ASSEMBLY OF FIRST NATIONS

A Distinct First Nations Accessibility Law Discussion Guide for First Nations

February 2022

TABLE OF CONTENTS

A DISTINCT FIRST NATIONS ACCESSIBILITY LAW
DISCUSSION GUIDE FOR FIRST NATIONS

A. INTRODUCTION

The Assembly of First Nations (AFN) would like to acknowledge Nahwegahbow, Corbiere Genoodmagejig Barristers and Solicitors for their assistance in preparing this discussion guide.

In 2019, the federal government passed the *Accessible Canada Act* (ACA or Act). First Nations will not be subject to the Act until 2026 – five years after the Act came into force. This five-year period is for the federal government to consult with Indigenous organizations regarding the legislation and proposed regulations. This period is to also propose amendments if necessary. Employment and Social Development Canada (ESDC) has partnered with the AFN to conduct these consultations.

The goal of this discussion guide is to provide information to First Nations on the ACA and to examine how the ACA will significantly impact First Nations and First Nations Persons with Disabilities (FNPWD). Its purpose is also to discuss four potential paths forward to create a Distinct First Nations Accessibility Law (DFNAL).

This period of consultation is vitally important for First Nations governments and organizations considering the high rates of disability within the First Nations population, the Crown's systemic method of poor infrastructure planning for First Nations, and the inadequate and inaccessible buildings on reserve lands. As will be discussed, the ACA will potentially establish significant liabilities for First Nations governments and First Nations organizations where capital and digital infrastructure has long been recognized as inadequate due to a historic lack of federal funding. While the ACA has valid legislative

intentions, the administration and enforcement in its present state fails to recognize the capital and digital infrastructure deficit that First Nations governments and First Nations organizations are responsible for managing. This failure leaves them at risk to the ACA's enforcement regime.

This document is a summary review of the Act. The full text of the ACA can be found here: Accessible Canada Act (justice.gc.ca.

This Discussion Guide considered the following reports:

- United Nations Convention on the Rights of Persons with Disabilities
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Royal Commission on Aboriginal Peoples
- Truth and Reconciliation Commission Calls to Action
- National Inquiry into Missing and Murdered Indigenous Woman and Girls Reports Calls for Justice
- Past AFN reports, such as "First Nations and First Nations Persons with Disabilities Engagement on Federal Accessibility Legislation" https://www.afn.ca/uploads/files/afn_fal_report_phase1_eng_-final_pdf.pdf. Specifically, the report contains a discussion on issues for FNPWD at page 9, and discusses the various legislative regimes interacting with Accessibility Legislation at Appendix A.

B. THE ACA: ASPIRATIONS, OMISSIONS, AND RISKS

The purpose of the *Accessible Canada Act* is sweeping with respect to scope as it will make all federally regulated entities (including First Nations) fully accessible on or before January 1, 2040. Specifically, the ACA will identify, remove and prevent barriers in

employment, the built environment, information and communication technologies, the procurement of goods, services and facilities, the design and delivery of programs and services, transportation, and areas where a regulation may be made under the *Act*. At first glance this legislation can be seen as a win for people with disabilities. However, entities must consider whether they are accessible, plan to become accessible in the near future, and the monetary fines if they are not. Despite the appearance of a lengthy implementation period, many critical decisions regarding ACA implementation are underway and could have far reaching effects on First Nations.

The legislation provides for a Minister, Accessibility Commissioner, Accessibility Standards Canada (ASC) (formerly Canadian Accessibility Standards Organization (CASDO)) and Chief Accessibility Officer to administer the Act. The ASC creates a framework for developing, reporting, enforcing accessibility requirements in priority areas and monitoring its implementation. Accessibility Standards will be developed through regulations. In its present form, all First Nations governments and First Nations organizations including service delivery entities will have to meet these standards (i.e., housing, health and social services). ASC currently has 9 members on its board of directors who consult with persons with disabilities. This board makes recommendations to the Minister to implement regulations containing standards for regulated entities (including First Nations). Most board members will be persons with disabilities, however, there is no requirement that these individuals be First Nations. Moreover, there is no formal mechanism under the ACA for First Nations governments to interface with ASC. While ASC is required to consult with Indigenous Peoples, there is no formal written procedure. In addition, this requirement does not guarantee that First Nations perspectives will be heard and appropriately conveyed in regulations. Indeed, in the current proposed regulations the drafters place an artificial cost and agency model upon all ACA agencies with no consideration for the unique structure or financial needs of First

Nations governments (e.g., the cost for a First Nation with 100 or less employees to develop accessibility plans and progress reports is estimated at $347 per year – this is far removed from reality). These arbitrary estimates of compliance costs with the ACA in the proposed regulations are concerning because they will apply to all First Nations governments.

In general, the ACA is problematic because it uses a human rights focused lens with respect to disability as distinct from First Nations rights to self-govern according to their customs, traditions, and values. This lens fails to consider the unique circumstances of First Nations underfunding, and the disproportionate percent of FNPWD compared with the average percent of Canadians with disabilities. First Nations persons are more likely to be disabled than non-First Nations persons. Many of these disabilities are a direct result of Canada's colonial policies, including residential schools, which have left many First Nations persons with mental or physical disabilities.

This legislation does not consider the history of colonialism on First Nations. For example, economic opportunities have often been denied and hindered by the *Indian Act*, leaving First Nations with a lack of ability to become a fully accessible First Nation with all the essential services. It also does not consider a First Nations' strength-based lens of disability: that persons with disabilities are in a position of power and to be respected as fully First Nations citizens. The language of disability in the ACA does not suit this view or acknowledge the First Nations worldview, and the legislation assumes that all entities are the same.

Canada's reliance on the human rights lens without adequate safeguards and protections for the delivery of ACA resources to First Nations creates an uneasy tension with the rights of First Nations self-government. The emphasis on individual human rights may result in

ACA restricting the decision-making abilities of First Nations governments who are mandated by their First Nations communities to make culturally appropriate decisions and accommodations, but with limited resources on account of Canada's failure to meet its obligation.

A similar tension occurred following an amendment to the Canadian Human Rights Act (CHRA) in 2008 that provided a means for First Nations individuals to file complaints with the Canadian Human Rights Commission (CHRC) against First Nations employers. Extending universal protections to First Nations individuals without the reciprocal allocation of resources to First Nations governments has not been viewed as an ideal approach within all First Nations. Following the 2008 CHRA amendment, several First Nations organizations advocated for an internal review process that would provide a more culturally meaningful venue to address the issue of individual human rights protections for First Nations employees.

A solution to resolve this tension is to recognize that human rights apply collectively to First Nations and appropriate consultations and financial resources must be provided by Canada. The right to health for Indigenous peoples is affirmed in articles 21, 23, 24 and 29 of the UNDRIP. Article 22 emphasizes the need for specific focus on children, women, older people, and persons with disabilities in the implementation of UNDRIP. Implementation of the UNDRIPO is provided for in a manner that meets minimal consultation standards and affirms the unique cultural and collective identity of Indigenous governments.

Finally, with respect to the right to health, it is a fundamental and universal human right affirmed in Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD). The delivery of the right to health is considered in relation to the availability, accessibility, acceptability, and quality of health services. New Zealand's experience with implementing

domestic legislation to balance the dilemma of individual and collective rights of Indigenous peoples is a noteworthy case study as it focuses on the delivery of effective service with forward looking funding considerations.

At present, the ACA represents a considerable risk to First Nations. The legislation does not contain a non-derogation clause stating that nothing in the legislation affects Aboriginal or treaty rights. The ACA infringes on First Nations ability to self-determine and self-govern in relation to accessibility issues and FNPWD. The legislation gives broad administration and enforcement powers to the Accessibility Commissioner, including the power to inspect First Nations at any time and the ability to levy significant fines. A first major violation may cost a First Nation with less than 100 employees up to $25,000, with fourth or subsequent violations costing up to $125,000 each. For First Nations with more than 100 employees, a first violation may cost up to $50,000, while fourth or subsequent major violation could cost up to $250,000 each.

Throughout the process the ACA imposes artificial reporting costs on entities. Further, the proposed regulations develop a complex method for valuating and prioritizing action items that entities must adhere to. The legislation places an additional administrative burden on First Nations to create accessibility plans, conduct consultations, and report to the Accessibility Commissioner without the provision of funds to undertake these activities. The ACA contains no funding for First Nations to become fully accessible. Chronic and systemic underfunding of First Nations health, infrastructure and housing services and programming means that First Nations often fall short of what is considered an acceptable standard. Without the provision of a means for First Nations becoming accessible, the ACA is setting up First Nations to fail.

The serious financial risk of liability, paired with First Nations inability to fund the necessary activities to make a First Nation fully accessible and a failure to consider the

unique needs of First Nations is a disaster in the making. Examples of the programs, services and retrofitting needed by a First Nation help illustrate this point: First Nations could be required to update their built environment. This could include, but is not limited to, the installation of accessible washroom facilities, ramps and/or elevators for all band owned buildings, including houses, schools, senior's centres, health centres and band offices. It could also include provision of: education tailored to FNPWD on reserve; accessible transportation; certain health services; and accessible communications e.g., First Nations sign languages, braille, large format, and audio recordings of written materials. It may also require that First Nations have accessible digital environments, including their website, that can be used with adaptive software for people with visual, hearing or learning impairments.

All these components come with a price tag. At present, there is no requirement that the Accessibility Commissioner consider First Nations' unique situation or ability to remedy the situation when issuing a violation, or ability to pay when issuing a fine. This comes at a time when many First Nations do not have potable water in their homes and are facing a housing crisis. In addition, while the ACA empowers the Accessibility Commission and ASC to make grants and contributions (a broad power - without specifications as to precisely what activities are permissible under the Act), there is no requirement that either allocate compliance costs. The proposed regulations do not address cost coverage for systemic refurbishments.

There is no organizational body under the ACA that may work with a First Nation to develop accessibility solutions. Many First Nations do not have an individual on staff who has the expertise to determine the accessibility needs of the community; or, if they do, the capacity to undertake this project. At a minimum, First Nations need significant funding to meet the standards unilaterally imposed by the ACA.

Further research is needed to determine the cost and capacity required to make a fully accessible First Nation (and considering the varying needs of urban, rural, and remote First Nations). However, it is the AFN's estimate that the funding required is likely in the hundreds of thousands of dollars or more for each First Nation. Further research is also needed regarding the current programs and services First Nations and FNPWD receive.

Discussion Questions:

1. Do you have any questions about the ACA or its applicability to First Nations?
2. Do you have any concerns about the ACA that are not raised in this brief overview?

C. A DISTINCT FIRST NATIONS ACCESSIBILTY LAW (DFNAL)

Due to the ACA's shortcomings, its imminent application to First Nations and institutions is far reaching and extends to housing, First Nations governments and administration, and health care services. It is imperative that First Nations develop their own Accessibility Regime before 2026 that centres the perspectives of FNPWD while ensuring First Nations are not set up to fail. In determining which option is best for First Nations and FNPWD, it is important to consider whether First Nations have the capacity to implement the options below.

The AFN proposes the following four options for First Nations and FNPWD to consider.

Option #1: Draft a regulation to be adopted under the ACA and amend the legislation to better consider First Nations perspectives.

First Nations could develop their own regulation, which uses a First Nations lens of disability and considers the unique circumstances of First Nations. This regulation could include what the ACA is lacking:

- a First Nations run organization that provides much needed financial resources for First Nations and works with First Nations to build their capacity and find solutions for accessibility issues.
- an organization that provides communications support (e.g., translation to braille or provision of sign language services).
- an organization that conducts research into the needs of First Nations and FNPWD. An example in data sharing is the First Nations Information Governance Center (FNIGC), which engages First Nations on the development of data and security protocols with the federal and provincial governments. This work is important following the transfer of health services to several First Nations and arising issues such as doctor-patient confidentiality.
- A First Nations organization under ACA could also vary the administration and enforcement of the Act. For example, by requiring that the Accessibility Commissioner use different criteria to assess First Nations and/or issue fines; or by creating an equivalent to the Accessibility Commissioner for First Nations.

The ACA legislation could also be amended to add a non-derogation clause regarding Aboriginal and treaty rights, as well as delegating some or all powers to First Nations organizations, among other things. In the engagement process for the enabling ACA-First Nations regulation, the parties could agree to the federal minimal standards and funding mechanisms.

This regulation also has the potential to create the framework for a path forward for First Nations that want to pursue their own regulatory regime (this is similar to Option #2 discussed below. However, this involves a regulatory scheme rather than legislation that enables a First Nation to develop their own law). There is precedent for such a model with respect to Native American tribal governments in the United States in the field of

environmental regulation for clean air, clean water, and access to safe drinking water. In the foregoing federal laws, tribal governments can elect to participate with the final objective of establishing their own tribal standards to meet and exceed federal requirements. The process is lengthy, and the work is intensive. However, federal funding is provided to incentivize participation by tribal governments.

Pros: This is the easiest option to accomplish. Regulations are created using a separate process than legislation, and only require an Order in Council, rather than having to be passed by parliament. Regulations are easier to amend. This option avoids issues of lack of political will to pass Distinct First Nations Accessibility Law and issues of parliamentary privilege. This option places pressure back on the Federal government to work with First Nations to develop acceptable regulations. This likely means that much of the development of a regulation will be funded by the federal government.

Cons: The regulations will have to be extensive to bring the ACA in line with the needs expressed by FNPWD and First Nations. It is unlikely all portions of the regulation that First Nations and FNPWD would like to see will make it into the final regulation. This option likely allows for the least amount of First Nations self-determination; however, the amount of self-determination and governance remains to be seen and will be largely based in what is included in the final regulation.

Option #2: Draft legislation that allows First Nations to adopt their own Distinct Accessibility Law.

Drafting legislation that allows First Nations to adopt their own distinct accessibility law is an approach like Bill C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families*. Bill C-92 sets minimum standards that First Nations must meet ('the best interests of the child'), but so long as the criteria is met, it allows First Nations to develop

their own law that governs child welfare practices. Thus, a Distinct First Nations Accessibility Law could follow this model if this option is selected. First Nations could work together to develop minimum standards that First Nations can meet, and then allow First Nations to determine for themselves what this law looks like. If this option is chosen, we recommend the AFN draft a model code for First Nations to consider adopting. If First Nations do not adopt their own legislation, they will continue to be subject to the ACA.

At the planning stage, attention needs to be given with respect to the jurisdictional framework of Distinct First Nations Accessibility Regime. Drafters should be mindful of the minimal standards regarding Canada's human rights provisions, Charter protections including equality rights and non-discrimination, and generally any discrete regulation that could have a differentiating impact that falls outside of international human rights conventions on the elimination of discrimination.

Pros: This option allows for the most flexibility for First Nations to craft legislation that works for their distinct needs. It also allows for the highest level of self-determination and governance. This option could be adopted as legislation by parliament, or it could be passed using First Nations inherent right to self-government. Either way, the ACA will likely have to be amended to include a delegation of power clause to First Nations.

Cons: This option will require an incredible amount of political will to pass into law, just as Bill C-92 did. Moreover, as we are seeing with Bill C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families*, it costs a substantial amount of money, time and energy for First Nations to develop their own child welfare laws. If First Nations advocate for Option #2, they must also be willing to advocate heavily for this legislation and be willing to pass their own laws. It is the most expensive, time-consuming,

and capacity-intensive option for First Nations, unless they adopt the suggested model code in its entirety.

This option also carries an additional risk because if the legislation does not make its way through the parliamentary process to become law, First Nations will be subject to the ACA beginning in 2026.

Option #3: Draft legislation that sets out anew Distinct First Nations Accessibility Law, the provisions of which would apply to all First Nations in Canada.

The third option is for First Nations (likely via the AFN and other engagement processes) to draft legislation regarding First Nations Accessibility with provisions that would apply to all First Nations. This approach is similar to Bill C-91: the *Indigenous Languages Act*. This legislation would be separate and apart from ACA. It would be comprehensive and create a new regime for First Nations Accessibility. This would create parallel legislation to the Federal Act and can be crafted in a way which respects First Nations ways of knowing and provide for greater self-determination for First Nations. This option differs from Option #2 because it would create a single legislative regime that applies to all First Nations, rather than allowing each First Nation to develop its own legislation so long as it meets minimum standards.

Pros: This option creates Distinct First Nations Accessibility Law from scratch, which can fix the many short comings of the ACA, with the least amount of work for individual First Nations (e.g., they will not have to develop their own distinct law). Again, this option could be passed by Parliament or by First Nations using their inherent right to self-government. As noted above, a delegation of power clause will be required in the ACA.

Cons: This option will also require an incredible amount of political will to pass and will likely be debated for much longer than Option #2 would be because it is comprehensive

– a single First Nations Accessibility Law will apply to all First Nations, and therefore cannot consider individual First Nations language, culture and world view of disability. Therefore, while this legislation is distinct to First Nations in general, it is not distinct to individual First Nations. We predict this option will require as much or more funding than Option #1, and that First Nations will likely bear most of the cost of developing this legislation. This option will likely be contentious because all First Nations will be subject to the same law, without the ability of First Nations to craft their own regime.

Again, this option carries the risk, that if the legislation does not get through the parliamentary process to become law, then First Nations will be subject to the ACA beginning in 2026.

Option #4: Disability Legislation as an Added Section to the Health Legislation (Omnibus Package).

This option is an extension of Option #3. The AFN has been in discussions with the federal government regarding a Distinctions-Based First Nations Health Legislation. Given the close connection between disability, accessibility, and health, it may be appropriate to add Distinct First Nations Accessibility Law to distinct health legislation.

Pros: If Distinct First Nations Accessibility Law is added as part of distinct health legislation, then First Nations may avoid the potential challenge of a lack of political will to pass federal legislation regarding Distinct First Nations Accessibility Law. In addition, First Nations governments will be required to use their own funds from their budgets to pay for ACA compliance absent from funding from the federal government. The close funding ties with federal and provincial authorities make the practical reality of finding a funding partner more likely because the subject-matter of Distinct First Nations Accessibility Law is closely tied to the funding of health services.

Cons: The addition of Distinct First Nations Accessibility Law to health legislation may create more confusion for the health scheme and risks causing a delay and/or adding lengthy debate to health legislation. This option also carries the same risk as Options #2, and #3: if legislation is not passed, First Nations will be subject to the ACA beginning in 2026.

Discussion of Options & Recommendations

To determine the best option, a capacity assessment is required. First Nations recognize that accessibility within their communities is important and necessary. However, ensuring First Nations are accessible is also a Crown obligation. Article 22(1) of UNDRIP states: "Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration." Article 22(2) follows, "States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."

While First Nations persons with disabilities are not specifically mentioned in Article 22(2), this may be implied. Therefore, accessibility in First Nations is also a state obligation under the UNDRIP. On June 21, 2021, Bill C-15 received royal assent. The Bill seeks to align Canadian law with the UNDRIP. This makes accessibility for First Nations an obligation under domestic law as well.

Moreover, the Crown has fiduciary duties to First Nations. However, they have introduced or approved infrastructure plans which failed to account for accessibility and First Nations persons with disabilities. Other relevant examples include systemic short falls in Crown funding in First Nations health care and education which also fail to account for accessibility and FNPWD. This failure of the Crown may be framed as a breach of

fiduciary duty. Therefore, no matter which option is chosen, First Nations may have some leverage to speak with the federal government regarding the development of Distinct First Nations Accessibility Law and funding for infrastructure, and to the provincial governments regarding funding for health services. In the context of the Crown-First Nations relationship, the fiduciary duty and the relationship that it confirms also requires proactive participation by First Nations during the decision-making process. It is on this basis that the AFN views the current timing of First Nations consultation to be significantly important, as having regard to the advancement of proposed regulations that will become binding on the ACA regulated entities.

The best option for First Nations is the one which they have capacity for. The AFN recommends Option #1because this option requires the least amount of political will, and regulations are more easily amended than legislation. First Nations could then request revisions as the regulation's efficiency is observed over the years following its coming into force. The idea of putting Distinct First Nations Accessibility Law as a responsibility of the federal government might be something that First Nations could embrace.

Discussion Questions:

1. Do you support a Distinct First Nations Accessibility Law?
2. Which option do you prefer? Why?
3. What are the necessary components of Distinct First Nations Accessibility Law, regardless of the option chosen? For example:
    - What standards should First Nations have to meet?
    - What organizations/bodies are required for the administration of Distinct First Nations Accessibility Law (e.g., inspections, communications support, First Nations accessibility planning support, etc.)?
    - Should any administration be left to the ACA/Accessibility Commissioner?

- How should Distinct First Nations Accessibility Law be enforced?