



Non-Derogation Clause in Bill C-15 – A Brief Analysis

Paul Joffe (January 24, 2021)

In the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Bill C-15), section 2(2) provides as follows:

2(2) This 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**. [emphasis added]

This non-derogation clause affirms that, in elaborating on Indigenous peoples' rights in the preamble and operative provisions, Bill C-15 is “upholding” the rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.

Bill C-15 is consistent with Indigenous peoples' rights in the *UN Declaration on the Rights of Indigenous Peoples* and other international human rights law. The Bill is also consistent with the “living tree” doctrine elaborated by the Supreme Court of Canada and which is further elaborated upon below.

For many years, Indigenous peoples around the globe fought for their collective rights to be recognized and affirmed as human rights. The UN Declaration affirms both the collective and individual human rights of Indigenous Peoples.

The above provision, section 2(2), is also consistent with the Recommendation proposed by the Standing Senate Committee of Legal and Constitutional Affairs, in its 2007 study on non-derogation clauses.

See Senate of Canada (Standing Senate Committee of Legal and Constitutional Affairs), *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, December 2007, at 19:

Recommendation 1:

The Committee recommends that the Government of Canada take immediate steps to introduce legislation to add the following non-derogation provision to the federal *Interpretation Act*:

Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, and not to abrogate or derogate from them. [emphasis added]

And in its Conclusion at page 35, the Senate Committee highlighted the positive effects of its proposed Recommendation with a view to “advancing” the purpose of section 35:



We believe that all Parliamentarians and this Committee in particular, have a major role to play in ensuring that those questions and policy matters are fully canvassed and resolved, **with a view to advancing the purpose of section 35.**

The Committee's objectives in examining the non-derogation issue have been to contribute to a timely consideration of an important public policy matter, and to **recommend a forward-looking approach** that considers both the government's role under section 35 of the *Constitution Act, 1982*, in light of its fiduciary relationship with Aboriginal peoples, and the interests of the broader Canadian public.

In this spirit, our observations and recommendations provide guidance as to some of the next steps we believe the government should make, in keeping with its **commitment to take section 35 rights seriously.**

...

We also recognize that, in constitutional terms, the **"living tree" of section 35** remains in its relative infancy. [emphasis added]

In regard to the "living tree" doctrine, see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, where the Supreme Court of Canada described Canada's Constitution as follows:

A constitution ... is drafted with an eye to the future ... It must, therefore, be capable of growth and development over time to meet **new social, political and historical realities often unimagined by its framers.** [emphasis added]

The *United Nations Declaration on the Rights of Indigenous Peoples* constitutes a new social, political, historical – and I would add "legal" – reality unimagined by the framers of Canada's Constitution. This new reality is being further implemented by Bill C-15.

See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 22, where the Supreme Court of Canada emphasized Canada's Constitution is a "living tree" subject to "progressive interpretation":

The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that **our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.** [emphasis added]

In December 2020, the UN General Assembly reaffirmed the *UN Declaration* for the **10th time by consensus.** No country in the world currently opposes this international human right instrument. This strengthens the status of the *Declaration* and its legal effect.



In this regard, see General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/75/168 (16 December 2020) (without a vote), where the preamble highlights the positive influence of the *UN Declaration* in drafting various constitutions and statutes at the national level:

Reaffirming the United Nations Declaration on the Rights of Indigenous Peoples, which addresses the individual and collective rights of indigenous peoples and has **positively influenced the drafting of several constitutions and statutes at the national and local levels and contributed to the progressive development of international and national legal frameworks and policies**, [emphasis added]

The above interpretation of s. 2(2) of Bill C-15 is further reinforced by the federal *Interpretation Act*, R.S.C. 1985, c. I 21, s. 12:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. [emphasis added]

Based on the above analysis, Bill C-15 must be interpreted as upholding Indigenous peoples' rights. In no way, can the Bill be interpreted as diminishing their human rights. In this regard, one could consider amending s. 2(2) as follows:

2(2) This 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 **diminishing or** abrogating them.