

## OPTIONS FOR NON-DEROGATION CLAUSE (NDC) AND REPEAL OPTIONS

**First issue:** Whether the federal *Interpretation Act* Non-Derogation Clause should refer to “Aboriginal and treaty rights” or to “the rights of Indigenous peoples”.

### Senate Committee Recommendation:

In its 2007 final report, the Standing Senate Committee on Legal and Constitutional Affairs supported the continued use of NDCs and recommended that a clearly worded clause should be added to the federal *Interpretation Act* for application to all federal statutes. For additional details, see the report: [Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights](#).

The 2007 Senate Committee recommendation was to include the following text:

“Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them.”

### Updated Language in Recent Legislation:

Recently, Parliament has introduced language that is consistent with the Senate Committee recommendation but has included the expression “Indigenous peoples”. This expression better aligns and reflects the vocabulary used in international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, recent policy direction of the Government of Canada and in the [United Nations Declaration on the Rights of Indigenous Peoples Act](#) (S.C. 2021, c. 14).

Doing so has required that the legislation include a definition clause for the expression “Indigenous peoples” that refers back to the definition of “aboriginal peoples of Canada” in the *Constitution Act, 1982*. More recent legislations have adapted some of the vocabulary used in the Senate Committee’s recommended clause to include more positive language, such as “as upholding” and “not as abrogating or derogating”. For example, the [United Nations Declaration on the Rights of Indigenous Peoples Act](#) (S.C. 2021, c. 14) includes the following text:

“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.”

**What an NDC in the federal *Interpretation Act* might say:**

**Option 1:** Would follow the recommendations of the Senate Committee on the use of the more positive language of “upholding rights”, and would include the updated vocabulary to reflect more recent NDCs, but would not refer to “Indigenous peoples” in order to avoid the necessity of adding a definition of “Indigenous peoples”. Option 1 could be worded as follows:

“Every enactment shall be construed as upholding the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

**Option 2:** Would also follow the recommendations of the Senate Committee on the use of the more positive language of “upholding rights”, but would refer to “Indigenous peoples”, therefore also requiring a definition of “Indigenous peoples” that refers back to the definition of “aboriginal peoples of Canada” in s. 35 of the *Constitution Act, 1982*. Option 2 could be worded as follows:

“Every enactment shall 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.”

## Second issue: Whether to remove all NDCs or have a partial repeal.

### Senate Committee Recommendation:

In its 2007 final report, the Standing Senate Committee on Legal and Constitutional Affairs recommended that the legislation to amend the federal *Interpretation Act* to add a non-derogation clause also provide for the repeal of all non-derogation clauses relating to Aboriginal and treaty rights included in federal legislation since 1982. The Senate Committee viewed it as important, for purposes of clarity and to avoid future confusion, that all existing non-derogation clauses included in federal statutes since the enactment of section 35 in 1982 be repealed.

For additional details, see the report: [Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights.](#)

### Considerations for total or partial removal:

The Senate Committee's recommendation for the repeal of all non-derogation clauses relating to Aboriginal and treaty rights included in federal legislation since 1982 aims to provide uniformity in statutes and to leave no room for differences in judicial interpretation regarding the intent of Parliament because there would be a single NDC.

However, further consideration is being given to the views of Indigenous partners with an interest in an NDC in specific legislations. As a result, some preexisting NDCs could be maintained after the introduction of an *Interpretation Act* NDC. The presence of a new *Interpretation Act* NDC alongside NDCs in other statutes does raise the possibility of differences in judicial interpretation because there would be different NDCs with variations in wording.

### What the repeal might be:

**Option 1:** Add a universal NDC in the federal *Interpretation Act* and remove all other NDCs in existing federal legislation since 1982.

**Option 2:** Add an NDC in the federal *Interpretation Act* and remove all NDCs except those that mirror the Senate Committee's recommended language and that Indigenous partners would prefer to retain.