



Assembly of First Nations

Statutory interpretation of federal laws: A call to amend Bill S-13 to ensure the federal *Interpretation Act* is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

Assembly of First Nations

The Assembly of First Nations (“**AFN**”) is a national advocacy organization that works to advance the collective aspirations of First Nations individuals and communities across Canada on matters of national and international importance.

The AFN hosts two Assemblies a year where mandates and directives for the organization are established through resolutions directed and supported by the First Nations-in-Assembly (elected Chiefs or proxies from member First Nations). Every Chief in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective, and cooperative measures on any subject matter that First Nations delegate for review, study, or response, or to advance the aspirations of First Nations.

In addition to the direction provided by the Chiefs of each member First Nation, the AFN is guided by an Executive Committee consisting of the elected National Chief and Regional Chiefs from each province and territory. Representatives from five national councils (Knowledge Keepers, Youth, Veterans, 2SLGBTQIA+, and Women) support and guide decisions of the Executive Committee.

The AFN is aware of the history of the proposed non-derogation clause (“**NDC**”) in Bill S-13.¹ The NDC in Bill S-13 was advanced by some Indigenous leaders, particularly those in the Land Claims Agreements Coalition, who have advocated for at least 20 years for the particular formulation of this NDC to be contained in the *Interpretation Act*.²

We must not create a situation where we wait another 20 years for a *United Nations Declaration on the Rights of Indigenous Peoples* (“**UN Declaration**”) related amendment to the *Interpretation Act*. The Government of Canada’s commitment to implementing the UN Declaration and achieving its objectives in Canada should not be circumspect.

AFN thanks Cheryl Casimer (?aq#smaknik pičak pa#kiy) and external counsel Sara Mainville for appearing at the Standing Senate Committee on Legal and Constitutional Affairs to advance AFN’s position on Bill S-13. We are publishing this paper in follow up to that appearance.

1. EXECUTIVE SUMMARY

AFN’s position is that the time is now to provide explicit interpretive guidance on Bill S-13 to lawmakers and those who apply laws and policies in Canada on the legislative significance of implementing the UN Declaration in a manner that ensures consistency of laws.

AFN asserts that Bill S-13 should comply with Canada’s legal obligation to take all measures necessary to ensure its laws are consistent with the UN Declaration. The AFN advances the following language as an amendment to section 8.3:

¹ Bill S-13, *An Act to amend the Interpretation Act and to make related amendments to other Acts*, 1st Sess, 44th Parl, 2021 (“**Bill S-13**”).

² *Interpretation Act*, RSC 1985, c. I-21 [**Interpretation Act**]; Tłıchq Government, *An Act to Amend the Interpretation Act* (14 June 2023), online: <<https://tlicho.ca/news/act-amend-interpretation-act>>.

8.3(3) Every enactment must be construed as being consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

The AFN's proposed amendment is supported by the following:

- The rights and principles in the UN Declaration “constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world” (*United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Preamble (“**UNDA**”)).³
- Canada is legally required to “take all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration” (*UNDA*, s 5) and to implement the UNDA Action Plan which includes a commitment in Action Plan Measure 2.2 for an interpretive provision in the *Interpretation Act* or other laws that provides for the use of the UN Declaration in interpreting Canada's laws.⁴
- The UN Declaration and section 35 of the *Constitution Act, 1982* each serve a distinct purpose in affirming and protecting the rights of Indigenous Peoples in Canada. The UN Declaration consistency clause is a sister provision to a section 35 non-derogation clause and both provisions ought to be read together.
- Since the UNDA came into force, Canada's legal landscape has altered; consequently, it is an omission for Canada to make a section 35-related amendment to the *Interpretation Act* without also making a UN Declaration-related amendment.

2. THE AFN AMENDMENT ADVANCES UNDA, S. 5 COMPLIANCE AND ACTION PLAN MEASURE 1.2 IMPLEMENTATION

The failure to act now to amend the *Interpretation Act* to require consistency of laws with the UN Declaration is contrary to the federal government's commitments, both legal and ethical, to take every measure necessary to ensure the consistency of Canada's laws with the UN Declaration.

2.1 The AFN Amendment is a Foundational Step to Advance UNDA, s 5 Compliance.

Canada has taken significant, legally binding steps to implement the UN Declaration in Canadian law. The federal legislature's important work to achieve the objectives of the UN Declaration—to meet the minimum standards for the survival, dignity, and well-being of Indigenous Peoples—in Canadian law and policy must be supported and advanced. *UNDA* is the key federal statute that guides this work. *UNDA* contains a recital citing the UN Declaration as an interpretive tool in Canadian law: “whereas the UN Declaration is affirmed as a source for the interpretation of Canadian law” [emphasis added].⁵ Here, the legislature recognizes that the UN Declaration is already used by Canadian decision-makers as an interpretive aide to guide decision-making; this issue is addressed further below in this submission. Canada's position that the UN Declaration is a key interpretive tool in respect to Indigenous rights is readily acknowledged by the Department of Justice: *UNDA* affirms “the UN Declaration as an

³ *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 [**UNDA**].

⁴ Government of Canada, *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan*, online<<https://www.justice.gc.ca/eng/declaration/ap-pa/ah/p2.html>> [**UNDA Action Plan**] at APM 1.2; *UNDA* at s 5.

⁵ *UNDA* at Preamble.

international human rights instrument that can help interpret and apply Canadian law.⁶ Indeed, the Department of Justice, when appearing before the Standing Senate Committee on Legal and Constitutional Affairs, did not oppose a UN Declaration-related amendment to Bill S-13.

AFN's proposed amendment aligns with *UNDA*'s recital and the federal government's position on the UN Declaration as an interpretive tool. Further, it is legally required under section 5 of *UNDA* which obliges the federal government to take "all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration."⁷ This amendment should be acknowledged for what it is: reaffirming the centrality of the UN Declaration as an interpretive tool. Importantly, while AFN's amendment is required according to Canada's commitment to consistency of laws with the UN Declaration, it does not discharge Canada of its section 5 obligations.

The AFN amendment would require that every enactment be interpreted in a manner consistent with the UN Declaration. This is a codification in the *Interpretation Act* of the interpretive approach that is already used by decision-makers in Canadian law and required according to *UNDA*. While such an amendment flows from Canada's section 5 obligations, it does not end the consistency exercise that is ongoing with respect to federal statutes. There is much work that must be done to ensure that federal statutes are consistent with the UN Declaration. Requiring that statutes be interpreted as consistent with the UN Declaration is not the same task as, nor does it eclipse the task of, reviewing federal statutes for compliance with the UN Declaration and amending laws accordingly as required by section 5 and the *UNDA* Action Plan.⁸ The amendment is one important first step to ensuring consistency. This first step will inform and support the future section 5 consistency processes that must be done with respect to federal statutes and their regulations and policy frameworks which operationalize the statutory and regulatory federal schemes.

2.2 AFN Seeks Meaningful Engagement on Section 5 Consistency Processes Moving Forward.

AFN acknowledges that engagement on section 35 and the UN Declaration-related amendments to the *Interpretation Act* has been problematic and that the engagement approach to section 5 consistency processes must meet a high bar. While engagement has been flawed, AFN strongly urges federal decision-makers to recognize that more consultation will not change what is already a foundational fact in Canadian law—the UN Declaration is an interpretive aide—which the AFN amendment affirms. AFN also urges federal decision-makers to acknowledge the consultation that went into the enactment of the *UNDA* itself. The AFN amendment is, in many ways, what should have been a consequential amendment to the *Interpretation Act* when the *UNDA* was originally enacted. As we discuss further below, the AFN amendment mirrors an amendment to BC's *Interpretation Act*. That amendment was co-developed by BC and First Nations. AFN holds that work in high regard and sees the co-developed nature of the BC amendment as enhancing its precedential value.⁹

⁶ Department of Justice, Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act, online: <<https://www.justice.gc.ca/eng/declaration/about-apropos.html>>.

⁷ *UNDA* at s 5.

⁸ See *UNDA* Action Plan at APM 1.1 to 1.3.

⁹ See e.g. *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at para 441 [*Gitxaala*]; and *Interpretation Act*, RSBC 1996, c 238 at ss 8.1(3) [*BC Interpretation Act*].

Moving forward, section 5 consultation ought to lead to amending bills that will amend a myriad of federal statutes providing for improved consistency of laws as between Canada's laws and the UN Declaration. This work, following more robust consultation, may well lead to further amendments to the *Interpretation Act* that include more guidance in respect to the UN Declaration interpretation. AFN acknowledges that there are ways in which the *Interpretation Act* could be further amended to strengthen the role that the UN Declaration plays in the interpretation of Canadian law. However—and intentionally—the AFN amendment does not go beyond what is already acknowledged in law by some Canadian decision-makers, affirmed by the federal government in *UNDA*, and recognized by the Department of Justice in practice, *because* that kind of robust consultation has not yet occurred.

In sum, the AFN amendment codifies our *starting place* for *UNDA* implementation: the UN Declaration must be an interpretive guide with laws construed as consistent with the UN Declaration. In practical terms, it is challenging to envision any future *Interpretation Act* consultation that does not, at a minimum, recommend the inclusion of the AFN amendment. This is due to the AFN amendment's adherence to the existing state of the law. There ought to be a robust consultation on how we move the law forward *beyond* the UN Declaration as an interpretive aide; this is exactly the type of work that requires meaningful engagement that is properly resourced by Canada in the section 5 consistency processes to come.

To ensure that the laws of Canada are consistent with the UN Declaration, Canada must take the opportunity to provide lawmakers and all those who interpret and apply laws in Canada with interpretive guidance; every enactment must be actively construed as being consistent with the UN Declaration. This is the essence of an effective measure called for in the UN Declaration. Such a legislative enactment would be tangible evidence of Canada taking all measures necessary to achieve alignment of Canada's laws with the UN Declaration. In stark contrast, a failure to implement the AFN amendment as a provision in Bill S-13 is a clear indication that Canada is not meeting its commitment to take all measures necessary to achieve consistency.

2.3 The AFN Amendment is a Necessary Step Towards Implementing Action Plan Measure 2.2.

In addition to the federal government's section 5 consistency obligations, it is legally required under section 6(1) of *UNDA* to implement the *UNDA* Action Plan including Action Plan Measure 2.2. Measure 2.2 states:¹⁰

Identify and prioritize existing federal statutes for review and possible amendment, including:

- A non-derogation clause in the *Interpretation Act* (Justice Canada)
- **An interpretive provision in the *Interpretation Act* or other laws that provides for the use of the UN Declaration in the interpretation of federal enactments** (Justice Canada)
- ...

Bill S-13, if passed without AFN's proposed amendment, will *not* fully implement Measure 2.2. Bill S-13 as presently drafted achieves *only* the NDC aspect of Measure 2.2 as set out in the first bullet point. The

¹⁰ UNDA Action Plan at APM 1.2.

opportunity is now, with the *Interpretation Act* open for amendment, for Canada to take meaningful steps to implement Measure 1.2 both in respect of the NDC and a UN Declaration-related amendment.

3. THE UN DECLARATION AND SECTION 35 MUST CO-EXIST AND BE MUTUALLY SUPPORTIVE

As stated above, Bill S-13 includes an NDC that is long awaited by Indigenous leaders in Canada. The AFN supports the inclusion of the NDC. At the same time, there must be clear interpretive guidance that lawmakers must not derogate from section 35 rights *while* also providing that the interpretation of Canada's laws affecting section 35 rights must be consistent with the UN Declaration. UNDRIP must be mutually supportive of section 35 rights.

While a decision-maker cannot derogate away from section 35 rights, the decision-maker is also required to interpret any enactment that may impact section 35 rights as being consistent with the UN Declaration. In practice this ought to lead to a shift in the common law that ensures appropriate characterization of those section 35 rights that might be erroneously construed as being below the minimum standards set out in the UN Declaration. Expression of this guidance simply adds clarity as to the standard now required by law. To be clear, where section 35 rights continue to evolve past those minimum human rights standards, AFN's view is that such evolution exemplifies the mutual support and synergistic utility of section 35 and the UN Declaration.

4. CLEAR INTERPRETIVE GUIDANCE ON THE UN DECLARATION FOR DECISION-MAKERS DEVELOPING COMMON LAW IS NEEDED

Courts have worked to reconcile the UN Declaration with the common law in Canada. In the absence of express interpretive guidance, the common law's treatment of the UN Declaration has been inconsistent over time. The dominant treatment of the UN Declaration has been reliance on the UN Declaration as an interpretive aide. For example, today, decision-makers typically apply the UN Declaration in one of three ways when making decisions that affect Indigenous issues and rights in Canada; decision-makers consider the UN Declaration as an interpretive aid,¹¹ query whether the UN Declaration creates substantive rights,¹² or ignore the UN Declaration entirely.¹³

This common law has developed, for the most part, without legislation implementing the UN Declaration. Now, as legislatures are taking steps to implement the UN Declaration in Canadian law, through *UNDA* and BC's *Declaration on the Rights of Indigenous Peoples Act* ("**DRIPA**"), the legal landscape in respect of Indigenous rights in Canada has changed.¹⁴

The changed legal landscape, coupled with the lack of consistency in our common law, underscores the urgency to amend Bill S-13 to include an express UN Declaration-related amendment on the consistency of laws with the UN Declaration as a sister provision to the NDC. A UN Declaration-related amendment, such as the AFN amendment, will guide decision-makers and affirm that the dominant treatment of the UN Declaration today as an interpretive aide is the treatment that should prevail in interpretation

¹¹ See e.g. *The Nuchatlaht v British Columbia*, [2023 BCSC 804](#) at paras [417-419](#); Bill C-92 Reference, [2022 QCCA 185](#) at paras [61](#), [506](#), [512](#).

¹² *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, [2022 BCSC 15](#) at paras [205-206](#); *George v Heiltsuk First Nation*, [2022 FC 1786](#) at para [66](#).

¹³ *Attawapiskat First Nation v Ontario*, [2022 ONSC 1196](#); *Bellegarde v Carry the Kettle First Nation*, [2023 FC 86](#).

¹⁴ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 [**DRIPA**].

exercises that involve Canadian laws, Indigenous rights, and section 35 Aboriginal and Treaty rights. This approach aligns closely with British Columbia’s legislative approach to implementing *DRIPA*.

For example, following *DRIPA*’s enactment in 2019, the Government of British Columbia amended its provincial *Interpretation Act* to require that every provincial enactment be construed in a manner consistent with the UN Declaration; the express language of the provision is as follows: 81.1(3) Every Act and regulation must be construed as being consistent with the UN Declaration.¹⁵

The BC Supreme Court in *Gitxaala* recently considered the implication of the BC *Interpretation Act*’s guidance, with this guidance proving to be seminal in the court’s decision to construe statutes in a manner that is consistent with the UN Declaration.¹⁶

[416] In my opinion, the purpose of s. 8.1 is clear and evident in the text of the section. That is: when I consider the proper interpretation of the *MTA* [*Mineral Tenure Act*], I should apply the *Rizzo Shoes* analysis. However, within that analysis, I am required to construe the *MTA* in a manner that upholds (as opposed to abrogating) the Indigenous rights of the petitioners. In other words, if there are two (or more) possibly valid interpretations of the *MTA*, then I am to construe the Act in a manner that is consistent with *the UN Declaration* (i.e., that protects Indigenous rights).¹⁷

The BC *Interpretation Act*’s guidance was a crucial aspect of the court’s analysis.¹⁸ The AFN amendment would provide the same type of much-needed guidance—guidance that the courts in Canada need to make decisions that allow for Canada’s common law to develop in a manner that is consistent with the UN Declaration.

5. CONCLUSION

AFN calls on federal decision-makers to amend Bill S-13 to include the following UN Declaration-related amendment: **8.3(3) Every enactment must be construed as being consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.**

This will provide immediate guidance on the statutory interpretation of federal laws: that every Act or regulation, or any portion of an Act or regulation, must be interpreted as being consistent with the UN Declaration. In the absence of completed section 5 processes, the AFN amendment is urgently required for coherence on the UN Declaration in the common law.

The AFN amendment follows the precedent set in British Columbia’s *Interpretation Act*, affirms judicial treatment of the UN Declaration as an interpretive aide, complies with Canada’s legal requirement to take all measures necessary to make the laws of Canada consistent with the UN Declaration according to the *UNDA*, and aligns with the Department of Justice’s position in respect of the UN Declaration.

After AFN’s appearance at the Senate Committee on Legal and Constitutional Affairs, a committee report was submitted upon completion of the study of Bill S-13. The Committee has decided to return the bill to

¹⁵ See e.g. *Gitxaala* at para [441](#); and *BC Interpretation Act* at ss 8.1(3).

¹⁶ *Gitxaala* at para [416](#).

¹⁷ *Gitxaala* at para [416](#).

¹⁸ See e.g. *Gitxaala* at paras [409 – 418](#), [420](#), [428](#).

the Senate without amendment in direct contravention from testimony by the AFN and other Indigenous groups requesting an amendment.

The AFN amendment is a necessary first step to making the laws of Canada consistent with the UN Declaration.