BUSINESS COUNCIL OF ALBERTA

Official Submission to the House of Commons Standing Committee on Indigenous and Northern Affairs

Considerations for the Ongoing Development of Bill C-15: An Act respecting The United Nations Declaration on the Rights of Indigenous Peoples

Introduction

We are pleased to provide ideas and recommendations to House of Commons Standing Committee on Indigenous and Northern Affairs as it reviews Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

The Business Council of Alberta (BCA) and its membership see the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a vital and important declaration that, properly implemented, can advance reconciliation in Canada. Our aim is to work alongside Indigenous Peoples in Canada and the business community to advance the principles and intent of UNDRIP: reconciliation, self-determination, equal rights, and the creation of, and inclusion in, prosperity.

The BCA is a non-partisan, non-profit, for-purpose organization composed of the chief executives and leading entrepreneurs of Alberta's largest enterprises. Our members represent the majority of Alberta's private sector investment, job creation, exports, and research and development. We are dedicated to building a better and more prosperous Alberta within a strong Canada, a process that includes the full participation of—and the advancement of reconciliation with—the Indigenous Peoples in Canada.

Context

Reconciliation has been, and will continue to be, an ongoing endeavour. For many Indigenous Peoples, the positive relationships being forged between industry and their communities have helped enhance local economic opportunities. For example, natural resource projects often provide Indigenous Peoples with high value business and employment opportunities where they may not otherwise exist. These opportunities in turn enable greater independence of Indigenous communities and an enhanced ability to shape their own futures. While more work still needs to be done, the business community is uniquely positioned to continue leading Canadian efforts in fostering Indigenous participation in economic ventures—a form of 'economic reconciliation' recommended in Call to Action (92) of the Truth and Reconciliation Commission.

Mutually beneficial partnerships between Indigenous Peoples, industry, and governments are beginning to advance economic reconciliation at a scale never seen before in Canada. The framework developed through Section 35 of the *Constitution Act, 1982* has helped clarify the constitutional recognition of rights, supporting partnerships that enable economic development. Case law has, after many years, defined the constitutional duty to consult and accommodate. This in turn has enabled the development of procedures rooted

Publication Date: April 2021

in best practices to guide proponents, government, and Indigenous Peoples through consultation. This process is contributing to legal certainty, enabling opportunities for economic reconciliation through mutually beneficial partnerships and agreements. We have welcomed comments from Minister Lametti and government officials that Canada's major project review processes are already compliant with UNDRIP, including its provisions for consultation.

Concerns

As an international declaration, UNDRIP will formally introduce international legal concepts and new terminology into the Canadian legal interpretive landscape – a landscape that recognizes Indigenous rights embedded in section 35 of the *Constitution Act, 1982* as developed through case law. While BCA supports the intent of Bill C-15, we are concerned that, as currently written, the legislation could impede reconciliation by creating uncertainty in several areas. These include:

- How particular terminology or concepts within UNDRIP will interact with existing case law, the Constitution, and federal regulatory frameworks such as the *Impact Assessment Act* and those of the Canadian Energy Regulator;
- The scope, ambition and process of the action plan outlined in Bill C-15 – as well as its role as the main vehicle to implement UNDRIP in Canada; and
- The potential impact on natural resource development which is a primary generator of economic opportunity for Indigenous communities across Canada.

Without a shared understanding of how the language, intent, and expected outcomes of UNDRIP implementation will impact all interested parties, Bill C-15 could lead to several undesirable outcomes, including:

- Increased legal action as affected parties seek clarification on the interpretation of UNDRIP from the court system;
- Diverging expectations from within and outside Canada's Indigenous communities around the ultimate impact of Bill C-15; and
- Fewer economic development opportunities as the lack of clarity around UNDRIP interpretation increases investment uncertainty.

As drafted, Bill C-15 introduces legal uncertainties, and threatens investment in Canadian resource development projects that would provide economic benefits for Indigenous Peoples. These outcomes could ultimately harm the progressing relationships between Indigenous Peoples, industry, and governments.

Recommendations for Improvement

Our goal with the recommendations outlined below is to offer suggestions for how the Government of Canada could amend Bill C-15 so as to achieve its goals of advancing Indigenous reconciliation without adverse or unintended consequences. If accepted, we

believe these recommendations will provide clarity for UNDRIP's legal interpretation and application, and create a better roadmap for developing and implementing the action plan.

Creating a Shared Interpretation of UNDRIP to Avoid Increased Litigation:

As previously addressed, Bill C-15 will introduce new terminology into the Canadian legal interpretive landscape – a landscape that recognizes Indigenous rights embedded in the *Constitution Act, 1982.* If Parliament is not clear in defining the approach to UNDRIP's application in Canadian law, Bill C-15 will create legal uncertainty that will put a chill on investment and major project development in Canada. These ambiguities will eventually receive definitional clarity either through new legislation or more likely through the courts.

Bill C-15 provides an excellent opportunity to clarify these ambiguities through the legislative process rather than through prolonged, reconciliation-damaging court cases.

The following recommendations can help create a shared interpretation of UNDRIP and decrease legal and interpretive uncertainties**:**

Recommendation 1:

Bill C-15 should include a definition of free, prior and informed consent, such that:

- FPIC's application in Canadian law is consistent with the current understanding of s.35 of the *Constitution Act, 1982* and related case law on the Crown Duty to Consult; and
- 'Consent' does not equate to a veto.

Both of these positions have been articulated by the federal government already. The Department of Justice Backgrounder on Bill C-15 communicates the point about consent, while at the second reading of Bill C-15, Justice Minister Lametti stated that:

"Free, prior and informed consent is a way of working together to establish a consensus through dialogue and other means and of enabling indigenous peoples to meaningfully influence decision-making. Free, prior and informed consent does not constitute veto power over the government's decision-making process"

Given the government's articulated positions on these points, we believe that including them within the text of Bill C-15 would provide additional certainty.

Recommendation 2:

The federal government should release to the public the legal advice it has received and that has guided the specific wording of Bill C-15. Informed debate within the House and the Senate will allow for government to clarify with precision, and on the Hansard record, the intent of this legislation in cases where ambiguity may remain, thereby providing opportunities for informed amendments to this bill. Clarity on the record should address the following ambiguities:

- How the federal government's recognition of UNDRIP as a human rights document applies within the context of constitutional rights and the individual and collective human rights already affirmed in Canadian law;
- Whether Bill C-15 in any way shifts the obligation of the Crown in upholding section 35 and treaty rights, and the recognition of title, to businesses or industry in ways that are not currently the legal status quo or representative of existing best practices;
- Whether applying UNDRIP in Canadian law could lead to recognition or incorporation of Indigenous law into Canadian law, and how this could impact principles of administrative fairness and clarity of processes;
- How Bill C-15, in the context of resource and infrastructure project development, will create clarity on whom the project proponents and the Crown engage and recognize as rightsholders and representatives of such rightsholders when meeting the duty to consult and accommodate; i.e. pursuing FPIC;
- The impact of Bill C-15 on existing legal ambiguities stemming from overlapping land claims;
- How varying degrees of consent among many Indigenous Nations, or within a particular Indigenous Nation along a proposed project route, will be interpreted in light of UNDRIP;
- How the federal government reconciles the immediate application of UNDRIP in Canadian law as outlined in section 2(3), previous government statements about existing Canadian laws not changing immediately upon Bill C-15's passage into law, and the three-year time limit between this bill's passage into law and the introduction of the action plan, which is meant to provide the roadmap for government's achieving of the objectives of the Declaration (sections 6(4) and 6(1), respectively); and
- How UNDRIP's concept of 'redress', particularly within Articles 11, 20, 28, and 32, interacts with government's understanding of FPIC; its implications for ongoing claims processes; and its impact on existing approvals and permits that were sought and obtained in accordance with existing law and regulations.

Recommendation 3:

For clarity, references to "Canadian law" in Bill C-15 should be amended to "federal law."

Creating a Better and More Inclusive Roadmap for the Action Plan:

The BCA recognizes that the development of the action plan is a central component of Bill C-15 and the reconciliation journey itself. Given its importance, Bill C-15 should provide more specificity about how the process for developing such a plan will unfold, what the plan itself will involve, and how to ensure that defining the plan's objectives is as inclusive a process as possible. Greater clarity in these areas need not limit the federal government's commitment to take all measures necessary to apply UNDRIP in Canadian law; rather,

clarity can ensure that the necessary measures taken involve a robust and inclusive process.

Though the duty to consult and accommodate is ultimately a legal obligation of the Crown and Indigenous rights and title holders, the business community understands that these same principles apply to building strong relationships between Indigenous Peoples and industry. Given industry's role in promoting and advancing reconciliation, the action plan should include consultation and input with key industry stakeholders.

The following recommendations can help establish an inclusive process for developing and implementing a clearly-defined action plan:

Recommendation 4:

> Bill C-15 should be inclusive of impacted businesses and community stakeholders. Section 6(1) should be amended as follows: "The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, identify key impacted stakeholders and work with them to prepare and implement an action plan to achieve the objectives of the Declaration."

Recommendation 5:

> Section 6(2) on the content of the action plan should be amended to add a subsection outlining in greater detail what the action plan must include and how it will achieve its objectives. This should include clarifying details on:
>
> - The scope of existing federal laws that will be reviewed and how government will work with Indigenous Peoples to determine which laws are the highest priority for review;
> - The process for how the federal government will balance diverging Indigenous opinions on the order in which federal laws will be reviewed;
> - How existing and new laws will be analyzed for consistency with UNDRIP; and
> - How industry engagement with Indigenous groups will be affected.

Recommendation 6:

> Section 6(2) should include a clause requiring the action plan to address issues related to Indigenous capacity funding when and where UNDRIP's application in Canadian law could adversely impact meaningful consultation efforts and timely legal approval processes.

Recommendation 7:

> Section 6(2) of should affirm that the action plan's review of Canadian legislation will maintain the principle of clear legal jurisdiction and accountability – that final decision-making authority on major projects rests with the Crown or a Crown-appointed decision maker. If and when the Crown delegates decision-making duties, including to Indigenous decision-making bodies, the action plan should be legally required to ensure

adequate resources will be provided for that body, and that the same principles of procedural fairness and transparency will be respected.

Moving Forward

BCA wishes to thank this Committee for its work in reviewing Bill C-15. Our organization and its members support the principles of UNDRIP and have worked hard to advance Indigenous economic reconciliation. The recommendations offered here are made in that spirit.