A Leopard Cannot Hide Its Spots: Unmasking Opposition to the UN Declaration on the Rights of Indigenous Peoples Special Issue: British Columbia's Declaration on the Rights of Indigenous Peoples Act

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In November 2019, the province of British Columbia passed the Declaration on the Rights of Indigenous Peoples Act,1 a legislative framework that would implement the United Nations Declaration on the Rights of Indigenous Peoples2 (UN Declaration, or UNDRIP) as required in 2015 by the Truth and Reconciliation Commission (TRC) of Canada.3 Call 43 in the TRC’s 94 Calls to Action calls upon all levels of government in Canada to “fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation in Canada.”4

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4 Ibid at 191.
With the passage of this Act, previously known as Bill 41,\(^5\) British Columbia became the first jurisdiction in the common-law world to establish a legislative framework for affirming Indigenous peoples’ human rights standards. This historic legislation was based on proposed federal legislation, Bill C-262,\(^6\) which died in the Senate in June 2019 after a handful of Conservative senators prevented it from coming to a final vote.\(^7\)

In the final hours before Bill 41 was passed by the Legislative Assembly in British Columbia, First Nations leadership expressed deep concern that it might suffer the same fate as the federal bill.\(^8\) Committee hearings dragged on for several days, and many worried that Bill 41 might not reach the floor again for a third reading before the end of the legislative session.

As the TRC firmly linked reconciliation with the implementation of the UN Declaration, any opposition to its implementation now translates directly into opposition to the findings and Calls to Action of the TRC. Therefore, many of those who work against its implementation do so subtly to preserve a façade of social acceptability, as they do not want to appear to oppose the TRC or oppose international human rights. In fact, individuals often profess to support the UN Declaration while simultaneously opposing efforts toward its implementation, such as federal Bill C-262 and British Columbia’s Bill 41. This article aims to unmask this veiled opposition to the UN Declaration. It will argue that at both the federal and provincial levels, veiled opposition to the implementation of the UN


\(^6\) Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, 1st Sess, 42nd Parl (as passed by the House of Commons 30 May 2018) [Bill C-262].


Declaration has common themes and patterns. Those patterns are uniformly politically motivated and not based on any actual conflict with Canadian or international human rights law.

This article is divided into four sections. First, despite some strong contextual differences, the similarities between federal Bill C-262 and British Columbia’s Bill 41 will be established so that the rationale for individual opposition to each of the bills can be analyzed together. Second, the qualitative data collection and analysis methods utilized in this study will be introduced, and the results presented. Third, the dominant themes of opposition common to British Columbia Liberal opposition in British Columbia and Conservative opposition federally will be discussed in terms of their political or legal nature. Finally, the article will end with some conclusions about opposition to legislation implementing the UN Declaration.

I. SIMILARITY OF BRITISH COLUMBIA AND FEDERAL LEGISLATION

British Columbia legislation to implement the UN Declaration, Bill 41, for all intents and purposes mirrors the federal Bill C-262. However, there are some important contextual differences between the two bills. The federal Bill was introduced as a private Member’s bill and debated for several years, including many hours of testimony in committee, and after passing in the House of Commons, it still needed to proceed to the Senate for passage, where it stalled. British Columbia’s Bill 41 was a government bill and only had to pass through a single house, which it did within a few weeks. Further, some features of British Columbia’s Bill 41 stand notably apart, and from an Indigenous perspective, provide distinct improvements when compared to the federal bill. The British Columbia Bill was co-drafted with the First Nations Leadership Council, and the draft Bill enjoyed a wide Indigenous consultation before it was tabled in the British Columbia legislature. The British Columbia Bill also contained a provision recognizing that the Province could make agreements with “Indigenous governing bodies” rather than only Indian Act bands. Despite these differences, the main thrust of the two bills is identical. Scott Fraser, British Columbia’s Minister of Indigenous Relations and Reconciliation, at the First Reading of Bill 41, stated the following:
Through this legislation, we are recognizing the human rights of Indigenous peoples in law. The legislation sees us bring provincial laws into harmony with the UN declaration over time. It will see us develop an action plan for how to meet the objectives of the UN declaration. Developed in consultation and collaboration with Indigenous peoples, with regular reporting on progress, this will provide transparency and accountability for all the work ahead.

The legislation also creates room for decision-making opportunities for Indigenous governments on matters that impact their citizens. It creates flexibility for the province to make agreements with more types of Indigenous governments, supporting self-determination and self-government. The legislation will give us a path forward, creating clarity and predictability for all people in British Columbia.\(^9\)

Like federal Bill C-262, British Columbia’s Bill 41 contained three major requirements: 1) consistency with the UN Declaration; 2) an action plan for the implementation of the UN Declaration; and 3) an annual report on progress.\(^10\) In fact, much of the language used in each bill is closely matched, if not identical.

Concerning the requirement for consistency, federal Bill C-262, section 4 reads as follows: “The Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.” Section 3 of the British Columbia Bill reads as follows: “In consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.”\(^11\) The common wording between the two bills is shown here in italics.

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\(^{9}\) British Columbia, Legislative Assembly of British Columbia, Official Report of Debates (Hansard), 41-4, No 280 (24 October 2019) at 10222 (Hon S Fraser).

\(^{10}\) The order in which these main sections appear differs between the two bills. In British Columbia’s Bill 41, supra note 4, s 4 is titled “Action Plan” and s 5 is titled “Annual report”. In federal Bill C-262, supra note 6, s 4 is titled “Consistency”, s 5 is titled “National Action Plan”, and s 6 is titled “Annual Report to Parliament”.

\(^{11}\) Bill C-262, supra note 6, s 4 [emphasis added].

\(^{12}\) Bill 41, supra note 5, s 3 [emphasis added].
On the subject of an action plan, Bill C-262 section 5 reads as follows: “The Government of Canada must, in consultation and cooperation with indigenous peoples, develop and implement a national action plan to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples”, 13 while section 4 of British Columbia’s Bill 41 contains all of the text of the federal bill, reflecting the provincial context, and adds some additional detail. Identical, or near identical, words are—once again—shown in italics. Section 4 of Bill 41 reads as follows:

(1) The government must prepare and implement an action plan to achieve the objectives of the Declaration.

(2) The action plan must be prepared and implemented in consultation and cooperation with the Indigenous peoples in British Columbia.

(3) The action plan must contain the date on or before which the government must initiate a review of the action plan.

(4) After the action plan is prepared, the minister must, as soon as practicable,
   a) lay the action plan before the Legislative Assembly if the Legislative Assembly is then sitting, or
   b) file the action plan with the Clerk of the Legislative Assembly if the Legislative Assembly is not sitting.

(5) The government may prepare a new action plan in accordance with this section. 14

For the annual report requirement, section 6 of Bill C-262 reads as follows:

The Minister of Indian Affairs and Northern Development must, within 60 days after the first day of April of every year including and occurring between the years 2017 and 2037, submit a report to each House of Parliament on the implementation of the measures referred to in section 4 and the plan referred to in section 5 for the relevant period. 15

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13 Bill C-262, supra note 6, s 5 [emphasis added].
14 Bill 41, supra note 5, ss 4(1)–(5) [emphasis added].
15 Bill C-262, supra note 6, s 6 [emphasis added].
Meanwhile, the British Columbia legislation contains more overlapping language, once again shown in italics, with additional detail. Section 5 of Bill 41 reads as follows:

1. Each year the minister must prepare a report for the 12-month period ending on March 31.
2. The report must be prepared in consultation and cooperation with the Indigenous peoples in British Columbia.
3. In the report under subsection (1), the minister must report on the progress that has been made towards implementing the measures referred to in section 3 and achieving the goals in the action plan.
4. On or before June 30 in each year, the minister must
   a. lay the report prepared for the 12-month period ending on March 31 in that year before the Legislative Assembly, if the Legislative Assembly is then sitting, or
   b. file the report prepared for the 12-month period ending on March 31 in that year with the Clerk of the Legislative Assembly, if the Legislative Assembly is not sitting. \[16\]

Federal Bill C-262 and British Columbia Bill 41 are extremely similar, and yet their political contexts differ substantially. Federal Bill C-262 was brought forward as a private Member’s bill by Cree New Democratic Party (NDP) Member of Parliament (MP) Romeo Saganash (Abitibi-Baie-James-Nunavik-Eeyou).\[17\] While this private Member’s bill was originally opposed by both the Liberal Party of Canada and the Conservative Party of Canada, with Liberal Justice Minister Jody Wilson-Raybould referring to legislative implementation of the UN Declaration as a “simplistic approach”, “unworkable”, and “a political distraction”,\[18\] the Liberal government led by

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\[16\] Bill 41, *supra* note 5, s 5 [emphasis added].


Prime Minister Justin Trudeau did eventually throw its support behind the bill, although it stopped short of taking it on as a government bill.\textsuperscript{19} Once the Trudeau Liberals threw their support behind Bill C-262, the Bill's primary opposition came from the Conservative Party of Canada.

In British Columbia, however, the Conservative Party of Canada holds no seats in the Legislative Assembly. In the 2019 session, the Legislative Assembly was comprised of 42 members from the British Columbia Liberal Party, 41 members from the British Columbia NDP, 2 members from the British Columbia Green Party, and 2 independent members.\textsuperscript{20} The NDP and the Green Party worked collectively under a 2017 "Confidence and Supply Agreement".\textsuperscript{21} So, when the British Columbia NDP tabled Bill-41, the British Columbia Liberals, a centre-right party with conservative and neo-liberal ideology, officially opposed the Bill in the provincial legislative assembly. Although it shares the same name, the British Columbia Liberal Party has been independent from the federal Liberal party since 1987, and its members support both the Liberal and Conservative parties in federal elections.

The remainder of this article will delve into the themes and patterns of opposition at both the federal and provincial levels, aiming to detect common themes and also show how federal and provincial opposition discourses differed.

\section{II. DATA COLLECTION AND ANALYSIS METHODS AND RESULTS}

This study analyzed the content and themes of three sources of data to closely examine opposition to UN Declaration implementation legislation:


\textsuperscript{20} See “Current Party Standings” (11 Aug 2020), online: \textit{Legislative Assembly of British Columbia} <leg.bc.ca/content-committees/Pages/Current-Party-Standings.aspx>.

1) legislative floor debates on both the federal and provincial levels; 2) testimony before the House of Commons Standing Committee on Indigenous and Northern Affairs; and 3) op-eds in major Canadian and British Columbia newspapers at the time that these bills were being considered.

Content and thematic analysis are qualitative research approaches within the social constructivist schools of the social sciences. Qualitative analysis of this type facilitates contextual meaning within text through developing emerging themes, which are derived from textual data. Through the close reading of texts and coding, subsequent analysis will reveal particular themes. Once themes emerge, data is consistently coded with them, but then, themes are also continuously clarified and refined by referring back to the original data, in a circular process. The thematic analysis then allows for interpretation of the main themes that emerged from a particular group of texts, in this case, transcripts and newspaper op-eds. As education scholars Merriam and Tisdell note, “[d]ata analysis is a complex procedure that involves moving back and forth between concrete bits of data and abstract concepts, between inductive and deductive reasoning, between description and interpretation.”

For this particular study, three main sources of data were analyzed, all of which contained statements or lines of questioning by individuals who either opposed or raised serious concerns about implementing UN Declaration legislation, at both the federal level and in the British Columbia Legislative Assembly. This included transcripts of the floor debate in the House of Commons on Bill C-262 between December 2015 and May 2018, transcripts of the House of Commons Standing Committee on Indigenous and Northern Affairs from April and May 2018, floor debate in the Senate in May 2019, the Standing Senate Committee on Aboriginal Peoples in June 2019, floor debate in the British Columbia Legislative

Assembly in October and November 2019, and a variety of major newspaper op-eds taking oppositional stances on either the federal or provincial proposed legislation between 2018 and 2020. All of these transcripts and newspaper op-eds were coded and analyzed using NVivo, a qualitative research software specifically designed for the analysis of text-rich materials.

Analysis of opposition complaints to British Columbia’s Bill 41 revealed eight major themes, which are shown in Table 1. First, the top complaint, making up more than 23% of total complaints among those who expressed opposition to Bill 41, was that the legislation would be too expensive and difficult to implement. Second, just over 22% of opposition complaints believed that it would be inappropriate to pass this particular legislation as the province was already engaged in UN Declaration implementation practices. Third, representing nearly 21% of all complaints, opponents were concerned that the legislation would require a full review of all laws and policies in British Columbia, both forward looking and backward looking, and remarked that such an undertaking would not be practical. Fourth, 12.5% of the concerns questioned the wisdom of passing implementation legislation in British Columbia for the UN Declaration, as the declaration itself lacks legal force and effect. Fifth, 8.3% of total complaints were concerned about the implications of recognizing Indigenous peoples’ right to free, prior, and informed consent (FPIC), with an emphasis on the practical difficulties of such recognition. Sixth, nearly 7% of complaints centered on the fact that this legislation was, in effect, a global pilot project since no other jurisdiction in the common-law world, either nationally or sub-nationally, had passed legislation to implement the UN Declaration. Seventh, just over 4.2% of concerns focused on inequality, or even reverse discrimination, claiming that UN Declaration legislation would provide more rights to Indigenous peoples in British Columbia than to non-Indigenous peoples.
Table 1: Opposition Complaints, British Columbia Bill 41

<table>
<thead>
<tr>
<th>Complaint</th>
<th>Percentage of Total Appearances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Too expensive, too difficult</td>
<td>23.6%</td>
</tr>
<tr>
<td>Already taking steps toward implementation</td>
<td>22.2%</td>
</tr>
<tr>
<td>Requires full review of laws and policies</td>
<td>20.8%</td>
</tr>
<tr>
<td>Lacking legal force and effect</td>
<td>12.5%</td>
</tr>
<tr>
<td>FPIC concerns</td>
<td>8.3%</td>
</tr>
<tr>
<td>Pilot project</td>
<td>6.9%</td>
</tr>
<tr>
<td>Reverse discrimination</td>
<td>4.2%</td>
</tr>
</tbody>
</table>

Analyzing opposition complaints about federal Bill C-262 revealed a much smaller set of dominant themes. First, representing nearly 48% of the opposition, the top complaint on the federal Bill concerned FPIC. Second, 22.5% of the opposition complained that the Bill—first tabled in 2015—was being rushed through the legislative process, and more time was needed to study it in depth. Third, representing almost 17% of opposition complaints, was the notion that the legislation should not be passed simply because Canada already respects the majority of rights articulated in the UN Declaration. Fourth, nearly 10% of complaints reflected the view that implementation was too expensive and difficult to execute. Fifth, 2.8% of the opposition complaints questioned the need to redress the wrongs of the past.
Table 2: Opposition Complaints, Federal Bill C-262

<table>
<thead>
<tr>
<th>Complaint</th>
<th>Percentage of Total Appearances</th>
</tr>
</thead>
<tbody>
<tr>
<td>FPIC</td>
<td>47.9%</td>
</tr>
<tr>
<td>Need more time to study</td>
<td>22.5%</td>
</tr>
<tr>
<td>Already taking steps toward implementation</td>
<td>16.9%</td>
</tr>
<tr>
<td>Too expensive, too difficult</td>
<td>9.9%</td>
</tr>
<tr>
<td>Redress past wrongs</td>
<td>2.8%</td>
</tr>
</tbody>
</table>

This analysis reveals some of the common themes of opposition, whether that opposition comes from Conservatives on the federal level or from the British Columbia Liberals. Specifically, both groups raised concerns regarding the following themes: (1) FPIC; (2) too expensive and difficult to implement; and (3) already taking steps toward implementation. However, emphasis differed from the federal Conservative opposition to the British Columbia Liberals’ opposition. As Table 3 shows, “FPIC” registered almost 30% higher as a complaint on the federal level among Conservatives than it did for the British Columbia Liberals. The pragmatic concern that implementation legislation was “too expensive and too difficult” was 13.7% more common in British Columbia opposition than on the federal level. There was only a 5.3% difference on the notion of “already taking steps toward implementation”.

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Table 3: Comparison of Complaints in Common

<table>
<thead>
<tr>
<th>Complaint</th>
<th>Percentage in Bill 41</th>
<th>Percentage in Bill C-262</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>FPIC</td>
<td>8.3%</td>
<td>47.9%</td>
<td>-39.6%</td>
</tr>
<tr>
<td>Too expensive, too dificult</td>
<td>23.6%</td>
<td>9.9%</td>
<td>+13.7%</td>
</tr>
<tr>
<td>Already taking steps toward implementation</td>
<td>22.2%</td>
<td>16.9%</td>
<td>+5.3%</td>
</tr>
</tbody>
</table>

There were some conservative opposition concerns that appeared on the federal level but seldom appeared in the British Columbia debate, including “need more time to study” and concerns over the appropriateness and practicality of potential “redress for past wrongs”. There were also some concerns that were unique to British Columbia’s debate: reluctance to accept the “full review of laws and policies”; a worry about passing legislation to implement an international human rights declaration that is “lacking legal force and effect”; concerns about British Columbia engaging in a “pilot project” of implementation through legislation; questions about “reverse discrimination” or inequalities that may be created through the legislation; and concerns over the “without delay” clause for implementation measures in British Columbia.

III. DISCUSSION OF DOMINANT THEMES OF OPPOSITION COMMON TO BOTH PARTIES

This section will discuss dominant themes identified through the content analysis. This discussion will also demonstrate how the common opposition arguments and lines of questioning by British Columbia Liberals on Bill 41 and Conservatives on federal Bill C-262 are not supported by Canadian or international human rights law.
A. FPIC EQUATES TO AN INDIGENOUS “VETO”

In May 2019, during Senate debate on Bill C-262, Senator Don Plett, Opposition Whip at the time, summed up Conservative complaints and concerns about the application of the principle of FPIC equating to an Indigenous “veto” in Canada. He said,

The part of UNDRIP which best exemplifies this uncertainty and disagreement is found in the articles which mention “free, prior and informed consent.”

The phrase shows up six times in UNDRIP in Articles 10, 11, 19, 28, 29 and 32. It elicits the greatest concern when it comes to its impact on resource development and public infrastructure projects. What’s the impact? Well, that’s the problem. No one seems to know because there is no agreement on whether consent means a veto.

... There are those that advocate that consent is a veto but believe it should not be a veto. There are those that say it is not a veto but that it should be a veto. There are those who insist that it is a veto and that it should be a veto, so just get over it. And then there are those who say it is clearly not a veto, so what’s the problem?

... I find it ironic we are being compelled to codify free, prior and informed consent without having a free, prior and informed understanding of what this even means.25

Similarly, in testimony to the Standing Committee on Indigenous and Northern Affairs in the House of Commons, Law Professor Dwight Newman outlined three interpretations of FPIC.26 The first interpretation, he said, is a strict reading of the text of the UN Declaration, which says that it is sufficient to seek FPIC in good faith, even if a group is not fully successfully obtaining it. He indicated that this is the interpretation that is most consistent with the French language version of the UN Declaration.27

25 Debates of the Senate, 42-1, No 284 (7 May 2019) at 8016–17 [Senate Hansard, No 284].


27 See Evidence 42-1, supra note 26 at 3.
The second interpretation centers on process, meaning that a process is sufficient if it is consent-based. Subsequently, he claimed that under the third interpretation, FPIC is essentially a veto, and he asserted that this is the interpretation advanced by many Indigenous advocates. 28

In a December 2019 article, lawyers Thomas Isaac, Jeremy Berretto, and Emilie N. Lahaie built on Newman’s claim that the principle of FPIC does not consider how Indigenous and non-Indigenous interests can be balanced. 29 Instead, they claim, respecting Indigenous peoples’ right to FPIC works against reconciliation by harming opportunities for peaceful co-existence because FPIC operates essentially as a veto on development projects. Their argument is as follows:

UNDRIP requires governments to obtain “free, prior and informed consent” (FPIC) prior to developing any project affecting the lands and territories of Indigenous peoples. FPIC can be interpreted to imply that governments cannot act without the consent of Indigenous peoples even when such actions are matters of general policy for the good of society, and otherwise justifiable under Canadian law. Due to UNDRIP’s strict terminology, this concept is particularly problematic in situations where a government decision or project is supported by the majority of affected Indigenous groups, but where there remains one holdout. 30

A 2018 op-ed by Henry Swain and Jim Baillie opposing federal Bill C-262 made a similar claim about the inequities that would emerge if Indigenous peoples’ right to FPIC was recognized in law. Swain and Baillie wrote, “The Trudeau Government signs on to give Aboriginals veto rights nobody else has. . . . [and] would give Aboriginals rights not enjoyed by other Canadians.” 31 Meanwhile, in other op-eds, Baillie claims to support


30 Ibid.

31 Harry Swain and Jim Baillie, “The Trudeau Government Signs on to Give Aboriginals Veto Rights Nobody Else Has”, Financial Post (26 January 2018), online:
“aggressive action to remedy historic wrongs to Indigenous people,” arguing that “[h]ealth care, housing, education, child welfare, adequate law enforcement—all these and still other aspects of life require urgent attention.” However, his concern is that the Bill goes too far, arguing that a legislative framework that includes the principle of FPIC provides Indigenous peoples in Canada with “legal rights and a special status that endures long after the social problems arising from centuries of neglect have been resolved.” Instead of FPIC, he notes, “we should strive for an emboldened Indigenous people, freed from the adverse consequences of their mistreatment and able to make their way as equal citizens.”

The House of Commons also raised fears over the implications and application of the right of FPIC for Indigenous peoples. Cathy McLeod, a Conservative MP from Kamloops-Thompson-Cariboo, raised additional fears over recognizing Indigenous peoples’ right to FPIC, particularly as it involves laws of general application. She asked as follows:

In a country such as Canada, how would it be feasible to consult and try to obtain consent from Métis, Inuit, and all first nations for essentially every bill tabled in Parliament? Clearly, almost every bill tabled in Parliament has an impact under article 19. I am concerned that this would lead to paralysis and an inability by government to move forward on its agenda and commitment.

In British Columbia, the opposition raised additional fears about the right of FPIC, particularly concerning forced relocations. Michael de Jong, British Columbia Liberal Member of the Legislative Assembly (MLA) from Abbotsford West and former minister of Aboriginal Relations and

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33 Ibid.

34 Ibid.

35 House of Commons Debates, 42-1, Vol 148, No 303 (29 May 2018) at 19836 [Hansard, No 303].

36 Ibid at 19837.
Reconciliation, mentioned this concern during a debate and emphasized that the history of British Columbia is rife with forced relocations of Indigenous peoples. He feared that his “interpretation of the article [on forced relations] is providing a clear enunciation of the principle that in the case of an Indigenous people being relocated, there is an entitlement under the terms of the declaration to compensation.”37 He then asked if there is any “reasonably up-to-date quantification around the likely cost or liabilities associated with those unresolved claims or assertions?”38 British Columbia Liberal MLA John Rustad (Nechako Lakes),39 former Minister of Aboriginal Relations and Reconciliation, also expressed some concern. He said, “Lots of people have lots of comments and fear. I’ve received emails and calls and these types of things already because of the fears of what free, prior, and informed consent may be or what this is or what it’s not.”40

Lawyer Paul Joffe provided testimony on the question of FPIC as a veto in front of the Standing Committee on Indigenous and Northern Affairs in April 2018, while Bill C-262 was being considered in the House of Commons. His testimony unequivocally indicates that consent does not equate to a veto. He said as follows:

Now let’s turn to the important issue of consent versus veto. FPIC, or free, prior and informed consent, is not created by the UN declaration. The declaration affirms and elaborates upon existing rights; it does not create any new rights. The term “veto” is not used in the UN declaration. Veto implies an absolute right, that is, no taking into account the facts and law in each case. There is no balancing of rights. This is neither the intent nor interpretation of the UN declaration, which includes some of the most comprehensive balancing provisions in any human rights instrument, especially article 46(3) which indigenous representatives negotiated with Canada.41

38 Ibid.
40 Ibid at 10380.
41 House of Commons, Standing Committee on Indigenous and Northern Affairs, Evidence, 42-1, No 103 (24 April 2018) at 14.
Further, Joffe self-published a paper in August 2018, where he elaborated on the legal distinction in Canadian law between veto and consent. “Veto”, he notes, “implies complete and arbitrary power, with no balancing of rights.”\(^4\) He acknowledges that the “Supreme Court of Canada (SCC) has used the term ‘veto’ but has not defined what ‘veto’ means in the context of Indigenous peoples’ rights and related Crown obligations.”\(^5\) Further, while the SCC did use the term “veto” in *Haida Nation*,\(^4\) it was used in the context of asserted but not yet proven Aboriginal rights.\(^5\)

In sum, opponents to the legislation argue that the principle of FPIC for Indigenous peoples is not compatible with Canadian law, and they base this argument on two assertions. First, they argue that international instruments are non-binding, and second, they claim that the principle of FPIC for Indigenous peoples is inconsistent with Canadian law and the Constitution.

The first assertion—that international human rights instruments are non-binding for Canada—is inaccurate. Canadian cases support the enforceability of international human rights law in Canada, particularly customary law, which applies directly. For example, in *R v Hape*,\(^4\) the SCC ruled as follows:

> Despite the Court’s silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations,

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\(^5\) *Ibid* at 1.

\(^4\) *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 48 [*Haida Nation*].

\(^4\) See Joffe, *supra* note 42 at 2.

\(^4\) 2007 SCC 26 [*Hape*].
is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.47

Therefore, according to the SCC, unless there is express legislation to the contrary, international human rights law should be utilized as an interpretive aid for Canadian law. Further, in a 2012 case pertaining to child welfare, the Federal Court stated,

The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the Canadian Human Rights Act. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.48

In the same case, the Federal Court went even further, noting that “international instruments such as the UNDRIP and the Convention on the Rights of the Child may also inform the contextual approach to statutory interpretation”,49 citing the 1999 Supreme Court ruling in Baker,50 and domestic legal “interpretation that reflects [international human rights] values and principles is preferred.”51


48 Canada (Human Rights Commission) v. Canada (AG), 2012 FC 445 at para 351 [Human Rights Commission].

49 Ibid at 353.


51 Human Rights Commission, supra note 48 at para 354 (where the court cites Amnesty International’s Memorandum of Fact and Law). See also Sullivan, above at 547-49; Hape, supra note 46 at paras 53-54; Baker, supra note 50 at paras 65-70; R v Sharpe, 2001 SCC 2 at 175.
Further, in international law, FPIC is derived from the fundamental human right of self-determination, from which all other human rights flow. While the principle was embraced much earlier in many regions of the world, its incorporation into the UN Charter\(^\text{52}\) marked its universal recognition.\(^\text{53}\) It was also recognized as a universal and inherent right of all peoples in the International Covenant on Civil and Political Rights\(^\text{54}\) and the International Covenant on Economic, Social and Cultural Rights,\(^\text{55}\) which both entered into force in 1976. Canada has signed and ratified both conventions.\(^\text{56}\)

The second assertion—that the principle of FPIC for Indigenous peoples is inconsistent with Canadian law—is also inaccurate. In fact, the notion of consent is a core principle in both Canadian and international law and has a long history. In Canada, consent-based decision making traces back to the Royal Proclamation of 1763, which required Indigenous peoples' consent, through agreements with the Crown, before lands could be alienated.\(^\text{57}\) As Anishinaabe law professor John Borrows points out, the Royal Proclamation was not, as is often presumed, a “unilateral declaration of the Crown’s will in its provisions relating to First Nations.”\(^\text{58}\) Rather, he

\(^{52}\) Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 [UN Charter].


\(^{57}\) See e.g Opetchesaht Indian Band v Canada, [1997] 2 SCR 119, 147 DLR (4th) 1.

argues, First Nations in the 1760s played an important role in decision-making with the Crown. As Borrows argues, “the Royal Proclamation is part of a treaty between First Nations and the Crown which stands as a positive guarantee of First Nation self-government.” After reconstructing the events surrounding the negotiation of the treaty ratified at Niagara in 1764, Borrows concludes that “the Proclamation cannot be interpreted to undermine First Nations rights.”

A series of Aboriginal title cases in the Supreme Court in the 20th and early 21st centuries have engaged directly with the question of Indigenous consent. The *Calder* decision in 1973 was the first to acknowledge the pre-existence of Aboriginal title as well as its non-derivation from colonial law. While the Nisga’a did not prevail in their effort to have Aboriginal title to their lands recognized, and the SCC ruling did not settle the land title question, this case did open the door to further cases.

In 1984, the SCC ruled in *R v Guerin* that Aboriginal title is a *sui generis* right and Canada has a fiduciary duty toward First Nations, particularly involving reserve lands. Therefore, the federal government is obligated to act in First Nations’ best interest. A few years later, in 1990, the SCC established criteria, known as the “Sparrow Test,” to determine justifiable infringements on Aboriginal rights. The SCC found that the Aboriginal right to fish had never been extinguished and was to be upheld

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59 *Ibid* at 155.

60 *Ibid* at 156.

61 *Calder et al v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].


64 *Ibid* at 382–94.

65 See *R v Sparrow*, [1990] 1 SCR 1075 at 1111–19, 70 DLR (4th) 385 [*Sparrow cited to SCR*].
under Section 35 of the Constitution, which protects existing treaty and Aboriginal rights but had not at that time been defined. By mimicking the “recognized and affirmed” language in Section 35, the Court ruled that “the Crown [is held] to a substantive promise . . . [and] required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).”

In 1997, the pathbreaking Delgamuukw decision engaged explicitly with the concept of Indigenous consent. In this case, brought forward by the Gitksan and Wet’suwet’en nations, the SCC set out a test to determine the existence of Aboriginal title and then established how the Crown could justifiably infringe upon it where it did exist. The SCC clarified that consultation was insufficient for certain infringements on Aboriginal title, so consent was required:

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

A series of decisions in 2004 and 2005 built upon Delgamuukw’s principles and further established the framework for the Crown’s “duty to consult.”

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66 Ibid at 1110.
68 See ibid.
69 See ibid at 1107–15.
70 Ibid at 1113.
71 Haida Nation, supra note 44; Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 550; Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69.
More recently, in the 2014 *Tsilhqot'in Nation* decision, the SCC ruled that an Indigenous nation retains Aboriginal title because no treaty or other surrender had ever occurred. This affirmed Indigenous peoples’ right of consent concerning their lands unless particular infringement conditions are met. The ruling stated the following:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s.35 of the *Constitution Act, 1982*.

The significance of this case is that it establishes a more robust test for the Crown to justify infringement when consent is required because consent must also be judged from the perspective of the Indigenous people whose rights are impacted as well as that of the wider Canadian public.

Therefore, the premise that Indigenous consent is inconsistent with Canadian law and the Constitution stands in stark opposition to this body of case law, especially SCC cases that have, in fact, supported a foundation of consent for Indigenous peoples.

**B. TOO EXPENSIVE AND TOO DIFFICULT TO IMPLEMENT**

Another dominant theme present in both the federal and British Columbia debates was that implementing the UN Declaration by means of legislation would be too expensive and difficult to put into practice. To address this question, British Columbia Liberal MLA Michael Lee, from Vancouver-Langara, joined British Columbia Liberal MLA Michel de Jong in the British Columbia floor debate with Minister of Aboriginal Relations and Reconciliation, Scott Fraser. MLA Lee acknowledged that following the passage of this legislation, the government would need an action plan and to collaborate with First Nations in British Columbia. However, he was

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72 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*].
74 *Ibid* at para 76.
75 *Ibid* at para 81.
deeply troubled by the cost of these processes and what they would mean for the government of British Columbia. He noted that, when we speak about taking “all measures necessary,” as stated in the text of Bill 41, “to ensure the laws of British Columbia are consistent” with the UN Declaration, the reasonable implication is that the government then has an obligation to do so.  

What, he asked, are the “considerations, including considerations from a cost point of view...?” Even more so, Article 39 of the UN Declaration indicates Indigenous peoples’ right to seek financial and technical assistance from the state. This means that there will be increasing demand for provincial engagement from First Nations, which “will translate into a need for additional resources that First Nations will be looking to government to provide.”  

He then mentioned a First Nations leader who had recently told him, “If UNDRIP...is going to have any practical impact, we (First Nations)...are going to need more capacity dollars from government.”  

During the House of Commons Standing Committee hearings on Bill C-262, Professor Ken Coates, who claimed to support the principles of the UN Declaration, encouraged Parliament not to pass this legislation over concerns about the difficulty and cost of implementation. He testified as follows:

[UNDRIP] is extremely comprehensive.... When I look at this and see this as harmonizing these laws and actually making them mean something, just think for a second what it would actually mean for Canada, with more than 60 first nations and different languages across the country, if we actually took seriously the commitment to improve education, including in indigenous peoples’ languages. That is something we should have done 50 years ago. It’s something we should have done 100 years ago. Now we have most of these nations’ languages on the verge of destruction and disappearance. To just take that one issue and make it into a national priority would cost hundreds and hundreds of millions of dollars.


77 Ibid.

78 Ibid at 10821–22.

79 Ibid at 10822.
I... would hope that... Parliament recognizes the complexity and potential cost of the UNDRIP commitments. To even go halfway toward meeting the obligations set out under UNDRIP would cost billions of dollars. I think it’s money that we have to spend and we should have spent it a long time ago, but it will cost a great deal and take a great deal of effort to put in place.80

Conservative MP Cathy McLeod raised particular concerns about the cost of implementation where land rights are concerned. She noted, “In British Columbia alone, that is 100% of the province.”81 Raising concerns about FPIC and the status of non-Indigenous businesses who operate on Crown land, she asked, “What are going to be the practical implications for perhaps the tourism operators in the Chilcotin or the ranchers who have depended on crown land, as these decisions get made? We have not talked about impacted third parties and how, as we correct the injustices of the past, we should not create a new injustice.”82

In the British Columbia legislature debates, British Columbia Liberal MLA Mike de Jong raised numerous questions about the difficulty and potential expense of implementing the UN Declaration in relation to land.83 Like Conservative MP McLeod on the federal level, de Jong expressed worry over the potential implications for private land owners in British Columbia84 and wondered whether the need for remedy or redress would include financial compensation, and if so, how much?85 He also worried about the possibility of land transfer.86 To increase the concerns about the far-reaching impacts and potentially astronomical cost of Bill 41,

80 See Evidence 42-1, supra note 26 at 12.
81 House of Commons Debates, 42-1, No 245 (5 December 2017) at 16054.
82 Ibid.
84 See BC Debates, No 295, supra note 37 at 10688.
85 See BC Debates, No 294, supra note 83 at 10652.
86 Ibid.
he wondered “how far into the past” will be relevant as we consider the possibility of financial or other compensation.\textsuperscript{87}

Another major line of argument for opposition parties in both federal and provincial level debates centered around one monumental and arduous task required by Bill 41, specifically a full review of existing laws and policies in British Columbia to determine their compliance with the UN Declaration. MLA Michael de Jong stated in debate on 19 November 2019, “Bill 41 operates in a way that attaches it, appends it, to all of the legislation that is on the books of British Columbia presently—the entire body of law—and that the question that can legitimately then be asked is whether or not that statute is consistent with the declaration.”\textsuperscript{88} In response, Minister Fraser agreed with the facts. This legislation requires a full review of British Columbia’s laws and policies. However, this task is not so onerous that it is infeasible. Conversely, Minister Fraser instead notes that the British Columbia government’s “commitment is . . . to work with Indigenous peoples in this province to bring our laws—if they’re existing ones, future ones—into alignment over time with the UN declaration.”\textsuperscript{89} For clarification, MLA de Jong asked Minister Fraser, this time in the negative, if “no positive legal obligation [is] created on the part of government to undertake that exercise of review and alignment . . . ?”\textsuperscript{90} Minister Fraser, again, did not disagree with the facts but provided a different interpretation. This Bill, he noted, did not itself create an obligation for the government to conduct such a review, but it is “enabling legislation that will allow us to create the obligation in section 3 to bring our legislation or laws into alignment with the UN declaration.”\textsuperscript{91} MLA de Jong then pronounced that such a deep and wide review would be an “onerous task” that would be a “multi-decade exercise” with “obvious


\textsuperscript{89} \textit{Ibid} at 10569 (Hon S Fraser).

\textsuperscript{90} \textit{Ibid} at 10569 (M de Jong).

\textsuperscript{91} \textit{British Columbia, Debates, No 292 (19 November 2019)} at 10569 (Hon S Fraser).
limitations...for government to complete that process of review and harmonization” and asked “what happens in the meantime...?”92 Would this legislation essentially subject every law in British Columbia to a “layer of international law and subject to measurement against that international declaration?”93 Minister Fraser reiterated that this Bill was intended to serve as an interpretive tool “to amend laws and create new laws, ensuring that they’re in alignment with the UN declaration”94.

Harkening back to the same conversation that occurred in debates at the federal level earlier in the year over Bill C-262, MLA de Jong quoted Senator Murray Sinclair:

This bill does not seek to implement the declaration itself. The bill itself does not raise the implementation of the declaration as its objective. The bill talks about calling upon Canada to do an analysis of existing legislation to see which laws are currently inconsistent with the declaration. That’s primarily what this bill is about...95

However, at that time, Senator Murray Sinclair was met with the same alarming response to the possibility of a full-scale policy review in the Senate, that Minister Fraser faced in British Columbia. In debates on Bill C-262, Senator Donald Neil Plett, a Conservative leader and future Leader of the Opposition in the Senate, also questioned the scale of the review this legislation would require:

Honourable senators, if ever there was a bill that needed sober second thought, it is this one. The reach and impact of this 14-page bill will be sweeping and extensive. It instructs the Government of Canada to take all necessary measures to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples. We are not considering a typical bill but one which will quite possibly have implications on every other piece of legislation in this country.96

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92 Ibid at 10570 (M de Jong).
93 Ibid at 10571 (M de Jong).
94 Ibid at 10571 (Hon S Fraser).
95 Ibid at 10573 (M de Jong).
96 Senate Hansard, No 284, supra note 25 at 8014–15.
In light of the severe discrimination and human rights violations that Indigenous peoples continue to face, it cannot be argued that legislation to safeguard their human rights is “too expensive and difficult to implement.” As Madame Justice Rosalie Abella stated, “We have no business figuring out the cost of justice until we can figure out the cost of injustice.”97

The UN Declaration explicitly calls for appropriate measures, including “legislative measures to achieve the ends of this Declaration.”98 In particular, Article 38 requires that such measures be carried out “in consultation and cooperation with indigenous peoples.”99 This collaborative approach has been adopted by Canada and British Columbia in drafting their respective legislation to implement the UN Declaration.100 The American Declaration on the Rights of Indigenous Peoples took a similar approach on legislative measures and was adopted by the Organization of American States in June 2016.101

Canada consistently takes a legislative approach to human rights—including in Canada’s Constitution.102 Canada’s human rights laws are based on the Universal Declaration of Human Rights, adopted by the General

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98 UN Declaration, supra note 2, art 38.
99 Ibid.
100 See Bill C-262, supra note 6, Preamble, ss 4, 5; Declaration on the Rights of Indigenous Peoples Act, supra note 1, ss 3, 4(2), 5(2).
101 OAS, General Assembly, 46th Reg Sess, American Declaration on the Rights of Indigenous Peoples, OEA/Ser.D/XLVI.19 (2016) [American Declaration] (“States shall promote, with the full and effective participation of indigenous peoples, the adoption of such legislative and other measures as may be necessary to give effect to the rights recognized in this Declaration”, art XXXI at para 2 [emphasis added]). Canada has been a member of the OAS since 1990.
Assembly in 1948, which outlines certain human rights that are universal and inherent.\textsuperscript{103} Two of the founding principles of the Declaration are equality and freedom from discrimination. The \textit{Canadian Human Rights Act}, originally passed in 1977 and later amended, protects all Canadians, including Indigenous peoples, from harassment and discrimination.\textsuperscript{104} The \textit{Canadian Charter of Rights and Freedoms},\textsuperscript{105} part of the \textit{Constitution Act, 1982}, “protects every Canadian’s right to be treated equally under the law... and guarantees broad equality rights and other fundamental rights such as the freedom of expression, freedom of assembly and freedom of religion.”\textsuperscript{106} Further, provincial and territorial human rights laws are strikingly similar to the \textit{Canadian Human Rights Act} and protect individuals from discrimination. All these legislative instruments provide “a reasonably robust array of legal protections that roughly mirrors many of the key rights in the canonical instruments of international human rights law.”\textsuperscript{107}

It would be a double standard for Canada’s Parliament and provincial legislatures to repeatedly adopt legislation affirming the human rights of all Canadians yet claim it is “too expensive” to legislate in favour of the rights of Indigenous peoples and individuals, particularly when it has violated Indigenous peoples’ human rights so flagrantly.\textsuperscript{108} In addition, Canada is

\begin{itemize}
\item \textsuperscript{103} \textit{Universal Declaration of Human Rights}, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.
\item \textsuperscript{104} \textit{Canadian Human Rights Act}, supra note 102.
\item \textsuperscript{105} Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (UK), 1982, c 11.
\item \textsuperscript{108} The UN Declaration includes both the collective rights of Indigenous peoples and individual rights of Indigenous persons.
\end{itemize}
obliged to report to international human rights bodies what legislative measures it has taken to implement human rights at home.\textsuperscript{109}

C. ALREADY TAKING STEPS TOWARD IMPLEMENTATION

British Columbia Liberal MLA Michael de Jong summarized the claim that British Columbia was already taking steps toward implementation when he announced that, in his assessment, the language in Bill 41 “just declares the existing state of law.”\textsuperscript{110} MLA John Rustad concurred with this line of opposition, adding that the history of Indigenous relations in Canada has been much more positive than in other countries.\textsuperscript{111} He relayed the story of the reconciliation agreement with the Cheslatta people and how the previous British Columbia Liberal government was able to take an economic and social agreement approach to reconciliation, which, he feels, reduces tensions between Indigenous and non-Indigenous peoples in Canada.\textsuperscript{112} He cited the Nisga’a agreement as well as other notable examples of agreements and positive steps that have occurred in British Columbia absent UN Declaration legislation, relying only on Indigenous rights and title as enshrined in the Constitution.\textsuperscript{113}

British Columbia Liberal MLA Ellis Ross, from Skeena, who was formerly the chief councillor for the Haisla Nation, added an Indigenous British Columbia Liberal voice to this line of opposition. He argued as follows:

When the declaration first came out—what, ten or 12 years ago?—I didn’t understand it. And for the most part, what I did understand, most of that

\textsuperscript{109} See e.g \textit{International Convention on the Elimination of All Forms of Racial Discrimination}, 7 March 1966, 660 UNTS 195, art 9(1) (entered into force 4 January 1969) (ratified by Canada on 14 October 1970): “States Parties undertake to submit to the Secretary-General of the United Nations . . . a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention”. See similarly \textit{ICCPR}, supra note 54, art 2(2).

\textsuperscript{110} BC Debates, No 292, supra note 88 at 10563 (M de Jong).

\textsuperscript{111} BC Debates, No 286, supra note 39 at 10378 (John Rustad).

\textsuperscript{112} See \textit{ibid} at 10377.

\textsuperscript{113} See \textit{ibid} at 10378–80.
declaration were rights that we already had. It went without saying that we had the right to self-determination. I knew that. We didn’t need case laws to say that. We didn’t need a declaration. I knew that.

We have the right to preserve our own language. I knew it. Nobody ever came to me and said: “You don’t have the right to preserve your own language and culture.” Nobody ever said that. A lot of that was empty promises in this declaration.

... Nothing has advanced Aboriginal issues in Canada more than the case law and section 35. Nothing...

... UNDRIP is really just a statement of principles. UNDRIP actually doesn’t acknowledge or recognize the progress of a country like Canada when we’re talking about case law principles or the constitution. Only section 35 and the legal precedents established by case law are binding...

Everything that we’ve done and accomplished in B.C. in the last 15 years was done without these principles, without UNDRIP principles.114

On the federal level, during the House of Commons debate on Bill C-262, Mark Strahl, Conservative MP from Chilliwack-Hope, referred to a version of Bill C-262 previously brought forward by MP Romeo Saganash in an earlier session of Parliament. Quoting himself, Strahl said the following:

It must be said at the outset that our government is dedicated to protecting aboriginal rights in Canada. Indeed, Canada already boasts a unique and robust legal framework through which aboriginal rights are protected...

More than just lip service, we have enshrined the rights of aboriginal peoples in our Constitution, one of the only countries in the world to do so. As my hon. colleagues will know, aboriginal and treaty rights are recognized and affirmed in section 35 of the Constitution Act and reaffirmed in the Charter of Rights and Freedoms. Moreover, our government has also issued a statement of support for the principles of the very document at the core of this bill, the United Nations Declaration on the Rights of Indigenous Peoples, which are consistent with our own commitment to continue working in partnership with aboriginal peoples to improve the well-being of aboriginal Canadians.115

114 BC Debates, No 286, supra note 39 at 10384–91.

115 House of Commons Debates, 42-1, No 257 (5 February 2018) at 16721 (Mark Strahl) [Hansard, No 257].
MP Strahl advocated for “a Canadian solution to this issue”, rather than simply adopting the internationally drafted UN Declaration, in the firm belief that the “tools available in our Constitution and in our courts” are far superior to anything the UN could offer Canada.\textsuperscript{16}

Thomas Isaac, a partner at Cassels Brock and Blackwell LLP, and Chair of that firm’s Aboriginal Law Group, testified at the House of Commons Standing Committee hearings that Canadian law did not need assistance from the UN Declaration to recognize Indigenous peoples’ rights. He expressed concerns that Bill C-262 may not actually live up to the standards of existing Canadian law and the tremendous efforts undertaken by Canadian courts, Indigenous peoples, and some governments in recent decades. In his testimony, he stated the following:

[A]ny effort to adopt UNDRIP must reflect the distance that Canada has travelled to date to prioritize reconciliation with indigenous peoples, the lessons we have learned over the past decades, and the significance . . . of section 35, a uniquely Canadian creation.

Since the 1990 Supreme Court of Canada decision in Sparrow, the court has developed a framework for protecting indigenous rights and reconciling those rights with other indigenous and non-indigenous Canadians through nearly 70 decisions. The progress made so far has been the product of substantial and purposeful efforts and dialogue between indigenous and non-indigenous Canadians. . . .

Progress in defining and advancing reconciliation has resulted in increasing clarity and has allowed us to have more meaningful discussions, better protect aboriginal and treaty rights, and promote reconciliation through practice. Bill C-262, as it is presently drafted, risks disrupting the increased clarity within Canada’s legal regime for protecting indigenous rights and as a result, risks becoming an obstacle to the pursuit of reconciliation.\textsuperscript{17}

Cathy McLeod, Conservative MP from Kamloops-Thompson-Cariboo, supported this opposition argument in her comments and questions in the Standing Committee hearings. She noted specifically that the absence of the UN Declaration in Canadian law has not prevented the Canadian

\textsuperscript{16} Ibid at 16722.

\textsuperscript{17} House of Commons, Standing Committee on Indigenous and Northern Affairs, \textit{Evidence}, 42-1, No 102 (23 April 2018) at 3–4 [\textit{Evidence}, No 102].
government from acting appropriately in pursuing reconciliation, and, further, section 35 of the Canadian Constitution and other Canadian law have produced an excellent result even absent a legislative commitment to the UN Declaration. 118

It is, first of all, logically flawed to argue that legislation to implement the UN Declaration is unnecessary since “we” are already doing these things.” If “we” are indeed, already “doing these things,” then what could be the harm in passing legislation that asks us to “do these things”?

More to the point, however, is that the impacts of colonialism, forced assimilation, genocide, 119 and dispossession are still evident in Canada. 120 Such impacts have not been addressed and, therefore, we are most certainly not “already doing these things.” As the SCC emphasized in 2012 in \textit{R v Ipeelee},

\begin{quote}
[C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. 121
\end{quote}

118 See generally Hansard, No 303, supra note 35.


121 \textit{R v Ipeelee}, 2012 SCC 13 para 60.
In 2004, the World Commission on the Social Dimension of Globalization emphasized the following:

There is a critical need for both national and local authorities to ensure that the rights of indigenous peoples are protected and discrimination against them is eliminated, including the effective implementation of legislation where it exists, and the development of appropriate legislation where it is absent.\textsuperscript{122}

In 2018, both the Canadian and the British Columbia governments acknowledged that their “relationships with Indigenous Nations have been steeped in colonialism.”\textsuperscript{123} In addressing this damaging situation, both governments have opted to implement a range of measures that include adopting legislation to implement the UN Declaration.

In its preamble, the UN Declaration repudiates all doctrines of superiority\textsuperscript{124} and affirms that Indigenous peoples “have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources”.\textsuperscript{125} Thus, the UN Declaration recognizes the “urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.\textsuperscript{126}

In relation to Indigenous peoples, Lumbee law professor Robert A Williams has emphasized the importance of international human rights law in ensuring the “progressive development of law”:

\begin{quotation}
[I]nternational law has begun to make important contributions to the progressive development of indigenous peoples’ rights in the world. In the Americas, the inter-American human rights system has worked to articulate a highly refined set of legal norms and juridical principles that speak to the concerns and aspirations of
\end{quotation}

\textsuperscript{122} World Commission on the Social Dimension of Globalization, \textit{A Fair Globalization: Creating Opportunities for All} (Geneva, Switzerland: International Labour Office, 2004), para 211.

\textsuperscript{123} Principals’ Accord, supra note 120 at para A.

\textsuperscript{124} UN Declaration, supra note 2 at 3, Preamble.

\textsuperscript{125} Ibid.

\textsuperscript{126} Ibid.
indigenous peoples without resort to colonial-era doctrines justifying racial
discrimination against indigenous peoples or to a language of racial inferiority and
cultural subordination. Contemporary international law rights discourse, with its
focus on core human values of racial equality and equal dignity under the law, is
used instead to analyze the complex and difficult questions raised by indigenous
peoples’ rights claims in a postcolonial world.127

Most states, including Canada and similar countries like New Zealand,
Australia, and Norway, develop progressive laws through their respective
institutions. Such development includes incorporating international human
rights standards and law.128 Thus, it is entirely appropriate for federal,
provincial, and Indigenous governments to implement the UN Declaration
through their own legal systems, customs, and laws.

IV. CONCLUSIONS

British Columbia’s Bill 41 and federal Bill C-262 were similar both in
content and context and each bill experienced opposition that tracked with
the conservative, neoliberal ideology of both the provincial and federal
opposition parties. The Conservative party opposed the federal Bill, while
the British Columbia Liberals, the centre-right hybrid party made up of
both conservative and liberal members, opposed the Bill in British
Columbia. Despite some differences in the ideological stance of each
opposition party, the analysis above reveals striking similarities consistent
with the conservative wing of each party.

First, most MPs, Senators, MLAs, and newspaper op-ed authors—from
across the full political spectrum—profess to support Indigenous peoples.
The analysis did not reveal any outright arguments indicating that the
current economic, social, or cultural status quo should continue.
Conversely, nearly all groups appear to recognize the need for change and
support some kind of shift. Some emphasize economic betterment for
Indigenous peoples while others focus on social conditions or the need to

127 Robert A Williams, Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and
the Legal History of Racism in America* (Minneapolis, MN: University of Minnesota
Press, 2005) at 188.

128 In regard to Indigenous peoples, see e.g. UN Declaration, *supra* note 2, arts 34, 40.
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protect Indigenous culture and heritage, including revitalizing Indigenous languages. Numerous individuals spoke strongly in favour of Indigenous human rights and many professed strong support for the UN Declaration, or as they often put it, support for the “principles” of the UN Declaration, even when they specifically opposed the particular pieces of legislation being considered.

As the above analysis demonstrates, opposition arguments to UN Declaration legislation follow a consistent set of dominant themes: (1) EPIC equates to an Indigenous veto; (2) the UN Declaration is too expensive and difficult to implement; and (3) steps are already being taken in both British Columbia and Canada in general to recognize and support Indigenous rights, so the legislation is unnecessary. Further, as the above discussion shows, none of these arguments are supported by either Canadian and international human rights law or normative expectations. In fact, international human rights law and norms expect Canada and the province of British Columbia to take further significant steps toward Indigenous human rights implementation, including, but not limited to, legislative frameworks. The UN Declaration is an articulation of Indigenous peoples’ inherent human rights—the minimum standard required to secure their survival, dignity, security and well-being—and both the proposed bills affirmed that these international standards apply to Canadian law. Further, the TRC called upon all levels of government to fully adopt and implement the UN Declaration as the framework for reconciliation in Canada.

The three dominant aspects of opposing arguments, discussed above, appear to be grounded in fear, and this analysis identifies a number of key fears. First, opponents fear the possibility of significant costs and difficulty of the potential scale and scope of UN Declaration legislation implementation.

Second, opponents fear how quickly changes may need to occur if UN Declaration legislation were to be passed. While British Columbia MLA Michael de Jong expressed certain concerns about the “no delay” phrase in the British Columbia legislation,129 Conservative members of the Senate

129 BC Debates, No 292, supra note 88 at 10571 (M de Jong).
allowed the legislation to die on the order paper in the Senate in June 2019.\textsuperscript{130} Implying that Bill C-262, which was originally tabled in April 2016,\textsuperscript{131} was being rushed through the legislative process without proper consideration of its potential implications, Conservative Senators sent Bill C-262 back for additional study and discussion. After implying that the Senate was being pressured to “hurry and implement the bill when [it is] nowhere near fully understanding its implications”,\textsuperscript{132} Senator Plett proclaimed that it is the Senators’ duty to take “the time to properly examine legislation”.\textsuperscript{133} This response, Plett contends, is not meant to be seen as blocking legislation, but rather “it is at the very heart of what this chamber is supposed to do”.\textsuperscript{134}

Third, there appears to be a significant fear over how much non-Indigenous peoples may be held accountable not only for current inequities and injustices between Indigenous and non-Indigenous peoples but also for the wrongs of the past and their cumulative effects. Even if opposition voices profess support for Indigenous peoples and Indigenous human rights or only oppose the particular legislation at hand, they are often extremely careful to specify the distinction between today and the “wrongs of the past”. This seems carefully constructed to avoid a claim for historical redress and make a clear demarcation between present day peoples and those of the past, implying that present day peoples do not share in the gains and profits of those who, in the past, committed gross harms against Indigenous peoples in Canada.

Fourth, there is a strong concern over the uncertainty that accompanies being the first in the common-law world to pass legislation to implement the UN Declaration. In debate on Bill C-262, Senator Don Plett noted

\begin{itemize}
  \item \textsuperscript{131} \textit{House of Commons Debates}, 42-1, No 44 (21 April 2016).
  \item \textsuperscript{132} Senate Hansard, No 284, \textit{supra} note 25 at 8015.
  \item \textsuperscript{133} \textit{Ibid} at 8014.
  \item \textsuperscript{134} \textit{Ibid}.
\end{itemize}
how Canada, Australia, New Zealand, and the United States have been slow to accept the UN Declaration. In British Columbia, Liberal MLA Michael de Jong repeatedly noted in his questioning of Minister Scott Fraser that no one else in the world has passed legislation like British Columbia is considering with Bill 41. He continued that even in Bolivia, where the UN Declaration has been put into law, it has not been to the same extent as contemplated by the legislation being considered in Canada. In testimony on federal Bill C-262, Thomas Isaac argued that most nation-states with Indigenous peoples have not supported the UN Declaration. He claimed that in the original 2007 vote on the floor of the UN General Assembly on the UN Declaration, only 42 out of 88 states with Indigenous peoples voted in favour of the UN Declaration and most of those that did vote in favour of the declaration put caveats on their support.

Finally, fifth, there is a strong fear of appearing to be oppositional even where a person is being oppositional. Again, nearly all opponents of UN Declaration legislation claim to support the UN Declaration itself fully and wholeheartedly, or at least the principles or the “spirit” of the declaration, while simultaneously opposing the legislation to implement the UN Declaration. On the federal level, Senator Don Plett, the lead Conservative opponent of Bill C-262 in the Senate, stated his personal support for justice concerning Indigenous peoples:

Colleagues, injustice is something that everyone in this chamber opposes. Of that, I am certain. When we see injustice, it troubles us, and perhaps the only thing that troubles us more is when we see injustices that are not being made right.

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135 See ibid at 8015.
136 BC Debates, No 295, supra note 37 at 10695.
138 Evidence, No 102, supra note 117 at 3.
139 See Evidence 42-1, supra note 26 at 11 (testimony by Dr Ken S Coates, Canada Research Chair in Regional Innovation, where Dr. Coates stated, “I endorse in total the spirit of UNDRIP” at 11).
140 Senate Hansard, No 284, supra note 25 at 8014.
In British Columbia debates, representatives were clearly defensive over the perception that they might stand in opposition to Indigenous peoples’ rights. On multiple occasions, MLA de Jong stated that it was not his intention to “be mischievous or argumentative,”141 “to quarrel,”142 or “to trick anyone”143 and his questions “should not be interpreted as obstinance or opposition.”144 Further, before British Columbia Liberal MLA Peter Milobar, Kamloops-North Thompson, began questioning Minister Scott Fraser, he cleared himself of any negative personal misperceptions in stating the following:

[As any good democracy does, debating legislation and expressing the concerns of our constituents from different regions of the province. Debating and questioning does not necessarily need to translate . . . . Too often in our society, I think it translates to an automatic opposition piece.145

It is exceedingly rare for Canada to question, let alone take opposition to, an international human rights standard. In fact, when Canada voted against the UN Declaration at the UN General Assembly, it was the first time that Canada ever opposed an international human rights standard and “it remains today the only international human rights standard in Canada up for debate.”146

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141 BC Debates, No 292, supra note 88 at 10559 (M de Jong).
142 BC Debates, No 297, supra note 87 at 10764 (M de Jong).
143 BC Debates, No 292, supra note 88 at 10563 (M de Jong).
144 Ibid at 10572 (M de Jong).
145 BC Debates, No 286, supra note 39 at 10402.