The Global Indigenous Rights Research Network

Bill C-15 and the Implementation of Indigenous Peoples' Human Rights in Canada

Bill C-15 helps protect against further misinterpretation of the *Declaration's* crucial Indigenous rights protections.

In September 2007 Indigenous peoples globally celebrated a major victory, decades in the making, when the United Nations adopted the *United Nations Declaration on the Rights of Indigenous Peoples*. Currently making its way through the parliamentary process is Bill C-15, An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples*. This is a historic piece of federal legislation that has the potential to change the landscape of Indigenous and government relations in Canada, moving us away from centuries of colonialism.

Governments in Canada have repeatedly tried to reinterpret, misrepresent, and minimize the *UN Declaration*. Some of this behavior has been analyzed by scholars such as Kiera Ladner, David MacDonald and Sheryl Lightfoot, as well as lawyers such as Paul Joffe.[1] For years, the government of Prime Minister Stephen Harper railed against the *Declaration*, alternating between claiming it was too far-reaching and claiming it had no legal effect. However, PM Harper officially endorsed the *Declaration* in November 2010.[2]

A decade later, in December 2020, the Trudeau government introduced legislation[3] intended to begin the process of actually implementing the *UN Declaration* and some commentators have raised concerns about whether this legislation could enshrine a diminished or harmful interpretation of the *Declaration* into Canadian law. In our view, this is not the case.

Nothing in the federal implementation bill, Bill C-15, can diminish the *UN Declaration* or the rights it affirms. In fact, in a number of sig-

Vote to adopt the *Declaration on the Rights of Indigenous Peoples.* United Nations, 2007

nificant ways, Bill C-15 helps protect against further misinterpretation of the *Declaration's* crucial Indigenous rights protections.

It is important to hold any proposed government law up to careful examination. Since Bill C-15 was introduced, there has been a lot of healthy debate about the implications of the Bill and how it can be made stronger. Currently, amendments to strengthen the Bill are taking place during the parliamentary process. The report from the Indigenous and Northern Affairs (INAN) parliamentary committee was tabled to the House of Commons with helpful amendments that further strengthen the Bill, and respond to issues raised by Indigenous peoples during the committee study.[4]

Unfortunately, there have also been claims about Bill C-15 made without substantiation or any foundation in law. These claims also need careful scrutiny. For example, some people have claimed that the seventeen preambular paragraphs in Bill C-15 have no legal effect. However, preambles do have legal effects when used to interpret the operative provisions in any legal instrument.[5]

We only have Bill C-15 because of years of Indigenous activism

Since the early 1980s, Indigenous peoples strived to achieve the realization of the *United Nations Declaration on the Rights of Indigenous Peoples*. At every step of the way, grassroots activists and leaders fought for the *Declaration* through more than two decades of painstaking discussions and negotiations at the United Nations – only to have Canada vote against it the UN General Assembly in 2007. Calls for the federal government to recognize and uphold the *Declaration* have been a consistent part of Indigenous rights activism for the last 13 years. These calls were also taken up by the Truth and Reconciliation Commission and by the National Inquiry on Missing and Murdered Indigenous Women and Girls. The final reports from each of these inquiries included concrete calls for Canada to adopt and implement the *UN Declaration*, in full.[6]

Calls for the federal government to recognize and uphold the *Declaration* have been a consistent part of Indigenous rights activism for the last 13 years.

Romeo Saganash, a Cree lawyer and residential school survivor from Eeyou Istchee in northern Québec, helped create a simple, principled and pragmatic model for implementing the *Declaration*. In 2014, while he was a Member of Parliament, Mr. Saganash drafted a private Member's Bill, C-641,[7] that would require the federal government to work with Indigenous peoples to put the *UN Declaration* into practice. That bill was defeated by the Conservative government at second reading in May 2015. Two years later, Mr. Saganash introduced an

Event supporting Bill C-262. Winnipeg, Manitoba, 2018.
Photo Credit Matthew Sawatsky

updated version, Bill C-262,[8] that was eventually passed by the House of Commons on May 30, 2018. Bill C-262 would already be part of the laws of Canada, except for the fact that it was killed by a filibuster in the Senate in June 2019.

When Bill C-262 was first introduced in the House of Commons, there was an outpouring of support from Indigenous peoples across Canada. This support continued to build as the Bill worked its way through Parliament. Eventually the governing Liberals agreed to support the private Member's Bill. Then, when stalling by a handful of Conservative Senators prevented Bill C-262 from becoming law, the Liberal government promised that it would introduce its own legislation by the end of 2020. The government pledged that the new bill would build on C-262. The Assembly of First Nations, the Inuit Tapiriit Kanatami, and the Métis National Council engaged with federal lawyers to make sure that the proposed federal legislation would be consistent with and build upon C-262.

Romeo Saganash has said of Bill C-15: "It's government legislation but it's our victory."[9]

International instruments like the *UN Declaration* are intended to bring about real and meaningful improvements in peoples' lives ...

International rights standards require domestic implementation

The rights of Indigenous peoples are inherent or pre-existing.[10] These rights existed before there was a Canada. Indigenous peoples live their rights daily through their own worldviews, cultures, traditions and institutions.

The first commitment is that the federal government must work collaboratively with Indigenous peoples to take all measures necessary to ensure that the laws of Canada are consistent with the *Declaration*.

Indigenous peoples expect and demand that Canada will respect and uphold these inherent rights, so that such rights will be freely exercised by present and future generations. Indigenous peoples also expect and demand that Canada take concrete steps to undo the harm that it has caused by generations of grave human rights violations, including genocide.

International instruments like the *UN Declaration* are intended to bring about real and meaningful improvements in peoples' lives by holding states accountable to standards adopted by the world community. As international human rights treaty bodies have repeatedly emphasized, States are the primary duty bearers of human rights obligations.[11] To a large extent, the global human rights system expects and repeatedly calls upon national governments to bring their laws, policies and practices into line with international human rights law.[12]

The process of bringing international human rights standards to life through legal and policy change at the national level is known as "domestication" or implementation. It is important to underline that international human rights instruments like the *UN Declaration* always remain international instruments. They cannot be constrained by current flawed, racist, colonial and/or discriminatory domestic laws.[13]

Essential Elements of Bill C-15

The key purposes of Bill C-15 are to:

> a) affirm the *Declaration* as a universal international human rights instrument with application in Canadian law (s. 4(a)); and
> b) provide a framework for the Government of Canada's implementation of the *Declaration* (s. 4(b)).

Bill C-15 will also enshrine key federal commitments into domestic law

Bill C-15, like C-262 before it, contains three key commitments.

- The first commitment is that the federal government must work collaboratively with Indigenous peoples to take all measures necessary to ensure that the laws of Canada are consistent with the *Declaration* (s. 5).

Bill C-15 provides a process to reform Canadian laws to ensure that they are consistent with the requirements of the *UN Declaration*.

- The second commitment is for the federal government to work collaboratively with Indigenous peoples and other federal ministers to prepare and implement an action plan. This plan must achieve the objectives of the *Declaration*, as well as address injustices, combat prejudice and eliminate all forms of violence and discrimination, including racism. The plan must also promote mutual respect and understanding as well as good relations, including through human rights education (s. 6(2)(a)(i) and (ii). The Plan must also include measures to monitoring, oversight, recourse or other accountability measures with respect to implementation of the *Declaration* (s. 6(2)(b).

- The third is for the Minister to make, in collaboration with Indigenous peoples, regular public reports on the progress made (s. 7).

Crucially, the Bill enshrines all three commitments into law so that they will be more transparent and it will be more difficult for future governments to ignore them.

The work of implementation required by Bill C-15 necessarily includes interpreting what the *Declaration* means in a Canadian context. Critically, however, this will not be done by federal bureaucrats working behind closed doors. The implementation process that is set out in the Bill requires collaboration with Indigenous peoples and transparency.[14] Furthermore, the preamble in Bill C-15 sets out important rights and principles that must be respected in the process, including the inherent right to self-determination. It is important to note that Canada has had an affirmative obligation to promote and respect the

Romeo Saganash at an event supporting Bill C-262. Winnipeg, Manitoba, 2018. Photo Credit Matthew Sawatsky

right of self-determination, since it ratified the two International Covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights in May 1976.[15]

Bill C-15 does not automatically turn the entire *UN Declaration* into domestic law

As noted above, Bill C-15 provides a process to reform Canadian laws to ensure that they are consistent with the requirements of the *UN Declaration*. In other words, the Bill is intended to raise Canadian laws to the standards set out in the *UN Declaration*.

As indicated above, the Bill also affirms the *UN Declaration* "as a universal international human rights instrument with application in Canadian law." The Bill uses the word "affirm" because it is reinforcing an existing, established principle of Canadian law – namely that international legal standards can be used in Canadian courts.[16] Underlining this principle is another way to help raise Canadian law to the higher bar set by the *UN Declaration.*

Bill C-15 does not contain any provision subjugating the *UN Declaration* to Canadian law

At no point does Bill C-15 state or even imply that implementation of the *Declaration* would be through the lens of current policies or bounded by current laws. In fact, the core requirement to bring Canada's laws into line with the *Declaration* (s. 5) clearly intends the very opposite.

The following clause of the Bill has been misinterpreted or misrepresented by some:

> This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

... this is a measure to protect Indigenous rights, not diminish them.

This provision is what's known as a non-derogation clause. Indigenous peoples have fought to ensure that non-derogation clauses are included in all federal legislation dealing with Indigenous rights. The purpose is to be clear that rights protected under the Canadian Constitution – that is, the very broad term of "existing Aboriginal and Treaty

rights" – are not to be ignored, violated or diminished no matter how the law in question gets interpreted. In other words, this is a measure to protect Indigenous rights, not diminish them.[17]

Critically, nowhere does Bill C-15 state that the rights protected in the *UN Declaration* would be subject to domestic limitations or that these rights would be viewed only through the lens of current Canadian jurisprudence. That's not what the Bill says and it's not what it implies. Such an arbitrary reinterpretation of the meaning of standard non-derogation clauses would have harmful implications for the rights of Indigenous peoples that go far beyond Bill C-15 and should be strenuously resisted.

The powerful preamble to Bill C-15 matters

The preamble to any piece of legislation provides importance guidance on how that legislation is to be interpreted and applied. Courts, for example, take preambles very seriously when resolving disputes about the intention behind a law.[18]

The preamble to Bill C-15 includes important language that will clearly rules out any effort to diminish the *Declaration*. Here are just a few examples:

the rights and principles affirmed in the *Declaration* constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada

> Whereas the rights and principles affirmed in the *Declaration* constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada;
>
> Whereas the implementation of the *Declaration* must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence and discrimination, including systemic discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons;
>
> Whereas the Government of Canada rejects all forms of colonialism and is committed to advancing relations with Indigenous peoples that are based on good faith and on the principles of justice, democracy, equality, non-discrimination, good governance and respect for human rights;
>
> Whereas the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government;

Nothing in this *Declaration* may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements

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 achieve the objectives of the *Declaration*;

The *Declaration* itself provides the best defense against any efforts to undermine Indigenous rights

Ultimately, the standard that Canada is obligated to implement are the standards set out in the *Declaration* itself. Much of the confusion around implementation of the *Declaration* can be resolved by looking at what the *Declaration* itself states. Therefore, we would like to conclude with the following examples:

Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

The Global Indigenous Rights Research Network has carefully analyzed Bill C-15 and held discussions with many partners. We conclude that Bill C-15 makes an important contribution to the advancement of Indigenous peoples human rights in Canada and look forward to seeing this complete the parliamentary process.

[1]For example, Sheryl Lightfoot, 2016, *Global Indigenous Politics: A Subtle Revolution*, Oxon and New York: Routledge, Ch.7 (pp.169-198); David MacDonald, 2020, "Paved with Comfortable Intentions: Moving Beyond Liberal Multiculturalism and Civil Rights Frames on the Road to Transformative Reconciliation." *In Pathways of Reconciliation: Indigenous and Settler Approaches to Implementing the TRC's Calls to Action*, edited by Aimée Craft and Paulette Regan, Winnipeg: University of Manitoba Press, pp.3-34; Kiera Ladner, 2009, "Gendering Decolonization: Decolonizing Gender," *Australian Indigenous Law Review* 13(1):62-77; Paul Joffe, 2010, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation," *National Journal of Constitutional Law* 26(2): 121-229.
[2]Canada, "Canada's Statement of Support on the *United Nations Declaration on the Rights of Indigenous Peoples*", 12 November 2010, http://www.aadnc-aandc.gc.ca/eng/1309374239861
[3]An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples*, (Bill C-15), House of Commons, 2nd sess., 43rd Parl., First reading (Dec. 3, 2020).
[4]INAN committee report, Study *United Nations Declaration on the Rights of Indigenous Peoples Act* https://www.ourcommons.ca/DocumentViewer/en/43-2/INAN/report-8/
[5]See, e.g., Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014), at 448, the legal significance of preambles is emphasized as follows: "14.28 ***Preambles reveal legislative purpose***. Preambles are relied on most often to reveal, or confirm, legislative purpose. While the courts are doubtless capable of figuring out the purpose of an enactment without having it spelled out for them, reliance on the preamble gives their conclusions added force and legitimacy."
[6]Truth and Reconciliation Commission of Canada, 2015, "Truth and Reconciliation Commission of Canada: Calls to Action," paras.43-44, http://www.trc.ca/assets/pdf/Calls_to_Action_English2.pdf; National Inquiry on Missing and Murdered Indigenous Women and Girls, 2019, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b," p.117 (Calls for Justice, para.1.2.v), https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf.
[7]*United Nations Declaration on the Rights of Indigenous Peoples Act*, (Private Member's Bill C-641), House of Commons, 2nd sess., 41st Parl., First reading (Introduced by Romeo Saganash on December 12, 2014.
[8]*United Nations Declaration on the Rights of Indigenous Peoples Act*, (Private Member's Bill C-262), House of Commons, 1st sess., 42nd Parl., First reading.
[9]Saganash, Romeo, Speaking Notes at National Leadership Forum: Overview of the UN Declaration (Panel 1), hosted by Assembly of First Nations, February 10, 2021.
[10]See, *e.g., R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 28: "s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law". See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007), Annex, preambular para. 7: "Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples".
[11]Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/26/27 (27 June 2014) (adopted without a vote), preamble: "*Reaffirming also* that it is the primary responsibility of States to promote and protect human rights"; General Assembly, *Human rights and transnational corporations and other business enterprises*: Note by the Secretary-General, UN Doc. A/68/279 (7 August 2013), para. 6: "...States as parties to international human rights treaties are the principal bearers of human rights obligations and that they have a duty to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction."; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, UN Doc. A/HRC/25/55 (23 December 2013), para. 129: "States have the primary responsibility to ensure that defenders work in a safe and enabling environment."; Human Rights Council, *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin*

Georgescu, UN Doc. A/HRC/21/48 (2 July 2012), para. 50: "...States have a primary duty to protect against human rights abuses by third parties, including business enterprises".

[12]Concerning the *UN Declaration*, S. James Anaya, former Special Rapporteur on the Rights of Indigenous Peoples, mentions that it "confers a pivotal role to State actors in the promotion and protection of the rights affirmed therein," and "Implementing the Declaration will normally require or may be facilitated by the adoption of new laws or the amendment of existing legislation at the domestic level" (UN Doc. A/HRC/9/9, 11 August 2008, paras. 44 and 50). His successor, Victoria Tauli-Corpuz, also asserts, "The effective implementation of the rights of indigenous peoples requires States to develop an ambitious programme of reforms at all levels to remedy past and current injustices. This should involve all the branches of the State, including the executive, legislative and judiciary, and implies a combination of political will, legal reform, technical capacity and financial commitment." (UN Doc. A/72/186, 21 July 2017, para. 22).

[13]See the report on his visit to Canada by S. James Anaya as the Special Rapporteur, UN Doc. A/HRC/27/52/Add.2, 4 July 2014. In another report, he also points out the remaining "implementation gap" as a significant issue in general, building on his former Special Rapporteur, who noted that "recent processes of constitutional and legal reform in various countries have not necessarily led to actual changes in the daily lives of indigenous peoples, and an 'implementation gap' continues to exist between 'legislation and the day-to-day reality'" (UN Doc. A/HRC/9/9, 11 August 2008, para.55).

[14]Victoria Tauli-Corpuz also asserts, "implementation of the *Declaration* cannot happen without the full and effective participation of indigenous peoples at all levels of decision-making" (UN Doc. A/HRC/27/52/Add.2, 4 July 2014, para.22).

[15]*International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), of 16 December 1966, entry into force 23 March 1976; Can. T.S. 1976 No. 47, accession by Canada 19 May 1976; and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI) of 16 December 1966, entry into force 3 January 1976; Can. T.S. 1976 No. 46, accession by Canada 19 May 1976.

[16]Multiple courts and tribunals in Canada have ruled that the *UN Declaration* can be used when interpreting domestic laws. See, for example, *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20; *Servatius v. Alberni School District* No. 70, 2020 BCSC 15, para. 37; *Pastion v. Dene Tha' First Nation*, 2018 FC 648, para. 10; . *Servatius v. Alberni School District* No. 70, 2020 BCSC 15, para. 37, and *Adoption – 1212*, [2012] R.J.Q. 1137 (Court of Québec (Youth Division)), paras. 587-590 (unofficial translation). In 2012, Canada also indicated to the Committee on the Elimination of Racial Discrimination over the state report that "Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution" (UN Doc. CERD/C/SR.2142, 2 March 2012, para. 39).

[17]Paul Joffe, 2021, " Non-Derogation Clause in Bill C-15: A Brief Analysis," https://www.afn.ca/wp-content/uploads/2021/01/C-15_Analysis_ENG-1.pdf.

[18]For instance, the Supreme Court of Canada says, concerning the Preamble to the *Constitution Act, 1867*, that "the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language. ... However, in my view, it goes even further. ... It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867," and "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law." (*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, para.95).

May 2021

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