Justice Centre
for Constitutional Freedoms

Bill C-15: Useless, dangerous, and divisive

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

Brief to the House of Commons Standing Committee
on Indigenous and Northern Affairs

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Introduction

Bill C-15: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* has been heralded as the means to build a better future for Indigenous people in Canada, and an important step towards reconciliation. It is neither. Instead, Bill C-15 and UNDRIP itself are based upon mistakes and myths. They will be an obstacle to the prosperity of ordinary Indigenous men, women, and children. Bill C-15 is useless, dangerous, and divisive.[1]

1. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a preposterous document.

The UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. At the time, Canada sensibly voted "no", along with New Zealand, the United States and Australia. Eleven countries abstained. In 2016, Canada reversed its objection. As a General Assembly declaration, UNDRIP is not formally binding in international law nor directly enforceable in domestic courts.

UNDRIP essentially provides that Indigenous people, among other things, own the land and resources, have the right to self-government and to their own distinct political, legal, economic, social and cultural institutions and educational systems, and that the federal government shall pay for all of it. The declaration provides in part:

[1] Portions of this brief are based upon and adopted from B. Pardy, "13 Things that can't be said about Aboriginal law and policy in Canada", *C2C Journal*, September 18, 2020 < https://c2cjournal.ca/2020/09/thirteen-things-that-cant-be-said-about-aboriginal-law-and-policy-in-canada/>.

> Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired…to own, use, develop and control … to redress…restitution…compensation…to have access to financial and technical assistance…to autonomy or self-government…as well as ways and means for financing their autonomous functions…to establish and control their educational systems…States shall take effective measures [to provide for all of the above].

2. Bill C-15 purports to incorporate UNDRIP into Canadian law but it does not fully do so. Instead, it gives the federal government the discretion to craft solutions to problems that for decades it has not had the courage or wherewithal to solve. There is no reason to believe that situation will suddenly change.

UNDRIP is not formally binding in international law nor directly enforceable in domestic courts. However, international documents like UNDRIP can be relied upon by Canadian courts as evidence of international legal norms. In November 2019, the legislature of British Columbia passed the *Declaration of the Rights of Indigenous Peoples Act*, which requires the B.C. government to "take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration." In Bill C-15, the federal government will be required to do likewise: in consultation and cooperation with Indigenous people, to take all measures necessary to ensure that the laws of Canada are consistent with the Declaration. That is not the same thing as a literal incorporation of the provisions of UNDRIP into Canadian law. The duty set out in Bill C-15 is vague, ambiguous, and ripe for political abuse. Promises abound to seek reconciliation, address poverty and repair water systems but for decades government has shown little ability or resolve to actually fix existing problems or to even acknowledge that Aboriginal law is based upon bad principles.

3. Aboriginal law applies different rules to different people based on race, lineage, and culture. That's a problem that Bill C-15 makes worse.

Justice is supposed to be blind. The ideal that the same rules and standards should apply to everyone has a long pedigree in Anglo-American law. This hard-fought achievement, which required centuries of nurturing and sacrifice, is now fraught with controversy. Identity politics and "substantive" equality claims are both inconsistent with equal application of the law. And simply having a category in Canadian law called "Aboriginal law" is itself problematic, since it means there are different rules for people who are of Indigenous descent. Bill C-15 and UNDRIP are based upon this premise. As lawyer Peter Best writes in his essay, *There Is No Difference*, "Our new Canadians, a great many of whom have immigrated from South Asia where the odious caste system was and remains prevalent, must be upset and bewildered to see a major element of the caste system – special, hereditary rights possessed by one racial group to the exclusion of all others – becoming further entrenched in the Canadian legal and social fabric."

Indigenous people have the same legal rights as any other Canadian citizen: the right to vote in general elections, to hold a job, to make contracts, to own property off-reserve, to due process in the legal system, to marry whom they wish and divorce as they see fit, and so on. They hold these rights like everybody else and may exercise them as they choose.

They also, however, have additional rights no one else may claim. Depending on their lineage and group affiliations, they may have treaty rights. They may be entitled to tax exemptions. They may receive exclusive benefits. They may claim positions on bodies and in institutions that are reserved only for them. They may be entitled to procedures and considerations in criminal sentencing that no one else receives. Police seem reluctant, contrary to their statutory responsibilities, to enforce court orders against Indigenous protesters. And Indigenous people have an entrenched set of Constitutional rights, which include a fiduciary relationship with the Crown.

The very notion of being "a people" means distinguishing between "us" and "them", which in turn requires criteria based on race, lineage or culture to determine who shall qualify for the rights and benefits reserved to that group. Globally, everyone is a minority. Virtually all races

and cultures on Earth are mixing (or "assimilating"), especially in Western countries. Canadians are usually quick to condemn anyone who advocates racial or cultural purity – except when it comes to Indigenous people.

4. The existing "duty to consult" is already paternalistic, incomprehensible, and unpredictable. Bill C-15 threatens to make this situation worse. Bill C-15 and UNDRIP represent an existential threat to Canada's resource industry.

The Supreme Court has said that the "honour of the Crown" governs the relationship between the government and Aboriginal people, and that therefore the Crown owes fiduciary duties to Aboriginal people, including a "duty to consult" whenever proposed action may adversely affect established or asserted rights under section 35. That duty has become a threat to the Canadian economy. After years of process, astounding amounts of money and its purchase by the federal government, the Trans Mountain pipeline expansion, intended to transport additional volumes of crude oil from Alberta to port in British Columbia, was in 2018 sent back to the drawing board. The Federal Court of Appeal found that the government had failed to fulfil its duty to consult.

Although the project has now cleared its previous legal hurdles, it has yet to be completed. What does a government have to do, exactly, to satisfy the duty to consult? The courts seem unable to say, except after the fact. "[T]he duties that flow from the honour of the Crown will vary with the situations in which it is engaged," the Supreme Court of Canada has observed, "Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances." In other words, courts will not prescribe what needs to be done but, in any specific case, are willing to conclude that it wasn't.

As it presently exists, the Aboriginal right to be consulted is not a veto, but it is more than an opportunity to give submissions. It is not necessarily a negotiation, but it could be one

depending upon the circumstances. Legislatures do not have a duty to consult before they pass legislation but if the legislation is inconsistent with the honour of the Crown, then courts can intervene. It is not difficult to picture the often-unworkable uncertainty this state of affairs imposes on anyone wishing to do anything in any area near Indigenous reserves, on a title claim, or even in an area (or body of water) asserted to be "traditional" territory. And, indeed, uncertainty prevails in many areas, with the courts typically ruling on a situation only after years of negotiation, disagreement or dispute.

Bill C-15 threatens to make this untenable situation even more extreme and uncertain. UNDRIP suggests that Indigenous people shall have a veto over resource projects that might affect any lands or territories that they "traditionally owned, occupied or otherwise used or acquired" and over legislation of any kind that might apply to them. Article 19 of UNDRIP reads:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Given that Bill C-15 will require the federal government "to take all measures necessary to ensure that the laws of Canada are consistent with the Declaration", the duty to consult will need to be amended to incorporate an Aboriginal veto.

5. Indigenous persons are not permitted to own Aboriginal property. Neither Bill C-15 nor UNDRIP will change that.

While Indigenous people have the right, like any other Canadian, to own property off-reserve and outside areas subject to Aboriginal title, they are not permitted to own any land on-reserve or to claim any personal interest in lands subject to Aboriginal title. Neither Bill C-15 nor UNDRIP changes this state of affairs.

Two-thirds of Canadians own their own homes. Indigenous people living on reserves cannot do the same. That is because property rights do not work the same way on reserves. Canadian property law provides for private, individual ownership of land. If you own your home, you likely own a property interest called a "fee simple absolute", which is the largest interest in Canadian real property law, essentially equivalent to title. The technicalities are not important, but it means that you hold all possible property interests in that land and can use, sell, mortgage, bequeath, or otherwise deal with your property in any way that the law permits.

Reserves, in contrast, are held by the Crown on behalf of a band. Plots of land are not privately owned. Instead, people must make do with other kinds of property interests that provide them with the right to merely occupy a dwelling. Depending upon the community, they may have "customary rights" that are unenforceable in Canadian courts; certificates of possession under the *Indian Act*, which are legally enforceable but whose transfer is restricted; or leases, which are more freely transferrable but limited in duration. These kinds of interests leave people poorer than they would be if they were able to own their homes. True property owners can accumulate equity in the property, care for and improve it to enhance its value, utilize it as collateral to secure loans at attractive interest rates, and sell it to the highest bidder in the open market. The system of landholding on reserves remains an anachronistic obstacle to the prosperity of Indigenous people who live on them.

Neither Bill C-15 nor UNDRIP will do anything to change this situation. They continue to treat the concept of Aboriginal land rights as collective rights over which individual Aboriginal people have no say, control, or personal interest.

6. Bill C-15 will not change the relationship of dependency that exists between Aboriginal people and the federal government.

UNDRIP appears to emphasize Aboriginal self-government, but instead it prescribes extensive governmental obligations that maintain dependency. The declaration suggests that Aboriginal

people are entitled to financial and technical assistance, "ways and means for financing their autonomous functions", their own educational systems, and so on, which shall be provided for not by their own self-determined communities, but by the Canadian government – and therefore by Canadian taxpayers.

Aboriginal dependency is typically portrayed as a one-way relationship resulting from the Crown's power and desire to continue oppressing Indigenous people. However, in reality it endures because both the federal government and many Indigenous leaders prefer it to continue. In their book, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation*, Frances Widdowson, a politics professor at Mount Royal University in Calgary, and Albert Howard, an independent researcher, argue that dependency and persistently poor social conditions experienced by many Indigenous people can be traced to a thriving "Aboriginal industry", consisting of Indigenous and non-Indigenous institutions and individuals – leaders, consultants, managers, bureaucrats, politicians, lawyers and others – who have a vested interest in the status quo.

The *Indian Act*, originally enacted in 1876, is widely acknowledged to be anachronistic and paternalistic, but no consensus can ever be found for its repeal. Meanwhile, the bulk of the recommendations of the Truth and Reconciliation Commission (TRC) seek to reinforce dependency rather than end it, by calling upon government to fix this, build that, or pay lots of money. "We call on the federal government to…" appears repeatedly in the TRC report. Many Aboriginal claims are exercises in rent-seeking that essentially amount to an insistence to be paid for nothing other than their presence. Government spending on Indigenous causes, which comes from different levels of government and from different Ministries, in a variety of forms, and provides for different purposes, totals many billions of dollars per year (although the complete figure is, perhaps not surprisingly, not transparently tallied). This lavish and, by any historical standard, generous approach does not work even for the intended beneficiaries.

Genuine self-government requires genuine self-sufficiency. Self-sufficient means self-funded. If Indigenous communities are dependent, they cannot be independent. "Self-government" is a fiction while taxpayers are footing the bill.

7. By endorsing UNDRIP's prescription for vast and broad collective land rights for Aboriginal people but no property rights for anyone else, Bill C-15 threatens to divide rather than reconcile.

The Canadian Constitution does not protect individual property rights. UNDRIP, on the other hand, provides that Aboriginal people "have the right [to own, use, develop and control] … the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Non-Aboriginal Canadians will rightfully wonder if the government may expropriate their land in the name of complying with UNDRIP's directives and Bill C-15's requirements. There is no better recipe for creating resentment and resistance. The road to truth and reconciliation does not run through Bill C-15 and UNDRIP.

8. Bill C-15 effectively grants UNDRIP quasi-constitutional status. It will become a standard to which the laws of Canada are to conform.

The Canadian Constitution is the supreme law of the land. All laws must be consistent with the provisions of the Constitution, including but not limited to the *Charter of Rights and Freedoms*. In contrast, on its own, UNDRIP is nothing more than a resolution of the UN General Assembly, and as such is not formally binding in international law nor directly enforceable in domestic courts. Yet Bill C-15 will give UNDRIP quasi-constitutional status in Canada by requiring the federal government "to take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." In effect, while Bill C-15 is in force, the laws of Canada will be expected to conform to the declaration of an international body not democratically accountable to the people of Canada.

9. The intended consequences of Bill 41 in British Columbia are a harbinger of what Bill C-15 might be expected to foist on Canadians across the country.

Although Bill C-15 is couched in the language of self-determination and self-government, its proponents mean to render the country unrecognizable. In British Columbia, Bill 41: *Declaration of the Rights of Indigenous Peoples Act*, was passed in November 2019. One month before, the *17th Aboriginal Law Conference,* sponsored by BC Continuing Legal Education, laid bare the agenda. Bill 41 was explained as a means to:

- "se[t] up a whole new norm";
- "put the government on notice";
- "change [the] system of how legislation is drafted";
- "change the legislation…over 5,000 laws in BC" including "the *Forest Act*, the *Heritage Conservation Act* [and] the *Mines Act*";
- "create a new tribunal";
- "put teeth to [UNDRIP]";
- move away, if "not fully", from the Westminster model of governance; and,
- confer "veto power" on Indigenous interest groups, which all but promise "that [free, prior and informed] consent will [not] be given very often, if at all".

Subsequent policy statements from the BC Government confirm that many of these prospects are on the legislative agenda.

At the conference, one of the contributors to UNDRIP had this to say of Bill 41:

- "We're not talking small changes; we're talking big changes, and I don't know if the BC government recognizes that, but we sure do";
- "The government gave us money, but it's not enough money";
- "Compensation for sacred sites, for lands taken, for relocation…it's going to be overwhelming at the number of compensation claims that there will be and so I'm hoping that the Province is ready for that"; and

- "Life [in British Columbia] can and will change".

We urge the House of Commons Standing Committee on Indigenous and Northern Affairs to pause and reflect on the intended consequences of a declaration dedicated to wreaking havoc on Canada's economy and legal system – to observe whether BC's implementation of a similar bill proves effective and whether the consequences are desirable – before recommending that Bill C-15 be unleashed on the country.

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