Canadian Electricity Association (CEA)

Submission to the Standing Committee on Indigenous and Northern Affairs

Bill C-15: An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples

Final

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Introduction

The Canadian Electricity Association ("**CEA**") appreciates the opportunity to provide feedback on Bill C-15: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* ("**Bill C-15**" or the "**Bill**").

Founded in 1891, CEA represents a broad range of companies that generate, transmit, distribute, and market electricity to industrial, commercial, and residential customers across Canada.

The Canadian electricity industry is committed to building strong, mutually beneficial relationships with Indigenous Peoples. Over the last several decades, CEA members have proactively demonstrated their commitment to reconciliation through a range of initiatives, including meaningful early consultations; joint business ventures; and access to employment, education, and training opportunities. Many of these activities are listed in CEA's compendium of member Indigenous initiatives.

It is with a great sense of responsibility that CEA supports the Government of Canada in its efforts to advance reconciliation with Indigenous Peoples, including implementing the spirit and intent of the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") through Bill C-15. The electricity industry supports the overarching principles outlined in UNDRIP. However, given the complexity of this issue, we also believe it is important that the intent, scope, and process for implementing UNDRIP are clearly defined and delineated in the implementing legislation.

The remarks made by the Minister of Justice, Hon. David Lametti, in the House of Commons during the Second Reading of Bill C-15 (Hansard, Volume 150, No. 060, Wednesday, February 17, 2021) and the government's Information Backgrounder (Bill C-15 – *United Nations Declaration on the Rights of Indigenous Peoples Act)* provide helpful clarity on the actual intent of the Government of Canada and the expected effects of Bill C-15. While this information is useful, parliamentarians should consider incorporating this information into the legislation.

Key Issues and Proposed Amendments

1. The legislation should recognize systemic racism

While the legislation recognizes discrimination, prejudice, and stereotypes against Indigenous Peoples, it conspicuously leaves out the term systemic racism. CEA believes that legislation aimed at implementing the principles of UNDRIP should recognize this issue. To this end, CEA recommends the following clause in the preamble could be amended as follows:

> *Whereas the implementation of the Declaration must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence,* ~~***and***~~ *discrimination* ***and racism,*** *including systemic discrimination* ***and racism,*** *against Indigenous peoples…;*

Further, paragraph 6(2)(a)(i) could be amended as follows:

> ***(i)*** *address injustices, combat prejudice and eliminate all forms of violence,* ~~***and***~~ *discrimination* ***and racism,*** *including systemic discrimination* ***and racism,*** *against Indigenous peoples…*

2. The legislation should provide clarity on the immediate impact of the Bill

Ambiguity in this legislation is a significant concern. Subsection 4(a) of Bill C-15 states that the purpose of the Bill is to affirm the application of UNDRIP in Canadian law. Subsection 2(3) states that "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law." The foregoing provisions sit beside subsection 4(b), which states that the purpose of the Bill is to "provide a framework for the Government of Canada's implementation of the Declaration", and sections 5 and 6, which establish the processes for implementation of UNDRIP. On an ordinary reading of the provisions, the effects of Bill C-15 appear to be simultaneously immediate and gradual vis-à-vis UNDRIP's application and implementation in Canadian law.

UNDRIP interacts with a range of federal legislation and established federal common law principles. Without clarification, there is the potential for this Bill to cause confusion regarding its immediate impact on existing federal legislation, common law, and the processes thereunder.

In particular, the language of Bill C-15 leaves open questions with respect to: **(a)** the Bill's immediate impacts on existing federal laws and decision-making powers thereunder; **(b)** whether and how the Bill affects Canada's duty to consult Indigenous peoples as established by jurisprudence with respect to section 35 of the *Constitution Act, 1982;* and **(c)** the application of the concept of free, prior and informed consent ("**FPIC**") in Canadian law.

(a) Effect of the Bill on decision-making authority and existing federal laws

The implementation of UNDRIP and the adoption of the principle of FPIC must maintain clear legal jurisdiction and accountability for final decision making. It should be clear that the passage of the Bill does not disturb decision-making authority under federal statutes. In this regard, the immediate application of UNDRIP affirmed through Bill C-15 should be expressly limited to its application in the Canadian federal common law.

The foregoing is particularly important to CEA in respect of federal environmental legislation that was recently passed or amended, including the *Impact Assessment Act* and the *Fisheries Act*. While the government has stated that Bill C-15 will not result in any immediate changes to legislation such as the *Fisheries Act,*[1] this is not clear on the face of the Bill.

To address the uncertainty described above, subsection 2(3) could be amended as follows:

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[1] For example, see Backgrounder: Bill C-15 – *United Nations Declaration on the Rights of Indigenous Peoples Act*, What does this mean for fisheries in Canada?

2(3) *Nothing in this Act is to be construed as delaying the* ***use*** ~~*application*~~ *of the Declaration* ***as a source for the interpretation of federal*** ~~*in Canadian*~~ *law.*

Further, a clause similar to the following could be added to the Interpretation section to clarify the effect of the Bill on decision-making processes:

Interpretation:

Effect on Federal Laws

(a) Nothing in this Act is intended to or shall be construed as changing, amending or altering the decision-making authority of the Government of Canada or federal departments, agencies or tribunals with delegated authority, under the federal statutes of Canada.

(b) Any changes or amendments to the federal statutes of Canada required to ensure consistency with the Declaration shall be made by Parliament in accordance with the process referred to in section 5.

(b) Recognition of the existing body of law related to the rights of the Indigenous Peoples of Canada

Legislation to implement UNDRIP ought to be consistent with the recognition and protection of Aboriginal and Treaty Rights, including those enshrined in the *Constitution Act, 1982*. In particular, jurisprudence flowing from section 35 of the *Constitution Act, 1982* anchors Aboriginal and Treaty Rights within Canada's wider constitutional and legal framework, carefully delineating rights, duties, and obligations, and defining key concepts. Thus, this legislation and related actions, should confirm and not rewrite, or erase this body of law that is foundational for reconciliation.

To recognize the existing body of law and its place within the implementation of UNDRIP, the following clause could be inserted in the Bill in place of the existing Purpose clause:

Purpose

The purpose of this Act is to create a process for the Government of Canada, in consultation and cooperation with the Indigenous peoples of Canada and others, to implement the objectives of, and to ensure that the federal laws of Canada are consistent with, the United Nations Declaration on the Rights of Indigenous Peoples as may be interpreted within the context of the **Constitution Act, 1982*, including section 35, and the related jurisprudence.***

(c) Interpretation of free, prior and informed consent (FPIC)

The electricity industry recognizes Indigenous Peoples must be consulted about decisions or activities that may have an impact on the exercise of Aboriginal or Treaty Rights as established through the jurisprudence and practice flowing from section 35 of the *Constitution Act, 1982*.

Legislation must ensure that FPIC is pursued under this established legal framework. This framework includes, for example, the concept of the spectrum of consultation, and the balancing of interests. It recognizes that consent is sought through good faith and meaningful consultation, and that despite good faith efforts consent may not always be secured.

CEA appreciates the clarification provided by the Minister of Justice, Hon. David Lametti, during the Second Reading of Bill C-15. As recorded in the Hansard, the Minister stated the following –

> *"Arising from the right to self-determination, "free, prior, and informed consent", as it appears in various articles of the declaration, refers specifically to the importance of meaningful participation of Indigenous Peoples, through their own mechanisms, in decisions and processes affecting them, their rights and their community.*
>
> *Free, prior, informed consent does not constitute veto power over the government decision-making process. After all, human rights and the resulting obligations and duties, particularly those provided for in the declaration, are not absolute.*
>
> *If passed, this bill will not change Canada's existing duty to consult with Indigenous Peoples or other consultation and participation requirements under other legislation such as the new Impact Assessment Act".*
>
> *Hon. David Lametti, Minister of Justice*
> *Hansard, Volume 150, No. 060, Wednesday, February 17, 2021*

The Minister's remarks provide important context. Given the numerous different interpretations amongst legal experts, it is important parliamentarians consider an interpretative clause on to capture the government's stated intent on this issue.

CEA would propose the following interpretive clause which incorporates the Minister's view as well as views expressed by the Supreme Court and the Federal Courts with respect to the role of consent within the established duty to consult framework.[2]

> **Interpretation:**
>
> **Free, prior and informed consent**
>
> ***Free, prior and informed consent in the Declaration is a process to ensure meaningful participation of Indigenous peoples, through their own mechanisms, in decisions that affect them or their rights, and shall be pursued in accordance with the Government of Canada's duty to consult Indigenous peoples as interpreted in the context of the* Constitution Act, 1982*, including section 35, and the related jurisprudence.***

[2] For example, see *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*., 2017 SCC 41 at para. 59

3. Obligations in Section 5

Section 5 of the Bill requires the Government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" [emphasis added]. This type of provision is extremely rare in Canadian statutes and the limits of the obligations established thereby are not well understood.[3]

The question of whether Canada is doing enough at any given time to ensure the laws of Canada are consistent with the Declaration is open to subjective interpretation. Likewise, the question of consistency of Canada's laws with the Declaration is also likely to be subject to debate. CEA recommends that section 5 be amended as follows

> ***5*** *The Government of Canada must, in consultation and cooperation with Indigenous peoples,* ***identify and prioritize reasonable*** ~~*take all*~~ *measures* ~~*necessary*~~ *to ensure that the laws of Canada are consistent with the Declaration.*

4. Consultation with other governments and non-Indigenous groups

Sections 5 and 6 of Bill establish the requirements for the government to ensure consistency of Canada's laws with UNDRIP, and to prepare and implement an action plan in collaboration with Indigenous Peoples. These processes are also likely to impact the interests of provincial, territorial, and other governments and non-Indigenous Peoples and organizations. To this end, an additional clause could be added to the Bill as follows:

> ***7 In addition to Indigenous Peoples, the Government of Canada will consult with provincial, territorial and other governments, and non-Indigenous Peoples and organizations as appropriate with respect to the processes established in sections 5 and 6 of this Act.***

5. Representative Institutions

Reconciliation can only be advanced in collaboration with properly resourced institutions designated and empowered by Indigenous Peoples to represent their interests.

In the context of infrastructure projects, there must be clarity on whom the proponent and the Crown engages and recognizes as rights holders, and representatives of such right holders, in meeting the duty to consult and accommodate and pursuing FPIC. This will be critical to the effective implementation of UNDRIP.

Conclusion

CEA appreciates the opportunity to provide proposed amendments to Bill C-15. We look forward to participating in this important consultation process.

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[3] For example, see Dwight Newman, Written Brief to the House of Commons Standing Committee on Indigenous and Northern Affairs.