

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT dated _____, 2021 (the “Agreement”)

BETWEEN:

THE PROVINCIAL HEALTH OFFICER

1515 Blanshard Street
Victoria, British Columbia
V8W 9P4

(the “Provincial Health Officer”)

AND

[INDIVIDUAL RECIPIENT] on behalf of the **[NAMED FIRST NATION]**

(collectively the “Nation”)

BACKGROUND:

- A. COVID-19 is an infectious disease, reportable under the *Public Health Act* S.B.C. 2008 c.28 and its accompanying Regulations.
- B. On March 17, 2020, the Provincial Health Officer for British Columbia, Dr. Bonnie Henry, provided notice that the transmission of the infectious agent SARS-CoV-2, which has caused cases and outbreaks of a serious illness known as COVID-19 among the population of the Province of British Columbia, constitutes a regional event as defined under section 51 of the *Public Health Act*, enabling the exercise of the powers in Part 5 of the *Public Health Act* (the “**Notice of Emergency**”).
- C. The Provincial Health Officer exercises control of all information collected for communicable disease management in British Columbia. The British Columbia Centre for Disease Control (“**BCCDC**”) has custody of the information for the Provincial Health Officer.
- D. The Provincial Health Officer recognizes that Indigenous communities in British Columbia have been seriously and negatively impacted by historical epidemics in the province. The Provincial Health Officer wishes to share information with the Nation in the spirit of reconciliation, to realize self-governance and self-determination, and for the purpose of ensuring an effective public health response to COVID-19.

- E. The Nation wishes to protect their community members and specifically their elders, who are the knowledge keepers and some of the few remaining speakers of their unique language.
- F. Cooperation between all parties is necessary to effectively manage COVID-19 in British Columbia.
- G. This Agreement does not replace any other processes for identification, management or contact tracing respecting COVID-19, including processes of the First Nations Health Authority or the Nation's own government processes.
- H. The Nation assesses risk differently than the Provincial Health Officer, and it intends to make its own decisions in relation to COVID-19 issues based on the Information. In furtherance of this objective of making decisions that do not necessarily align with the assessment of the Provincial Health Officer, the Nation does not view this Agreement to provide satisfactory disclosure.
- I. The Provincial Health Officer and the Nation agree that the information disclosure in this Agreement does not satisfy the requests made by Heiltsuk Tribal Council, Nuu-chah-nulth Tribal Council and Tsilhqot'in National Government, and they view negotiating this Agreement to have been a long and frustrating process. The Nation is of the view that systemic change must occur in BC's healthcare system, including the Nation's view that new structures and protocols that support sufficient and timely information sharing with Indigenous governments during emergencies should be established with consideration to the *Declaration on the Rights of Indigenous Peoples Act* and the November 2020 report *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in BC Health Care*.
- J. The Nation wants to receive Information, and the Provincial Health Officer wishes to provide the Nation with the Information, on the terms and conditions below.

The Provincial Health Officer is prepared to provide the Information to the Nation on the following terms and conditions, which the Nation acknowledges and agrees to follow in exchange for receiving the Information:

Definitions

- 1. In this Agreement, unless the context otherwise requires, the following terms will have the following meaning:
 - (a) **"Case"** means a person who meets the COVID-19 case definition criteria established by the BCCDC that is published at [http://www.bccdc.ca/health-professionals/clinical-resources/case-definitions/covid-19-\(novel-coronavirus\)/covid-19-\(novel-coronavirus\)](http://www.bccdc.ca/health-professionals/clinical-resources/case-definitions/covid-19-(novel-coronavirus)/covid-19-(novel-coronavirus)).

- (b) **“Health Leader”** means a health care provider or other person who is advising the Nation in relation to how to manage the COVID-19 pandemic.
- (c) **“Information”** means the information in a report generated by the BCCDC that identifies the number of Cases in each Proximate Community.
- (d) **“person”** has the same meaning defined in the *Interpretation Act*, R.S.B.C. 1996 c 238.
- (e) **“Proximate Community”** means a community that is set out in Schedule 1, 2 or 3 of this Agreement.
- (f) **“Public Health Surveillance”** means the Nation’s ongoing collection and analysis of data for the purpose of planning, implementation and evaluation of public health practice.
- (g) **“Threshold”** means that there have been:
 - (i) 10 or more Cases in a Proximate Community listed in Schedule 1;
 - (ii) 5 or more Cases in a Proximate Community listed in Schedule 2; or
 - (iii) any Cases in a Proximate Community listed in Schedule 3,

that are reported under this Agreement for the most recent 28-day period of time, calculated starting with the date the Nation discloses information as Day 1 and counting backwards. For example, for the Threshold to be met to authorize the Nation to disclose the number of Cases on December 1, 2020 for a Proximate Community listed in Schedule 1, there must have been at least 10 Cases reported in the identified Proximate Community since November 4, 2020.

Frequency of Disclosure

- 2. The Provincial Health Officer will provide the Nation with a report containing Information as frequently as reasonably practicable, which the Provincial Health Officer anticipates to occur on most weekdays.

Permitted Purposes

- 3. Subject to Section 4 below, the Nation will not use the Information for any purpose, except:
 - (a) for Public Health Surveillance in relation to the Nation;
 - (b) to communicate and coordinate with the Provincial Health Officer, the relevant regional health authority, or the First Nations Health Authority, as is appropriate in the circumstances;
 - (c) to make informed decisions about providing extra supports and implementing safety measures to members of the Nation and residents in their communities; and

(d) as otherwise designated in writing by the Provincial Health Officer.

(collectively “**Permitted Purposes**”)

For clarity, Section 3 above does not permit:

- (a) the use of Information in any manner that could reasonably enable the identification of an individual; or
- (b) any form of linking the Information with other information that could reasonably be expected to reveal the identity of a person who is a Case.

Confidentiality Undertaking

4. The Nation acknowledges and agrees to maintain the Information in confidence, and that the Nation will not publish, release, (expressly or implicitly) reveal or disclose – or permit to be published, released or disclosed – Information, except (during the term of this Agreement):
 - (a) to disclose the Information to a Health Leader for advice in relation to a Permitted Purpose;
 - (b) to make public statements about risks to Nation’s peoples or residents of their communities that relates to COVID-19, provided that if the Threshold is not met for a Proximate Community the Nation may not: (i) disclose the number of Cases in the Proximate Community; or (ii) attribute the Nation’s risk assessment solely to any one or combination of the Provincial Health Officer, the Office of the Provincial Health Officer, the Government of BC, or Information the Nation received under this Agreement; or
 - (c) as required by law.
5. The meaning of the phrase “to maintain the Information in confidence” in Section 4 above includes the requirement that the Nation must take reasonable security measures to protect the Information from unauthorized access, collection, use, disclosure, alteration or disposal, including that the Nation will:
 - (a) ensure that there are adequate physical controls and information technology controls over the Information, so the Information remains confidential and is not accessed by anyone except in accordance with this Agreement; and
 - (b) securely shred, delete, remove or otherwise destroy records containing Information when the record or Information is no longer required by the Nation.

Document Retention

6. Upon termination of this Agreement, the Nation may retain the Information, including internal documents the Nation has developed based on the Information for governance

purposes, for future pandemic planning and Public Health Surveillance. The Information may not be used directly or indirectly to identify any individuals.

No Representations or Warranties that the Information is Accurate or Complete; No Reliance

7. The Nation acknowledges and agrees that the Provincial Health Officer is providing the Information on an “as is” basis (*i.e.* the reported Cases), which may be limited in its accuracy or completeness. The Nation agrees to waive any claim for damages relating to the inaccuracy or incompleteness of Information provided by the Provincial Health Officer. Additionally, the Nation acknowledges that the Information has limitations, including that:
 - (a) the attribution of location of a Case is based on a person’s reported address of residence, which may not reflect the actual location of the Case during their period of communicability, isolation and recovery;
 - (b) the submitted information about location of Cases does not include:
 - (i) the place where the person may have been exposed to SARS-CoV-2, which led to the COVID-19 infection;
 - (ii) the location(s) that person may have attended or travelled during their period of communicability; or
 - (iii) information about whether a person is still within the period of communicability; and
 - (c) the Information provided to the Nation will reflect Cases tested at least 6 days prior to the provision of the Information to the Nation, so the Information is not the “real time” Cases.

Termination

8. The Agreement terminates immediately:
 - (a) if the Notice of Emergency is rescinded; or
 - (b) upon one party providing the other party with notice of termination for any reason (or no reason).
9. Notwithstanding Section 8(a) of this Agreement, the Parties acknowledge their intention to revive this Agreement if a new public health emergency is issued under Part 5 of the *Public Health Act* in relation to COVID-19 after the Notice of Emergency is rescinded.

Survival upon Termination

10. Sections 4 to 7 of this Agreement are intended to survive termination of this Agreement, and they will continue in force indefinitely subject to any applicable limitation period prescribed by law, even after this Agreement ends.

<p>SIGNED on the ____ day of _____, 2021 by the Nation):</p> <p>_____</p> <p>Signature(s)</p> <p>_____</p> <p>Print Name(s)</p> <p>_____</p> <p>Print Title(s)</p>	<p>SIGNED on the ____ day of _____, 2021 on behalf of the Provincial Health Officer by her duly authorized representative:</p> <p>_____</p> <p>Signature</p> <p>_____</p> <p>Print Name</p> <p>_____</p> <p>Print Title</p>
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SCHEDULE 1

PROXIMATE COMMUNITIES WITH A POPULATION OF FEWER THAN 20,000 RESIDENTS

[INSERT]

SCHEDULE 2

PROXIMATE COMMUNITIES WITH A POPULATION OF GREATER THAN 20,000 RESIDENTS

[INSERT]

SCHEDULE 3

[INSERT]