



## **Bill C-15 – Legal Significance of the Preamble**

*Paul Joffe (January 24, 2021)*

Bill C-15 is legislation that requires context and such context will be set by the preamble of the Bill, as well as the nature of the *United Declaration on the Rights of Indigenous Peoples* itself. The *UN Declaration* also includes an extensive preamble that adds to the interplay between the richness of the *Declaration* and C-15.

The preambles of Bill C-15 and the *UN Declaration* make clear that we are ending any and all colonial approaches to Indigenous peoples' rights, including those pertaining to Treaty rights. Doctrines of superiority, including “discovery” and *terra nullius*, are being unequivocally renounced.<sup>1</sup> This, in turn, serves as a clear renunciation of all such previous approaches in the laws and policies of Canada. The status of C-15 as a decolonizing lens for all such discriminatory laws and policies is secured by the preamble, building on the *UN Declaration*.

In light of the crucial role of preambles, it is important to underline that they do have legal effect. As confirmed in section 13 of the federal *Interpretation Act*<sup>2</sup>, there is no doubt that the preamble of Bill C-15 will have legal effect when the Bill is enacted:

The **preamble** of an enactment shall be **read as a part of the enactment** intended to assist in **explaining its purport and object**.

When preambles are used alone, they do not provide any legal remedy. However, **preambles do have legal effects when used to interpret the operative provisions in any legal instrument**. In Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed. (Markham, Ontario: LexisNexis Canada, 2014), at 448, the legal significance of preambles is emphasized as follows:

**§14.28 Preambles reveal legislative purpose.** Preambles are relied on most often to reveal, or confirm, legislative purpose. While the courts are doubtless capable of figuring out the purpose of an enactment without having it spelled out for them, reliance on the **preamble gives their conclusions added force and legitimacy**.

**§14.31 Preambles as source of legislative values.** Preambles are an **important source** of legislative values and assumptions. ... Preambles that set out assumptions the legislature takes to be true, policies and principles it wants to advance or values to which it committed **offer interpreters helpful and authoritative guidance**.

<sup>1</sup> See also Human Rights Council, Incompatibility between democracy and racism, UN Doc. A/HRC/RES/18/15 (29 September 2011), para. 5, where the Council by consensus “condemned” doctrines of superiority as “incompatible with democracy and transparent and accountable governance”.

<sup>2</sup> Interpretation Act, R.S.C. 1985, c. I 21.



And at 453:

**§14.36 Weight of preamble.** ... Canadian practice ... is to attach as much weight to the preamble as seems appropriate in the circumstances. In keeping with the modern emphasis on purposive analysis, **heavy reliance on the preamble is often judged appropriate.**

C. (*G.C.*) v. *New Brunswick (Minister of Health and Community Services)*, [1988] 1 S.C.R. 1073 at 1080:

**Even if the Act did transfer to the Minister “all parental rights” as stated by Angers J.A., as we have seen, it provides some means for the conservation of the relationship between the child and its natural parent or guardian when in the former’s best interests. Indeed, the preamble of the Act declares that “children should only be removed from parental supervision either partly or entirely when all other measures are inappropriate”.**

See also *Reference re Resolution to Amend the Constitution* (Patriation Reference), [1981] 1 S.C.R. 753, at 805:

A preamble, needless to say, has no enacting force but, **certainly, it can be called in aid to illuminate provisions of the statute** in which it appears.

For example, in *Quebec (Attorney General) v. Moses et al.*, 2010 SCC 17, at para. 101, the Supreme Court of Canada highlighted the legal significance of the preamble in a federal law to implement the *James Bay and Northern Québec Agreement*:

The **wording of a statute’s preamble often provides insight into the statute’s purpose or goal** that can be helpful to a court interpreting it. According to s. 13 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, “[t]he **preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.**” As Professor Sullivan notes, “[t]he **most direct and authoritative evidence of legislative purpose is found in formal purpose statements** appearing in the body of legislation” (*Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 270). **Legislative preambles in particular may “contain direct descriptions of purpose or descriptions of the circumstances giving rise to the enactment — the mischief the legislature intended to cure, the social problems it wished to address”** (Sullivan, at p. 271). Although a legislative preamble will never be determinative of the issue of legislative intent since the **statute must always be interpreted holistically**, it can nevertheless assist in the interpretation of the legislature’s intention (P. A. Côté with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 72-75).





[102] The **preamble to the federal legislation further highlights the intention to create mutually binding obligations between the parties:**

WHEREAS the Government of Canada and the Government of Quebec have entered into an Agreement with the Crees and the Inuit inhabiting the Territory within the purview of the 1898 acts respecting the Northwestern, Northern and Northeastern Boundaries of the Province of Quebec and the 1912 Quebec Boundaries extension acts, and with the Inuit of Port Burwell;

AND WHEREAS the Government of Canada and the Government of Quebec have assumed certain obligations under the Agreement in favour of the said Crees and Inuit;

AND WHEREAS the Agreement provides, *inter alia*, for the grant to or the setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the Territory, measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture, the establishment of laws, regulations and procedures to manage and protect the environment in the Territory, remedial and other measures respecting hydro electric development in the Territory, the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society, an income support program for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation;

As described above, preambles **provide an important context and they do have legal effects.** In addition, PP11 in Bill C-15 elaborates on the “inherent” or pre-existing rights of Indigenous peoples. By adding a reference to Indigenous peoples’ “legal systems”, PP11 in C-15 goes further than what is in the preamble of the *UN Declaration*:

Whereas the *Declaration* emphasizes the urgent need to respect and promote the inherent rights of Indigenous peoples of the world which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, philosophies and **legal systems**, especially their rights to their lands, territories and resources; [emphasis added]



Bill C-15 includes 22 preambular paragraphs and these provisions have diverse legal effects. Therefore, in interpreting any of the 7 operative sections of the Bill, it is necessary to fully take into account any and all preambular paragraphs that are relevant.

In this whole context, in light of the far-reaching significance of the right of Indigenous peoples to self-determination, it is important to highlight here PP12 in Bill C-15:

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 inherent right of self-government ...<sup>3</sup>

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<sup>3</sup> For the exact same wording, see *An Act respecting Indigenous languages*, S.C. 2019, c. 23, 4<sup>th</sup> preambular para.