

**Assembly of First Nations**

**Submission to the Expert Mechanism on the Rights of Indigenous Peoples**

**RE: Study on state action to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples**

**February 13, 2024**

The Assembly of First Nations (AFN) welcomes the Expert Mechanism’s study on “Legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration.”[[1]](#footnote-1) The AFN notes that Articles 3, 4, 18, 19 and 39 provide important context for Article 38 in addition to the Articles mentioned in EMRIP’s [call for input](https://www.ohchr.org/en/calls-for-input/2024/call-inputs-study-laws-legislation-policies-constitutions-judicial-decisions). This submission shares some key developments in Canada.

As an advocacy organization, the AFN has no inherent authority of its own but receives regular delegated mandates from First Nations, including [mandates relating to advocacy on the UN Declaration](https://afn.bynder.com/m/10c0667d8e0bb381/original/AFN-Mandates-to-Support-Essential-Elements-Measures.pdf). For example, First Nations have repeatedly called for their full participation in implementation of the Declaration and for resourcing of First Nations rights holders to ensure their meaningful consent-based participation in co-development of UN Declaration action plans. (See for example, [AFN Res. 12/2022](https://afn.bynder.com/m/3604d3ac553a7bef/original/12-2022-Call-for-Full-First-Nations-Participation-in-the-Implementation-of-the-UN-Declaration.pdf)). First Nations also called for all levels of government to take every action necessary to immediately ensure all laws and policies are consistent with the UN Declaration ([AFN Res 13/2022](https://afn.bynder.com/m/1be108beb371b03/original/13-2022-First-Nations-Priorities-to-Guide-the-Crown-s-Implementation-of-the-UN-Declaration-on-the-Rights-of-Indigenous-Peoples.pdf)). In December 2023, the AFN established a standing Chiefs Committee on the Declaration charged with reporting back to First Nations-in-Assembly on the status of implementation in Canada and to seek adequate resources to support First Nations rights holders ([AFN Res. 78/2023](https://afn.bynder.com/m/b0e11cd9212f055/original/78-2023-Establishing-a-Chiefs-Committee-on-the-UN-Declaration-Act.pdf)).

The AFN notes that in its engagement dialogue with First Nations, Canada essentially characterized its first federal Declaration [Action Plan](https://www.justice.gc.ca/eng/declaration/ap-pa/ah/index.html) as a placeholder that requires more work and also acknowledged that funding to support all interested First Nations in engagement was not made available. Funding was promised to support First Nations in the ongoing review and development of the federal Action Plan.

In recent years, there have been notable legislative and judicial developments in Canada relating to implementation of the UN Declaration. First Nations have mounted sustained advocacy to secure several statutory commitments to full implementation of the UN Declaration. To date, First Nations have succeeded in securing passage of such legislation federally ([2021](https://laws-lois.justice.gc.ca/eng/acts/U-2.2/)), in British Columbia ([2019](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044)), and in the Northwest Territories (NWT) ([2023](https://www.canlii.org/en/nt/laws/stat/snwt-2023-c-36/latest/snwt-2023-c-36.html)). The NWT legislation contains a process element not contained in the federal implementing legislation; it requires the tabling of a Statement of Consistency prepared by the Attorney General indicating whether, in their opinion, the bill is consistent with the UN Declaration and with the rights of Indigenous Peoples recognized and affirmed by Canada’s Constitution.

Notable also, the NWT legislation calls for “reasonable” efforts to be made to achieve consistency with the Declaration—rather than the “all measures necessary” standard expressed in the federal and BC statutes. The NWT implementation legislation states that the laws of the NWT must be interpreted, and applied, in a manner consistent with the UN Declaration. Further, at federal/provincial/territorial levels, dozens of references to the UN Declaration exist in sectoral legislation—both laws of general application and laws specifically relating to Indigenous Peoples. While many of these are restricted to preambles, several references exist in operative clauses. This reflects the effective advocacy of Indigenous Peoples and a greater awareness of the importance of the UN Declaration’s minimum human rights standards to lawmaking and policy in Canada.[[2]](#footnote-2)

An obstacle to meaningful implementation of the UN Declaration in Canada is a lack of proper understanding by some members of the public service, the judiciary, and public office holders of the UN Declaration’s legal effect in Canada. Too often, a tendency exists to simply state the UN Declaration is not, in itself, formally legally binding and to leave discussion there.

First Nations have pointed out in litigation, and in policy and legislative discussions, that the UN Declaration nevertheless has legal effect in Canada: first, as an interpretive aid consistent with Canada’s judicial treatment of international human rights instruments; second, several provisions of the UN Declaration form part of customary international law (making such provisions binding on Canada); third, the legal requirement in Canada of the honour of the Crown in its dealings with Indigenous Peoples; and fourth, the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* arguably has quasi-constitutional status, similar to the *Canadian Human Rights Act*.

Notably, the Parliament of Canada has affirmed the Declaration “as a source for the interpretation of Canadian law” and as “a universal international human rights instrument with application in Canadian law.”[[3]](#footnote-3) The Province of British Columbia has amended its [Interpretation Act](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96238_01) to require courts to construe every BC law and regulation as being consistent with the UN Declaration. A bill to amend the federal Interpretation Act in a similar way ([S-13](https://www.parl.ca/legisinfo/en/bill/44-1/s-13)) is currently before the Parliament of Canada.

Unfortunately, First Nations must still undertake considerable costly litigation to seek remedies and redress respecting our rights on a case-by-case basis. Resource regulation is a frequent, but by no means, only point of friction. This situation does not advance the ends of the UN Declaration. Another challenge is the current inconsistency in judicial analysis respecting the legal effect of the UN Declaration in Canada. This is illustrated briefly but not exhaustively, below.

In an historic 2016 decision that found that Canada has been discriminating on grounds of race in First Nations child welfare service funding and decision-making, the Canadian Human Rights Tribunal (CHRT) concluded that national legislation must be interpreted in a manner harmonious with Canada’s international law commitments, including the UN Declaration.[[4]](#footnote-4)

In [*Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*](https://courdappelduquebec.ca/fileadmin/Fichiers_client/Jugement/renvoi_-_avis_rendu_le_10-02-2022.pdf), the Quebec Court of Appeal relied on the UN Declaration to support its analysis that section 35 of the *Constitution Act, 1982* includes a right of self-government over child and family services (para 61). The Court articulated a clear harmony between the UN Declaration and the section 35 right to self-government, noting that the UN Declaration confirms Indigenous Peoples’ autonomy over decision-making in respect of child and family matters.

The Quebec Court of Appeal also found that although the UN Declaration is non-binding as an international instrument, it has been implemented as part of a federal normative order through federal legislation, which states that Indigenous Peoples have the right to autonomy or self-government in matters relating to their internal and local affairs (para 512). That Court’s analysis of the UN Declaration and the *UN Declaration on the Rights of Indigenous Peoples Act* led the Court to conclude that the right of self-government over child and family services applies to all Indigenous Peoples—moving beyond the application of Indigenous rights on a case by case and group-specific basis (para 506). An appeal by Quebec of this decision was heard by the Supreme Court of Canada (SCC). At the time of writing, the SCC decision had not been issued.

[*Gitxaala* v *British Columbia*](https://www.bccourts.ca/jdb-txt/sc/23/16/2023BCSC1680.htm) *(Chief Gold Commissioner)* considered the legal status of the UN Declaration and the effects of B.C.’s *Declaration on the Rights of Indigenous Peoples Act* (DRIPA). Among other findings, the B.C. Supreme Court held that DRIPA does not implement the UN Declaration into the law of B.C., nor require the court to interpret whether the laws of B.C. are “consistent” with the UN Declaration. The court made other important findings concerning the province’s constitutional duty to consult. [Gitxaala Nation announced](https://gitxaalanation.com/gitxaala-nation-appeals-courts-refusal-to-apply-undrip-and-stop-unconstitutional-mineral-tenures/) it is appealing the court’s disappointing findings on the legal effect of B.C.’s *Declaration on the Rights of Indigenous Peoples Act*.

Another clear reality is that budget decisions by States can impair or advance implementation of the UN Declaration. In Canada, annual federal spending on priorities relating to Indigenous Peoples has notably increased since 2015. Nevertheless, a serious obstacle to implementation of the UN Declaration is the outstanding gap in resourcing of First Nations governments for essential services such as clean water, infrastructure, policing, fire and other emergency services, and housing. In 2022, the CHRT found that the under-funding of First Nations Policing is a breach of the Canadian Human Rights Act (the [*Dominique*](https://www.canlii.org/en/ca/chrt/doc/2022/2022chrt4/2022chrt4.html#_Toc99363472) case). [*Takuhikan* c. *Procureur général du Québec*](https://www.canlii.org/en/qc/qcca/doc/2022/2022qcca1699/2022qcca1699.html#par116) also challenges government performance of legal obligations in relation to First Nations police funding agreements and is on appeal to the Supreme Court of Canada.

First Nations are pursuing sectoral legislation as a strategy to address some of the funding gaps in essential services. Federally, discussions were opened on the content of legislation to support First Nations policing as an essential service. This table has been stymied by a refusal of the federal government to acknowledge the inherent jurisdiction of First Nations over policing in our communities.

A federal bill on water and infrastructure was recently tabled in Parliament ([Bill C-61, First Nations Clean Water Act](https://www.parl.ca/Content/Bills/441/Government/C-61/C-61_1/C-61_1.PDF)). The Bill contains references to the UN Declaration in its preamble, purpose clause, and an operative provision relating to free, prior, and informed consent. The latter requires decisions under the proposal act “to be guided by the principle” of FPIC—rather than the standard of consistency with the UN Declaration that is actually articulated in the bill’s purpose clause in 4(c). The Bill also affirms that the inherent right to self-government, recognized and affirmed by section 35 of the *Constitution Act, 1982*, includes the jurisdiction of First Nations in relation to water, source water, drinking water, wastewater, and related infrastructure on, in, and under First Nations lands. It would articulate principles, such as substantive equality, to guide the provision for First Nations of clean and safe drinking water and the effective treatment and disposal of wastewater on First Nations lands. Real concerns remain among First Nations about securing the budgetary and statutory commitments to ensure the objectives of the Bill are in fact met.

States should be encouraged to adopt a human rights-based approach to budget-making decisions. Human rights-based approaches to budget decisions in national budgets, along with appropriate nation-to-nation funding arrangements, and statutory funding commitments can be a tool to promote and track government accountability and advance human rights compliance under the UN Declaration. Articles 4, 39, and 43 of the UN Declaration are relevant here.

First Nations have had to bring a broad range of class action lawsuits, representative actions, and other litigation, seeking compensation for individual and collective harms, as well as substantive policy and program reform to prevent future breaches. Unfortunately, litigation remains an essential tool for First Nations to drive and force change on pressing rights issues in Canada.

A sense of the scope and depth of denial and delay in respecting and implementing Indigenous Peoples’ rights (collective and individual) is evident in the escalating estimates of Canada’s contingent liability. In 2023, Canada reported that 95 percent of federal contingent liabilities, amounting to $76 billion relate primarily to settlement of Indigenous Peoples’ rights and claims against the Crown (but also include loan guarantees). Behind this number is a lot of suffering by First Nations seeking to access and exercise their rights as peoples, as well as individual human rights. The escalating trend in federal contingent liability was noted by Canada’s [Parliamentary Budget Officer.](https://www.pbo-dpb.ca/en/publications/RP-2324-021-S--supplementary-estimates-b-2023-24--budget-supplementaire-depenses-b-2023-2024#:~:text=Supplementary%20Estimates%20(B)%2C%202023%2D24%20outlines%20an%20additional,a%20total%20of%20%243.9%20billion.)

Further, even where a process for “co-development” of legislative or policy reform is launched, significant challenges for First Nations rights holders often arise in how States regard their obligations to engage in “consultation and cooperation” and obtain (not merely “seek”) consent (Articles 18 and 19), such as:

* Failure to design engagement and consultation processes in ways that would effectively ensure all rights-holders can have meaningful input, receive information in a timely way, and can express consent or withhold consent to outcomes;
* Lack of sufficient mandates from Cabinet to ensure senior officials have authority to engage fully, substantively, and cooperatively with First Nations on all aspects of policy development and legislative drafting;
* Resistance to First Nations’ proposals for consent-based mechanisms and redress mechanisms to ensure compliance with the UN Declaration’s standards;
* Zero-sum negotiating mentalities respecting power and decision-making;
* Continued reliance on colonial assumptions embedded in the racist legal doctrines such as the Doctrines of Discovery and Terra Nullius,[[5]](#footnote-5) which are explicitly condemned in the preamble of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.

**Recommendations:**

The AFN recommends that:

1. EMRIP and the broader UN system continue examining Canada’s compliance (at all levels of government) with the rights and standards in the UN Declaration; and continue urging Canada to fully implement all Calls to Action of the Truth and Reconciliation Commission of Canada and the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls.
2. EMRIP recommend that when requested by Indigenous Peoples, States establish jointly designed review processes with Indigenous Peoples to re-examine law and policy for the purpose of rooting out remaining elements, impacts, and influences of racist legal doctrines, such as the Doctrines of Discovery and Terra Nullius.

1. Article 38 provides “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration.” [↑](#footnote-ref-1)
2. A detailed list of examples can be provided to EMRIP, upon request, as space here does not allow. [↑](#footnote-ref-2)
3. *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](https://laws-lois.justice.gc.ca/eng/acts/U-2.2/) . [↑](#footnote-ref-3)
4. *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Northern Affairs Canada)*, [2016 CHRT 2](https://www.canlii.org/en/ca/chrt/doc/2016/2016chrt2/2016chrt2.html?resultIndex=1&resultId=2355455bfff943aa8f90ecedc370d8e3&searchId=6946235aa03e40be88604defd1f3aa9c&searchUrlHash=AAAAAQAMMjAxNiBDSFJUIDIgAAAAAAE) (26 January 2016). [↑](#footnote-ref-4)
5. Borrows, J. (2015). The durability of terra nullius: Tsilhqot'in Nation v. British Columbia. *UBCL Rev.*, *48*, 701. [↑](#footnote-ref-5)