



Overview of Legal Support: UNDA engagement with the federal government

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Federal Engagement Timelines

Federal Action Plan Timeline - A Tight Schedule

- June 2021 - Royal Assent
- Winter 2021 / Fall 2022 - Phase I Engagement Process
- Ongoing Indigenous-led Consultation (until March 2023)
- Fall 2022/Winter 2023 - Internal Policy Period
- Winter / Spring 2023 - Phase 2 Validation Process
- **June 21, 2023 - National Action Plan Legislated Deadline**



Federal Engagement

United Nations Declaration on the Rights of Indigenous Peoples Act (“UNDA” or “UNDRIPA”) commits the Federal Government to three legal obligations, all to be carried out in consultation and cooperation with Indigenous peoples

- Take “all measures necessary” to ensure consistency of federal laws with the Declaration
- Develop an action plan within two years of Royal Assent (i.e. by June 21, 2023)
- Prepare annual reports on progress to be tabled in Parliament and made public



Initial Advice

United Nations Declaration on the Rights of Indigenous Peoples has restated binding International legal principles

- Canada's common law and Canada's commitments need to be aligned with these binding international legal principles
- Partnering with Canada on a National Action Plan is leverage for our priority positions on Title, Indigenous jurisdiction, and decolonizing Canada's Indigenous policies
- We will support mandates from the Chiefs in Assembly

Legal Analyses on
Priority
Topics

Bilateral
Negotiations

A central blue banner with a white border and a slight 3D effect. The text "Key Areas of Focus" is written in a large, blue, serif font with a white outline. Three yellow arrows point towards the banner from the left and right sides.

Key Areas of Focus

Additional
Support
for
engagement
& to
CC-UNDRIPA

Legal Analyses on Priority Topics

- Examples include:
 - Federal legislation conformity with UNDRIP
 - Non-Derogation Clause (“NDC”) and *Interpretation Act*
 - Interim guidance to federal bureaucrats, law-makers
 - “Co-development” of Legislation, Policy
 - How courts are treating application of UNDRIP
 - Accountability mechanisms/bodies
 - ITK’s proposal of an Indigenous Human Rights Tribunal
 - Treaty Councils
 - International bodies/models

NDC & Interpretation Act

- Federal government has been exploring potential of:
 - amending the federal *Interpretation Act* by adding a non-derogation clause (NDC); and
 - repealing most existing NDCs found in other legislation.
- Standing Senate Committee on Legal and Constitutional Affairs (2007)
- Non derogation tied to section 35 common law and “domesticating” the Declaration.

NDC & Interpretation Act

- 2020/2021 “targeted” consultation & engagement results, according to Canada:
 - “considerable support” to amend *Interpretation Act*, with no consensus on wording of NDC; and
 - “differing views” on whether to repeal existing NDCs.

NDC & Interpretation Act

“I can advise that the AFN would be open to participating in these discussions [regarding introduction of a non-derogation clause in the Interpretation Act], subject to your government consulting widely with First Nations across Canada, as this is an important issue that will affect our nations and requires adequate participation.”

– National Chief RoseAnne Archibald to Minister Lametti, Feb 17, 2022

NDC & Interpretation Act

- Section 2 (2) of UNDA (mirrors language in federal Indigenous languages legislation, Indigenous child welfare legislation, and the *Fisheries Act*):

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 [emphasis added].

- Implications for the *Interpretation Act* NDC

NDC & Interpretation Act

- Need to consider differences between s. 35 and UNDRIP

Section 35	UNDRIP
Duty to consult: No veto for Indigenous peoples	FPIC: Free, prior & informed consent
Rights established on a case-by-case basis	Rights are universal
<i>Van der Peet</i> test for establishing rights	Rights, including self-determination, are affirmed
Crown can justify infringements	Article 46 provides a much narrower scope for justifying limitations
Based on the doctrine of discovery	Rejects the doctrine of discovery
Collective rights	Both individual and collective human rights

Conformity with UNDRIP: Other Aspects & Considerations

- How to accomplish legislative review in partnership with federal government?
 - Federal government’s previous “co-development” approaches have been inconsistent, without uniform guiding principles
- Co-development processes already announced for specific Acts (*Minister of Justice Act, Interpretation Act*)
- *Indian Act* strategy (AFN mandate)
- Criminal Justice Reforms

Accountability

- Section 5 - take “all measures necessary” to ensure conformity
- Section 6 - create National Action Plan which “must include [...] measures related to **monitoring, oversight, recourse or remedy or other accountability measures** with respect to the implementation of the Declaration” (s. 6(2)(b))
- Section 7 - Annual Reporting to Parliament, made public
- Beyond Parliamentary Processes

Accountability - International Considerations/Models

- Permanent Forum on Indigenous Peoples (2023 theme: “Indigenous Peoples, human health, planetary and territorial health and climate change: a rights-based approach”) - April 2023.
- UN CERD (Article 6 and UNDRIP)
- Special Rapporteur on the Rights of Indigenous Peoples
- Canada’s self reflection and measurements vis-à-vis New Zealand, Australia and the USA

Accountability - Canadian Considerations/Models

- ITK proposal for an Indigenous Human Rights Commission & Tribunal
 - Supported by MNC
 - Consistent with MMWIG Call to Justice 1.7
- Treaty Council with GCT3
- Reforming the Federal Court - Aboriginal Lands and Treaties Tribunal (RCAP)

Tracking Immediate Application

- UNDA s. 2(3):
“Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.”
- Next slides:
 - Interim federal guidance
 - What Canadian courts are saying

Federal “Interim Guidance”

- Directed to federal bureaucrats
- About consistency of federal laws
- How can this be strengthened?
 - Move from “guidance” to “imperative”
 - Broaden: Application of UNDRIP is not limited to legislative consistency

Courts Wary of Weighing In

- Cases where UNDRIP invoked by party, not considered by Court:
 - *Flette et al. v. Manitoba et al.*, 2022 MBQB 104 (regarding province’s treatment of Children’s Special Allowance Benefit for children in care): Court found applying Article 40 of UNDRIP (regarding access to justice) did not add to its analysis
 - *Attawapiskat FN v. Ontario*, 2022 ONSC 1196: Court declined to consider Articles 18, 32, and 39 of UNDRIP, invoked to support argument that Ontario must provide technical and financial resources to enable proper consultation & engagement, because found Ontario’s lack of funding was reasonable.
- Case where courts failed to consider UNDA at all:
 - *Wesley v Alberta*, 2022 ABKB 713: the Court relied on reasoning from a case decided *before* enactment of UNDA, *Watson v Canada*, 2020 FC 129, where the UNDRIP was characterized as “a non-binding . . . political commitment”.



Non-binding comments: *Saik'uz FN v Rio Tinto Alcan*, 2022 BC SC [per Kent J]

[para 192]: [...0]n June 21, 2021, the federal government passed into law the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“UNDRIPA”), which includes in the preamble the statement that “the doctrines of discovery and terra nullius are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”

[para 194]:If the doctrines of discovery and terra nullius are indeed “legally invalid” or simply inapplicable in Canadian law, **what then is the legal justification validating the assertion of Crown sovereignty over Indigenous peoples and Indigenous lands?** [emphasis added]



Saik'uz FN v Rio Tinto Alcan, 2022 BC SC [per Kent J]

[para 212]: It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that **supports a robust interpretation of Aboriginal rights.** Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law.



QCCA in Reference re. C-92 (2022 QCCA 185) - Dec 7/8 hearings SCC

UNDRIP Used to Confirm Interpretation of s. 35:

[513] Construing s. 35 of the Constitution Act, 1982 as including, within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate child and family services seems entirely consistent with the principles set out in the *UN Declaration*. This bolsters and confirms the correctness of such an interpretation.

Developments to Watch For

- **Gitxaala Nation mine tenures litigation:**
 - Gitxaala seeks an order setting aside seven mineral rights claims and suspending operation of the Mineral Registry concerning the granting of mineral titles within their lands.
 - One argument being advanced is that the province’s mineral grant regime is inconsistent with UNDRIP.
 - Gitxaala seeks a declaration that BC’s DRIPA requires BC to consult and cooperate with Gitxaala and other nations about measures necessary to make the *Mineral Tenure Act* regime consistent with UNDRIP.



Considerations: DRIPA Case Study

In 2019, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”). Under DRIPA, BC began a five-year action in consultation and cooperation with Indigenous Peoples.

- 89 actions that BC will undertake over 5 years, organized by 4 themes:
 - Self-determination and inherent right of self-government
 - Title and rights of Indigenous peoples
 - Ending Indigenous-specific racism and discrimination
 - Social, cultural and economic well-being

Considerations: DRIPA Case Study (cont.)

Things to avoid from British Columbia's action plan:

- Vague and general language
- Does not reference specific UNDRIP articles
- FPIC not mentioned
- Lacks precise timelines or accountability structures



JFK Team

- Sara Mainville, Partner in Toronto, Indigenous law practitioner (Anishinaabe, Couchiching FN, Treaty 3)
- Jeff Langlois, Partner in Vancouver, Regulatory and Resource law, Treaty infringement (cumulative impacts)
- Claire Truesdale, Counsel in Vancouver, Litigation, Bill C-92 intervention, Support Bilateral meetings with federal govt
- Tejas Madhur, Associate, Legislative drafting
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- Louise Kyle, Health Policy, UNDRIP specific research across our national practices
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