

# UPHOLDING SECTION 35 RIGHTS THROUGH A NON-DEROGATION CLAUSE IN THE *INTERPRETATION ACT*

## CONSULTATION AND ENGAGEMENT PROCESS OVERVIEW AND SUMMARY OF WHAT WE HAVE LEARNED THUS FAR

### PURPOSE

This document has been prepared by the Department of Justice Canada to summarize consultation and engagement with Indigenous partners regarding possible amendments to add a non-derogation clause (NDC) in relation to upholding section 35 rights to the federal *Interpretation Act* and to repeal most NDCs found in existing federal laws. Justice is pleased to share information on the progress made on this initiative by highlighting what we have learned to date from consultations and engagement with Indigenous partners.

### BACKGROUND

Indigenous partners have been asking that the federal *Interpretation Act* be amended to include a NDC for many years. In 2007, the Standing Senate Committee on Legal and Constitutional Affairs undertook an examination of the implications of including NDCs referring to section 35 of the *Constitution Act, 1982* in federal legislation. The Committee heard from representatives of Indigenous communities and organizations,<sup>1</sup> as well as Aboriginal law academics and representatives from the Government of Canada.

Based on these hearings, the Senate Committee submitted its report entitled "[Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal rights](#)". The Senate Committee recommended, among other actions, that the Government of Canada introduce legislation to add a NDC to the federal *Interpretation Act* and to 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, while also avoiding infringing on, or interfering with, those rights unless intentional and justifiable under the *Sparrow* test.

In 2009, a series of initial meetings and discussions were held between Justice officials and representatives of the Assembly of First Nations (AFN), Inuit Tapiriit Kanatami, the Métis National Council, the Congress of Aboriginal Peoples and the Native Women's Association of Canada on the Senate Committee recommendations.

Since 2009, Indigenous partners, especially Inuit partners, Modern Treaty organizations and governments, and the Land Claims Agreements Coalition (LCAC), have been actively asking in many fora for the Government of Canada to bring forward amendments to the federal *Interpretation Act*. Indigenous peoples and organizations

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<sup>1</sup> Representatives of the Assembly of First Nations, Nisga'a Lisims Government and Nunavut Tunngavik Incorporated/Inuit Tapiriit Kanatami appeared before the Senate Committee on June 20, 2007. A representative of the Congress of Aboriginal Peoples appeared on June 21, 2007.

and Indigenous members of Parliament have also repeatedly raised the issue of the NDCs during legislative processes.

In 2019, Canada enacted statutes that are generally reflective of the language recommended by the Senate Committee (e.g. *An Act respecting Indigenous languages*; *An Act respecting First Nations, Inuit and Métis children, youth and families*; *An Act to amend the Fisheries Act and other Acts in consequence*).

### **2020/2021 CONSULTATION AND ENGAGEMENT PROCESS ON NDC**

In 2020, the Minister of Justice and Attorney General of Canada directed Justice officials to initiate “pre-engagement” discussions with some members of the Inuit-Crown Partnership Committee and some Modern Treaty organizations and governments, as well as representatives from the Land Claims Agreements Coalition (LCAC). These partners were contacted for purposes of a “pre-engagement” phase based on their key participation in the 2007 Senate Committee hearings and because LCAC and Inuit partners had been active advocates for the implementation of the Senate Committee recommendations. During this “pre-engagement” phase, input was sought on the approach to engagement, with whom to engage, engagement documents and the communications approach.

On December 16, 2020, the Minister of Justice and Attorney General of Canada launched a targeted consultation and engagement process on the NDC legislative initiative. The primary objectives of this process were the following:

1. Informing Indigenous partners of consideration being given to adopting a NDC in the federal *Interpretation Act* and repealing existing NDCs in federal statutes;
2. Providing opportunities for input into the proposal, including on possible wording of the NDC;
3. Determining if the preliminary support expressed in 2009 by NIOs engaged had changed; and
4. Satisfying any statutorily mandated requirements to consult that may arise in seeking to repeal existing NDCs.

A letter was sent to 58 Indigenous rights-holders and representative organizations, inviting them to provide written submissions on the NDC legislative initiative and offering them engagement sessions with Justice officials (see list at **Annex A**). This list encompassed many Modern Treaty organizations and governments, including Yukon First Nations Final Agreements signatories and the Nisga’a Lisims Government.

Over the course of February and March 2021, Justice officials held about a dozen virtual meetings and received over 30 written submissions from Indigenous partners representing many Indigenous peoples and organizations.

### **What We Learned in 2021**

This targeted consultation and engagement process revealed that there was considerable support for the proposal to amend the federal *Interpretation Act* to add a

NDC in relation to upholding section 35 rights. However, opinions varied on the exact wording of the NDC. There were also differing views on whether to repeal all, or most, of the existing NDCs in federal legislation. While many Indigenous partners favoured partial repeal of existing federal NDCs, there were still several partners who preferred to fully repeal these NDCs outright. Several others preferred that the NDCs be fully repealed unless certain Indigenous partners prefer to retain NDCs in legislation affecting them.

## **2022 NDC CONSULTATION AND ENGAGEMENT PROCESS**

In August 2021, the Minister of Justice and Attorney General of Canada provided an update to Indigenous partners on the NDC initiative. The letter focused on the potential benefits of hearing from a broader range of voices in order to better understand their views. On December 21, 2021, the Minister of Justice and Attorney General of Canada launched a next phase of the NDC consultation and engagement process.

In order for the NDC consultation and engagement process to be as broad and inclusive as possible, background information on the NDC legislative initiative, including a Discussion Paper and a list of NDCs currently found in federal legislation, was also posted to the [Justice Canada website](#) with an invitation to submit feedback by email to: [Non-Derogation@justice.gc.ca](mailto:Non-Derogation@justice.gc.ca).

In addition to more focused bilateral meetings with Indigenous partners, the broad consultation and cooperation process to advance the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) presented an excellent opportunity to further canvas the views from a broad range of Indigenous partners with respect to the NDC initiative. The NDC initiative has since been proactively raised with Indigenous partners via the UNDA consultation and cooperation process, as part of the work that can contribute to implementing section 5 of the UNDA (requirement to take measures to ensure consistency of federal laws with the Declaration). It is also recognized that the UNDA itself contains a NDC that could possibly be amended by this legislative initiative. The UNDA process is guided by the requirements of the UNDA and by the rights and principles of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), including good faith consultation and cooperation.

The UNDA consultation and cooperation process is intended to be broad and inclusive, and provides a variety of ways for Indigenous peoples to provide input and identify priority items, including in relation to the NDC legislative initiative. Additionally, the Justice Canada website "[United Nations Declaration on the Rights of Indigenous Peoples Act - Guiding Questions](#)" ([justice.gc.ca](http://justice.gc.ca)) was updated to include a series of questions designed to help guide discussions related to each of the legal obligations contained in the UNDA. Indigenous partners are invited to submit feedback via email or an [online submissions portal](#).

A letter was also sent on the launch date of the NDC consultation and engagement process to the same Indigenous partners that were contacted in 2020/2021, inviting them to share their views on the NDC initiative. In addition, Justice officials have also reached out to the First Nations Leadership Council in British Columbia, given the fact that NDC legislation had now been enacted in that province.

Bilateral meetings were held between February and May 2022. Some of these bilateral meetings were held with Indigenous partners that had already met Justice officials in 2021. In these instances, the goal was to have a touch point to communicate the progress made to date and to discuss timelines and next steps.

In accordance with the *Mackenzie Valley Resource Management Act* (S.C. 1998, c. 25), statutorily-mandated consultations with the Dëłı̄në Got'ı̄në Government and Tlicho Government were held. Additionally, in accordance with the *Yukon Act* (S.C. 2002, c. 7), statutorily-mandated consultations with the Yukon Government Executive Council occurred. In an effort to ensure transparency Yukon Government representatives, Yukon First Nations and the Council of Yukon First Nations were invited to participate in a meeting on the NDC initiative.

## **What We Learned In 2022**

Differing views remain on whether the federal *Interpretation Act* NDC should refer to “Aboriginal and treaty rights” or to “the rights of Indigenous peoples”. However, many Indigenous partners preferred the reference to “Aboriginal and treaty rights”. Partners who preferred the reference to “Aboriginal and treaty rights” appreciated how the wording linked clearly to section 35 rights in the *Constitution Act, 1982*. Nonetheless, many Indigenous partners supported using either expression, emphasizing their priority was to ensure that amendments to the federal *Interpretation Act* are enacted, whichever expression is ultimately used.

Similar to the example of the NDC in the British Columbia [Interpretation Act](#), a number of participants suggested using both “Aboriginal and treaty rights” and “the rights of Indigenous peoples” as a compromise or solution, with a definition of ‘Indigenous peoples’ included at the beginning of the Act. It was suggested that using both references would be a way to refer to both the constitutional Aboriginal and treaty rights and the rights of Indigenous peoples found in the UN Declaration.

We learned that repealing all existing federal NDCs was not the preferred approach. Indigenous partners generally agreed that NDCs in federal legislation affecting only certain Indigenous partners should be retained if these partners wish to do so. Indeed, there were partners who wished to retain such NDCs and were open to amending them to reflect the wording of the new NDC in the *Interpretation Act*. To promote consistent judicial interpretation across statutes, Indigenous partners tended to support the repeal of all other remaining NDCs that Indigenous partners did not wish to retain (see [list of all existing federal NDCs](#)). In addition, several Indigenous partners favoured repealing NDCs that did not align with the Senate Committee report’s recommended language.

In this vein, partners repeatedly raised the need to repeal NDCs referencing the “protection provided” through the *Constitution Act, 1982*. For example:

“For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.”

Many Indigenous partners stressed the importance of ensuring that the NDC initiative proceed without delay rather than getting drawn into ongoing discussions on the specific wording of the NDC.

### **Discussions with Provinces and Territories**

Justice officials also held discussions with government representatives from British Columbia, the Northwest Territories, and Nova Scotia. While there is no legal requirement to consult with provinces or territories, other than the Yukon Government, invitations were extended to hold discussions with some provinces and territories that are signatories to agreements that have subsequently been enacted through legislation and contain a NDC.

While the province of British Columbia is not a signatory to an agreement enacted through legislation containing a NDC, discussions were held with the Government of British Columbia to gain insight on the addition of a NDC to British Columbia’s *Interpretation Act* in 2021.

These meetings with provinces and territories were helpful in keeping Justice officials informed of any new and related legislative initiatives.

### **Conclusion**

The consultation and engagement sessions held to date have revealed general support for the NDC initiative amongst Indigenous partners. While divergent views remain as to the specific wording that should be used in the *Interpretation Act* NDC, many Indigenous partners stressed the importance of ensuring that the NDC initiative proceed without delay. As for repealing other NDC in federal statutes, Indigenous partners generally agreed that NDCs in federal legislation affecting only certain Indigenous partners should be retained if these partners wish to do so.

Justice officials are pursuing their work based on the input received from Indigenous partners to date with a view to advancing in a timely manner, while remaining open to hearing from those who express a desire to further discuss the initiative. Once the work is complete, findings will be presented to decision makers.

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

## MAILING LIST - INDIGENOUS PARTNERS

FIRST NATIONS	
National Indigenous Organization	<ul style="list-style-type: none"> <li>• Assembly of First Nations</li> </ul>
Other National / Canada-wide First Nations Organizations	<ul style="list-style-type: none"> <li>• Land Claims Agreements Coalition (First Nations &amp; Inuit)</li> </ul>
Provincial-Territorial Organizations	<ul style="list-style-type: none"> <li>• Atlantic Policy Congress of First Nations Chiefs</li> <li>• Council of Yukon First Nations</li> </ul>
Other Regional Organizations	<ul style="list-style-type: none"> <li>• Kinoomadziwin Education Body</li> <li>• Manitoba Keewatinowi Okimakanak Inc.</li> <li>• Mi'kmaw Kina'matnewey</li> </ul>
First Nations Modern Treaty and Self-Government Partners	<i>Yukon</i>
	<ul style="list-style-type: none"> <li>• Carcross/Tagish First Nation</li> <li>• Champagne and Aishihik First Nations</li> <li>• First Nation of Nacho Nyak Dun</li> <li>• Kluane First Nation</li> <li>• Kwanlin Dün First Nation</li> <li>• Little Salmon/Carmacks First Nation</li> <li>• Selkirk First Nation</li> <li>• Ta'an Kwäch'än Council</li> <li>• Tr'ondëk Hwëch'in</li> <li>• Teslin Tlingit Council</li> <li>• Vuntut Gwich'in First Nation</li> </ul>
	<i>Northwest Territories</i>
	<ul style="list-style-type: none"> <li>• Délıne Got'ıne Government</li> <li>• Gwich'in Tribal Council</li> <li>• Sahtu Secretariat Incorporated</li> <li>• Tłıchǝ Government</li> </ul>
	<i>British Columbia</i>
	<ul style="list-style-type: none"> <li>• First Nations of the Maa-Nulth Treaty Society</li> <li>• Toquaht Nation</li> <li>• Yuułu?ıf?ath First Nation Government</li> <li>• Uchucklesaht Tribe</li> <li>• Huu-ay-aht First Nations</li> <li>• Ka:'yu:'k't'h'/Chek'tles7et'h' First Nation</li> <li>• Nisga'a Lisims Government</li> </ul>

<b>FIRST NATIONS</b>	
	<ul style="list-style-type: none"> <li>• Tla'amin Nation</li> <li>• Tsawwassen First Nation</li> <li>• Westbank First Nation</li> <li>• shíshálh Nation</li> </ul>
	<i>Manitoba</i>
	<ul style="list-style-type: none"> <li>• Sioux Valley Dakota Nation</li> </ul>
	<i>Quebec</i>
	<ul style="list-style-type: none"> <li>• Grand Council of the Crees and Cree Nation Government</li> <li>• Naskapi Nation of Kawawachikamach</li> </ul>
Historic Treaty Partners	<ul style="list-style-type: none"> <li>• Treaty 6 First Nations</li> <li>• Treaty 7 First Nations</li> <li>• Treaty 8 First Nations</li> </ul>
Other First Nations	<i>Yukon</i>
	<ul style="list-style-type: none"> <li>• Liard First Nation</li> <li>• Ross River Dena Council</li> <li>• White River First Nation</li> </ul>
	<i>Quebec</i>
	<ul style="list-style-type: none"> <li>• Mohawk Council of Kahnawà:ke (*only in December 2021 mail-out)</li> <li>• Mohawks of Kanesatake (*only in December 2021 mail-out)</li> </ul>

<b>INUIT</b>	
National Indigenous Organization	<ul style="list-style-type: none"> <li>• Inuit Tapiriit Kanatami</li> </ul>
Other National / Canada-wide First Nations Organizations	<ul style="list-style-type: none"> <li>• Land Claims Agreements Coalition (includes First Nations &amp; Inuit)</li> </ul>
Inuit Land Claim Organizations	<i>Northwest Territories</i>
	<ul style="list-style-type: none"> <li>• Inuvialuit Regional Corporation</li> </ul>
	<i>Nunavut</i>
	<ul style="list-style-type: none"> <li>• Nunavut Tunngavik Incorporated</li> </ul>
	<i>Quebec</i>

<b>INUIT</b>	
	<ul style="list-style-type: none"> <li>• Makivik Corporation</li> </ul>
	<i>Newfoundland and Labrador</i>
	<ul style="list-style-type: none"> <li>• Nunatsiavut Government</li> </ul>

<b>METIS</b>	
National Indigenous Organization	<ul style="list-style-type: none"> <li>• Métis National Council</li> </ul>
Self-governing Métis bodies	<ul style="list-style-type: none"> <li>• Manitoba Métis Federation</li> <li>• Métis Nation of Alberta</li> <li>• Métis Nation of Ontario</li> <li>• Métis Nation of Saskatchewan</li> </ul>
Other representative organizations	<ul style="list-style-type: none"> <li>• Métis Nations British Columbia</li> </ul>

<b>OFF-RESERVE &amp; URBAN INDIGENOUS PEOPLES</b>	
National Indigenous Organizations	<ul style="list-style-type: none"> <li>• Congress of Aboriginal Peoples</li> </ul>

<b>INDIGENOUS WOMEN</b>	
National Indigenous Organizations	<ul style="list-style-type: none"> <li>• Native Women's Association of Canada</li> </ul>

**INDIGENOUS PARTNERS**  
Reach out via UNDA consultation process

<b>FIRST NATIONS</b>	
Maritime Aboriginal Peoples Council	2020-01-27
Manitoba Keewatinowi Okimakanak's	2022-02-15
Sioux Valley Dakota Nation	TBD
First Nations Leadership Council	TBD
Nishnawbe Aski Nation	June 22, 2022
Anishinabek Nation-Union of Ontario Indians	June 27, 2022
Grand Council of Treaty 3	TBD

<b>INDIGENOUS WOMEN</b>	
Infinity Women's Secretariat Infinity Women Secretariat affiliated to the Manitoba Métis Federation (MMF)	2022-02-10