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Chair of the Standing Committee on Indigenous and Northern Affairs

Re: Bill c-15

Wa'tkonnonhwerá:ton,

I. Introduction

The Mohawk Council of Kahnawà:ke ("MCK") is writing to the Standing Committee on Indigenous and Northern Affairs with our position on Bill c-15.

We are extremely concerned with Bill c-15's approach, as it does not provide for the implementation of UNDRIP in Canadian law and inappropriately subjugates the inherent rights outlined in UNDRIP to section 35(1) of the *Constitution Act, 1982* ("s. 35"). Bill c-15 will not meet the objectives of the Truth and Reconciliation Commission's calls of action pertaining to UNDRIP, including the call to "fully adopt and implement" UNDRIP as the framework for reconciliation[1].

Therefore, while MCK supports UNDRIP, we oppose Bill c-15. The Standing Committee has a duty to consider significant amendments as proposed by MCK, the AFNQL and other Indigenous rights holders for the Bill to obtain our support.

II. Bill c-15 is insufficient and does not implement UNDRIP

a) The Bill does not implement UNDRIP

Bill c-15 does not implement UNDRIP. During an engagement session on October 29, Canada's representatives acknowledged that the legislative proposal does not implement UNDRIP in Canadian

[1] Truth and Reconciliation Commission's Calls to Action, see in particular Calls to Action 43 and 45. http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf

law and does not have the effect of "creating" stand alone enforceable legal rights for Indigenous peoples. This was also recognized by National Chief Bellegarde during the press conference on Bill c-15, when he stated that the Bill "doesn't give First Nations anything new"[2].

b) The preamble overstates what the Bill accomplishes

The MCK supports the substance of what is conveyed in the recitals of Bill c-15's preamble. What is problematic, is the text of the legislation itself, which does not reflect the scope of the preamble. For example:

- the preamble states that the doctrine of discovery is "legally invalid", but the law contains nothing to acknowledge or reverse the common law's reliance on the doctrine of discovery in its interpretation of s. 35;
- the preamble states the urgent need to respect and promote the inherent rights of Indigenous peoples, including their rights to their lands, territories and resources, but then contains no substantive provisions about this in the legislation;
- the preamble states that the "declaration is affirmed as a source of the interpretation of Canadian law", whereas the text of the law employs weaker wording to the effect that the declaration has "application in Canadian law"

The MCK has heard supporters of the Bill dispute this concern by arguing that preambles serve an important interpretive function. However, this interpretative function only has value to the extent that the preambular provisions are connected to the substantive provisions of the law. The expansive preamble proposed by Bill c-15 is a textbook example of preambles that: "make extravagant claims about what the legislation achieves or hopes to achieve that are not supported by the text of the law" and that are:

> […] a means of overselling the legislation that will quickly generate disappointment and cynicism or as an attempt to achieve a consensus at such a high level of abstraction that it will quickly break down when anyone tries to apply the legislation[3].

c) Action plans are insufficient

MCK is not opposed to the development and implementation of an action plan but it is insufficient. National Action Plans ("NAP") that are frequently used by states to implement international human rights commitments are insufficient when not developed in parallel with legally binding international treaties or effective domestic legislation that bind the state[4]. In this case, Bill c-15 does not constitute effective domestic legislation, as it essentially only refers to the obligation of creating a NAP. Simply put- binding legislative requirements and standards work in conjunction with NAP's but NAP's should not act as a substitute for binding legislation.

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[2] https://www.msn.com/en-ca/news/canada/liberals-table-bill-to-implement-un-declaration-on-the-rights-of-indigenous-peoples/ar-BB1bAM9w?ocid=spartan-ntp-feeds

[3] Roach, Kent "The Uses and Audiences of Preambles in Legislation", (2001), McGill L.J. 129, at p. 132, 148.

[4]Blackwell, Sara and Meulen, Nicole Vander (2016) "Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights," Notre Dame Journal of International & Comparative Law: Vol. 6: Iss. 1, Article 5. Available at:http://scholarship.law.nd.edu/ndjicl/vol6/iss1/5.

We also note that the elements that are included to detail what must be in the action plan, avoids all reference to elements directly supporting the inherent rights of Indigenous peoples to self-government, economic rights, and rights associated with lands, territories and resources.

III. MCK's Minimally Required Amendments to Bill c-15

a) The Bill must explicitly state that UNDRIP interprets s. 35

The wording of section 2(2) of Bill c-15 could be interpreted as meaning that the entirety of the Act must interpreted as upholding and not derogating from the current rights framework recognized and affirmed by s. 35. A clause stating that the Act does not abrogate, or limit s. 35 rights would be sufficient and reference to "non-derogation" must be removed.

This wording is especially concerning because during the October 29 engagement session we were told that the rights outlined in UNDRIP may exceed what is recognized by s. 35 and that in case of inconsistency, s. 35 would prevail. This is entirely unacceptable to the MCK. Section 35 must be interpreted in accordance with UNDRIP and not the other way around. Minister Bennett and the AFN have also stated that the purpose of implementing UNDRIP is to breathe new life into s. 35[5]. Achieving these objectives is compromised by the wording of subsection 2(2).

Therefore: Bill c-15 must explicitly prescribe that UNDRIP serves to interpret the laws of Canada, including s. 35.

b) The Bill must include a substantive provision on the repudiation of the doctrine of discovery in Canadian law

There is a tension and incompatibility between the rights prescribed by UNDRIP and s. 35. For reasons that are well explained by legal scholars, the common law interpretation of s. 35 is heavily based on the Doctrine of Discovery. The application of this doctrine has resulted in numerous problematic legal interpretations associated with s. 35, including:

- The imposition of Crown sovereignty over Indigenous peoples, including self-government rights
- Disregarding Indigenous laws and legal traditions
- Establishing that the Crown has "ultimate title" to land
- The burden of proof imposed on Indigenous peoples to establish their rights in Canadian courts
- The racist and "frozen in time" "Van der Peet test" for establishing aboriginal rights
- [6]

[5] https://www.afn.ca/wp-content/uploads/2018/02/17-11-27-Implementing-the-UN-Declaration-EN.pdf .
[6]See for examples of analysis on how section 35 has been interpreted by the common law in accordance with the Doctrine of Discovery: Borrows, John. "(Ab)Originalism and Canada's Constitution." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 58. (2012 /

For the MCK, the promise of UNDRIP includes the repudiation of the Doctrine of Discovery and many of the problematic features that have been developed by the common law. In fact, the repudiation of the Doctrine of Discovery is specifically cited in the text of UNDRIP, in addition to the Royal Commission on Aboriginal Peoples recommendations and the TRC's calls to action[7]. It is not possible to implement UNDRIP and respect the recommendations of the Royal Commission and TRC's calls to action by subjugating UNDRIP rights to the current legal framework associated with s. 35.

Given this inconsistency, it is essential that any federal legislation pertaining to UNDRIP include a provision in the body of the law that affirms the repudiation of the application of the doctrine of discovery in Canadian law.

c) **Bill should include provision requiring that federal courts and decision makers consider UNDRIP in exercising their authority**

Section 4 is not prescriptive as to its legal effects and does not have the effect of implementing UNDRIP in Canadian law. In response, we were told that UNDRIP can inform the interpretation of domestic law and is already a relevant interpretive tool that can be drawn upon. Firstly, we dispute the notion that UNDRIP should serve only an interpretative function. UNDRIP uses prescriptive language about rights and corresponding state obligations. UNDRIP calls upon states to "comply with and effectively implement all their obligations under international instruments, in particular those related to human rights".

Van Ert provides guidance on what an effective federal law could have looked like:

- Implementing laws frequently say, in plain language, that their purpose is to implement some instrument (whether international or internal) in law, or to give such an instrument the force of law. Neither s. 4 nor any other provision of the bill does this. Furthermore, implementing laws frequently include a provision directing the courts on what to do in the event of an inconsistency between the instrument being enacted and existing law[8].

If Canada is seriously committed to implementing UNDRIP and respecting the TRC's calls to action, the federal law must include a provision that requires federal courts and decision makers to consider UNDRIP in exercising their authority. Furthermore, legal remedies in the event of an inconsistency between UNDRIP and federal law or federal government action should also be included.

d) **Section 5 should be amendment to specify what government action is required**

It is unclear what section 5 requires the federal government to do. If enacted, would section 5 require the government to audit existing federal laws for consistency with the Declaration? Would it require the government to introduce bills to remedy such inconsistencies? These questions raise a separation of powers problem: section 5 raises the spectre of legislative constraint upon what initiatives the executive may introduce in Parliament.

[7] See preamble of UNDRIP, s. 45 i. of the TRC Calls of Action and Royal Commission on Aboriginal Peoples "Looking Forward, Looking Back" at recommendation 1.16.2.
[8] Van Ert, Gib, "The impression of harmony: Bill C-262 and the implementation of the UNDRIP in Canadian law" 2018 CanLII Docs 252

The Bill should therefore be amended to clearly outline what action the government must take to achieve the objectives of section 5.

e) Sections 5, 6 and 7 should be amended to ensure that Nation to Nation relationship is respected

Reference to "in consultation and collaboration" outlined in sections 5, 6 and 7 of the Bill should be replaced by reference to being actions being carried out jointly, in co-operation and equal partnership in respect for the Crown-Indigenous relationship.

f) Bill should include authority of federal government to enter into Nation to Nation Agreements

Any legislation to implement UNDRIP should recognize the possibility of concluding Nation to Nation agreements. This is important for us because of the Two Row Wampum treaty relationship between ourselves and the Crown.

In accordance with the Two Row Wampum treaty relationship, Mohawk jurisdiction continues to apply independently and in parallel to the Crown. Wampum belts were among the first documented agreements between First Nations and European settlers. The Two Row Wampum belt consists of two rows of purple beads separated by three rows of white. The white symbolizes the river of life or the land that we all now share. The two purple rows symbolize the Haudenosaunee and the Europeans traveling side by side, never interfering with each other's journey.

This legislation is an opportunity to provide a legislative basis to enter Nation to Nation relationships. The Bill should incorporate a model like that outlined in the *Declaration on the Rights of Indigenous Peoples Act* of British Columbia and that should have the flexibility to respond to situations where agreements are needed but not otherwise provided for.

The Two Row relationship includes the obligation to maintain proper alignment of the parties. This is spoken of in the Silver Covenant Chain Wampum, which requires the polishing of the chain binding the parties to the Two Row. The amendments put forth in the submission are required for the MCK to remove its opposition to the Bill and reflect the polishing of that chain, thereby properly realigning the relationship.

In peace and friendship,

ON BEHALF OF THE OFFICE OF THE COUNCIL OF CHIEFS
MOHAWK COUNCIL OF KAHNWÀ:KE

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Chief Ross Kakwirakeron Montour