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BRIEF FROM THE ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR

Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*

MARCH 23, 2021

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I. INTRODUCTION

This brief presents the perspective of the Assembly of First Nations Quebec-Labrador ("AFNQL")¹ and outlines the institutional and legislative framework in which First Nations operate in the context of issues related to the United Nations *Declaration on the Rights of Indigenous Peoples* (the "Declaration") in Quebec and Canada. This document proposes amendments to clarify and strengthen certain parts of Bill C-15.

On February 26, 2021, the Chiefs unanimously adopted a motion to the effect that "amendments to Bill C-15 are a minimum condition for the AFNQL to even consider supporting the bill".

The Chiefs support the passage of federal legislation to implement the Declaration. However, the Chiefs oppose the passage of Bill C-15 in its current form.² Bill C-15 must go further.

The political context in Quebec that conditions the relationship between First Nations and the provincial government deserves particular attention. First, we must deal with a provincial government that refuses any discussion on the implementation of the Declaration in Quebec, despite a resolution from its National Assembly committing it to negotiate the terms of its implementation.³ Second, the constitutional validity of the *Act respecting First Nations, Inuit and Métis children, youth and families*⁴ ("Bill C-92"), passed in June 2019, is being challenged by the Quebec government before the Court of Appeal.

With the federal government considering the introduction of other legislation (e.g., Indigenous health legislation or First Nations policing), it is essential that the legislative context be conducive to ensuring that all future federal legislation is consistent with the rights and principles of the Declaration.

¹ A description of the AFNQL is attached.

² This position cannot be interpreted as a form of relinquishment by First Nations governments of their jurisdiction, for which First Nations will continue to fully exercise their right to self-determination.

³ The provincial government is struggling to act on the motion submitted by Québec Solidaire and unanimously adopted by the National Assembly on October 8, 2019, calling on the Québec government to negotiate the terms of implementation of the Declaration.

⁴ [SC 2019, c 24](#).

II. BILL C-15 AND THE IMPLEMENTATION OF THE DECLARATION IN CANADIAN LAW

Bill C-15 is not an act to implement the Declaration in Canadian law in the traditional sense.⁵ Rather, Bill C-15 sets in place a process to initiate a process towards eventual implementation of the Declaration into Canadian law.⁶

Given the urgency of implementing the minimum rights and principles of the Declaration for the survival and welfare of Indigenous peoples in Canada, the AFNQL believes that Bill C-15 must take a greater step forward to move beyond the status quo.

III. OUR RECOMMENDATIONS

a. Essential amendments

i. *Clarify that the Declaration is an instrument of interpretation of section 35 of the Constitution Act, 1982*

Section 2(2) must clarify the relationship between the Declaration and section 35 of the *Constitution Act*. In order to achieve the legislative objective, it must be clear that (1) the Act does not abrogate or derogate from any Aboriginal or treaty rights protected by section 35 of the *Constitution Act*, and (2) the laws of Canada, including section 35 of the *Constitution Act, 1982*, must be interpreted in a manner consistent with the rights and principles set out in the Declaration. Finally, in its current form, the English and French versions of section 2(2) are inconsistent and need to be amended to avoid an interpretative debate.

The English version is particularly problematic. The current text ends with the principle that C-15 is not to be interpreted "as abrogating or derogating from" the rights protected by section 35. The French version does not deal with abrogation, but simply states that C-15 "[ne] porte pas atteinte" to the rights protected by section 35. This inconsistency between the English and French versions is perfect for an endless legal debate. Especially since the English version seems to suggest that section 2(2) amounts to a non-derogation clause, which would lead to the absurd result of protecting the interpretation of section 35 from any modification or influence of the rights under the Declaration.

It should be recalled that one of the purposes of the eventual implementation of the Declaration is to "breathe life into" section 35.⁷ An interpretation of section 2(2) that would conclude that section 35 acts as a shield to any evolving interpretation influenced by the rights and principles

⁵ Gib van Ert, The impression of harmony: Bill C-262 and the implementation of the UNDRIP in Canadian Law, [2018 CanLII Docs 252](#). With few exceptions, the conclusions of this analysis apply to Bill C-15.

⁶ The purpose of Bill C-15 is to affirm a principle of interpretation of existing law (s. 4(a)) and to substitute the granting of substantive rights under the Declaration for the establishment of a process that should eventually lead to the implementation of the Declaration into Canadian law (ss. 4(b), 5, 6 and 7).

⁷ Statement by Minister Carolyn Bennett in an address to the Permanent Forum on Indigenous Issues in May 2016.

of the Declaration would be completely at odds with this legislative objective of establishing a process towards the implementation of the Declaration.⁸

CLARIFY ARTICLE 2(2)	
Proposed amendments	<ul style="list-style-type: none"> • To expressly state, in both the English and French versions, that the laws of Canada, including section 35 of the <i>Constitution Act, 1982</i>, must be interpreted in accordance with the rights and principles set out in the Declaration. • Ensure that the English and French versions are consistent and expressly state that the Act does not abrogate or derogate from any Aboriginal and treaty rights recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>. • In the English version, replace the word "upholding" and delete the expression "or derogating from" to ensure that the text of this section is consistent with the intent of the Act.

ii. Clarify the repudiation of the doctrines of superiority

The preamble contains a paragraph which refers to the rejection of "doctrines, policies and practices which are based on the superiority of peoples or individuals". The preamble's repudiation of doctrines of superiority⁹ does not indicate that the Canadian government endorses the rejection of such doctrines. As this type of doctrine is at the root of the colonization enterprise from which Indigenous peoples throughout the world, including Canada, are still suffering today, the AFNQL wishes that the repudiation of all doctrines of superiority be express, unequivocal and incontestable.

CLARIFY THE PREAMBLE AND IMPROVE THE BODY OF THE TEXT	
Proposed amendments	<ul style="list-style-type: none"> • Begin this preambular paragraph with "That the Government of Canada rejects all doctrines, policies [...]"» • Add a clause in the body of the bill that confirms and reinforces the rejection of superiority doctrines in Canadian law.¹⁰

⁸ See also section 12 of the *Interpretation Act*, [R.S.C. 1985, c. I-21](#), which requires that an enactment be given the "such fair, large and liberal construction and interpretation as best to ensures the attainment of its objects".

⁹ Including the doctrine of discovery and terra nullius.

¹⁰ Although the preamble has interpretive value, it is not determinative where there is no ambiguity in the statute or where there is a conflict between the statute and the preamble. See *Interpretation Act*, [R.S.C. 1985, c I-21](#), s 13. See also *Quebec (Attorney General) v Moses*, [2010 SCC 17](#), [para 101](#); *Yin v Lewin*, [2006 ABQC 402 \(CanLII\)](#), paras 31-32, affirmed by [2007ABCA406 \(CanLII\)](#); *Maritime Electric v Summerside (City of)*, [2011 PECA 13 \(CanLII\)](#), paras 20-23.

iii. Clarify the obligation of courts to consider the rights and principles of the Declaration

We suggest that Bill C-15 reinforces the persuasive value of the Declaration in Canadian law. As currently drafted, Bill C-15 simply affirms the current status quo, *i.e.*, that the Declaration has interpretive value in Canadian law. This affirmation (in the preamble and section 4(a)) does not add anything new.

Considering that implementation of the Declaration is subject to a process that may take several years, we suggest, as an interim measure, that C-15 move beyond the current status quo to strengthen the persuasive value of the Declaration as a source of interpretation and as a source of Canadian law in the short term.

The courts already take into account the values of the *Canadian Charter of Rights and Freedoms*¹¹ when deciding on the administrative exercise of discretionary powers.¹² Similarly, we suggest that the principles of the Declaration be taken into account by federal boards, commissions or other tribunals¹³ in all cases involving Indigenous peoples.

ADD AN ARTICLE 5A	
Proposed amendment	Addition of a section that specifically requires federal boards, commissions or other tribunals (as defined in the <i>Federal Courts Act</i>) to consider the rights and principles of the Declaration in any case involving Indigenous peoples.

b. Additional Recommendations - Improved Implementation Processes Focused on Nation-to-Nation Relationships

i. Develop in partnership with indigenous peoples

In order for Bill C-15 to mark a movement towards true reconciliation between Indigenous peoples and the Canadian government, it is necessary that measures to implement the Declaration be developed in partnership with Indigenous peoples.

The phrase "in consultation and collaboration with Indigenous peoples" in sections 5, 6(1) and 7(1) of Bill C-15 does not establish a partnership approach among equal peoples. Indigenous peoples must be actively and meaningfully engaged in the process of implementing the Declaration in order to move beyond the colonial status quo of the Canadian government ultimately proceeding unilaterally.

¹¹ *Constitution Act 1982 (UK)*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹² See for example *Doré v. Barreau du Québec*, [2012 SCC 12 \(CanLII\)](#), [paras 54-58](#).

¹³ As defined in the *Federal Courts Act*, [RSC 1985, c F-7](#).

REPLACE "IN CONSULTATION AND COLLABORATION" - SECTIONS 5, 6(1) AND 7(1)	
Proposed amendments	<p>Replace "in consultation and collaboration" with terms that reinforce the involvement of Indigenous peoples as partners, e.g. "co-development", "jointly", "in partnership", or others.</p> <p>5 - Clarify that measures implemented by Canada must be co-developed in partnership with Indigenous peoples.</p> <p>6(1) - Clarify that the action plan must be co-developed in partnership with Indigenous peoples.</p> <p>7(1) - Clarify that the annual report is to be prepared jointly with Indigenous peoples or that Indigenous peoples may file a separate report from Canada's, if necessary.</p>

ii. Clarify the content of government measures and the action plan

The "measures" to be taken by the federal government (s. 5) are not defined. In order to make the federal government's obligations more easily measurable, the nature of these measures could be clarified. Article 5 could, for example, include an obligation for the federal government to create, in partnership with Indigenous peoples, measures relating to follow-up, monitoring, redress or other accountability measures of the federal government that will contribute to the implementation objective of the Declaration.

This could include, for example, creating a list of federal laws that are inconsistent with the Declaration and then requiring bills to be introduced to amend each of these laws to make them consistent with the Declaration.

CLARIFY SECTION 5	
Proposed amendment	Clarify what type of measures the federal government will need to put in place.

CLARIFY SECTION 6	
Proposed amendments	<p>Clarify that the action plan must contain measures to amend, add to, or replace federal laws and policies to make them consistent with the Declaration.</p> <p>Add that all calls to action from the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls are automatically part of the action plan.</p>

iii. Recognize the right to self-determination of indigenous peoples and their right to adopt their own laws

The preamble establishes a recognition of the inherent right of Indigenous peoples to self-determination, including the right to self-government. To reinforce this recognition, we suggest that it be included directly in the body of the legislation.

CLARIFY THE PREAMBLE AND IMPROVE THE BODY OF THE TEXT	
Proposed amendments	<ul style="list-style-type: none"> • Clarify that this inherent right of self-determination, including the right to self-government, includes the power to make laws. • Add a clause to the same effect in the body of the law.

iv. Add an explicit denunciation of "systemic racism"

Although the preamble already contains a denunciation of systemic discrimination, it would be more precise to specify explicitly that the denunciation of systemic discrimination includes systemic racism.

ADD A DECLARATION OF SYSTEMIC RACISM IN THE PREAMBLE AND ARTICLE 6(2)(a)(i)	
Proposed amendment	Add an explicit denunciation of systemic racism.

IV. CONCLUSION

The AFNQL deplors the fact that the emergency has gone on too long with regard to the adoption of a bill to implement the Declaration and that we are now being asked to support this bill under duress. A bill of such great importance cannot be instrumentalized with the sole argument of "urgency".

The AFNQL fully supports the principles of the Declaration but must oppose C-15 in its current form, while helping to propose amendments that would make it more acceptable. This is not necessarily a missed opportunity and Canada can still do the right thing.

V. **APPENDIX**

DESCRIPTION OF THE APNQL

Created in May 1985, the AFNQL is the place where the Chiefs of the 43 First Nations communities in Quebec and Labrador meet periodically. It organizes four Chiefs' meetings per year, during which it receives its various political mandates.

Mission and objectives

Affirmation and respect of First Nations rights.

Recognition of First Nations governments.

Greater financial autonomy for First Nations governments.

First Nations Public Administration Development and Training.

Coordination of the First Nations' position-taking mechanism.

Representation of their positions and interests in various forums.

Definition of action strategies to advance common positions.

Recognition of First Nations cultures and languages.