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Thomas Isaac Appears Before House of Commons Standing Committee on Indigenous and Northern Affairs

Thomas Isaac

April 23, 2018

On April 23, 2018, Cassels partner Thomas Isaac appeared in his personal capacity to the House of Commons Standing Committee on Indigenous and Northern Affairs to provide comments on 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*).

Thomas Isaac and Arend Hoekstra have prepared a report on Bill C-262 (found here), which has also been shared with the Standing Committee on Indigenous and Northern Affairs.

Below are Mr. Isaac's comments in full.

My comments today are focused on why incorporating the United Nations Declaration on the Rights of Indigenous Peoples[1] (UNDRIP) within Canada's already highly developed and world-leading legal regime protecting Indigenous rights against unilateral and unjustified state action, requires a prudent and thoughtful approach. This approach needs to be sensitive to existing Canadian law and the tremendous efforts undertaken by our courts, Indigenous peoples and some public governments, over the last 25 years. Bill C-262, as presently drafted does not, in my view, reflect the necessary prudence or thoughtfulness required.

The creation of UNDRIP, and the embrace of the principles therein, marks a critical step forward by some parts of the international community to recognize and protect the rights of Indigenous peoples globally. This is a significant international human rights achievement. UNDRIP provides an important benchmark in a world which has too often harmed, mistreated, and exploited Indigenous peoples.

You will note that I said "some parts of the international community." Not all states with Indigenous peoples are on the right path, and the process itself has been divided. At the 2007 United Nations General Assembly vote regarding UNDRIP, only 42 (less than a majority) of the 88 countries with Indigenous peoples voted in favour of UNDRIP, while four (including Canada) took a principled stand when voting against UNDRIP. The remaining states either abstained or were absent from the vote.

UNDRIP was drafted in the context of this division. By necessity, UNDRIP needed to be blunt and as easy to understand as possible given that it was intended to globally to address those states that act without restraint against the rights of Indigenous peoples.

This is not to suggest that UNDRIP has nothing to offer Canada. Many elements in UNDRIP are relevant to Canada including those relating to education, health, equality under the law, the development and maintenance of political systems and institutions, social and economic security, and gender equality.[2] While these, and other elements of UNDRIP are relevant to Canada, any effort to adopt UNDRIP must reflect the distance Canada has travelled to date to prioritize reconciliation with Indigenous peoples, the lessons that we have learned over the past decades, and the significance of Section 35, *Constitution Act, 1982*.

Since the 1990 Supreme Court of Canada decision in *R. v. 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 the substantial and purposeful efforts and dialogue between Indigenous and non-Indigenous Canadians. Today, after decades of effort and investment by all parties, we have a constitutional regime that, for example, recognizes and protects Tsilhqot'in Aboriginal title rights[3], and identifies the degree of consultation required when reversing the flow of a pipeline.[4] We also have a federal government that has expressly stated that Canada's most important relationship is that with its Indigenous peoples. As each year passes, Canadians gain increased certainty and confidence in how Indigenous and non-Indigenous peoples can respectfully and productively live together.

In introducing Bill C-262 to a second reading, the Bill's sponsor said that the Bill promises "to at least provide the basis or framework for reconciliation in our country,"[5] suggesting that a new approach to Indigenous rights is needed, one focused on reconciliation. Yet, reconciliation has been a primary goal of our courts for nearly three decades. 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 presently drafted, risks disrupting the increasing clarity within Canada's regime for protecting Indigenous rights, and as a result, risks becoming an obstacle to the pursuit of reconciliation.

UNDRIP itself cannot be meaningfully incorporated into Canadian law unless it is understood in relation to the existing Canadian legal framework including, importantly, Section 35. For example, UNDRIP uses terms and phrases such as "Indigenous," "the lands and territories of Indigenous peoples," and "free, prior, and informed consent" each of which will need to be interpreted within the context of Canada's existing legal regime for the protection of Indigenous rights.

It is presently unclear in Canadian law who "Indigenous" refers to. In *Daniels v Canada*,[6] the Supreme Court of Canada stated that the term included those individuals who do not possess Aboriginal rights under Section 35. Additional instruction is needed to clarify the intended beneficiaries of the rights set out in UNDRIP, which uses the term "Indigenous" throughout.

Likewise, Canada has developed a nuanced understanding of Indigenous interests in land, including

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traditional territories, Aboriginal title, and treaty lands. These terms are not used in UNDRIP which lacks specificity, including in relation to overlapping and competing Indigenous interests, a live issue in Canadian law.

Finally, much has already been said about whether “free, prior, and informed consent” means a veto, a duty to consult consistent with that already existing in Canadian law, or something different. This phrase is clear on its face as it is used in UNDRIP. Any attempt at redefining the phrase in a less than forthright manner in terms of its application in Canada risks undermining the needed transparency in the reconciliation process – i.e., *say what you mean and mean what you say*.

Nowhere does UNDRIP refer to “reconciliation” or give specific consideration to how Indigenous and non-Indigenous peoples can respectfully coexist. Such considerations are irrelevant for most counties, where any Indigenous rights are fully subject to acts of government. In Canada, reconciliation, and principles such as the honour of the Crown, are at the core of the relationship between Indigenous peoples and all Canadians and work to direct and constrain how governments interact with Indigenous rights.

In the preamble to Bill C-262, it suggests that the Parliament of Canada recognizes the “principles” set out in UNDRIP,[7] however it is unclear what “principles” the Bill refers to; UNDRIP refers to three different sets of principles: the principles of the Charter of the United Nations,[8] the principles of “justice, democracy, respect for human rights, non-discrimination, and good faith,”[9] and principles of “of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith,”[10] none of which are novel within Canada. Section 5 of Bill C-262 refers to the “objectives” of UNDRIP,[11] though UNDRIP makes no reference to “objectives,” “goals,” “aims,” or “intentions.”

With respect, the sponsor has said that Bill C-262 can advance “justice”[12] and “reconciliation,”[13] clarify “the existing rights of Indigenous peoples”[14] and establish “very clear rules.”[15] Bill C-262, as presently drafted, provides no clear or even vague direction on any of these matters, does not explain how it will advance justice or reconciliation, and does nothing to clarify the existing rights of Indigenous peoples in Canada.

Finally, Bill C-262 is missing an element which should be essential for any legislation which proposes to alter significantly Canada’s legal regime: a clear explanation of how the outcome of adopting Bill C-262 will differ from that currently existing in Canadian law.

Canada’s legal regime relating to the protection of the rights of Indigenous peoples is evolving, and can benefit from being examined critically against the clear, if bluntly stated, articles of UNDRIP. But simply adopting UNDRIP, without clear direction of how it should interact with Canada’s existing and highly-developed regime for the protection of Indigenous rights, risks disrupting the increasing clarity that has been gained through unprecedented efforts, and decades of decisions by the Supreme Court of Canada.

Canada has made substantial progress over the last few decades, both in relation to where it was, and as against the actions and progress of all other states regarding the protection of Indigenous rights.

To move forward, Canada requires a thoughtful and purposeful approach, consistent with the honour of the Crown. To the extent that Bill C-262 can contribute to that dialogue, it should be revised to provide the context and substance required for promoting and enhancing reconciliation and protecting Indigenous rights in Canada. As I wrote in my 2016 Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision, "reconciliation is more than platitudes and recognition. Reconciliation flows from the constitutionally protected rights of [Indigenous Peoples] protected by Section 35 and is inextricably tied to the honour of the Crown, and must be grounded in *practical actions*. [emphasis added]"

UNDRIP has value for Canada, but it must be incorporated in a way that promotes clarity and that integrates within Canada's world-leading regime for the protection of Indigenous rights.

Thank you.

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[1] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th plenary meeting (13 September 2007) [UNDRIP]
[2] Article 14 refers to right of Indigenous peoples to establish and control their educational systems and institutions providing education in their own languages; Article 17 refers to the right of Indigenous peoples to fully enjoy all rights established under domestic labour laws; Article 20 refers to the right of Indigenous peoples to maintain and develop their political, economic and social systems or institutions; Article 21 refers to the right of Indigenous peoples to the improvement of their economic and social conditions, including in the areas of education, employment, housing, heath, and social security; Article 22 calls for particular attentions to be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities; and Article 24 refers to the right of Indigenous individuals to access, without any discrimination, all social and health services.
[3] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256.
[4] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*., 2017 SCC 41, [2017] 1 SCR 1099.
[5] *Hansard*, 42nd Parl, 1st Sess, No 245 (5 December 2017) (Hon Geoff Regan).
[6] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] SCJ No 12.
[7] 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, 2015 (second reading and referral to committee in the House of Commons) [Bill C-262].
[8] UNDRIP, *supra* note 1.
[9] UNDRIP, *supra* note 1.
[10] UNDRIP, *supra* note 1 at art 46, s. 3.
[11] Bill C-262, *supra* note 10.
[12] House of Commons, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Sess, No 095 (13 February 2018) [13 February 2018 Standing Committee on Indigenous and Northern Affairs].
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
