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Our File No.: 189.202

June 3, 2019

The Honourable Lillian Dyck, Chairperson
Standing Senate Committee on Aboriginal Peoples
The Senate of Canada
621 Victoria Building
Ottawa, ON K1A 0A4

Dear Senator Dyck:

Re: Bill C-262

At the request of Senator Tannas, I have reviewed Bill C-262 which seeks to ensure that the laws of Canada are in harmony with the United Nations Declaration on the right of Indigenous People (**UNDRIP**).¹ His advice to me was not to consider the merits of UNDRIP or the substance of Bill C-262 and accordingly I have not done so other than, as requested, I have reviewed Professor Newman's opinion and agree with it.

As a result, this opinion focusses only on the proposed legislative drafting and at the request of Senator Tannas, the hard copy is addressed and delivered to you.

Making law is arguably the most important activity of government. Governments make law through adopting Acts. An Act is the most formal expression of the will of the state. It needs to be understood by the public, members of Parliament and the Senate, and the courts. There is a need for clarity and certainty, which is met by adhering to legislative drafting conventions, using standard wording for particular expressions, having due regard to historical precedents, knowing the principles applied by the courts when they interpret legislation, and considering other technical matters. An Act should use natural language, but care must be taken in legislative drafting to reduce the ambiguity or vagueness inherent in all languages, particularly English or French in Canada.²

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

² See Canada, *Guide to Making Federal Acts and Regulations*, 2nd ed, Catalogue No J2-8/2001E-IN (Ottawa: Privy Council Office and Department of Justice, 2001) at 6, 49, 116 and 123-124, from which portions of this paragraph are *verbatim*.

It appears to be the common intention of all concerned that Bill C-262 create a collaborative process to implement UNDRIP in Canada by 2037 using a national plan of action. It does not appear to be the intention of Parliament to have UNDRIP take full effect immediately. If I have accurately stated the intention of Parliament, then Bill C-262 should say that. As a matter of legislative drafting, it does not say that clearly. It should.

The primary difficulty is that section three of Bill C-262 uses novel language. Others, such as Professor Newman, have noted that the phrase UNDRIP "... is hereby affirmed as a universal international human rights instrument with application in Canadian law" has no precedent in the operative sections of any past statutes.³ I too have found no precedent in federal or provincial legislation for that wording. A court, faced with this novel wording would have to consider afresh what that phrase means.

International instruments are not a part of Canadian law unless they have been implemented through statute. In doing so, the statute must make its intent to implement sufficiently clear. It is not clear to me that wording such as "is hereby affirmed" and "with application in Canadian law" indicates an intention to implement UNDRIP in the future rather than immediately. Such ambiguity and vagueness should be avoided.

There is simple wording that is clear and that has been used before to recognize an international document without making it the law in Canada immediately. That is to use the word "approved" ("approuvé"). It was used, for example, in implementing NAFTA. The *North American Free Trade Agreement Implementation Act* says simply in this respect: "The Agreement is approved."⁴ Because of historical precedent, the courts understand this wording to mean that the document referred to does not take immediate effect: approval of an international instrument does not give the document force of law in Canada.⁵ Other commentators have also recognized this solution.⁶

If section three merely stated that UNDRIP is approved then it would be relatively clear that the intention of Bill C-262 is to indicate Canada's approval of UNDRIP and to develop a plan to implement it by 2037.

Professor Newman suggests instead that section three be deleted or moved to the preamble. That is another possibility. He also suggests that the Bill be reviewed by legislative drafting experts who could improve the text and ensure that the French and English version are consistent. That is an excellent suggestion. That would avoid surprise, disappointment, and frustration should the courts be called upon to review the resulting Act.

³ In his *Submissions to Senate Standing Committee on Aboriginal Peoples Re Bill C-262*, dated 26 May 2019.

⁴ SC 1993, c 44, s 10. In French: "L'Accord est approuvé."

⁵ See for example *An Act Respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41 at 109-110, *Fraser v Janes Family Food Ltd*, 2012 FCA 99 at paras 14-16 and 22, and *Council of Canadians v Canada (Attorney General)*, 277 DLR (4th) 527 at para 25 (Ont CA).

⁶ Gib van Ert, *The Impression of Harmony: Bill C-262 and the Implementation of the UNDRIP in Canadian Law*, 2018 CanLII Docs 252 (27 November 2018).



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It was a pleasure reviewing these matters. If it would be helpful, I am available to discuss this letter at your convenience.

Yours truly,


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