WRITTEN BRIEF TO HOUSE OF COMMONS STANDING COMMITTEE ON INDIGENOUS AND NORTHERN AFFAIRS

RE BILL C-262 (*An Act to Ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples)*

TO ACCOMPANY ORAL SUBMISSION OF 17 April 2018

Dwight Newman, Professor of Law & Canada Research Chair in Indigenous Rights, University of Saskatchewan (full credentials in Appendix A) – appearing in personal capacity

I make this written submission to the Committee to provide additional details and citations pertinent to the oral presentation I will make on 17 April 2018.

I come with full respect for the noble aspirations reflected by Bill C-262, the passion and lifelong advocacy efforts of the member who has introduced it, the support for this Bill by many well-intentioned civil society organizations, and the importance of Canada working to implement the aspirations reflected by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

However, I must also come to say that Bill C-262 as presently drafted is framed in ways that have the potential to cause enormously negative unintended consequences. Ultimately, Bill C-262 warrants much more study and careful analysis than what it is receiving. There may be amendments that can improve it, although even these would require much more study.

Working to implement UNDRIP is good policy. However, passing this particular bill without appropriate extensive further study and amendments would be irresponsible. This Bill is not drafted in accordance with well-accepted norms of legislative drafting. Canada's Indigenous peoples deserve our best work in every respect, including legislative drafting, and it is unacceptable to have a lesser standard of legislative drafting in this context. There are legislative drafting experts—many employed by the Government of Canada—who could improve the Bill so that it better achieves its aims while having fewer unintended effects, and it would be irresponsible for Parliament to pass this Bill without resort to that expertise.

My objective is in no way to be alarmist but to engage in serious discussion of a statute in the manner appropriate in the context of passing a statute. Indigenous rights contexts certainly deserve that careful attention no less than any other area of law.

I will add that there have been civil society organizations that have engaged in very harsh commentary on anyone attempting to have a serious discussion of this Bill.[1] Though I am here to

[1] An open letter of 5 February 2018 by "The Coalition for the Human Rights of Indigenous Peoples", *Open Letter to all MPs – Parliamentarians Should Embrace Bill C-262*, referred broadly to comments critical of the bill as engaged

express legislative drafting concerns with the Bill, I would myself be critical of some of the views that have been expressed as reasons against adopting this statute. However, at the same time, polarized and vicious condemnations of those attempting to engage in serious and nuanced discussion are not appropriate, not befitting of democratic discussion, and not constructive in encouraging reconciliation. We must have a serious discussion on this Bill as a statute.

I will proceed to offer comments on some of three legislative drafting issues I see as warranting further attention.

(1) Internal Inconsistencies in Bill C-262

Bill C-262 contains internal inconsistencies that are of concern from a legislative drafting standpoint:

(1) Four different things happen in Bill C-262 that are not necessarily consistent. Section 3 tries to further the position that UNDRIP has immediate application in Canadian law. Section 4 puts in place a requirement that Canadian federal legislation be made consistent with UNDRIP, with no obvious period of delay on that. Sections 5 and 6 of the proposed Act set out the requirements for a national action plan that seeks to "achieve the objectives of" UNDRIP, with the requirement of an annual report on progress each year from 2017 to 2037 (with part of this being now misphrased to refer to a past year). And section 2(2) says nothing in the Act should be construed as delaying the application of UNDRIP.
Frankly, it is not clear how construal not permitting delay is to sit beside a 20-year implementation plan. It is not clear how a 20-year implementation plan on "objectives" sits beside a seemingly immediate requirement of consistency of statutes with UNDRIP. There are tensions between different parts of this Bill that have to raise concerns in relation to what statutory effect it is supposed to have.
It is my submission that you need to get appropriate legislative drafting advice to more appropriately achieve clearer statutory objectives.

(2) There are possible inconsistencies as between the effects of the English- and French-language versions of Bill C-262. I do not claim any expertise in French-language legislative drafting. However, I would note that in a number of places, the French-language version of Bill C-262 does not use the same French-language constructions as are used in other Canadian statutes with the same English-language text as in this proposed *Act*. It is my submission that you need to get appropriate legislative drafting experts to comment on the consistency of the English- and French-language versions of the proposed Act.

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in "fear-mongering and race-baiting", singling out for special attention as "[o]ne of the most malicious of these articles" a piece in the *National Post* by Harry Swain (former deputy minister of Indian Affairs) and Jim Baillie (retired partner of Torys LLP).

(2) Unpredictable Effects of Bill C-262 on Other Statutes

Bill C-262 has been introduced as a general statute related to Indigenous rights, without any specific attention to how it interacts with other statutes. Its proponents might well say that that is the very point—they seek to bring Canadian law into conformity with UNDRIP. However, the result could be a set of highly unpredictable effects on other statutes.

Section 3 of the proposed Act states that "is hereby affirmed as a universal international human rights instrument with application in Canadian law". That terminology ("application in Canadian law") does not seem to appear in any other Canadian statute and is thus of highly unpredictable legal effect.[2] Section 4 of the proposed Act states that "[t]he Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples." The terminology "must take all measures necessary" is exceedingly rare within Canadian statutes,[3] and is potentially of broad, sweeping effect whose limits are highly uncertain.[4]

When a statute is passed that overlaps on the same subject matters as other statutes, there can be complex effects on the existing statutes (and sometimes on the newly passed statute).

- There is a long-standing rule of law that an inconsistency between two statutes will generally mean that the later statute has impliedly repealed the earlier one[5]—the principle of *leges posteriores priores contrarias abrogant*. As put by a leading common law Canadian scholar of statutory interpretation, Ruth Sullivan, "Since a legislature cannot bind its successors, in the event of a conflict between two provisions, the more recent expression of the legislature's will prevails over the earlier one."[6]
- There is sometimes an exception to this principle where an earlier statute is more specific, such that it can be considered to continue in force as an exception to the later more general statute[7]—the principle of *generalia specialibus non derogant*. In any event, a later statute would render a prior statute inoperative to the extent of the conflict between these statutes.[8]

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[2] The statement is based on a search for the term on the main Canlii database, which should have led to a search of all Canadian statutes currently in force.

[3] A small number of references appear in a Canlii search, most in regulatory requirements on regulated actors or in the texts of appended international conventions.

[4] On the issue of this terminology within the statute having highly uncertain effects, see also Thomas Isaac & Arend J.A. Hoekstra, "Implementing UNDRIP in Canada:

[5] E.A. Driedger, *Construction of Statutes*, 2nd edn. (Toronto: Butterworths, 1981) at 226; *Churchwardens etc. of West Ham v. Fourth City Mutual Building Society*, [1892] 1 Q.B. 654; *Ex parte Byrne* (1874), 15 N.B.R. 125; *Re Lamb* (1979), 25 O.R. (2d) 23; *Re Newport and Government of Manitoba* (182), 126 D.LR. (3d) 563; *Ells v. Ells* (1979), 99 D.L.R. (3d) 686. See also Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edn. (Toronto: Carswell, 2011) at 385-86.

[6] Ruth Sullivan, *Statutory Interpretation,* 2nd edn. (Toronto: Irwin Law, 2007) at 311.

[7] E.A. Driedger, *Construction of Statutes,* 2nd edn. (Toronto: Butterworths, 1981) at 227; *Seward v. Ver Cruz* (1884) 10 A.C. 59 at 68; *Re Steil's Prohibition Application* (1964), 49 W.W.R. 371; *R v. Faulkner and McIntosh* (1958), 24 W.W.R. 524.

[8] R. (3d) 686.

[8] Ruth Sullivan, *Statutory Interpretation,* 2nd edn. (Toronto: Irwin Law, 2007) at 311.

- It is worth adding that the leading civilian Canadian scholar of statutory interpretation, Pierre-André Côté, emphasizes the position that courts should presume that the legislature is consistent should thus try to avoid the interpretation that one statute has repealed another. On this view, courts will try to harmonize different statutes by reconciling them or by developing priorities between parts of them, more so than simply declaring one to be impliedly repealed.[9] However, Côté also certainly acknowledges the possibility of the of *leges posteriores priores contrarias abrogant* principle being applied where there is indeed a conflict between two statutes.[10]

In the case of Bill C-262, it will by definition be the later statute relative to all prior statutes on Indigenous issues in Canada. If there are conflicts between UNDRIP as interpreted as part of Canadian law (pursuant to interpretation in the context of Bill C-262) and any other existing statutes, there is the potential that Bill C-262 will have the effect of causing immediate implied repeal – this is particularly the case with section 3 which by using unprecedented language could have entirely unpredictable legal effects.

At a practical level, before voting on the Bill, Parliament deserves to know such things as:

- Does this Bill potentially cause the immediate implied repeal of parts of the *Indian Act*, *First Nations Land Management Act*, or other key statutes and legal structures under which many First Nations currently organize themselves? There is obviously strong desire to get rid of the *Indian Act*'s paternalism, but is there a risk of creating an interim legal vacuum?
- How does this Bill affect other Canadian statutes? Given the comprehensive scope of *UNDRIP*, there could be many different immediate legal effects on environmental legislation, national parks legislation, and innumerable other areas of law without any parliamentary involvement simply by virtue of possible applications of the unpredictable wording of s. 3. Has Parliament received careful legal analysis on the range of possible effects?

In relation to statutes not yet passed, I might also add that there may be other complex legal issues arising from the order in which different bills presently before Parliament are passed. Bills C-68 and C-69 contain provisions related to consultation and related to consideration of Indigenous interests and rights that are likely not as extensive as what would be presumed by Bill C-262. If Bill C-262 is passed after Bill C-68 and C-69, it may cause an amended interpretation or even implied repeal of (parts of) those statutes. If Bills C-68 and/or C-69 are passed after Bill C-262, they may have effects on Bill C-262 in terms of an amended interpretation or even implied repeal of Bill C-262, with potentially further-reaching effects on how concepts in Bill C-262 are understood across a variety of different contexts beyond those at issue in Bills C-68 and C-69. There is a need for careful legal analysis on these issues beyond what is apparent in discussions thus far.

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[9] See generally Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edn. (Toronto: Carswell, 2011) at 374-93.

[10] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edn. (Toronto: Carswell, 2011) at 385-86

(3) Effects of Bill C-262 Wide-Ranging and Require Further Study in Multiple Committtees

Giving full meaning to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) implies changes to many areas of policy.

Amongst other areas, UNDRIP bears on intergovernmental relations, financial issues, cultural heritage issues, language issues, religious freedom, education, media/broadcasting, labour issues, democratic reform, employment, housing, health, land and property, natural resources, environmental issues, national defence, foreign affairs, and other areas.

In many ways, Bill C-262 has analogies to a piece of omnibus legislation in so far as it touches on many different areas of policy, even while advancing a key principle.[11] Although the consideration of omnibus legislation need not always be divided, and indeed it would not be proper to do so where one key principle is at issue, there ought to be the chance for full consideration of the range of effects of an omnibus bill. In recent past parliaments, some pieces of omnibus legislation attached to budget bills, for instance, were referred not just to the ways and means committee but to other committees whose areas of policy were to be affected by attached provisions within the bill.

Best parliamentary practice would, in my view, call for a bill analogous to an omnibus bill to receive attention in the various committees whose subject matters are affected. The effects of Bill C-262 are wide-ranging and would warrant further study in other committees as well.

CONCLUSIONS AND RECOMMENDATIONS

This Bill is an important Bill. It warrants significant further study and analysis. Further legislative drafting expertise should be sought so as to attempt to ensure that the Bill is meeting the objectives it has and that those objectives are understood by Parliament in voting on the Bill. The Bill likely requires amendments, although what those are requires legislative drafting expertise. Presently, there are internal inconsistencies in the Bill, its effects in relation to other statutes give rise to significant uncertainties, and more study across a wider range of committees would be appropriate best practice. Indigenous peoples and Indigenous rights deserve good legislative drafting, and I respectfully urge the Committee to seek the appropriate expertise to develop appropriate amendments to the Bill.

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[11] Issues related to omnibus legislation have of course received some attention in Marc Bosc & André Gagnon, eds., *House of Commons Procedure and Practice*, 3rd edn. (Ottawa: House of Commons, 2017), c. 16. Broader principles on the parliamentary/legislative process and its purposes also receive important attention in Craig Forcese & Aaron Freeman, *The Laws of Government*, 2nd edn. (Toronto: Irwin Law, 2011), c. 5.

APPENDIX A – Presenter's Credentials

Dwight Newman, B.A. in Economics (Regina), J.D. (Saskatchewan), B.C.L., M.Phil., D.Phil. in Legal Philosophy (Oxford), is a Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan, where he started in a faculty position in 2005 and has also served a three-year term as Associate Dean. He has been a Canada Research Chair since 2013. In 2017 he became a member of the College of the Royal Society of Canada.

Dr. Newman has also taught during visiting terms at Alberta, McGill, Osgoode Hall (PD), and Oxford University. In addition, during the 2015-16 year, he was a James Madison Visiting Fellow at Princeton University, and during the second half of the 2016-17 year he was a Professeur invité at the Université de Montréal Faculté de Droit and a Herbert Smith Freehills Visitor at Cambridge University. In early 2018 he visited at the University of Western Australia.

Dr. Newman has published around a hundred articles or book chapters and twelve books. His books include: *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich/UBC, 2009), *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart/Bloomsbury, 2011), *Natural Resource Jurisdiction in Canada* (LexisNexis, 2013), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich/UBC, 2014), both the *Charter of Rights* volume of *Halsbury's Laws of Canada* and *The Law of the Canadian Constitution* (with co-author Guy Régimbald) (LexisNexis, 2013, 2nd edn 2017), *Business Implications of Aboriginal Law* (LexisNexis, 2018), and *Mining Law of Canada* (LexisNexis 2018). He is under contract to complete a co-edited volume on *Indigenous-Industry Agreements, Natural Resources, and the Law* (Routledge, forthcoming) as well as the Edward Elgar *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar, forthcoming). His writing has been cited by all levels of Canadian courts, including repeatedly by the Supreme Court of Canada, as well as in argument before the United States Supreme Court.

Dr. Newman is a Munk Senior Fellow of the Macdonald-Laurier Institute and has contributed to policy discussions by publishing a number of think tank reports. He is past Co-Chair of the American Society of International Law (ASIL) Rights of Indigenous Peoples Interest Group. He also serves as an expert member of the International Law Association (ILA) Committee on Implementation of the Rights of Indigenous Peoples and contributes to ongoing discussion on international norms on related issues. He has delivered dozens of presentations to a variety of audiences on six continents and has published many op eds in leading Canadian and American newspapers.

Prior to entering a faculty role, Dr. Newman clerked for Chief Justice Lamer and Justice LeBel at the Supreme Court of Canada, worked for human rights NGOs in South Africa and Hong Kong and for the Canadian Department of Justice, and completed his graduate studies at Oxford University, where he studied as a Rhodes Scholar.

Dr. Newman is a member of the Ontario and Saskatchewan bars and he does selective legal work for industry, government, and Indigenous communities focused mainly on understanding constitutional and Indigenous rights issues associated with resource development as well as consulting work on related issues for international investment entities.