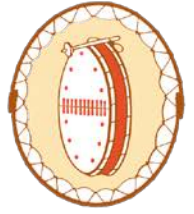




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28 January 2021

UN Declaration on the Rights of Indigenous Peoples

Understanding Bill C-15

On December 3, Justice Minister David Lametti tabled Bill C-15 that, if passed into law, will create the legal framework for the federal implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.

The tabling of the Bill follows commitments made by the Trudeau government after a previous implementation bill, Romeo Saganash’s private Member’s Bill C-262, was blocked by stalling tactics in the Senate in 2019. As promised, the Liberals tabled a government bill before the end of 2020 that built on the “floor” of C-262.

It is important to recall that Romeo Saganash undertook national tours and other speaking engagements to inform Indigenous and non-Indigenous communities across Canada in regard to the contents and significance of Bill C-262.

In addition, since the time of the *Declaration’s* adoption, the Grand Council of the Crees (Eeyou Istchee) [or GCC(EI)] has participated in countless workshops and presentations on the *UN Declaration* as well as C-262 in more recent years.

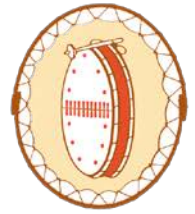
In the view of the, GCC(EI) / Cree Nation Government, Bill C-15 not only contains the essential elements of C-262, it also builds on C-262 in a number of important ways.

To become law, the Bill must still be considered by committees of both the House of Commons and the Senate and be adopted by a vote of both Houses. As a government Bill, it will not be as easy to block as C-262. However, given that this is a minority government, the window for passing the Bill into law may be short.

This document provides a brief commentary on the text of Bill C-15, as well as a comparison with common elements in C-262.



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Section one: Preamble

Bill C-15 includes a much longer preamble than Bill C-262. The preamble to any legislation is a crucial guide as to how the law will be interpreted and applied in the future. In the case of Bill C-15, the preamble is particularly important because the bill is intended to set in motion an ongoing process of implementation that is intended to continue regardless of any changes in government. If Bill C-15 is passed into law, a solid understanding of Indigenous rights and the federal government's corresponding obligations is crucial.

The status of C-15 as a decolonizing lens for all discriminatory laws and policies is secured by the preamble, building on the *UN Declaration*.

In light of the crucial role of preambles, it is important to underline that they do have legal effects. As confirmed in section 13 of the federal *Interpretation Act*, there is no doubt that the preamble of Bill C-15 will have legal effect when the Bill is enacted:

The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.¹

The following is a brief commentary on the provisions of the preamble. The first paragraph of the preamble states:

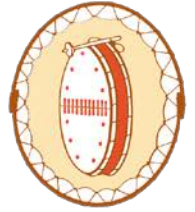
Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith.²

The paragraph sets the tone for the bill. The importance of the *Declaration* to peace, harmonious and cooperative relations, and the principles of justice, democracy, respect for human rights, non-discrimination and good faith are all found in the preamble of the *Declaration* itself and in its final article, Article 46. The reference to “reconciliation” reflects conclusions from both the UN Permanent Forum on Indigenous Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples. The GCC(EI) / CNG has been very active in these international bodies.

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.



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This second paragraph of the preamble echoes Article 43 of the *Declaration* which states that the rights recognized in the *Declaration* constitute global minimum standards. Bill C-15 builds on this by stating that these minimum standards “must be implemented in Canada.”

Whereas, in the outcome document of the high-level plenary meeting of the General Assembly of the United Nations known as the World Conference on Indigenous Peoples, Canada and other States reaffirm their solemn commitment to respect, promote and advance the rights of Indigenous peoples of the world and to uphold the principles of the Declaration;

Whereas, in its document entitled Calls to Action, the Truth and Reconciliation Commission of Canada calls upon federal, provincial, territorial and municipal governments to fully adopt and implement the Declaration as the framework for reconciliation, and the Government of Canada is committed to responding to those Calls to Action;

Whereas, in its document entitled Calls for Justice, the National Inquiry into Missing and Murdered Indigenous Women and Girls calls upon federal, provincial, territorial, municipal and Indigenous governments to implement the Declaration, and the Government of Canada is committed to responding to those Calls for Justice;

These three paragraphs of the preamble provide context for the importance and urgency of implementation in Canada. The preamble accurately notes that the Truth and Reconciliation Commission and the National Inquiry on Missing and Murdered Indigenous Women and Girls both called for implementation of the *Declaration* by all levels of government in Canada.

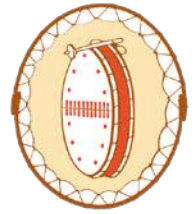
Whereas First Nations, Inuit and the Métis Nation have, throughout history and to this day, lived in the lands that are now in Canada with their distinct identities, cultures and ways of life;

Whereas Indigenous peoples have suffered historic injustices as a result of, among other things, colonization and dispossession of their lands, territories and resources;

While it is important to emphasize that all Indigenous peoples have their own distinctive history, the above two paragraphs set the implementation in the context of Canada’s colonial history.



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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;

This paragraph links implementation of the *Declaration* to the urgent necessity of addressing injustice, prejudice, and all forms of violence and discrimination, including systemic discrimination. Identical language is found in the operative paragraphs of the Bill as discussed below. This language is particularly significant given the events of the last year, where tragic loss of life has highlighted persistent issues of systemic racism in Canada – even as some governments and officials have refused to use the word “systemic.” This is one of the areas where Bill C-15 goes beyond Bill C-262. At the same time, it would be important to add a specific reference to “racism” in C-15.

Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust;

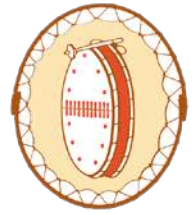
Whereas the Government of Canada rejects all forms of colonialism and is committed to advancing relations with Indigenous peoples that are based on good faith and on the principles of justice, democracy, equality, non-discrimination, good governance and respect for human rights;

Similar language is also found in the preamble to the *UN Declaration* and is key to its interpretation. In C-15, the “doctrines of superiority” referred to include the Doctrines of Discovery and Terra Nullius. In the past, these doctrines have been applied by Canadian courts to justify the dispossession of Indigenous peoples. However, in 2016, the Supreme Court of Canada ruled in *Tsilhqot’in Nation v. British Columbia*: “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada”.

Whereas the Declaration emphasizes the urgent need to respect and promote the inherent rights of Indigenous peoples of the world which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, philosophies and legal systems, especially their rights to their lands, territories and resources;



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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;

These paragraphs provide a clear statement that Canada recognizes the rights of Indigenous peoples are “inherent” or pre-existing based on Indigenous peoples’ own governance, laws and traditions – rather than being granted by this or any other law of Canada – and include the right to self-determination. The second of the two paragraphs also states that Canada understands that all its relations with Indigenous peoples must not only recognize this reality, but most also put such recognition into practice.

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;

This paragraph recognizes that measures to implement Canada’s obligations must be “effective.” This is a term that has been previously interpreted in human rights law as including timeliness and cultural appropriateness. Furthermore, the paragraph states that these measures must be taken in “consultation and cooperation” with Indigenous peoples. This is consistent with the wording of the *Declaration* which consistently refers to consultation and cooperation or “in conjunction” with Indigenous peoples. It also illustrates that Indigenous peoples are both national and international actors.

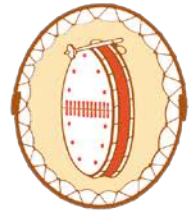
Whereas the Government of Canada is committed to exploring, in consultation and cooperation with Indigenous peoples, measures related to monitoring, oversight, recourse or remedy or other accountability measures that will contribute to the achievement of those objectives;

As discussed below, Bill C-15 includes monitoring and oversight provisions, but does not spell out what should happen if the government fails to uphold its responsibilities. This paragraph in the preamble opens the door to additional accountability measures for recourse and remedy being developed in the course of implementation. The paragraph also relates to the right to an effective remedy, which is affirmed in art. 40 of the *UN Declaration*.

Whereas the implementation of the Declaration can contribute to supporting sustainable development and responding to growing concerns relating to climate change and its impacts on Indigenous peoples;



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This paragraph is another example of where C-15 goes beyond C-262, as it indicates some of the diverse ways that the *Declaration* is relevant to crucial policy issues and needs to be considered in these new contexts. Climate change is one of the greatest challenges of our time, especially in relation to Indigenous peoples. Sustainable development not only is essential to Indigenous peoples, but also contributes to mitigating the adverse effects of climate change.

Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;

Whereas the Government of Canada welcomes opportunities to work cooperatively with those governments, Indigenous peoples and other sectors of society towards achieving the objectives of the Declaration;

While there are important aspects of *UN Declaration* implementation that are beyond the scope of federal legislation, these paragraphs encourage cooperation and collaboration among all levels of government and all sectors of society to achieve the objectives of the *Declaration*.

Whereas the Declaration is affirmed as a source for the interpretation of Canadian law;

The paragraph is a statement of the current reality that federal and provincial courts and tribunals are already using the *Declaration* to interpret Indigenous rights and related government responsibilities – even in the absence of *UN Declaration* legislation.

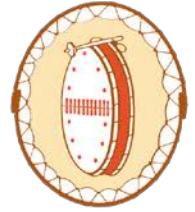
Whereas the protection of Aboriginal and treaty rights — recognized and affirmed by section 35 of the Constitution Act, 1982 — is an underlying principle and value of the Constitution of Canada;

Whereas there is an urgent need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements and other constructive arrangements, and those treaties, agreements and arrangements can contribute to the implementation of the Declaration;

These paragraphs acknowledge the importance and urgency of upholding the inherent rights of Indigenous peoples that are now also recognized and affirmed in Canada's Constitution and in Treaties and other agreements between the Crown and Indigenous peoples. The *Declaration* can be used to interpret these existing obligations, which are not frozen in time.



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Whereas respect for human rights, the rule of law and democracy are underlying principles of the Constitution of Canada which are interrelated, interdependent and mutually reinforcing and are also recognized in international law;

The principle that human rights are “interrelated, interdependent and mutually reinforcing” – in other words, that no right can be fully understood or properly protected in isolation from other rights – is a defining principle of international human rights law.

And whereas measures to implement the Declaration in Canada must take into account the diversity of Indigenous peoples and, in particular, the diversity of the identities, cultures, languages, customs, practices, rights and legal traditions of First Nations, Inuit and the Métis and of their institutions and governance structures, their relationships to the land and Indigenous knowledge;

The final paragraph of the preamble makes it clear that the intention of the bill is not to take a “one size fits all” approach to implementation, but instead to acknowledge and respect the diversity and distinctiveness of all Indigenous peoples. In other words, the bill takes a distinctions-based approach.

Section 2: Interpretation

Federal legislation often contains an interpretation section defining key terms and providing clarity, especially where there may be a risk of misinterpretation. The interpretation section of this bill clarifies that, when it refers to the *Declaration*, it is referring to the final text of the *Declaration* as adopted by the UN General Assembly on September 13, 2007. It also clarifies that references to Indigenous peoples in this context are interchangeable with the term “aboriginal peoples,” which in the Canadian Constitution is defined as referring to First Nations, Inuit and Métis peoples.

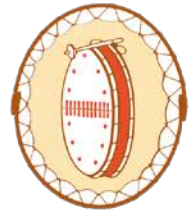
The interpretation section also states in 2(2):

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.

The purpose of the *Declaration* is to set out minimum global standards. The *Declaration* is clear, in Article 45, that it should never be applied in a way that would diminish or extinguish any rights that Indigenous peoples have now or may acquire in the future.



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The above non-derogation clause affirms that, in elaborating on Indigenous peoples' rights in the preamble and operative provisions, Bill C-15 is "upholding" the rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.

The above interpretation of s. 2(2) of Bill C-15 is further reinforced by the federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Bill C-15 must be interpreted as upholding Indigenous peoples' rights. In no way, can the Bill be interpreted as diminishing our human rights. Bill C-15 is wholly consistent with Indigenous peoples' rights in the *UN Declaration* and other international human rights law.

Section 3: Designating a "Minister"

The Bill contains several provisions where responsibility for implementation is assigned to a government Minister. The Bill does not specify whether that will be the Minister of Justice (who led the development of this Bill) or another member of Cabinet. Section 3 states that this will be determined at a later date and can be changed based on the circumstances at that time:

3 The Governor in Council may, by order, designate any federal minister to be the Minister for the purposes of any provision of this Act.

Section 4: Purposes of the Act

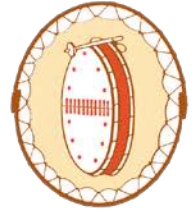
Even more than the preamble, the purposes section of the bill is crucial to interpretation. Two purposes are named in the Bill.

*4 (a). affirm the Declaration as a universal international human rights instrument **with application in Canadian law** [emphasis added]*

This again is a reflection of the reality that the *Declaration* is already being used by Canadian courts and tribunals as a tool to interpret Canadian law. The inclusion of this affirmation in the purposes of the Bill is important to dispel some of the confusion that has resulted from years of government opposition to the *Declaration* and misinformation about its legal effect in Canada. The same provision was included in Bill C-262.



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4 (b). *provide a framework for the Government of Canada's implementation of the Declaration.*

Bill C-15 will not immediately enshrine all the rights in the *Declaration* as Canadian law. Rather, it sets out processes for the implementation of the *Declaration*. This was implicit in Bill C-262. It is made explicit in Bill C-15.

See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014), at 281:

§14.38 Definition of purpose statement. Strictly speaking a purpose statement ... is not a descriptive component but rather a type of **interpretation** provision. Its function is to set out the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Purpose statements are found near the beginning of Acts and at the beginning of Divisions, Parts or particular provisions within Acts. Some are explicit and begin with the words “The purposes of the Act are ...”

§14.39 Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms or policies. Unlike principles, **purpose statements come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense they carry the authority and weight of duly enacted law.** However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation - that do apply to facts – are to be interpreted. [emphasis added]

Section 5: Consistency

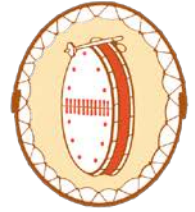
The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

Like Bill C-262, Bill C-15 sets out two key ways in which the Government of Canada must work together with Indigenous peoples to implement the *Declaration*.

This provision does not immediately alter any existing law. What it does is call for an ongoing collaborative process of legal review and reform.



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Section 6: Action Plan

The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.

An additional way that the *Declaration* will be implemented is through the development of an action plan, something that was also required in Bill C-262.

Bill C-15 provides much greater detail than C-262 on the elements that such an action plan must contain. It is important to note however that there is nothing in the Bill to prevent other elements being considered and adopted in a plan.

The Bill states that an action plan “must include measures to”

6 (2) (a)(i) 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, and

(ii) promote mutual respect and understanding as well as good relations, including through human rights education;

The Bill also states that an action plan must include

6 (2) (b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.

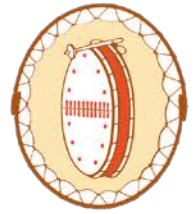
6 (3) ... measures related to monitoring the implementation of the plan and reviewing and amending the plan.

6 (4) The preparation of the action plan must be completed as soon as practicable, but no later than three years after the day on which this section comes into force.

The Bill provides a deadline for completion of the action plan, while encouraging efforts to complete the plan before this deadline.



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6 (5) The Minister must cause the action plan to be tabled in each House of Parliament as soon as practicable after it has been prepared.

6 (6) After the action plan is tabled, the Minister must make it public.

The Bill also requires the action plan to be tabled in the House of Commons and Senate and to be made public. These are crucial measures for accountability and transparency.

7. Annual report to Parliament

7 (1) Within 90 days after the end of each fiscal year, the Minister must, in consultation and cooperation with Indigenous peoples, prepare a report for the previous fiscal year on the measures taken under section 5 and the preparation and implementation of the action plan referred to in section 6.

(2) The Minister must cause the report to be tabled in each House of Parliament on any of the first 15 days on which that House is sitting after the report is completed.

(3) The report stands permanently referred to the committee of each House of Parliament that is designated or established to review matters relating to Indigenous peoples.

(4) After the report is tabled, the Minister must make it public.

An additional accountability measure is the requirement for regular reporting to Parliament and the provision for these reports to be examined in a Parliamentary committee, as well as made public.

¹ *Interpretation Act*, R.S.C. 1985, c. I-21.

² Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014), para. 1.

Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-E/C.19/2015/10, para. 33: “...implementation of the United Nations Declaration provides a common framework for **reconciliation, justice, healing and peace**. Each State has a prime responsibility and duty to protect, promote and implement all human rights, consistent with the Charter of the United Nations and international human rights law.