

SUBMISSION TO SENATE STANDING COMMITTEE ON ABORIGINAL PEOPLES
RE BILL C-262

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From:

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(as an individual)

I make this written submission concerning Bill C-262 following an invitation from the clerk to appear before the Committee. Unfortunately, it was impossible to appear at the time for which I was invited, and the clerk was able to offer only one time. As at present, it appears that the Committee is hearing from only a small number of witnesses on the Bill, which is very unfortunate in light of its potentially wide-ranging impacts and some significant issues with the drafting of the bill. While the Bill's objectives are laudable and represent an important response to the norms in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), when considered as a potential Canadian statute, there are serious issues with the Bill and its implications that need to be considered carefully and that may lead to possible reasons to amend aspects of the Bill.

Review of My Past Submission to the House of Commons Committee

I appeared as an invited witness at the House of Commons Standing Committee on Indigenous and Northern Affairs when it considered Bill C-262. I provided a written brief for my April 17, 2018 submissions, and I would refer you back to that brief, available at <https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9762671/br-external/NewmanDwight-e.pdf> In that brief, I explained that the Bill contained **internal inconsistencies** as between the expectations in different sections and inconsistencies between the English- and French-language texts of the Bill. I also discussed the **highly unpredictable effects** of the Bill, particularly in light of s. 3, which states that UNDRIP "is hereby affirmed as a universal international human rights instrument with application in Canadian law". While similar language would exist in preambles, I could not find any precedent for such language in the

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operative sections of any past statute, as it would be in s. 3 of Bill C-262. The concept of UNDRIP being given immediate “application in Canadian law” raises many uncertainties and could raise questions about whether Bill C-262 would immediately invalidate parts of other Canadian statutes and/or would be hemmed in in its aspirations by subsequently adopted statutes. I also emphasized that because the contents of UNDRIP cover many different matters, Bill C-262 had wide-ranging effects that made even its sparse statutory provisions analogous to **an omnibus bill** and worthy of study by multiple committees whose mandates could be affected. All of those points are detailed further in that submission to the House of Commons Committee, and I would refer you back to those in addition to the further points I will make now.

Significant Uncertainties in Types of Effects, Including as Found in Statements of Those Who Have Spoken in Favour of the Bill in Its Current Form

UNDRIP covers many different subject matters. Comments from some prominent individuals who have spoken in favour of Bill C-262 in its present form have made all the more clear that there are significant uncertainties on how it will affect these different subject matters, notably arising in when the Bill will cause UNDRIP to begin affecting Canadian law and to whom the Bill is intended to apply.

First, in respect of whether the Bill supports only a gradual process of implementation work through further discussions or causes UNDRIP to have immediate effects in Canada, it is important to note section 3 of the Bill, which states explicitly that Parliament is affirming that UNDRIP “has application in Canadian law”. While that phrasing is unprecedented in an operative section of a statute, its linguistic construction is in the present tense and, on an ordinary reading of the text, affirms some kind of immediate effect on Canadian law. It is also worth noting that Bill C-262 follows on other similar private members’ bills from past sessions—indeed, on private members’ bills identical in most parts, but with section 3 now added to the Bill. Apart from basic principles that all words in a statute are to be given meaning, the drafting history of the Bill would directly suggest that section 3 was added for some reason.

Despite this natural reading of section 3 of the Bill, Senator Murray Sinclair made representations to the Senate that the Bill would have no immediate effects if adopted. In second reading debate on November 29, 2018, Senator Sinclair made remarks that included the following statements: “this bill does not seek to implement the declaration itself”; “the bill itself doesn’t raise the implementation of the declaration as its objective. The bill talks about calling upon Canada to do an analysis of existing legislation to see which laws are currently inconsistent with the declaration. That’s primarily what this bill is about”; and “I suspect it will be unlikely that the Government of Canada will ever simply pass a law declaring the UN declaration as the law of Canada. That is mainly because it impinges not only on federal law but also on the laws of the provinces. And the laws of the provinces are going to have to be considered by each provincial entity”.

If section 3 were not within the Bill, all of these statements would describe what is going on within a natural reading of the Bill. However, section 3 could have **very different effects than Senator Sinclair has suggested**. Indeed, it may be that the Bill as presently drafted significantly overshoots the intentions of even such a supporter of the Bill as Senator Sinclair.

Second, Senator's Sinclair words have already alluded to a further complexity. Section 3's statement that UNDRIP has "application in Canadian law" raises issues concerning applications that affect the provinces, illustrating that there are some meaningful federalism complexities that come into play on section 3 of the Bill. Here, it is worth noting carefully some of the evidence put before the House of Commons Committee by some law professors who commented on the Bill's legal implications. While many law professor witnesses were not forthcoming in actually drawing upon their purported expertise in the law and simply offered general policy urgings in relation to the Bill, some did offer more specifically legal comments, and one of those who did was the well-known Professor John Borrows. Two dimensions are noteworthy.

First, in his opening statement before the Committee on May 3, 2018—which one would assume was carefully prepared, in contrast to the potential for anyone to say something less precise during questions and answers—Professor Borrows testified that "part of the principles of this bill are limitations on governments, indigenous and Canadian...UNDRIP will not apply just to Canadian governments". The plural of "governments" and "Canadian governments" is significant in so far as it suggests a view that the bill does apply to not just the federal government, which could be described by the singular "Canadian government", but also to **provincial governments**. If that is indeed what he meant, there are enormous federalism issues with the bill.

Second, Professor Borrows also spoke more tangibly of the effects of the bill on Indigenous governments, and his testimony suggested that he thought the bill's implementation of UNDRIP would bear on "a recent controversy in Quebec and the Kahnawà:ke reserve about the marry-out get-out laws". He suggested that article 9 of UNDRIP, which refers to an individual right to belong, would resolve this issue. With respect, however, citing to one article of UNDRIP without reference to other pertinent articles may suggest Bill C-262's implementation of UNDRIP would have what many would find more appealing consequences than it might actually have. Because C-262 seeks to implement UNDRIP as a whole, one would also need to consider other articles like article 33's statement that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions" and article 35, which states that "Indigenous peoples have the right to determine the responsibilities of individuals to their communities". UNDRIP may have **very different implications than Professor Borrows claims** based on the one article he pulled out.

I would add that I appreciate very much that Professor Borrows discussed also article 46 of UNDRIP, which contains some language concerning limits on the rights in UNDRIP. However, while Professor Borrows is (rightly, in my respectful view) trying to show that UNDRIP could come to be interpreted in balanced ways, his engagement with the limitations clause in UNDRIP is actually relatively distinctive. Many of the prominent international writings on UNDRIP do not reference article 46 and proceed as if it contained no limitations clause.¹

¹ For example, there is almost no mention of article 46 in the recent and very prominent Oxford Commentary on UNDRIP published in 2018 (something I critique in a forthcoming book review in the *Canadian Yearbook of International Law*). In that, though, it is just typical of the way many write about UNDRIP without attention to the holistic text of the instrument. Some judges of the New Zealand Supreme Court have now cited UNDRIP in several cases, but their statements about it have contained technical errors and also do not reference possible limits on the effects of the articles they choose to discuss (something I critique in a forthcoming article in the *New Zealand Law Review*). Neither the bulk of scholars nor judges engaging with UNDRIP have taken approaches that reference the

Major Implications on Issues Having Potentially Unexpected Effects on Indigenous/Non-Indigenous Reconciliation in Canada

Over the past fifteen years, the Canadian courts have developed a complex body of law on the duty to consult Indigenous communities whose rights could be affected by a government decision. That duty to consult doctrine has already led to some surprises that have had major implications for Canada, such as some of the pipeline-related decisions of the Federal Court of Appeal that have seen major projects' certificates of approval quashed after businesses engaged in multi-year regulatory processes and spent hundreds of millions of dollars doing so. Various articles within UNDRIP reference an obligation by states to consult with Indigenous peoples "in order to obtain their free, prior, and informed consent". If Bill C-262 has any effects of directly implementing UNDRIP, Parliament should be aware of what these words mean. However, they have shown themselves to be subject to multiple different interpretations in international law discourse such that any statutory adoption of them leaves it in the hands of the courts in what ways these words may alter the duty to consult doctrine, with whatever consequent effects there might be for relationships between Indigenous and non-Indigenous Canadians. Even were the Canadian government to express what it thinks the words mean, no such statement would bind the courts if they read the statute (and UNDRIP) differently. While Canada is certainly fortunate to have a judicial system of high quality, on the present text of Bill C-262 and the presence of many different interpretations possible for FPIC in UNDRIP, **the Court's interpretation of FPIC is nonetheless subject to uncertainties that have enormous implications for Canada.**

If UNDRIP has "application in Canadian law", it is also worth noting that it has provisions that could affect many different issues. Its provisions on Indigenous land rights differ, for example, from Canada's Aboriginal title doctrine. Some variations may be to the disadvantage of Indigenous communities. For example, many scholars think that the courts have made clear that Aboriginal title includes subsurface mineral rights.² UNDRIP suggests that Indigenous land rights do not generally include subsurface mineral rights.³ Others may pose other kinds of challenges. For example, some would read article 28 of UNDRIP as permitting **certain kinds of Indigenous land rights claims in respect of land in the hands of private landowners** that may not be permitted by current Aboriginal title doctrine. To be clear, I do not raise these examples to be alarmist but simply to say that any statement that UNDRIP applies in Canadian law incorporates by reference an instrument that could have significant unexpected consequences on various matters.

limitations clause that Professor Borrows cites so as to make Bill C-262 more appealing, and it is not clear if judicial interpretations will make use of that.

² I do not happen to agree and consider the point unsettled in Canadian law, as I discuss in my *Mining Law of Canada* (LexisNexis, 2017) but many scholars take the view that it is settled.

³ The land rights provisions are in articles 25-28 and are well discussed in Sámi scholar Mattias Ahren's *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016), where Ahren makes clear that these articles see most mineral rights as likely to be owned by states even in Indigenous territories. For a number of reasons that I will not detail at length here, I do not take section 2(1) of Bill C-262 to automatically block an adverse impact on the scope of Aboriginal title resulting from it as a statute.

Recommended Amendments

Section 3 of Bill C-262 gives rise to more difficulties than any other section of the Bill. The others contain the kind of gradual implementation of UNDRIP that Senator Sinclair described, but section 3 could do very different things that his comments did not seem to envision. Accordingly, the Senate should consider **removing section 3 of Bill C-262**. Similar language as what it contains could be added to the preamble, such as by adding a recital such as “Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides guidance on the interpretation of international human rights law as it applies to the circumstances of Indigenous peoples worldwide;”. But having section 3 as an operative section is unprecedented and generates significant legal risks of various types.

The Senate could also consider amendments that make clear that the Bill does not have disruptive effects on section 35 jurisprudence. For example, it could add a **section 2(2)** stating that “For greater certainty, nothing in this Act is to be construed as augmenting or expanding the scope of the existing aboriginal or treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in section 35 of the *Constitution Act, 1982*”.

If the Senate determines that a particular definition of FPIC is that which it considers implicit in Bill C-262’s adoption of UNDRIP, it could also set out a section providing a **deemed definition of FPIC**.

The Senate should also ask Justice lawyers to apply themselves to some of the **linguistic inconsistencies** in the current form of Bill C-262. The government employs large numbers of legislative drafting experts who could improve the text.

This Committee should also solicit views from other committees. In so far as Bill C-262 is analogous to omnibus legislation, it is not this committee alone that has relevant perspectives on it. **Other committees should also analyze Bill C-262**.

Overall, Bill C-262 pursues laudable aims and hopes to set Canada on a path of UNDRIP implementation in a carefully negotiated manner over the coming years. However, the present form of the Bill contains various problems, generates more uncertainties than it needs to, and is inconsistent with some of the statements made in support of it. Appropriate amendments can improve this Bill.