Bill C-15 (UNDRIP Act) Commentary

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EXECUTIVE SUMMARY

Bill C-15 is the Government of Canada's attempt to establish a process for the domestic implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The need for this type of legislation is the result of the complex and often misunderstood relationship between Canadian domestic law and international law. UNDRIP is part of international law. But whether and how it applies domestically in Canada depends on its status at international law and the steps taken domestically to incorporate it into law.

This article attempts to add to the discussion about Bill C-15 by identifying what it does and does not do in its present form and recommends some changes that might help it do more. We also question some of the assumptions about the status of UNDRIP at international law and its place in Canadian domestic law that have characterized much of the discussion to date.

The key takeaways are that:

- Bill C-15 does not implement UNDRIP directly into Canadian law and it is not intended to change Canadian law immediately. Rather, it establishes a process that could make federal laws and policies consistent with UNDRIP.

- The principles of UNDRIP can, should and have been used as an interpretive tool for domestic law. This means that the laws of Canada should be interpreted in ways that are presumed to conform with the principles of UNDRIP. The Bill goes some way to clarifying this use as an interpretive tool, but could be strengthened.

- While UNDRIP is a non-binding declaration, the principles of UNDRIP are expressions of binding international law, sourced from treaties, conventions, and customary international law. Therefore, these principles should be given the highest interpretive weight. As well, in the case of principles that form part of customary international law, they are already a source of Canadian common law, a point which Bill C-15 is currently not clear on. UNDRIP can and should be used to interpret Canada's substantive and procedural constitutional obligations to Indigenous peoples, including s 35 of the *Constitution Act, 1982* and ss 91 and 92 of the *Constitution Act 1867*. Canada's stated intention of UNDRIP implementation was to "breathe new life" into s 35 – it would be anomalous if the Crown used s 35 to shield itself from international Indigenous rights protections.

- The Bill's Action Plan for *implementation* of UNDRIP should not delay the *application* of UNDRIP's principles in the ways of described above. Instead, it should be an opportunity for Indigenous peoples and government to review policies, regulations and laws to ensure that UNDRIP's principles are fully implemented going forward.

At the end of this blog post, we propose revisions to the text of Bill C-15 to add clarity on how UNDRIP should be used in Canadian law, both as an interpretive aid and as a source of common law, and how it should be used by federal employees and decision-makers. We propose language to clarify the intended application to historical and modern treaties and the intersection with s 35 rights. We also propose additional language to ensure that the Action Plan involves a comprehensive policy and legislative review to bring both federal legislation and federal policies into conformity with UNDRIP.

INTRODUCTION

UNDRIP was adopted by the UN General Assembly in 2007. At that time, Canada did not support or adopt it, but later Canada became a "full supporter, without qualification" of it in 2016.[1]

Previous steps were made to move toward the domestic implementation of UNDRIP by private members bills introduced by MP Romeo Saganash (Bill C-641 in 2014 and Bill C-262 in 2016). Neither of these passed.

The current Bill C-15 is a government bill attempting to establish a process for the domestic implementation of UNDRIP. A comparison of Bill C-262 and Bill C-15 by Mary-Ellen Turpel Lafond for the Assembly of First Nations shows that Bill C-15 is consistent with Bill C-262 and in fact contains some improvements. See https://www.afn.ca/wp-content/uploads/2020/12/NC-Bulletin-on-Tabling_Comparison.pdf.

THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

To understand the purpose and effects of Bill C-15, one must keep in mind the general relationship between international and domestic law, and, among other things, the different meaning that "binding" has in those spheres.

If something is binding in domestic law, it means that domestic courts will enforce it by punishing breaches, or by ordering compensation for them, backed up ultimately by the state's policing power. In the international sphere, there is no real equivalent to a domestic court having such coercive power. If something is "binding" in international law, it means that there could be international law remedies for its breach, such as diplomatic steps or economic sanctions or even military steps by other states. There are also various UN bodies that could publish opinions or reports condemning breaches of international law. But none of these bodies have a direct coercive enforcement power. International law functions by persuasion, or by convincing other states to take some action against an offending state.

Principles of international law, however, can become incorporated into domestic law, at which point such principles could be enforced by state courts, as any other provision of domestic law. There are three ways in which international law principles can become so domesticated. First, international law principles can be used as an aid to interpret domestic law, thus nudging domestic law closer to international law. This can only go as far as clarifying ambiguities in domestic law – international law cannot be used by a domestic court to overrule or alter clear statutes. Second,

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[1] https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html

an international law instrument could be directly adopted and enacted by a domestic statute. That would give the provisions of such international law instrument domestic statutory force. Third, principles of international law that are established by custom (as opposed to being created by an international agreement) are considered as having been adopted into domestic common law, unless they were inconsistent with a statute of the state.

It is because of this complicated relationship between international and domestic law that there has been a move to explicitly implement UNDRIP domestically in Canada.

WHAT BILL C-15 DOES AND DOES NOT DO

Bill C-15 is styled as the *United Nations Declaration on the Rights of Indigenous Peoples Act*. It does not, however, implement UNDRIP directly into Canadian law. The Bill includes an extensive preamble. While this does not directly create rights, it is far more specific and emphatic than Canada's 2016 statement of support for UNDRIP and elaborates on some of its principles.

The Department of Justice has prepared a backgrounder that makes it clear that the Bill is not intended to change Canadian law immediately. According to the Department of Justice:

- "If passed, this legislation would not change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in other legislation…"
- "The Bill does not create new obligations or regulatory requirements for industry…"
- "Bill C-15 does not immediately change any operations, policies, or laws related to the Department of Fisheries and Oceans or the Canadian Coast Guard."
- "Nothing in the federal legislation would prevent provinces or territories from developing their own plans and approaches for implementation of the Declaration, *or require them to do so*."[2]

What the Bill does do is to establish a process that could make federal laws consistent with UNDRIP. The Department of Justice has described this as "a shared road map for Indigenous peoples, industry, communities and government to work better together."[3]

The process set out appears to be in two parts. First, the Government of Canada "must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure the laws of Canada are consistent with the Declaration" (s 5). Second, the Minister must prepare an action plan to achieve the objectives of UNDRIP within the next three years, "in consultation and cooperation with Indigenous peoples" (s 6). However, it is unclear how these two parts are related to one another. As currently drafted, the Action Plan under s 6 does not contain the type of broad legislative and policy review that appears to be contemplated in the Government's own review of its laws under s 5. Instead, the Action Plan is about proposing measures of various types. It would be important to clarify that the Action Plan is intended to include review and revision of existing laws and policies.

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[2] Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act, https://www.justice.gc.ca/eng/declaration/about-apropos.html
[3] Ibid.

The Bill would require annual reports to Parliament on measures taken under the Bill. Reporting on the Action Plan and proposed measures would presumably include suggestions for legislative amendments, which could then be considered by Parliament. But again, the intersection of the Government's own legislative and policy review and the Action Plan is unclear. It would be important to clarify the Government's obligations in reporting to Parliament on its review and proposing necessary amendments to legislation and new legislation where required.

Overall, the Bill, if passed, would not make any direct substantive changes in Canadian law. Rather, it would initiate a process that might lead to such substantive changes. The process would also apply to federal laws only. It would not affect provincial laws. If provincial laws are to be made consistent with UNDRIP, this would require a separate process with each province. British Columbia now has legislation in place somewhat similar to the federal Bill C-15.[4]

Beyond this, the Bill does clarify that UNDRIP is a source of interpretation of Canadian law. Already courts are using UNDRIP as an aid in interpreting statutes and common law, both federal and provincial. The language of the Bill would, in our view, assist courts in this process by making what was required more explicit. We discuss this in more detail in the next section.

UNDRIP'S CURRENT APPLICATION IN CANADIAN LAW

There appears to be some confusion about whether and how the principles of UNDRIP would apply in Canadian law once the Bill is enacted: Is there any immediate application in Canadian law or does this have to wait for outcomes of the implementation process?

The Bill itself states in s 2(3) that "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law," and, in s 4, affirms UNDRIP as "a universal international human rights instrument with application in Canadian law". These provisions appear to point to UNDRIP's accepted principles already applying in Canadian law. However, the Department of Justice's backgrounder states that essentially nothing in Canada's domestic law will change as a result of the enactment of the Bill and that any such changes will be through the implementation process. This runs counter to the affirmative language in the Bill itself.

The answer to this depends on how the provisions of UNDRIP relate to the three ways in which international law principles can interact with Canadian law: as an interpretive aid; by incorporation by statute; and by incorporation of customary international law into the common law.

Application of UNDRIP as an Interpretive Aid

First, as noted above, the principles of UNDRIP can, should and have been used as an interpretive tool for domestic law. This is not controversial, and is already happening. There is no need to wait for any implementation process. The preamble affirms UNDRIP as "a source for the interpretation of Canadian law". The Bill states that its purposes is to "affirm the Declaration as a universal international human rights instrument with application in Canadian law" (s 4). The backgrounder from the Department of Justice confirms that "the Declaration is an important source to interpret provincial and federal law…[and] provincial and federal courts are already using the Declaration

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[4] Declaration On The Rights Of Indigenous Peoples Act, SBC 2019 c 44, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044

in this regard".[5] This appears to confirm that UNDRIP's principles can be immediately used as an interpretive tool

The real uncertainty, however, is how UNDRIP principles are to be used, and what weight they are to be given. As we discuss below, while UNDRIP is itself a non-binding declaration, the principles of UNDRIP are expressions of binding international law, sourced in treaties and conventions, as well as in customary international law. As such, they should be given the highest interpretive weight, and there should be a strong presumption that Canadian laws conform to them. Given the apparent confusion about the relationship in the domestic application of international law, it would be advisable that UNDRIP's status and the nature of its application be clarified in the Bill. What type of "international human rights instrument" is it and what consequences does that have?

Our concern is that the use of UNDRIP as an interpretive tool, without further statutory or policy guidance, will be narrow and limited. One of the problems is that UNDRIP is often seen as a standalone document, which is non-binding and aspirational in nature. Indeed, Canada's early statements about it reflect this view. This means, as some commentaries have hastened to point out, that it may be given more limited interpretative weight.

What this view ignores is that UNDRIP "does not create new rights but elaborates on existing ones that are enshrined in various international human rights treaties and instruments, placing them in the context of indigenous peoples' realities."[6] Many of the core principles expressed in UNDRIP are in fact expressions of long-standing binding international law, whether contained in treaties or in customary international law. Domestic laws are presumed to conform with these obligations and should be interpreted accordingly. Canada's laws and constitution should be presumed to provide protection at least as great as that afforded by the provisions of UNDRIP that restate binding international law.[7] There is a long tradition of using international law to inform the interpretation of protections under the *Charter of Rights and Freedoms*, for instance.

Bill C-15 seems to recognize the binding status of UNDRIP's principles. The preamble acknowledges the status of the principles of UNDRIP as "the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world". It would useful for Bill C-15 to clarify the bearing that this has on the interpretation of Canadian law. Also, consequential amendments to *Interpretation Act*, operational statutes that affect Indigenous rights, and departmental policy guidance should ensure that UNDRIP's principles are not inappropriately read-down or disregarded.

Application of UNDRIP Principles as Existing International Treaty Obligations

As noted above, in addition to their use as interpretive aids, obligations in international treaties can be domesticated by incorporation into a statute, making them directly enforceable

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[5] Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act, https://www.justice.gc.ca/eng/declaration/about-apropos.html .

[6] *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians N 23*, at p 13, https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf

[7] *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, at paras 30-34, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18529/index.do.

domestically. It turns out that much of the content of UNDRIP is based on existing binding international treaties, including the *International Convention on Civil and Political Rights*; *Convention on the Elimination of All Forms of Racial Discrimination*; *Convention on the Rights of the Child*; *Convention on the Protection and Promotion of the Diversity of Cultural Expression*; *Convention for the Safeguarding of Intangible Cultural Heritage*; *American Declaration on the Rights and Duties of Man*; and *American Convention of Human Rights*.[8]

Unless the relevant provisions of such international treaties have already been incorporated into Canadian statute law, doing so would be part of the process, set out in the Bill, of ensuring that the laws of Canada are consistent with UNDRIP.

Application of UNDRIP Principles as Reflecting Customary International Law

Additionally, beyond being included in binding international treaties, the principles of UNDRIP are also in many cases expressions of customary international law. Thus, they are already incorporated into Canadian common law.

Unlike international law arising from treaties, customary international law arises from established international practices. Both are equally binding on states, with an important distinction: laws arising from treaties must usually be incorporated into state law through legislation, while customary international law automatically becomes part of Canadian common law, unless it is inconsistent with a clear statute.[9]

What UNDRIP does is restate binding international law, sourced both in treaties and in customary international law, in the specific and unique context of Indigenous peoples. Indigenous peoples long struggled with their inability to assert these international norms and to vindicate their rights because they had no standing at international law. UNDRIP was an attempt to address that standing issue and to restate existing rights as they relate to Indigenous peoples, not to create new rights. As the International Law Association has put it: "the adoption of UNDRIP, after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties".[10]

While it is beyond the scope of this comment to describe all of the principles of UNDRIP that are expressions of binding international law, the International Law Association has offered several key examples:[11]

- Indigenous peoples' right of self-determination to decide what their future should be, within the territories in which they traditionally lived;

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[8] International Law Association, ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175897 , pp 44-49

[9] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5, at paras 94-96, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do.

[10] International Law Association, ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175897 , p 51.

[11] Ibid, at pp 51-52.

- The right to be represented in the national government;
- The right to participate in national decision-making with respect to decisions that may affect their rights or their ways of life;
- The right to be consulted with respect to any project that may affect them;
- The right that any project that may significantly impact their rights and ways of life not be carried out without their prior, free and informed consent;
- The right to regulate autonomously their internal affairs according to their customary law and to establish, maintain and develop their own legal and political institutions, in a way that is consistent with the rules on fundamental human rights;
- The right to recognition and preservation of their cultural identity;
- The right to use ancestral lands and natural resources according to their own tradition;
- The right to profess and manifest their religion in community with the other members of the group;
- The right to pursue their traditional medicines and burial traditions;
- The right to their traditional lands and natural resources;
- The right to restitution for ancestral lands from which they have been removed;
- The right to redress for any breaches of these rights;
- The right that all treaties and agreements with the state shall be honoured.

Suggested Clarifications

Below we suggest some specific amendments to Bill C-15 to address the points noted above that that UNDRIP expresses principles of binding international law and should be given the highest persuasiveness and weight in the interpretation of Canada's laws and constitution, and that Canada's laws and constitution should be presumed to provide protection at least as great as that afforded by UNDRIP.

There are also points where the Bill appears to paraphrase parts of UNDRIP, but omits some significant points. For example, the Preamble recognizes that the principle 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." This is a paraphrase of Article 4 of UNDRIP, but it omits the requirement to provide the "ways and means for financing their autonomous functions." We recommend this be included.

RELATION OF UNDRIP AND CANADIAN CONSTITUTION

Legal Structural Issues

As we discussed above, UNDRIP, as one of Canada's international commitments and a restatement of other binding international law, is a source for the interpretation of Canadian law. This is affirmed explicitly in the preamble of Bill C-15, as well as being the underlying common law. Given the importance of the rights contained in UNDRIP and their relation to well-established international law and human rights principles, this interpretive principle can and should include UNDRIP being used to interpret the constitution. This means using UNDRIP to inform the interpretation of Canada's obligations to Indigenous peoples under s 35 of the *Constitution Act, 1982,* as well as other constitutional provisions as they uniquely relate to Indigenous peoples. It would be anomalous if s 35, which was adopted into the *Constitution* to protect Indigenous peoples and their rights, actually came to shield the Crown from the development of those protections to better reflect international law.

According to the Department of Justice backgrounder, Canada accepts that UNDRIP should be used to interpret its constitutional obligations. However, Canada appears to view this as largely procedural, rather than as informing its substantive obligations to Indigenous peoples:

> "If passed, this legislation would not change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in other legislation like the new *Impact Assessment Act*. What it would do is inform how the Government approaches the implementation of its legal duties going forward."

We believe that the principles in UNDRIP should be used to inform both the substantive and procedural aspects of Canada's constitutional obligations to Indigenous peoples. Rather than s 35 jurisprudence being used to read-down UNDRIP principles, those principles – some of which represent binding international law and customary international law – should be used to "breathe new life" into the interpretation and application of s 35.[12] That was what was promised by this Government when it promised to adopt UNDRIP, and it would be consistent with the way courts have used international legal norms to inform the application of the *Charter of Rights and Freedoms* for decades.

We note that this is the opposite direction of some interpretations being discussed – favoured by some and feared by others – that UNDRIP should be interpreted through the lens of Canada's s 35 jurisprudence. Those aligned with resource developers tend to propose that Bill C-15 be clarified to say that UNDRIP should be interpreted through the lens of Canada's s 35 jurisprudence. That, in turn, is what is feared by some pro-Indigenous commentators. But this is not the relationship between international law and domestic law, nor what Bill C-15 would enact.

Bill C-15 has an explicit affirmation that UNDRIP is a source for the interpretation of Canadian law. Bill C-15 has another clause that provides that the "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."[13] This means that UNDRIP is not to be used to diminish s 35 rights – not that existing legal definitions of s 35 rights should be used to limit UNDRIP's principles.

The principles of UNDRIP, which represent and restate the highest orders of international law, should not be diminished by s 35 or anything else. Instead, they should be used to push the development of Canadian law, including the interpretation of s 35, in a way to recognize greater rights for Indigenous peoples. As the Supreme Court recently affirmed, "the *Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." The same should be true of s 35.

The contents of UNDRIP do not all relate to the subjects embraced by s 35 of the constitution. Some may relate to other parts of the Canadian constitution – for example, Article 7 of UNDRIP (the rights to life, physical and mental integrity, liberty and security of person) is much more directly connected to s 7 of the Canadian *Charter* (right to life, liberty and security of the person) than it is to s 35. Article 17 of UNDRIP (labour law) relates to s 2(d) of the Canadian *Charter*

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[12] See Risa Swartz: Will Canada's support of UNDRIP "breathe new life" into Section 35 of the Constitution in the form of Free and Prior Informed Consent? | Centre for International Governance Innovation (cigionline.org)
[13] Bill C-15, s 2(2).

(freedom of association). What UNDRIP does is restate these rights and freedoms, which normally attach to individuals, in the unique context of Indigenous collectivities. Bill C-15 should clarify that UNDRIP is meant to be a source for *Charter* interpretation and that Canada recognizes the unique dimensions of human rights in Indigenous societies.

Neither do all of UNDRIP's provisions bear on the relationship between the Crown and Indigenous nations – some relate to the relationship between individuals and governments – perhaps including the relationships between Indigenous individuals and Indigenous governments, such as Article 44 (gender equality). Bill C-15 may also lend some support to Indigenous societies looking to incorporate human rights norms in ways that appropriately recognize the collective nature of their communities. UNDRIP should be used as a lens to interpret *Charter* rights in the unique relationship between Indigenous individuals and their governments, which is distinct from non-Indigenous parts of Canadian society.[14]

FPIC

The debate about whether UNDRIP should inform the interpretation of s 35 of the *Constitution Act, 1982* or *vice versa* is really triggered by concerns about whether UNDRIP's "free, prior and informed consent" (FPIC) is a "veto" and how it relates to s 35, the interpretation of which includes the concepts of justified infringement and the duty to consult and accommodate. Such issues often arise in relation to resource projects. Indeed, Canada initially refused to adopt UNDRIP because the federal government thought that FPIC was "inconsistent" with the Canadian constitution, and viewed it as non-binding and "aspirational".

Hence, proposals abound (from those aligned with resource developers) that the law should be clarified to prevent the creation of an Indigenous veto (or an expectation thereof) over resource development projects. Our view is that such interpretations misunderstand both the content of Canadian law and of UNDRIP. It is not a matter of being "always a veto" nor "never a veto". In our view, neither Canadian law nor UNDRIP provide for a sweeping Indigenous veto across the board. But both of them do require Indigenous consent in some circumstances. Further, even without FPIC being treated as a categorical "veto", UNDRIP could advance the interpretation of the duty to consult, as discussed below.

Indigenous Consent is Already Part of Canadian Law

The duty to consult and accommodate arises when the Crown knows or ought to know that Aboriginal rights or title may exist (whether or not they are proven), and is considering action that may adversely affect such rights or title. It is well established that there is a spectrum of consultation and accommodation required, depending on the strength of the claim and the seriousness of the impact. For serious impacts on proven rights, consent may be required.

While courts have been said that the duty to consult and accommodate is "not a veto" we view this as meaning that the duty to consult and accommodate is not necessarily a veto, but that for a serious impact on a proven right, a project may not be permitted to go ahead without consent of the

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[14] John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges", in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, p. 25.

Indigenous group in question. In such a circumstance, it is not a matter of going through enough procedural steps – consent is a requirement.

Consider a situation where Aboriginal title has been established. The title holder has the right to exclusive use and occupation of the land held. The Supreme Court in *Tsilhqot'in* confirmed that "the Crown must seek the consent of the title-holding Aboriginal group to developments on the land".[15] If the Crown fails to obtain such consent, it can only proceed in a way that does not substantially deprive future generations of the benefit of the land, and where it can meet a heavy test to justify the infringement. Simply granting land subject to Aboriginal title to non-Indigenous people cannot be done without consent.

The aspects that consent must be "free", "prior" and "informed" are also already part of Canadian law. Courts have made clear that the process of consultation (even when consent is not required) must take place before decisions are made, must include the provision of appropriate information, and must not include coercive actions by the Crown. When consent is required, these considerations apply with even greater force.

UNDRIP's FPIC

Similarly, UNDRIP's FPIC requires governments to seek consent but is not an absolute veto either. Article 46 of UNDRIP provides for qualifications and limitations for the rights set out. Further, the UN Handbook for Parliamentarians on implementing UNDRIP distinguishes between when FPIC requires a government to "seek consent" and when it requires that consent be obtained.[16]

In short, the requirement for consent exists in both UNDRIP and the s 35 jurisprudence, and it does not always amount to an absolute veto. What UNDRIP does is substantially widen the requirement for governments to seek to obtain consent in good faith, to include all situations where the rights of Indigenous peoples may be affected. This is wider than the duty to consult and accommodate. This is something which the courts will need to address as the law concerning s 35 develops.

POSSIBLE IMPACTS OF BILL C-15

Stronger Source of Interpretation

As noted above, the Preamble to Bill C-15 is clear about using UNDRIP as a source for the interpretation of Canadian law. We have proposed it be even more emphatic and be more precise about the legal weighting and persuasiveness that UNDRIP's principles should be given when interpreting Canadian laws and constitutional obligations. In any event, the current references would be a strong reminder signal to the Courts about how they are to use UNDRIP.

Reset Crown and Public Attitude: UNDRIP is the Law

Bill C-15, if passed, would be a total repudiation of the idea, expressed by the previous Harper government, that UNDRIP was non-binding and "aspirational". This alone should be a signal to

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[15] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at para 90, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

[16] Implementing the UN Declaration on the Rights of Indigenous Peoples, Handbook for Parliamentarians No. 23, https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf, pp 27-30.

Crown officials, resource developers and the public. While many of the substantive legal changes would have to await the Government's own review process and the results of the Action Plan, the Bill affirms that UNDRIP applies in Canadian law. We have proposed that it go further to recognize how, right now, it is a source of law in Canada.

Duty To Consult and Accommodate Process ("DTCA")

The adoption of Bill C-15 could also give a push to the attitude with which Crown officials approach consultations. The Supreme Court has been very clear that the DTCA process is not just an opportunity for Indigenous people to "blow off steam" before the Crown goes ahead with what it had intended all along.[17] Rather, it is supposed to be a good faith effort "with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[18] Despite this, some Crown officials approach consultations as a matter of checking off all the right boxes of procedures that have been done, so that whatever decision that is in question can proceed as originally planned. Here is where UNDRIP could be of help, with its stress that the **objective** of consultations must be to obtain Indigenous consent.[19]

Start of a Process

Bill C-15, if passed, would commence a process of developing an action plan to achieve the objectives of UNDRIP. The plan is to be prepared within the next three years, "in consultation and cooperation with Indigenous peoples." There has been some criticism about this length of time. However, it is hard to imagine wide-ranging consultations with many different Indigenous governments taking less time than this, and to implement UNDRIP without such consultation would be contrary to UNDRIP itself.[20] Indeed, in addition to being explicit in Article 38 of UNDRIP, the guidance provided to parliamentarians for implementing UNDRIP stresses the importance of Indigenous participation in the development of legislation that affects Indigenous peoples including the implementation of UNDRIP.[21] For Indigenous peoples to object to such consultations would only provide an excuse for Canada to abandon the idea of implementing UNDRIP entirely.

Negotiating Tables

Many of the principles in UNDRIP are highly relevant to the matters being discussed at various negotiation tables with Indigenous groups concerning land rights and governance issues. The position Canada takes at these tables is strongly guided by federal policies. These policies are often at odds with the principles of UNDRIP, and, for that matter, at odds with some significant

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[17] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para 54, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2251/index.do.

[18] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 40, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2189/index.do?q=2004+SCC+73.

[19] Implementing the UN Declaration on the Rights of Indigenous Peoples, Handbook for Parliamentarians No. 23, https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf, p 28.

[20] Indeed, 3 years may be optimistic for such consultations to be concluded. See the many factors that would require being negotiated in Kerry Wilkins, "Strategizing UNDRIP Implementation" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws – Special Report*, Centre For International Governance Innovation, 2018.

[21] *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23*, p 31 & 38, https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf.

principles of Canadian domestic law. We therefore propose that Canada review its policies that govern negotiations with Indigenous Peoples and bring them into conformity with UNDRIP, in addition to a review of legislation.

One unfortunate result of this Bill is that federal officials at negotiation tables may refuse to discuss any matters touched on by UNDRIP, saying that this must come under the process to be established by Bill C-15 if it is passed, thus deferring important issues into the misty future. This has in fact already happened, although it seems to be a perverse interpretation of Bill C-15 in light of its purpose, and the explicit text of the Bill itself which says "Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law."[22] As set out below, this suggests that a current and explicit direction to federal officials would be an appropriate part of the Bill.

TECHNICAL DRAFTING LANGUAGE

Throughout the Bill, the words "must" or "should" are used frequently. While these sound imperative, the legal drafting convention is to use words like "shall" or "is to" to convey a command. We identify a number of such examples below, and suggest corresponding amendments.

SUMMARY OF SUGGESTIONS FOR IMPROVEMENT TO BILL C-15

Our suggestions are as follows:

- Clarify that UNDRIP expresses principles of binding international law and should be given the highest persuasiveness and weight in the interpretation of Canada's laws and constitution, and that Canada's laws and constitution should be presumed to provide protection at least as great as that afforded by UNDRIP:

    - Preamble: "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 **the laws of Canada should be interpreted and, if necessary, modified to provide at least as great protection as the Declaration affords**";

    - Preamble: "Whereas the Declaration is affirmed as a**n authoritative and persuasive** source for the interpretation of Canadian law **of the highest weight**";

    - Section 4: "The purpose of this Act is to (a) affirm the Declaration as a universal international human rights instrument **and expression of binding principles of international treaty law and customary international law** with application in Canadian law **as both an source of interpretation and source of law**"; and (b) provide a framework for the Government of Canada's implementation of the Declaration, **including legislative reform, policy reform and an administrative action plan.**

- Refer to the full content of UNDRIP article 4 in the Preamble:

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[22] Bill C-15, s 2(3).

- Preamble: 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, **and ways and means for financing their autonomous functions.**"

- Clarify that UNDRIP should inform the interpretation of s 35:

    - Subsection 2(2): "This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed **by the Declaration and** by section 35 of the Constitution Act, 1982, **,** and not as abrogating or derogating from them.

- Clarify the connection between treaty implementation and UNDRIP implementation:

    - Preamble: "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 **and vice versa**;

- Strengthen and clarify the Action Plan and its connection with the Government's review:

    - Section 6(1): "The Minister **shall**, 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 **and to ensure that the laws and policies of Canada are consistent with the Declaration**."

    - Subsection (2): "The action plan **shall** include: **(a.1) measures to amend, supplement or replace Canada's policies and legislation to ensure that that they are consistent with the Declaration**."

- Clarify that "consultation and cooperation" shall meet the standards of Article 19 of UNDRIP:

    - **Subsection (7): "For the purposes of this section and section 5 of this Act, consultation and cooperation with Indigenous peoples shall be carried out 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."**

- Consequential amendment to the *Interpretation Act* directing such interpretation and administration of Canada's enactments:

    - "**The Declaration is an authoritative and recognized source of interpretation for the laws in Canada and reference shall be made to the relevant principles and provisions of the Declaration in the interpretation and administration of laws that affect the rights of Canada's Indigenous peoples.**"