**Dwight Newman, QC, DPhil (Oxon)**[*]
**Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law, University of Saskatchewan**
**Munk Senior Fellow, Macdonald-Laurier Institute**

**(submission in individual capacity and not representing any organization)**

# SUBMISSION TO THE HOUSE OF COMMONS STANDING COMMITTEE ON INDIGENOUS AND NORTHERN AFFAIRS

## RE BILL C-15
**April 8, 2021**

I provide this written submission on Bill C-15 in lieu of the oral presentation I was originally invited to make before this Committee.[1] I write solely in my personal capacity and do not represent any organization. As always in responding to an invitation from a Parliamentary committee (I have presented on a substantial number of occasions), my aim is to provide you with perspective based on my legal expertise so as to contribute toward the Committee being able to consider draft legislation with knowledge concerning possible interpretation and implications of the bill under consideration. In various instances when Members/Senators have contacted me, I have always spoken with Members/Senators from multiple political parties who wished to ask further on any aspects of my submissions, so do not hesitate to contact me if you wish further information or perspectives.

Bill C-15 seeks to contribute to the implementation in Canadian federal law of the *UN Declaration on the Rights of Indigenous Peoples* (*UNDRIP*). I will make several background points concerning this aim.

(1) The UNDRIP itself is of major significance to Indigenous peoples around the world, as a General Assembly declaration that expressed a set of Indigenous rights norms. While the contents do not directly become part of international law (other than as "soft law"), it is a significant instrument as resulting from decades of efforts and lengthy negotiations between Indigenous peoples and states.

[*] My writings on related topics include two books on the duty to consult doctrine that have been widely cited in Canadian courts and by scholars both within Canada and internationally (*The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich 2009) and *Revisiting the Duty to Consult Aboriginal Peoples* (Purich/UBC Press 2014), a co-authored 900 page treatise on *The Law of the Canadian Constitution* (LexisNexis, 2013 and 2nd edn 2017), *Mining Law of Canada* (2018), and a co-edited volume on *Indigenous-Industry Agreements, Natural Resources, and the Law* (Routledge 2021). I have served as a past Co-Chair of the American Society of International Law Rights of Indigenous Peoples Interest Group and as a past member of the International Law Association (ILA) Committee on the Implementation of the Rights of Indigenous Peoples, and I have carried on selective, relevant practice and consulting for Indigenous communities, governments, and industry.

[1] For that oral presentation, I was offered 3 minutes on March 25, but the meeting was cancelled shortly before it occurred; I was offered one alternative meeting date at a time at which I had been booked up for months.

(2) There has come to be a major symbolic significance to this bill, and the efforts of those who have pursued this bill and its predecessor version (notably Romeo Saganash MP) must be recognized as having been oriented by the very best of intentions to improve the situation of Indigenous peoples in Canada.
(3) At the same time, every bill must also be considered as a potential statute, and the Honourable Members must consider the effects of a bill as a statute.
(4) There is no requirement to have a statute to begin work on the issues supposed to be advanced by Bill C-15. The government could have begun work on the action plan discussed by the bill last year or five years ago or under the prior administration. As matters stand, significant legislative efforts are going into this Bill rather than into other practical improvements that Parliament could be working on in the same time.
(5) The *UNDRIP*'s articles themselves do not necessarily envision the implementation of the *UNDRIP* in any article-by-article fashion, but the *UNDRIP* refers to the use of "appropriate measures, including legislative measures, to achieve the ends of the Declaration / les mésures appropriées, y compris législatives, pour atteindre les buts de la présente Déclaration" (art. 38). Reference to "the ends/les buts" is legally different than a reference to all of the contents of an instrument.

Some provisions of the Bill as presently drafted raise challenging interpretive questions, and these have implications for what Parliament is adopting, what legal effects it will have, and what expectations it is generating that may or may not be met, with resulting effects for reconciliation:

(1) Section 4(a) indicates that a purpose of the Act is to "affirm the Declaration as a universal international human rights instrument with application in Canadian law". The term "application in Canadian law" does not seem to appear in prior Canadian statutes, so it is of uncertain legal meaning. Moreover, while a purpose clause may be thought not to have the same legal effects as an operative clause, some appear to have been advising that section 4(a) does have the legal effects of an operative clause. (i) For example, Mary Ellen Turpel-Lafond's advice to the AFN contained in a comparison table appended to the National Chief Bulletin of December 3, 2020 suggested that section 4(a) achieved at least as much as an operative clause in Bill C-262 with some similar language. Whether her analysis is correct or not concerning how a court would interpret the statute, it will affect expectations. (ii) In British Columbia, whose *Declaration on the Rights of Indigenous Peoples Act* (BC-DRIPA) has a similar clause, some Indigenous leaders have publicly argued that the BC-DRIPA means that all of the UNDRIP is part of BC statutory law, which again affects expectations even if not consistent with how a court would rule. It may be appropriate to seek further clarification on the effects of section 4(a) to ensure that Parliament is doing what it thinks it is doing.
(2) The section 5 phrasing concerning the Government of Canada "tak[ing] all measures necessary to ensure that the laws of Canada are consistent with the Declaration" uses extremely strong language of "all measures necessary" as opposed to qualifying with a term like "all reasonable measures". Section 5 probably exposes the Government of Canada to liability (perhaps extremely substantial) in at least some circumstances. On equivalent phrasing in the BC-DRIPA, some well-known lawyers have made almost immediate arguments that they can use it in court to compel certain courses of conduct. For example, Jack Woodward, a leading Aboriginal law practitioner and author of a significant book, appeared on behalf of an intervenor in the Supreme Court of Canada in

the October 2021 in the *Desautel* case and argued that the equivalent provision in the BC-DRIPA statute-barred the province of British Columbia from making some legal arguments. That case has not been decided, and the Court may not comment on that argument, but it would seem the language in section 5 will be used by lawyers in various ways even immediately.

(3) Section 6(2)(a) would seem to commit to including in the action plan measures that go beyond those included in operative articles of the UNDRIP. Any failure to include various elements in the action plan that "address injustices, combat prejudice and eliminate all forms of violence and discrimination, against Indigenous peoples" could give rise to court action, which is notable since a term like "address injustices", while a laudable idea, could see different people adopt a wide variety of interpretations when it is included in a statute as a required legal standard on the action plan. Any action plan adopted under the legislation could itself be subject to litigation arguing about whether it meets the standards in section 6(2) given that no clause protects such further action plan from such litigation.

(4) Different parts of the preamble use two different terms – "the Métis Nation" and "the Métis" – that may not have the same meaning and that may have implications on complex debates on Métis identity and which claimant groups in some parts of the Canada are or are not recognized as holding Indigenous rights as Métis.

Parliamentarians should think seriously on if they wish to adopt a statute that has these sorts of outstanding interpretive difficulties or if it would be better to improve upon the drafting to attain greater clarity. The Government of Canada runs what is effectively the largest law firm in the country, and it has legislative drafting experts who can do better in response to requests from a Parliamentary committee. Parliament should consider asking for improved language that adds clarity, legal briefings on why particular language is thought to have certain effects, and ongoing scrutiny of these efforts through further outside analysis.

There should also be further language to ensure that the final text affects only federal law. Section 4(a)'s use of the term "Canadian law" is different than the term "laws of Canada" used elsewhere in the bill. It is essential that the Bill not include language that could be seen as impacting provincial law, or it will be susceptible to constitutional challenges.

I respectfully present these comments for the Committee's consideration in the hopes of supporting Parliament being able to consider the Bill with awareness of some of its possible legal implications as presently drafted and to suggest that Parliament consider asking for better drafting that avoids ambiguities, reduces future litigation, and furthers better relationships rather than generating new expectations with dramatically different readings on what those are. This Bill has very wide-ranging effects (FPIC gets mentioned frequently, but anyone thinking about the Bill should read the entirety of the UNDRIP) and it is important for Parliament to get it right.