



**INDIGENOUS BAR**  
— ASSOCIATION —

— ASSOCIATION DU —  
**BARREAU AUTOCHTONE**

**Submissions to the Standing House of Commons Committee on Bill  
C-15:  
An Act respecting the United Nations Declaration on the Rights of  
Indigenous Peoples**

**Date: March 11, 2021**

The Indigenous Bar Association in Canada (the “IBA”) is pleased to respond to the federal governments’ request for our comments on Bill C-15: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (“Bill C-15”).

The IBA’s membership consists of Indigenous lawyers, scholars, law clerks, law students, and judges from across Canada. The IBA’s mandate, among other things, includes: recognizing and respecting the spiritual basis of our Indigenous laws, customs, and traditions; promoting the advancement of legal and social justice for Indigenous Peoples; and promoting the reform of policies and laws affecting Indigenous Peoples.

Canada’s commitment to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) aligns with many of the principles and objectives that the IBA was founded to advance. As a professional association of Indigenous legal experts, we hope that the comments outlined below will help inform Canada’s view of Bill C-15 and contribute to the implementation of UNDRIP in Canadian law.

Before commenting on Bill C-15, we recognize the many Indigenous leaders, advocates, and legal warriors who have played an instrumental role in the development of UNDRIP and its adoption by the United Nations General Assembly. Their advancements of the recognition and respect for, and implementation and enforcement of, Indigenous rights has laid a strong foundation for Canada and the world to follow. We are honoured to count many of these legal warriors among our esteemed members and Indigenous Peoples’ Counsel (“IPC”). We recognize and honour their work in bringing us to where we are today.

The IBA also wishes to acknowledge Prime Minister Trudeau’s government for fulfilling their commitment to introduce legislation on the implementation of UNDRIP before the end of 2020. This is a momentous accomplishment for all of Canada. We would also like to recognize the efforts of one of the IBA’s Honourary Members who is also the former Member of Parliament for Abitibi-Baie-James-Nunavik-Eeyou, Romeo Saganash, for first introducing UNDRIP in his

private member's bill in 2016.

While it is unfortunate that more time was not available for consultation and collaboration with Indigenous communities and governments leading up to Bill C-15's introduction, we are encouraged by the federal government's commitment to engage with Indigenous peoples to gather feedback on the Bill as it moves through the parliamentary process. We trust that engagement with First Nations, Inuit, and Métis peoples, as rights-holders, will continue as Bill C-15 moves forward and Canada works to implement UNDRIP. It is essential that Canada work in full partnership with Indigenous Peoples as this work advances.

The IBA also recognizes that Indigenous Peoples, as sovereign Nations within what is now Canada, will have their own relationships with UNDRIP. Just as Canada is working to implement UNDRIP within Canadian laws, Indigenous governments are likewise working to consider how the rights and responsibilities outlined in UNDRIP will find expression within their respective nations, legal systems, and relationships with one another and the Canadian state. That work can, and will, continue regardless of what Canada chooses to do or how the Canadian state chooses to align its laws with the rights and responsibilities set out in UNDRIP.

The IBA's comments on Bill C-15 should be read in light of our understanding that Canada is committed to implementing UNDRIP as part of Canadian law within the Canadian legal system. If Bill C-15 is revised to live up to this promise and potential, the IBA would be able to fully endorse it. At this time, we propose several key amendments, as set out more fully below, that will need to be incorporated into the Bill in order to receive an unqualified endorsement from the IBA. Our comments on Bill C-15 are not in any way meant to detract from the important work ongoing in Indigenous Nations on these same topics.

Specifically, the IBA is providing the following five comments to assist Parliament with strengthening Bill C-15. We want to emphasize that these comments are not intended to in any way take away from the significance of what has been accomplished by bringing Bill C-15 to Parliament, but to recognize and highlight areas where this Committee may be able to advocate for further improvements.

### **1) Strengthening a Distinctions-Based Approach to Implementation**

While Bill C-15 contains a detailed preamble that reflects how the First Nations, Inuit, and Métis are distinct Indigenous Peoples, this context alone does not solidify Canada's stated commitment to adopting a distinctions-based approach in implementing UNDRIP.<sup>1</sup> There is a difference between recognizing diversity and committing to having diversity guide or inform your actions. This latter commitment can be strengthened by including a clear provision within the body of the Bill that Canada is committed to not only recognizing the diversity of Indigenous Peoples within in Canada in the text (e.g., preamble), but also implementing UNDRIP following a distinctions-based approach.

For example, in British Columbia, the provincial legislation adopting UNDRIP includes the

---

<sup>1</sup> *Interpretation Act*, RSC 1985, c I-21, s. 17, s. 13.

following section, which could be added (with modification to be national in scope) to the interpretation section of Bill C-15:

*For the purposes of implementing this Act, the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia.*<sup>2</sup>

## **2) Clear, Positive Statement that the Legislation Binds the Crown**

Bill C-15 does not expressly affirm that it binds Her Majesty the Queen in right of Canada. As per section 17 of the *Interpretation Act*, “[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment”.<sup>3</sup> While arguments can be made that Bill C-15 would implicitly or necessarily bind the Crown because its purpose would be frustrated if the Crown was not bound, the courts on this point are by no means clear or consistent in their interpretation.<sup>4</sup> Federal legislation is likewise inconsistent.<sup>5</sup> In light of this inconsistency and ambiguity, “clear and unequivocal expression of legislation intent” is required.<sup>6</sup>

Where Canada intends the proposed legislation to bind the Crown—and we understand and agree that this is Canada’s intent—must be expressly stated. A clear statement that “this Act is binding on Her Majesty in right of Canada or of a province” (such as in section 7 of *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*) would confirm this fact.

## **3) UNDRIP Must Breathe Life into Section 35**

Based on the remarks by Minister Bennett at the United Nations Permanent Forum on Indigenous Peoples in 2016, it is evident that Canada understands that UNDRIP will be used to breathe “life into section 35” and recognize it as “a full box of rights for Indigenous peoples in Canada”.<sup>7</sup> With this notion we could not agree more.

UNDRIP establishes the minimum standards necessary for the survival, dignity, and well-being

---

<sup>2</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44, section 1(2).

<sup>3</sup> *Interpretation Act*, RSC 1985, c I-21, s. 17; *Canada (Attorney General) v. Thouin*, 2017 SCC 46, paras 1, 19-21.

<sup>4</sup> *Troller v. Manitoba Public Insurance Corporation*, 2019 MBQB 157, paras 46; 112-113; 117; see also: *Manitoba Metis Federation Inc. v. The Government of Manitoba et. al*, 2018 MBQB 131, paras 79-82; 85.

<sup>5</sup> *Indigenous Languages Act*, SC 2019, c 23 (where no such statement was included); *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s.7.

<sup>6</sup> *Canada (Attorney General) v. Thouin*, 2017 SCC 46; para 19.

<sup>7</sup> The Honourable Carolyn Bennett, Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10, 2016. Online: <<https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html>>

of Indigenous Peoples.<sup>8</sup> However, the expression of this legislative intent in Bill C-15 is notably unclear. UNDRIP cannot simply be an authoritative moral force that creates non-binding expectations on Canada; it must be an enforceable instrument that binds Canada's actions. While Bill C-15 affirms that UNDRIP is a universal human rights instrument "with application in Canadian law", this phrase is not a term of art.<sup>9</sup> It fails to clearly articulate how or when courts or other law-makers can consider or use UNDRIP. Specifically, it fails to clarify the nexus between Bill C-15, UNDRIP, and Aboriginal rights and freedoms protected by sections 25 and 35 of the *Constitution Act, 1982*.

Courts are already looking to UNDRIP to resolve ambiguities in statutes, which is consistent with the long line of cases that state International human rights norms can be relied on in this manner.<sup>10</sup> Where Canada intends that UNDRIP be more than an interpretative aid to statutes where there is ambiguity—where Canada intends that UNDRIP be used to interpret section 35 constitutional rights and obligations and "breathe life" into section 35—Canada must say so explicitly.<sup>11</sup> A clear and unambiguous statement that UNDRIP is to be used to interpret Indigenous Peoples' constitutional rights and federal obligations to Indigenous Peoples is required.<sup>12</sup>

For example, including the following text in the purpose of the Bill, would provide this clarity about the Bill and Canada's constitutional recognition of Aboriginal rights:

*4 The purpose of this Act is to*

*(a) affirm the Declaration as a universal international human rights instrument with force and effect in Canadian law;*

*(b) provide a framework for the Government of Canada's incorporation of the Declaration into Canadian law; and*

*(c) provide that the Declaration informs the broad and purposive interpretation required of the rights and freedoms of, and commitments owed to, Indigenous*

---

<sup>8</sup> UNDRIP, Article 43.

<sup>9</sup> Gib van Ert, *The impression of harmony: Bill C 262 and the Implementation of the UNDRIP in Canadian law*, 2018 CanLIIDocs 252, at para. 17.

<sup>10</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1056; *R. v. Keegstra*, [1990] 3 SCR 697 at 750; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 70.

<sup>11</sup> For examples of cases where courts have not considered UNDRIP to "breath life into s. 35 rights" see: *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at para 51; *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 at paras. 104 to 106; *Ross River Dena Council v. Canada*, 2017 YKSC 59 at para. 304.

<sup>12</sup> The IBA notes that this would also be consistent with recent legislation passed by this federal government (see: *Indigenous Languages Act*, SC 2019, c 23, at s. 6; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s. 18(1)), as well as Canada's 10 Principles respecting the Government of Canada's relationship with Indigenous peoples.

Peoples in Canada, including sections 25 and 35 of the Constitution Act, 1982.

In addition, this clarity on the purpose of the Bill as implementing UNDRIP within Canadian law should be reflected in the title of the Bill and the preamble, and further referenced in section 6 regarding the Action Plan, to make clear that Canada intends to implement UNDRIP and not merely its “objectives” (which are not clear nor defined within the Bill). Specifically, the bill could be strengthened as follows:

*6(1) The Minister must, in consultation and cooperation with Indigenous Peoples and with other federal ministers, prepare and implement an action plan to incorporate the Declaration into Canadian law.*

Preamble:

*Whereas the Government of Canada is committed to taking effective measures – including legislative, policy and administrative measures – at the national and international level, in consultation and cooperation with Indigenous peoples, to implement the Declaration.*

...

*Whereas the Government of Canada welcomes opportunities to work cooperatively with those governments, Indigenous peoples and other sectors of society to implement the Declaration.*

#### **4) Implementation with Indigenous Governments and Representatives**

Bill C-15 says that Canada will implement UNDRIP “in consultation and cooperation with Indigenous people”; however, there are no details on how this will happen. Consistent with UNDRIP, such implementation, consultation, and cooperation must be with Indigenous rights-holding bodies and governments. Bill C-15 would be strengthened by making this clearer, as well as by including language indicating that federal Ministers could work with Indigenous governing bodies on implementing UNDRIP in a manner that respects each Indigenous government’s laws, traditions, and processes.

Implementation in partnership with Indigenous governments would align with other recent federal legislation (which provide for implementation to be undertaken through agreements with Indigenous governing bodies<sup>13</sup>) and other provincial legislation.<sup>14</sup> This approach would also align with the *Principles respecting the Government of Canada's relationship with Indigenous peoples*, which states that Canada will implement UNDRIP through “collaborative initiatives and

---

<sup>13</sup> *Indigenous Languages Act*, SC 2019, c 23, s. 9; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s. 20 (2); *Fisheries Act*, RSC 1985, c F-14, s. 4.1.

<sup>14</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s. 6.

actions.”<sup>15</sup>

## **5) Funding, Timing, and Regulations**

Finally, the Action Plan is the vehicle that Canada relies on in Bill C-15 to perform the work needed to incorporate UNDRIP into Canadian law. While Canada has said that this plan will be developed in collaboration with Indigenous Peoples, there will need to be funding and capacity supports provided for Indigenous communities, governments, grassroots organizations, and others to effectively participate in this work. We urge this Committee, and Canada as a whole, to ensure that the necessary funding and capacity supports are available for both the development of the plan and its implementation.

Moreover, this funding and capacity support should be long-term, stable, and predictable. Canada’s timeline for creating the Action Plan, as well as reporting on its progress, is ambitious, and to meet these times—which should not be delayed—sufficient funding and supports will be needed.

In addition, this Committee may wish to consider whether Bill C-15 should include a regulation-making power. Regulations could address matters such as authorizing the Minister to enter into constructive arrangements with Indigenous Peoples (or Indigenous Governing Bodies) regarding the implementation of UNDRIP in a particular subject area or for a particular Indigenous Peoples or government, recognizing Indigenous laws or jurisdictions, or through regulations taking further steps to achieve the goals of Bill C-15 and aligning federal laws and policies with UNDRIP.

## **Conclusion**

While Canada has taken great strides in advancing its commitment to implement UNDRIP within Canadian law, there is much work still to be done to make this commitment a reality. Bill C-15 sets the stage for this work by outlining a framework for implementation, which is more than was previously available, but in and of itself, it is not a watershed or panacea. It does not make UNDRIP the law in Canada, nor does it magically transform all of Canada’s laws so that they align with the minimum standards set out in UNDRIP.

This Committee can play a significant role in further strengthening Bill C-15 and working to reconcile this law with Indigenous People’s perspectives and interests, including by advocating around the points outlined by the IBA above.

The IBA would like to thank the Committee for the opportunity to provide our submissions on this important matter.

---

<sup>15</sup> *Principles respecting the Government of Canada's relationship with Indigenous peoples.*