exercise in self-determination. This is not the same as where a state government may be proposing legislation to do something that was not requested or agreed to with an Indigenous people, and where they may, or may not, have been sufficient interaction during the policy phase of the initiative before the legislation was introduced.

Finally, the last article I will highlight, is article 39 which is very broad and says:

“Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.”

One way to do this, of course, is using legislative and regulatory initiatives such as the FMA.

At the end of my presentation, I will provide some specific FNFA issues that the Province might consider when thinking about the implementation of UNDRIP. But before I do, and for some more context, I want to provide some additional background on the origin of the FNFA and our mandate.

In the early 1990s Westbank First Nation wanted to lever its newly acquired property tax revenues to build much needed infrastructure – specifically a new water system for its most populous reserve (approximately 6,000 people and dozens of businesses). Going to a bank was not a good option, if an option at all. Given that most of the money for the water system was going to come from property taxes collected over many years, the Westbank First Nation property tax office contacted its municipal neighbours to see how they borrowed. It was suggested Westbank contact the (BC) Municipal Finance Authority to inquire if they could provide services. Westbank did this, and it was explained to them that it was not the mandate of MFABC to include First Nations in their borrowing pool. Soon thereafter the idea was floated that First Nations should establish their own pool. And to do so nationally. The idea of an FNFA was born.

As this idea was explored further it became clear that there were serious limitations to borrowing under the *Indian Act* and the borrowing powers of “bands”, whether borrowing on their own, or collectively. Even then, if a Band could go to the market legally, no Band was, or is to this day, big enough to realistically issue debentures on their own. Even for the self-governments that now have the recognized legal power to borrow, it is not a realistic option. At the time, it was also identified that there was a lack of institutional structure to support First Nations in their borrowing needs. Bands were basically beholden to the banks and this was just the “way it is”. Their own “special case”. Neither a government, nor a corporation and not a private client.

The idea started to crystalize. The work began to create a not-for-profit institution like the MFABC, to pool the borrowing requirements of First Nation governments to provide access to public debt financing like other sub-national governments in Canada and to do so using federal legislation. This took a lot longer than expected and there are some important lessons here. But once the First Nations Fiscal Management Act became law, the legislated FNFA established, and all the regulatory pieces were in place, the FNFA grew exponentially. Today the FNFA enjoys a credit rating of Aa3 with a stable outlook from Moody's Investor Services, and a rating of A+ with stable outlook from S&P Global Rating.

It is the objective of the members of the FNFA, that the FNFA be the institution of choice to raise capital for all Indigenous Governments in Canada and the institutions that support them. Over time our mandate will continue to evolve, and this is an area where the Province can help.

When implementing UNDRIP and considering plans and initiatives with respect to the recognition of rights and the ongoing work of reconciliation, we ask that, where appropriate, you please acknowledge and accommodate the role of the FNFA. Further, where plans could impact the borrowing capacity of Indigenous groups, or where you intend to recognize Indigenous governments and their associated institutions, that you support their ability to utilize and become a part of the FNFA. The following are some specific issues to consider.

1. Access to FNFA by Self-governing Indigenous Groups

As mentioned previously, the framers of the FNFA and the other fiscal institutions were very cognisant that self-governing First Nations would need to use the FNFA and some First Nations

would, in fact, be borrowing through the FNFA as *Indian Act* bands before becoming recognized as self-governments (either through stand-alone self-government agreements or as part of modern treaties). Unfortunately, this is not yet the case.

Of the 29 self-governing Indigenous groups in Canada (some are former *Indian Act* bands and others are an amalgamation of former bands in accordance with their historical pre-contact tribal affiliation) not one is borrowing through the FNFA. This is a national issue with a BC dimension.

There is an outstanding issue with respect to First Nations that have entered into modern treaty agreements with Canada and BC, and specifically those who want to become a part of the FNFA. Without going into all the details here, the issue has to do with the construction of the Constitutionally protected agreements and the role of the FMB with respect to intervention and the internal financial management of an Indigenous government. I understand a fix to this problem is being finalized and we encourage the Province to move quickly along with the other fiscal institutions, Canada and the affected First Nations to resolve this matter as soon as possible. To do so in the spirit of implementing UNDRIP and good governance.

For those groups that are actively negotiating modern treaties or rights recognition agreements, either as bands or part of larger tribal groupings, I also understand that there is new language that can be used in agreements that would recognize that a former band can continue to use the FNFA or use it in the future if they currently are not. Ensuring this option is in all agreements, is consistent with implementing UNDRIP and demonstrates an understanding of the complementary role that First Nations institutions can play in regulating and supporting aspects of Indigenous governance as an exercise of self-determination.

2. Securitisation of Revenue Sharing/Benefits Agreements

In addition to the recognition of the structure and powers of self-governments as I have just described, it is also important to continue to ensure that there is nothing in revenue sharing or benefits agreements that would preclude the securitization of those revenues through the FNFA or that would prohibit those revenues from being deposited into an interceptor account. Under our pooled borrowing model revenues that are coming from a third party to a borrowing member are transferred first into an independently run interceptor account. The amounts necessary to satisfy FNFA obligations are transferred first to the FNFA and the balance transferred to the Indigenous government. This feature of the financing model provides security and peace of mind for all borrowing members and the market and is very efficient. To date, our experience with BC revenues has been good. A number of our BC Borrowing Members have provincial revenues, including through the B.C. First Nations Gaming Revenue Sharing Limited Partnership, or hydro income from run of the river or wind projects, or other provincial revenues, that are being used in the calculation of borrowing room and being used to service FNFA obligations.

3. Maximizing the Benefits of Pooling

While Indigenous governments are, of course, free to raise their own financing as they see fit, (assuming they have the legal authority to do so), it is important that the federal and provincial governments do not support the establishment of an entity or entities that basically mimic the FNFA and that would, in effect, compete with the FNFA. This would be counter intuitive to the purposes of the FNFA and the benefits of pooling. Their establishment would, rather than creating healthy competition as in the private sector, potentially increase the costs of borrowing. While competition in the private sector is good and keeps costs down, when it comes to government financing and where there is no profit motive, the same considerations do not apply. For example, BC would never create a parallel body to compete with the MFABC. That said, the FNFA recognizes that changes to our structure may be needed as the range and scope of Indigenous governments and institutions expands. Including when UNDRIP is implemented.

4. Purchasing FNFA bonds

With over \$1.3 billion of bonds issued there is now a growing and healthy secondary market which helps to keep borrowing costs down. For our last issue, the spread over Ontario's cost of borrowing was only 9 basis points (.09%). The Province and other public bodies that have the function and need to make investments should look to purchase FNFA debentures if they are not already.

Finally, I am including with this presentation a deck entitled, "A Summary of FNFA's Loans to First Nations Across Canada and Projects Financed (By Province)", dated January 14, 2021. This will provide some more detail on our borrowing program, who is borrowing and for what purposes the loans are being used. You can also visit our website, www.fnfa.ca, for more information.

Thank you for listening to me. If you have any questions, I would be pleased to answer them.

Thank you.