



ASSEMBLY OF FIRST NATIONS

Implementing the United Nations Declaration on the Rights of Indigenous Peoples

We are Nations. And Canada ... having embarked on a path of reconciliation through its commitment to implement all 94 Calls to Action of the Truth and Reconciliation Commission, including adoption of the UN Declaration as the framework for reconciliation ... Canada must now act true to its words.

National Chief Perry Bellegarde, April 2017

In many ways, Canada waged war against Indigenous peoples through Law, and many of today's laws reflect that intent. ... The full adoption and implementation of the UN Declaration on the Rights of Indigenous Peoples will not undo the War of Law, but it will begin to address that war's legacies.

Senator Murray Sinclair, Truth and Reconciliation Chair, April 2016

NOVEMBER 2017



The Assembly of First Nations is deeply committed to the full and effective implementation of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration or Declaration). To further understand the history of the Declaration, its significance, and the meaning of international human rights instruments, please see our paper “An Introduction to the United Nations Declaration on the Rights of Indigenous Peoples.”

We know that full implementation of the Declaration will require long-term commitment and collaboration. We need the Declaration precisely because so many of the laws and policies affecting the lives of First Nations in Canada are profoundly unjust, and rest on foundations of racism and colonialism.

To ensure that the Declaration is a living document, meaningful for the world’s Indigenous peoples, its force and effect can be strengthened by its implementation locally, regionally, nationally and internationally. Repeated use of the Declaration will ensure that it continues to develop as a living instrument and serve the diverse needs of First Nations. Implementation happens in our communities and Nations, and in all our relations with federal, provincial and territorial governments, with corporations and with Canadian society as a whole.

AFN resolutions regularly reference the Declaration. We encourage legal counsel to acquire capacity in making effective arguments that include relevant references to the *Declaration* and international law generally.

Repeated use of the Declaration will ensure that it continues to develop as a living instrument and serve the diverse needs of First Nations.

No specific provision in the UN Declaration should be interpreted in isolation. Rather, each provision should be interpreted in the context of the whole Declaration. It is also helpful to refer to other international human rights law (an example being the *UN Convention on the Rights of the Child*). Such an approach is more consistent with First Nations holistic perspectives of our diverse rights.

The final report of the Truth and Reconciliation Commission (TRC) detailed the violent legacy of colonization in what is now Canada. In its Calls to the Action, the TRC directly connected the overarching goal of reconciliation to the implementation of the UN Declaration. Calls to Action 43 and 44 specify:

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

The TRC’s decision to identify the UN Declaration as “the framework” for reconciliation forever links the Declaration to any strategies on reconciliation. When the Declaration is undermined, reconciliation is also under threat. Commentators who try to misrepresent and undermine the Declaration are also threatening the national objective of reconciliation.

Former UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya has underlined: “implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.”





Implementation and Non-Indigenous Governments

UN Declaration and s. 35 of the Constitution Act, 1982

For over 35 years, federal, provincial and territorial governments have sought to limit as much as possible the interpretation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. Instead of striving for genuine reconciliation, non-Indigenous governments have sought to lower standards and expectations in comprehensive claims and other processes.

Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” For greater certainty, section 35(3) adds that “treaty rights” includes “rights that now exist by way of land claims agreements or may be so acquired.”

Former Chief Justice Dickson of the Supreme Court stressed: “The various sources of international human rights law – declarations, covenants, conventions ... customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter’s provisions.” The same rule necessarily applies to the “guarantee of Aboriginal rights” in s. 35 of the *Constitution Act, 1982*.

In 2002, Chief Justice Beverly McLachlin stated that Indigenous Peoples’ rights have always been shaped by international concepts. She concluded, “[a]boriginal rights are an international matter.”

In 2012, the previous federal government at least acknowledged that Canadian courts could consult international law sources, such as the UN Declaration, “when interpreting Canadian laws, including the *Constitution*”.

On its website, Global Affairs Canada emphasizes: “The UN Charter and customary international law impose on all countries the responsibility to promote and protect human rights. This is not merely a question of values, but a mutual obligation of all members of the international community”.

The Supreme Court of Canada has repeatedly confirmed the role of international law in interpreting domestic law, and the expectation that Canadian law will live up international human rights standards.

In addressing Aboriginal and treaty rights in s. 35, the Supreme Court has mainly addressed issues relating to land and resource rights. However, a “full box” of Indigenous rights in s. 35 would include the wide range of human rights in the UN Declaration. This includes social, economic, cultural, political, environmental, and spiritual rights.

Canada’s commitment to reconciliation is a further reason for using the UN Declaration to interpret s. 35. In the *Haida Nation* case, the Supreme Court of Canada indicated: “Reconciliation ... is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples.”





Prime Minister Trudeau has repeatedly indicated that implementation of the UN Declaration is a “top priority” for his government. On February 22, 2017, the Prime Minister announced a major initiative to “examine all relevant federal laws, policies and operational practices to ensure that the Crown is meeting its constitutional obligations as well as adhering to the UN Declaration on the Rights of Indigenous Peoples and other international human rights standards.”

The federal government has explicitly linked s. 35 to international human rights standards. Clearly, the UN Declaration must be used to interpret s. 35. As Indigenous Affairs Minister Carolyn Bennett indicated in May 2016: “By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada.” The Minister of Justice and Attorney General of Canada has added that the government supports all articles of the Declaration “without reservation.” This contributes to the “unique contemporary relationship” that the Supreme Court of Canada has described in regard to s. 35.

Legal Implementation

The AFN has been advised that the UN Declaration has diverse legal effects including:

- Canadian courts and tribunals are using the UN Declaration to interpret Indigenous peoples’ human rights;
- UN treaty bodies use it to interpret Indigenous rights and related State obligations in existing international human rights treaties. The same is true for regional human rights bodies;
- Federal, provincial and territorial human rights commissions can and should use the Declaration to interpret the human rights legislation they’re mandated to promote and uphold;
- First Nations governments are relying on it in policy and law making, as well as in negotiations with other governments and corporations.

Courts can use the Declaration in interpreting First Nations’ rights and related Crown obligations in Canada’s *Constitution* and laws. Further, the application of the Declaration by domestic courts is a tool to guide the interpretation of constitutions and legislation. The case of *Cal & Coy v. Attorney General of Belize*, in which the Supreme Court of Belize (2007) relied in part upon the Declaration in upholding the constitutional rights of the Maya people to lands and resources, is an example of this potential.

As Dr Mauro Barelli asserts:

in light of the authoritativeness and legitimacy that the Declaration has acquired in the international legal system, States are not in a position to dismiss it as a mere aspirational text. ... In particular ... the UNDRIP can be used as an authoritative instrument to clarify, interpret and expand the meaning and scope of regional and domestic laws.

In 2012, the Federal Court of Canada indicated: “International instruments such as the [UN Declaration] and the Convention on the Rights of the Child may also inform the contextual approach to statutory interpretation”. In this case the court found the Human Rights Tribunal was in error in not using the UN Declaration and other instruments in interpreting the Canadian Human Rights Act. Thus, domestic courts can and do harmonize Canadian law with the UN Declaration.





In 2013, in *Simon v. Attorney General of Canada*, the Federal Court ruled: “Applicants invoke UNDRIP to inform the contextual approach to statutory interpretation... Indeed, while this instrument does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values.”

In 2015, in *Hamilton Health Sciences Corp. v. D.H.*, the Ontario Court of Justice commended the Ontario government and the parents of a cancer-stricken child for collaborating on a joint approach that recognized the benefits of both Indigenous traditional medicine and western medicine in the best interests of the child: “Such an approach bodes well for the future. It is also an approach that is reflected in Article 24 of the United Nations Declaration on the Rights of Indigenous Peoples”.

In 2016, in *Catholic Children’s Aid Society of Hamilton v. G.H.*, an Ontario court relied on statements and commitments of the Crown – including those relating to the Truth and Reconciliation Commission and the UN Declaration – in determining whether a Métis child had been discriminated against contrary to s. 15 of the Canadian Charter. The Court added that all such developments “form an important contextual backdrop for the analysis”.

In 2017, an Ontario court elaborated:

...in dealing with aboriginal people and aboriginal land claims and rights, the Crown has a special responsibility and relationship with its indigenous peoples. The Crown must deal with such peoples and related issues fairly and appropriately, especially in light of the recent recommendations as released by the Truth and Reconciliation Commission and Canada’s recent adoption of the United Nations Declaration of the Rights of Indigenous Peoples.

In 2018 the federal court, in *Pastion v. Dene Tha’ First Nation*, used the UN Declaration in highlighting the importance of Indigenous legal traditions:

And the United Nations’ Declaration on the Rights of Indigenous Peoples (UN GA Res 61/295, 61st Sess, Supp No 53 (2007)) echoes these aspirations in Article 34.

In its critically important ruling on child welfare in 2018, the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada (FNCFCS) et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada (INAC))* repeatedly relied on the UN Declaration, including the following:

[72] Of particular significance especially in this case is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) ... It outlines the individual and collective rights of Indigenous peoples. In May 2016, Canada endorsed the UNDRIP stating that “Canada is now a full supporter of the Declaration, without qualification.

And

[81] Furthermore, the Panel believes that national legislation such as the CHRA must be interpreted so as to be harmonious with Canada’s commitments expressed in international law including the UNDRIP.

It is critically important that when the UN Declaration is brought into litigation, that it is done well. Legal representatives for First Nations must use the Declaration appropriately, and know how to defend it. Ensure your legal counsel is wholly familiar with the Declaration and related international human rights law.





Amnesty International Canada and Canadian Friends Service Committee (Quakers) argued as intervenors before the Supreme Court of Canada the importance of using the Declaration in domestic Indigenous rights cases. In the landmark case on land title brought by the Tsilhqot'in Nation, they focused on how standards in international law, including the Declaration, need to be used by the courts. This factum is a good example of how First Nations can include the Declaration in litigation.¹⁹

UN Declaration and Resource Development

Indigenous peoples are increasingly using the Declaration to assert rights in relation to resource development and other matters. In particular, the Declaration is being used to encourage governments and resource companies to respect the right of free, prior, and informed consent (FPIC).

An essential aspect of the right of self-determination is the right to choose, the right to provide or withhold consent.

FPIC is the right to say 'no' to the imposition of decisions that would further compound the marginalization, impoverishment and dispossession to which Indigenous peoples have been subjected throughout history. FPIC is also the power to say 'yes' to mutually beneficial initiatives that can promote healthy and vital Indigenous Nations for the benefit of present and future generations. FPIC can also be expressed as 'yes, with conditions', to ensure projects meet the standards set by First Nations.

Article 28 of the UN Declaration affirms that Indigenous peoples have the right to redress for lands, territories and resources that were taken or damaged without their free, prior and informed consent. This right is relevant to federal comprehensive claims and specific claims processes relating to Indigenous peoples.

The UN Declaration has been part of the ongoing federal review of policies and processes used with regard to impact assessment of development projects on our lands and territories.

In government legislation currently in process, the Impact Assessment Act and the Canadian Energy Regulator Act (both contained in Bill C-69), have been passed by House of Commons and are currently before the Senate. In both these Acts, the preamble contains the affirmation to the *Declaration*: "Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples."

Bill C-69 also ensures that the government, the Minister, the proposed Impact Assessment Agency and federal authorities would need to exercise their powers under the Impact Assessment Act in a way that respects the Government's commitments with respect to the rights of Indigenous peoples.

First Nations can use the *Declaration* to promote our rights when developments are proposed. Some examples include:

- incorporation of the UN Declaration into First Nations' processes for assessment of resource development proposals on our traditional territories;
- use of the Declaration in negotiation with governments and corporations including the negotiation of terms of impact and benefit sharing agreements and other mitigation agreements;



- use of the Declaration in engagement with federal, provincial and territorial environmental impact assessment processes;
- use of the Declaration in legal challenges to decisions taken against the wishes of First Nations

Implementation

Full and effective implementation of the UN Declaration is critical to its success. There are numerous additional ways that First Nations can use the Declaration in our communities and Nations. Examples include:

- Distribute copies of the Declaration and related materials in Indigenous communities. The AFN is proud to work with other organizations in the Coalition for the Human Rights of Indigenous Peoples. The Coalition produces the pocket size booklet form of the Declaration, and to date more than 300,000 copies have been distributed. To order copies, contact our office.
- If you can, translate the Declaration into your own First Nation language as some First Nations have. Work with language speakers and knowledge keepers to make it relevant in your Nation's worldview. Indigenous peoples around the world have already produced the Declaration in many languages and these are available on the website of the UN Permanent Forum on Indigenous Issues.
- Incorporate the Declaration into curriculum for education at all ages. This can take place in our communities, as well as educational facilities outside our communities, where Indigenous peoples are students at all levels.
- Have workshops at gatherings to explore meaning and effects.
- Explore resources already developed, including videos: e.g. <http://quakerservice.ca/our-work/indigenous-peoples-rights/un-declaration> and <https://www.declarationcoalition.com>
- Use provisions from the Declaration in all relevant policy and decision making
- Cite the Declaration in First Nations resolutions, laws and other instruments of governance
- Incorporate the standards of the UN Declaration in diverse agreements with governments and corporations
- Use the Declaration as a key tool for Nation-building and for strengthening communities
- Discover how the UN Declaration can assist in any litigation, including Indigenous title and other rights cases. See interventions from the Tsilhqot'in Nation case as examples.²⁰

Need for a Legislative Framework

Having a legislative framework to ensure governments carry out their responsibilities is needed. Legislative implementation of the UN Declaration will contribute to ensuring that progress made will not be easily reversed by any future government. As the Minister of Justice indicated to the House of Commons on April 12, 2016: "We need to develop a national reconciliation framework in partnership with indigenous communities ... That reconciliation framework needs to survive the life of one government."

This can be done through a legislative framework for implementing the UN Declaration. Such a framework would affirm its central significance in the process of national reconciliation. Such implementation would also need to highlight the harmonizing of federal laws consistent with the UN Declaration, as well as repudiate colonization and doctrines of superiority.



The federal law and policy review must not be a substitute for ensuring a legislative framework to fully implement the UN Declaration. The Assembly of First Nations strongly urges the Senate to pass Bill C-262 as quickly as possible.

The AFN, along with many partner organizations in the Coalition for the Human Rights of Indigenous Peoples, have strongly supported private member's Bill, C-262, on implementation of the UN Declaration introduced in Parliament on April 21, 2016 by Cree MP Romeo Saganash (NDP). In June 2018, C-262 passed third reading in the House of Commons and was introduced in the Senate.

Implementing the UN Declaration through co-development with the federal government of a national action plan is a priority for the AFN. Bill C-262 requires the federal government to work with Indigenous peoples to develop a national action plan for implementation and provides transparency and accountability by requiring annual reporting to Parliament on progress made. C-262 repudiates the Doctrine of discovery as well as colonialism.

C-262 also calls for a collaborative process for the government to review laws and policies – much like the mandate of the Working Group of Ministers. To date, this Working Group has not been very inclusive of First Nations. Implementing C-262 should ensure our voices are part of this critical review of federal laws and policies. After decades of widespread discrimination, domination, exploitation and unilateral actions, Indigenous peoples must be full partners in the reform of domestic laws and policies.

The UN Declaration provides a framework for the law and policy reform needed to ensure justice and achieve reconciliation, harmonious relations and lasting peace. We know it won't be easy, but the AFN is fully committed to this crucial challenge.

Other pieces of federal legislation, such as the potential Indigenous Languages Act, must also include reference to the UN Declaration. In this way, we continue to strengthen the protection of our human rights for now and future generations.





Endnotes

¹ This text draws upon, with permission, other published materials by Jennifer Preston and Paul Joffe.

² General Assembly, Rights of indigenous peoples: Note by the Secretary-General, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 67.

³ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting); cited with approval in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

⁴ Beverley McLachlin, P.C. Chief Justice of Canada, “Aboriginal Rights: International Perspectives”, Order of Canada Luncheon, Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002

⁵ Committee on the Elimination of Racial Discrimination, “Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (continued): Nineteenth and twentieth periodic reports of Canada (continued)”, Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSR.2142&Lang=en, para. 39.

⁶ Global Affairs Canada, “Canada’s international human rights policy”, <http://www.international.gc.ca/rights-droits/policy-politique.aspx?lang=eng>.

⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 32.

⁸ “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples”, February 22, 2017, <http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>

⁹ Minister of Indigenous and Northern Affairs (Carolyn Bennett), “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10”, May 10, 2016, <http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

¹⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1110.

¹¹ *Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, para. 132. The Court’s reliance on Belize’s international treaty obligations and the UN Declaration and other international law was fully upheld by the Court of Appeal: see *A.G. Belize et al. v. Maya Leaders Alliance et al.*, Belize Court of Appeal, judgment rendered on 25 July 2013, paras. 276-277.

¹² Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples (Routledge Research in International Law)* (New York: Routledge, 2016), at 67.

¹³ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, para. 353. Affirmed in 2013 FCA 75.

¹⁴ *Simon v. Attorney General of Canada*, 2013 FC 1117, para. 121 (ruling reversed on other grounds in *A.-G. Canada v. Simon*, 2015 FCA 18). The Federal Court was correct in concluding that the UN Declaration does not create any new rights. This is because the rights in the UN Declaration are inherent or pre-existing.

¹⁵ *Hamilton Health Sciences Corp. v. D.H.*, 2015 ONCJ 229, para. 5. See also UN Declaration, art. 24: “Indigenous peoples have the right to their traditional medicines and to maintain their health practices ... Indigenous individuals also have the right to access, without any discrimination, to all social and health services.”

¹⁶ *Catholic Children’s Aid Society of Hamilton v. G.H.*, 2016 ONSC 6287, para. 66: “The Crown ... highlighted that a cornerstone of its commitment to achieving reconciliation between Aboriginal and non-Aboriginal Canadians was the establishment of the Indian Residential Schools Truth and Reconciliation Commission. In 2010, the federal government took another important step in implementing the promise to pursue reconciliation by signing the United Nations Declaration on the Rights of Indigenous Peoples. In May 2016, the government announced that Canada is now a full supporter, without qualification, of this international Declaration.”

¹⁷ *Ibid.*, para. 73.

¹⁸ *R. v. Sayers*, 2017 ONCJ 77, para. 53(2) See also para. 51, where the Ontario Court of Justice cited TRC Calls to Action 42, 45, 46, 52 and 92(i) and (ii). At para. 50, the Court cited the UN Declaration, arts. 3, 8(2)(b), 26, 28, 32 and 40. In view of the unacceptable delay by the Crown in dropping criminal charges, the Court awarded costs of \$390,000 to the Indigenous defendants.

¹⁹ *William et al. v. British Columbia*, “Factum of the Interveners Amnesty International and Canadian Friends Service Committee”, Appeal to Supreme Court of Canada, Court File No. 34986, 24 September 2013

²⁰ Amnesty International and Canadian Friends Service Committee (Quakers) and Hul’qumi’num Treaty Group made written and oral submissions using the UN Declaration.

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