To: House of Commons Standing Committee on Indigenous and Northern Affairs

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Re: Bill C-15, *An Act Respecting the United Nations Declaration on the Right of Indigenous Peoples*

Thank you for inviting me to make a presentation to your committee regarding Bill C-15. I regret that my schedule did not allow me to make a presentation via Zoom, so I appreciate the opportunity to file this written submission.

There are some differences in organization and wording between Bill C-15 and Bill C-262, which was introduced as a private member's bill but failed to pass in the last Parliament. However, the wording of essential features is similar, so that I would still maintain the views I expressed last year about Bill C-262.[1] Anyone who is interested may refer to that publication for a fuller explanation of my opinions.

This submission will be confined to section 32.2 of UNDRIP:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or

[1] Tom Flanagan, "Squaring the Circle: Adopting UNDRIP in Canada," Fraser Institute, 2020. Squaring the Circle: Adopting UNDRIP in Canada (fraserinstitute.org).

> territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

This section is commonly referred to by the phrase "free, prior, and informed consent," or by the acronym FPIC. It is not the only important section of UNDRIP, but it is the most controversial in Canada, and the one on which I have done the most research.

Bill C-15 does not legislate FPIC or UNDRIP. However, it states that UNDRIP has "application in Canadian law"; that C-15 provides "for the Government of Canada's Implementation of the Declaration"; and that the government must "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." Any citizen reading C-15 will conclude that the plan is to legislate UNDRIP and FPIC in Canada sooner or later. Yet there are several difficulties standing in the way of this legislative project.

First, Canada already has an elaborate body of jurisprudence regarding consultation. Starting with the Supreme Court of Canada's 2004 decisions in the *Haida Nation* and *Taku River* cases, the courts have propounded the doctrine of government's "duty to consult and accommodate" Indigenous peoples before authorizing resource development on their lands. The development of this body of law has sometimes seemed chaotic, as when the Federal Court of Appeal ruled that consultation had been inadequate in the case of the Mackenzie Valley pipeline, the Northern Gateway pipeline, and the Trans Mountain expansion.[2] However, with that court's holding in the second Trans Mountain case that the right to be consulted is not a

[2] Summarized in Tom Flanagan, *The Wealth of First Nations* (Vancouver: Fraser Institute, 2019), pp. 126-129. The Wealth of First Nations (fraserinstitute.org).

veto power, the law seems to have reached a certain state of maturity.[3] That equilibrium would be upset by layering FPIC over it, for FPIC is nothing if not a veto. As Senator Murray Sinclair said in the Senate debate over C-262, "Free, prior, and informed consent is a very simple concept. And that is, before you affect my land, you need to talk to me, and you need to have my permission …."[4] A requirement to obtain permission amounts to the same thing as a veto power.

Another problem is that the concept of "traditional territory," over which the duty to consult applies, has never had an authoritative definition in Canadian law. Many First Nations have overlapping and conflicting claims to traditional territory against each other as well as against Métis and non-status organizations. Legislating a veto right would create many difficult issues of knowing who could exercise that right, and within which boundaries.

The difficulties become extreme when one considers linear projects such as pipelines, highways, railways, and hydro lines. Projects of this type, especially when they are interprovincial or international, may cross the traditional territories of dozens of First Nations and Métis organizations. Under the FPIC doctrine, would each entity be able to exercise a right of veto over construction on its traditional territory? Such a right would create costly holdout problems, as organizations jockeyed to obtain better terms from the proponent. In the larger Canadian society, dilemmas of this type are resolved by expropriation with fair compensation, as determined by a third party such as a regulatory commission or court. The equivalent in

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[3] *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34. Coldwater First Nation v. Canada (Attorney General) - Federal Court of Appeal (fca-caf.gc.ca).

[4] Cited in Flanagan, "Squaring the Circle," p. 8. Senator Sinclair went on to argue that a requirement to obtain permission didn't confer a right of veto because the project could still be built elsewhere. That, however, is hardly persuasive; it just amounts to saying that the veto applies only on one's own land, which is still enough to derail many linear projects.

Aboriginal law is the doctrine of justified infringement of Aboriginal rights and title, which the courts have propounded on numerous occasions.[5] Legislating FPIC would threaten to overturn the doctrine of infringement, with incalculable consequences for necessary infrastructure.

These are not merely speculative concerns. The real-world consequences of legislating FPIC were put on display in early 2020 in the dispute over the Coast GasLink pipeline. This project was supported by the elected governments of all 20 First Nations affected by it, but it was opposed by one faction of the Wet'suwet'en Nation led by some of their hereditary chiefs. Opponents of Coastal GasLink were encouraged by the passage in British Columbia of Bill 41, whose wording is similar to that of C-15.[6] Members of this Committee will recall that within a few months of passage of Bill 41, opposition to Coastal GasLink had spiralled into nation-wide blockades of highways and railroads, especially the CN mainline. This was a dramatic illustration of the potential of legislation involving UNDRIP and FPIC to produce chaos in the field of resource development.

Members should not think that the effects are limited to the obstruction of oil and gas pipelines. If Canada is to move toward the current government's announced goal of net-zero carbon emissions by 2050, vast new construction of hydro dams, wind farms, and solar farms will be required to replace oil, gas, and coal with electricity. Many of these installations will be in remote areas, and they will require new hydro lines to tie into the electrical grid. They will also require new service roads for construction and maintenance. All of these projects will be just as susceptible to obstruction as oil and gas pipelines now are. Under any conceivable

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[5] E.g., *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at 160ff. Delgamuukw v. British Columbia - SCC Cases (lexum.com).

[6] Flanagan, "Squaring the Circle," pp. 12-13.

scenario, the last thing that Canada should do now is to pass legislation that will make the construction of necessary linear infrastructure more difficult. If Parliament chooses to go ahead with C-15, it would be wise to include an amendment specifying that FPIC will not supersede Canada's evolved jurisprudence on the duty to consult and accommodate Indigenous peoples regarding resource development affecting their traditional territories.