

## **Discussion Guide**

### **Upholding Section 35 Rights through a Non-Derogation Clause in the federal *Interpretation Act***

The Government of Canada is committed to building renewed nation-to-nation, Inuit-Crown, and government-to-government relationships with First Nations, Inuit and Métis based on affirmation of rights, respect, cooperation and partnership.

In 2007, after examining non-derogation clauses (NDC) referring to section 35 of the *Constitution Act, 1982* in federal legislation, the Senate Committee on Legal and Constitutional Affairs (Senate Committee) prepared its report entitled [“Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal rights”](#). Among other recommendations intended to advance implementation of section 35 rights in the short and medium term, the Senate Committee recommended that the Government of Canada introduce legislation to add an NDC to the federal *Interpretation Act* and repeal current NDCs found in other federal statutes. The specific NDC wording the Senate Committee proposed was intended to convey an intention from the Parliament of Canada that public officials should actively take measures to uphold and implement Aboriginal and treaty rights.

Over the course of many years, NDCs have been included in several federal statutes with variations in language. They have often been added in the course of the parliamentary process at the request of some Indigenous peoples, governments, or organizations seeking to ensure that legislation would be interpreted in a way that respects section 35.

More recently, legislation has included a more positive formulation of NDCs including in the [United Nations Declaration on the Rights of Indigenous Peoples Act](#) (UN Declaration Act). The NDC in subsection 2(2) of the UN Declaration Act reads as follows:

#### **Rights of Indigenous peoples**

(2) This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the [Constitution Act, 1982](#), and not as abrogating or derogating from them.

Recently British Columbia’s *Interpretation Act* was amended to include a section 35 NDC along with an interpretive clause providing that B.C.’s laws are to be construed as being consistent with the UN Declaration.

#### **Preliminary Engagement & What We Learned**

In December 2020, the Minister of Justice and Attorney General of Canada announced the launch of a preliminary consultation and engagement process with Indigenous peoples on potential legislative changes in support of an NDC in the federal *Interpretation Act*. Justice Canada officials undertook preliminary consultation and engagement in February and March 2021 to seek views from Indigenous peoples to inform policy-making on potential amendments to the *Interpretation Act*. Justice officials consulted and engaged with Indigenous peoples on the following two questions:

- 1) **Language of the NDC:** Should the federal *Interpretation Act* use the term “Aboriginal and treaty rights” or “Indigenous peoples”?
- 2) **Repeal of some or all existing NDCs:** Should existing laws be amended to remove all NDCs included in federal legislation or should only certain NDCs be repealed?

Over the course of February and March 2021, federal officials, held about a dozen virtual meetings and received over 30 written submissions from groups representing many Indigenous peoples and organizations. From these meetings and submissions, we learned that there is general support for this initiative. The issue of a NDC is important for many Indigenous peoples as it concerns all section 35 rights holders of the *Constitution Act, 1982*.

However, there are divergent views on how the NDC in the federal *Interpretation Act* should be worded. The many participants who prefer using the term “Aboriginal Peoples” in the NDC appreciate how the term “Aboriginal” is linked clearly to constitutionally identified section 35 rights holders. Many others though favour the term “Indigenous peoples”. Some of the participants who prefer using “Indigenous peoples” appreciate how it closely aligns to language used in the UN Declaration Act and international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).

Views differ on whether or not to repeal all NDCs in current legislation. While a number of Indigenous partners have expressed a view that all NDCs should be repealed, some Indigenous partners have expressed their desire for a partial repeal, with certain specific NDCs being retained where they relate to legislation that impact them. The majority view is to keep NDCs in certain specific pieces of legislation where Indigenous peoples have voiced a desire to retain these.

### **The current approach and objectives**

On June 21 2021, the UN Declaration Act came into force. In keeping with the UN Declaration Act requirements, the Act’s consultation, cooperation and engagement process was launched on December 10, 2021. During this process, federal officials are working with Indigenous peoples and their organizations to identify measures to be included in the action plan, including measures to ensure consistency of federal laws with the UN Declaration. A broader range of Indigenous partners will be able to express their views on the NDC initiative as part of this process.

The objectives of the current consultation and engagement process on the NDC is to hear from a larger range of Indigenous voices, on a distinctions basis, to better understand how any concerns might be addressed through changes to the federal *Interpretation Act* going forward. We invite you to participate further in this discussion to share your views and recommendations on options for NDCs in federal legislation.

For the purpose of discussion, the corresponding table is a tool that presents more information on potential options for an NDC clause and repeal options.

Thank you for your time and efforts on this legislative initiative.