



**YUKON
REGION**

Bill C15: United Nations Declaration of the Rights of Indigenous Peoples Act

March 21, 2021

Prepared for: AFN Yukon First Nation Chiefs Summit

Prepared by: Victoria B. Fred Professional Corporation

Disclaimer. The contents contained in this document do not reflect the position of Yukon First Nations or any individual Yukon First Nation and should not be considered a consultation document. This document is developed for information purposes and to support discussion on the federal bill titled “United Nations Declaration on the Rights of Indigenous Peoples Act”.

1. Introduction

The federal government seeks to enact Bill C-15 titled *United Nations Declaration on the Rights of Indigenous Peoples Act* (“**Bill C15**”).

Justice Minister David Lametti, before the House of Commons on February 17, 2021, expressed that ‘Bill C15 is an endorsement of the UN Declaration on the Rights of Indigenous Peoples and is intended to renew, strengthen and reconcile the relationships between Indigenous Peoples and the Crown’.¹

2. Yukon First Nation Interests

Yukon First Nations have expressed their interests and raised questions specific to Bill C15 directly with the Justice Minister² and in preparation for the AFN National Forum on Bill C15.³

Reconciliation for Yukon First Nations requires the Crown’s recognition and protection of Yukon First Nation aboriginal rights within their unceded traditional territories; the continued protection of Yukon First Nation existing aboriginal and treaty rights within section 35 of the *Constitution Act*; recognition of Yukon First Nations inherent right to self-government; and the meaningful implementation of Yukon First Nation Final and Self-Government Agreements.

Section 2(2) of Bill C15 sets out that the Act will be interpreted to uphold the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982 and will not abrogate or derogate these rights. Therefore, Bill C15 cannot be used to reduce or diminish existing aboriginal and treaty rights recognized under section 35.

Bill C15 has the potential to reaffirm the source of Yukon First Nations’ jurisdictions and powers in their inherent right to self-government as opposed to recent assertions put forward by the Yukon Government that Yukon First Nations self-government rights are established by legislation.⁴

Further Bill C15 presents the opportunity to improve federal mandates and policies to advance the implementation of Yukon First Nation Final and Self-Government Agreements.

3. Bill C15

Bill C15 represents Canada’s efforts to respond to specific Calls to Action set out in the Truth and Reconciliations Report (2015) (“TRC”) and the Call to Justice expressed in the National Inquiry into Missing and Murdered Indigenous Women and Girls Report (2019). In particular the TRC called on all governments to fully adopt and implement the Declaration as a framework for reconciliation and called on the Government of Canada to establish a national action plan to realize the goals of the Declaration.⁵

Section 4 of Bill C15 provides that the purpose of the statute is to affirm the United Declaration on the Rights of Indigenous People (2007) (“**Declaration**”) as a universal international human rights instrument; to apply the Declaration to Canadian law; and establish a framework for the Government of Canada’s implementation of the Declaration.

The Declaration, attached as a Schedule to Bill C15, is an international human rights instrument that contains 46 articles that affirm the minimum human rights standards for the survival, dignity and well-being of Indigenous

peoples throughout the world, and includes the recognition of rights specific to Indigenous self-determination and self-government; Indigenous rights to culture, language and identity; Indigenous rights not to be forcibly removed from lands or territories; Indigenous rights not to be relocated from lands without free, prior and informed consent and fair and just compensation upon agreement; and the recognition that Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.

The Declaration was adopted by 114 states at the UN General Assembly on September 13, 2007. The Government of Canada originally refused to endorse the Declaration in 2007.⁶ However the Government of Canada endorsed the Declaration in 2010⁷ with reservation, under the former Prime Minister, Stephen Harper. Then in 2016 the Government of Canada endorsed the Declaration without reservation under the current Prime Minister, Justin Trudeau. At the time that the Government of Canada endorsed the Declaration without reservation, the Minister of Indigenous and Northern Affairs, Carolyn Bennett, stated before the Permanent Forum on Indigenous Issues at the UN in New York City:

*"We are now a full supporter of the declaration, without qualification. We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution."*⁸

Research indicates that because the Declaration is neither a convention nor a treaty, it is not legally binding in Canada unless adopted by way of a federal, provincial or territorial statute. The law firm of OKT⁹ provides a useful analysis of Bill C15 and highlights that there are three ways in which the international principles expressed by the Declaration can become part of Canadian law. Firstly, the international principles can be used as an aid to interpret Canadian law;¹⁰ secondly, the international law instrument itself can be adopted through the enactment of a federal, territorial or provincial statute;¹¹ and thirdly, the international principles are assumed to be adopted into Canadian common law unless the international principles are inconsistent with a federal statute.¹²

Legislative Process

Bill C15 was introduced to the House of Commons on December 3, 2020 (first reading) and on February 17, 2021 (second reading). Before proceeding to the third reading Bill C15 is currently being reviewed by the Standing Committee on Indigenous and Northern Affairs ("Standing Committee"). The public is invited to provide written submissions to the Standing Committee until April 8, 2021.¹³

Note. Yukon First Nations may want to consider putting forward recommendations that can be submitted before the Standing Committee either by the AFN National Chiefs office,¹⁴ the AFN Yukon Regional Chiefs office by a designated Yukon First Nation or by a combination of the options.

Enactment of Bill C15 will require the approval by the House of Commons and Senate with Royal Assent issued by the Governor General. If enacted Bill C15 will come into force on the date of Royal Assent or on a date specified in the federal statute.

Federal obligations

Application of the Declaration in Canadian law does not create new rights for Indigenous Peoples but does provide recognition of existing international human rights. If enacted Bill C15 will impose obligations on the federal government.¹⁵ Specifically the federal government will be required to establish a process in consultation and cooperation with Indigenous Peoples to ensure that the laws of Canada are consistent with the Declaration;¹⁶ and develop a national action plan within three years to achieve the objectives of the Declaration. As well the federal

government, in consultation and cooperation with Indigenous People, will be required to file annual reports with Parliament demonstrating: federal actions taken to ensure the laws of Canada are consistent with the Declaration; and the preparation and implementation of the national action plan.

Recommendation. It is important that the review of the laws of Canada and the operation of a national action plan be consistent with “the principles and objectives” of the Declaration. It is recommended that Bill C15 be revised to qualify that the review of all existing and future laws be consistent with the “principles and objectives” of the Declaration and that the implementation of the national action plan be consistent with the “principles and objectives” of the Declaration.

Potential and limitations of Bill C15

Bill C15 to date has received mix reviews by Indigenous leaders and the legal community. Critics have characterized the proposed law as another White Paper¹⁷ while proponents see Bill C15 as having the potential to significantly improve the lives of Indigenous Peoples.¹⁸

There is a general agreement, however, that if and when Bill C15 is enacted the statute will establish a process intended to make the laws of Canada consistent with the Declaration and an action plan, developed within three years, intended to address injustices, violence and discrimination towards Indigenous Peoples in Canada. What is unclear in Bill C15 is the relationship and timing between the establishment of a process to review the laws of Canada and the completion of the action plan to begin applying the principles and objectives of the Declaration.

Recommendation. If the processes are not intended to be separate and independent it is recommended that the statute be revised. For example, require that the action plan include the review and revision of existing and proposed laws and policies to ensure consistency with the principles and objectives of the Declaration.

While Bill C15 is currently part of Canadian law by way of the courts considering the Declaration as an interpretive tool Justice Minister Lametti confirmed that the enactment of the statute would be intended to use the Declaration as an interpretive tool to amend existing or develop new laws.

Recommendation. To ensure that the review and amendments of existing laws and improvements to new proposed laws remain at the forefront of the Canada’s priorities it is recommended that the statute be amended. For example, qualify the annual reporting to include a standing requirement that the federal government identify and present proposed amendments to federal laws.

The Justice Minister also confirmed, before the House of Commons, that Bill C15 will not change Canada’s existing duty to consult (as set out in legislation); nor will the Declaration be used to override Canadian laws; the requirement of free prior and informed consent will not in effect create a veto for Indigenous People but rather will be applied to improve the consultation process;¹⁹ and finally nor will Bill C15 create any new obligations or regulatory requirements for industry but recognizing that Provinces and Territories can develop their own plans to implement the Declaration as it may apply to matters within their jurisdictions.²⁰

While further analysis is required to achieve a deeper understanding about the impact of these matters specific to Yukon First Nations interests, there may be value in proposing that the Yukon Government enact its own territorial statute.²¹

Noting that Bill C15 is a federal law and the Yukon Government would have the authority to enact its own legislation, the proposed statute could likely impact Yukon First Nations specific to laws of general application, i.e., Criminal Code of Canada, Canadian Human Rights Act. As well Bill C15 does present the doorway to advance Yukon

First Nations interests as they relate to the recognition of the inherent right to self-determination and the inherent right to self-government. However, it is recommended that Bill C15 be strengthened to realize the proper recognition and implementation of self-government as originally expressed in the Declaration.²²

OKT in their analysis of Bill C15 identified that Article 4 of the Declaration is cited in recital number 12 of the Preamble. While the preamble provides recognition of the implementation of the inherent right to self-determination and self-government the recital fails to incorporate the recognition of Article 4 which is the inclusion of financial resources to support Indigenous Peoples autonomous functions to realize their inherent right to self-government. The inclusion of financial resources would in effect provide for a more meaningful implementation of Yukon First Nation Final and Self-Government Agreements and could provide the potential for meaningful agreements for Yukon First Nations without Final or Self-Government Agreements.

Recommendation. Recital 12 of the Preamble be amended to include language that supports Indigenous People access to financial resources to fund their autonomous functions, to fully realize their right to self-determination and self-government.

4. Closing

Bill C15 represents an important step toward improving the relationship between Indigenous Peoples and the Crown. As Senator Murray Sinclair noted in 2016.

“The full adoption and implementation of UNDRIP will not undo the war of law but it will begin to address the wars’ legacies.”

If and when enacted the success of Bill C15 will be contingent on the political will and confidence of Indigenous Peoples to participate in the consultations and cooperate to: establish a process that would allow for a review of all existing laws of Canada, to satisfy the principles and objectives of the Declaration; and a resulting national action plan to realize the principles and objectives of the Declaration. To achieve the confidence and political will of Indigenous People it is recommended that the term “consultation and cooperation” be qualified as part of the development of the action plan.

Recommendation. Section 6 of Bill C15 provide for a new provision that would read “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.”²³

The proposed statute has potential and has notable limitations that may be improved, in part, through strengthening Bill C15 provisions. If and when enacted Bill C15 does present the opportunity for Yukon First Nations to advance their priorities and interests. However, if not enacted Yukon First Nations with Final and Self-Government Agreement have their treaties to continue advancing their priorities and interests; and Yukon First Nations without treaties could still apply the Declaration as an interpretive tool to advance their priorities and interests before the courts.

5. Summary of Recommendations²⁴

Sections	Original Language	Recommended Language
Preamble: Recital 12	Where 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.	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 ²⁵
Consistency: Section 5	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.	The Government of Canada must in consultations and cooperation with Indigenous peoples, take all measures necessary to ensure that the existing and future laws of Canada are consistent with the principles and objectives of the Declaration.
Action Plan: Section 6(1) Action Plan: Section 6(2)(a)	<p>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.</p> <p>The action plan must include</p> <p>(a) measures to</p> <p>(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-spirited persons; and</p>	<p>The Minister must in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the principles and objectives of the Declaration.</p> <p>The action plan must include</p> <p>(a) measures to</p> <p>(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-spirited persons; and</p>

<p>Action Plan: Section 6(7) NEW</p>	<p>(ii) promote mutual respect and understanding as well as good relations, including through human rights education; and</p> <p>(b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.</p>	<p>(ii) promote mutual respect and understanding as well as good relations, including through human rights education; and</p> <p>(b) measures to review, amend or replace existing laws that are not consistent with the principles or objectives of the Declaration; and</p> <p>(c) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.</p> <p>(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.²⁶</p>
<p>Annual Report: Section 7(1)</p>	<p>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.</p>	<p>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 and identify any proposed amendments to existing laws to ensure that that Canadian laws are consistent with the principles and objectives of the Declaration.</p>

¹ Government Orders, *United Nations Declaration on the Rights of Indigenous Peoples Act*. Hansard – 60 (February 17, 2021) @1805.

² Yukon First Nation Chiefs met with Minister Lametti on December 9, 2020. AFN Yukon Regional Chief Adamek followed up with a letter to the Minister’s office on December 24, 2020.

³ The AFN Yukon Chiefs met on February 2, 2021 in preparation for the AFN National Forum on Bill C15 scheduled for February 9-10, 2021.

⁴ See paragraph 4(a) where the Yukon Government submits that 'Self-Government Agreements and the VGFN Constitution are not codification of inherent self-government rights but rather reflect a transfer of authority to First Nation Governments via legislation'. (Dickson v. VGFN SC No 18-AP012 at page 1)

⁵ TRC Calls to Action #43 and #44.

⁶ Canada viewed the terms of the Declaration to be contrary to Canadian domestic constitutional law. Chuck Strahl, then Minister of Indian Affairs, explained the government's reasoning. "By signing on, you default to this document by saying that the only rights in play here are the rights of First Nations. And, of course, in Canada, that's inconsistent with our Constitution (S. Edwards, "Tories Defend "No" in Native Rights Vote" Montreal Gazette, September 14, 2007).

⁷ In March 2010, Governor General Michaëlle Jean announced that the Canadian government "will take steps to endorse this aspirational document in a manner fully consistent with Canada's Constitution and laws."

⁸ "Canada officially adopts UN declaration on the rights of Indigenous Peoples", CBC News (May 10, 2016.)

⁹ OKT is the law firm of Olthuis Kleer Townshend LLP with offices located in Toronto Ontario and Yellowknife NWT.

¹⁰ Research identifies that there are over 15 cases that have applied the Declaration as an interpretive tool that include matters before the Federal Human Rights Commission and Federal Courts.

¹¹ British Columbia Bill C41- *Declaration on the Rights of Indigenous Peoples Act* (November 2019) and proposed Bill C15.

¹² "Bill C-15 (UNDRIP Act) Commentary" Kevin Hille, Roger Townshend and Jaclyn McNamara, January 29, 2021@ page 3.

¹³ The Standing committee adopted a motion on February 25, 2021 to initiate a study of the subject matter of Bill C15. A committee's report can provide recommendations for amendments to Bill C15 or provide recommended consequential amendments to other acts.

¹⁴ First Nations have been invited by the AFN National Chiefs office to provide their written submissions and recommendations by Wednesday, March 24, 2021.

¹⁵ Minister Lametti statements before the House of Commons on February 17, 2021.

¹⁶ See Bill C15 section 5.

¹⁷ "Canadian view on UNDRIP Questionable at Best" Ira Timothy, Association of Iroquois and Allied Indians, December 4, 2020.

¹⁸ *A commentary on the Federal Government's Legislation to implement the Rights of Indigenous Peoples*, Residential School History and Dialogue Centre, (January 2021) @ page 7.

¹⁹ Specific to questions on the application of free prior and informed consent ("FPIC") the Minister noted that FPIC refers to the importance of meaningful participation of Indigenous people through their own mechanisms in decisions and processes affecting them; their rights; and their community. FPIC is a way to establish a consensus through dialogue. It does not constitute veto power over government's decision-making process. After all human rights and the obligations and duties are not absolute. Different initiatives will require different type of approaches. If passed the bill will not change Canada's existing duty to consult.

²⁰ Backgrounder: Bill C15: United Nations Declaration on the Rights of Indigenous Peoples Act, February 26, 2021. Justice Minister at second reading of Bill C15, February 17, 2021 stated "Let me be clear. Bill C-15 would impose obligations on the federal government to align our laws with the declaration over time and to take actions within our areas of responsibility to implement the declaration, in consultation and cooperation with indigenous peoples. It would not impose obligations on other levels of government. However, we know that the declaration touches on many areas that go beyond federal jurisdiction. Our goal is not to get in the way of good ideas and effective local action, but to look for opportunities to work collaboratively on shared priorities and in ways that are complementary."

²¹ During the AFN National Forum preparation discussions Kwanlin Dün First Nation Chief Doris Bill identified that there are a number of matters where Yukon laws and policies may frustrate the interests of Yukon First Nations. A deeper analysis of these issues may be warranted. (February 2, 2021).

²² Bill C15 (UNDRIP Act) Commentary at page 7.

²³ Ibid at page 13.

²⁴ Recommendations are informed by the OKT analysis and commentary cited in this paper.

²⁵ Ibid at page 13.

²⁶ Ibid at page 13.