Excerpt from Senate Hansard for February 21, 2019

United Nations Declaration on the Rights of Indigenous Peoples Bill

Second Reading—Debate

On the Order:

> Resuming debate on the motion of the Honourable Senator Sinclair, seconded by the Honourable Senator Pratte, for the second reading of 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.

Hon. Peter Harder (Government Representative in the Senate): Honourable senators, I rise to deliver episode two of my speech in support of 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, which I would like to indicate the government has supported.

Again, I would like to congratulate member of Parliament, the Honourable Romeo Saganash, for bringing this measure forward and Senator Sinclair for his speech as the sponsor of the bill in this chamber.

I believe that this bill is an opportunity for the Senate to do its part to defend section 35's constitutional values to help right historic injustice in Canada and to achieve further reconciliation with our Indigenous partners. This is also an opportunity to build on this chamber's excellent work to eliminate historic gender discrimination in the Indian Act, as well as in relation to cannabis legislation for Indigenous communities.

In regard to process, I support scheduling our legislative agenda generally and particularly on several pieces of legislation that will advance Indigenous rights and interests. This is so that Canadians can follow and contribute to our work. Again, this would include our studies on the government's Bill C-91, the Indigenous Languages Bill, and the forthcoming Family and Child Services Bill.

In that regard, we look forward to the guidance of Senator Dyck, the chair of the Aboriginal Peoples Committee, on the best path forward in consideration of all of these pieces of legislation.

I also hope that we can move swiftly forward with private member's Bill C-374 to guarantee Indigenous representation on the Historic Sites and Monuments Board of Canada. That bill was passed in the other place unanimously and is only the third private member's bill ever to have received a Royal Recommendation authorizing expenditures. So we should move swiftly to review and, hopefully, complete our passage of Bill C-374.

Turning to UNDRIP, as you know, Bill C-262 calls for the harmonization of Canada's laws with the United Nations Declaration on the Rights of Indigenous Peoples and calls for the standards and principles of the UN declaration to serve as a framework for

reconciliation. In doing so, Bill C-262 advances Call to Action 43 of the Truth and Reconciliation Commission.

The United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples over 10 years ago, in 2007. On the day of its adoption, the chair of the UN Permanent Forum on Indigenous Issues urged everyone to make the declaration:

> . . . a living document for the common future of humanity.

The declaration is the only international instrument focused on Indigenous rights that has received global support. It is the result of more than 20 years of negotiations involving both Indigenous peoples and states, and Senator Boehm in his intervention described some of those negotiations, of which he was a party.

Bill C-262 today is part of a broader conversation about national reconciliation, the recognition and implementation of Indigenous rights and the rebuilding of a strong and healthy relationship between the Crown and Indigenous peoples based on respect, cooperation and partnership.

Bill C-262 reflects the desire of many Indigenous and non-Indigenous people in Canada to pursue reconciliation efforts, including the rebuilding of Indigenous nations through lasting, tangible and meaningful change.

Although reconciliation has been a core principle of section 35 of the charter for many decades, there is still much work to do to live up to its promise and for true reconciliation to be achieved.

I note that the UN declaration, like other international human rights instruments that Canada supports, already applies to Canadian law as a source that can be drawn upon to inform the interpretation of domestic law. With Bill C-262, we introduce legislative measures that further support the implementation of the UN declaration in Canada in ways that ensure increasingly better outcomes for Indigenous communities and moves reconciliation forward. Bill C-262 would require the Government of Canada to take all measures necessary to ensure consistency between federal laws and the UN declaration.

However, the bill provides flexibility for the government to determine, in consultation and cooperation with Indigenous peoples, what measures will be necessary to align federal laws with the declaration within Canada’s constitutional framework. This approach is consistent with the declaration itself, which specifies that it is up to individual states to determine what measures are appropriate to achieve the ends of the declaration:

> . . . in consultation with and cooperation with Indigenous peoples . . .

For Canada, it means that this work needs to take place in full partnership with First Nations, Metis and Inuit peoples.

Bill C-262 also provides accountability mechanisms for the federal government, including a requirement to develop and implement a national action plan in partnership with Indigenous peoples and the obligation to report on progress to Parliament annually on both the harmonization of laws and the national action plan.

Through these key mechanisms, the government's progress on implementing the declaration will be monitored and measured over time.

[*Translation*]

Like other laws, once Bill C-262 is passed, it will be interpreted in a way that respects the Canadian Constitution, including section 35 of the Constitution Act and the division of powers. I want to point out that Bill C-262 specifically mentions that it should not be interpreted or enforced in such a way as to reduce the constitutional protection afforded by section 35.

(1730)

Cooperative federalism also means that the implementation of an instrument as important as the United Nations Declaration on the rights of Indigenous Peoples cannot be done by the federal government alone. It requires the collaboration of the provinces and territories. This is a national project that requires the engagement of all governments and all Canadians.

[*English*]

Now I would like to briefly address some of the issues that were raised during the study of Bill C-262 in the House of Commons which may also be raised here.

First, there is quite a bit of discussion around the meaning of the principle of free, prior and informed consent, or commonly referred to as FPIC, which appears in different articles of the declaration. The larger objective of FPIC is that all parties work together in good faith towards mutually acceptable arrangements with Indigenous peoples genuinely influencing decision-making.

Here in Canada, consultation and cooperation with Indigenous peoples would require to develop Canada's approach to FPIC within our legal framework and consistent with the UN declaration as well as Bill C-262's requirements. For instance, new processes, structures and mechanisms for participation and engagement in decision making could be required. Such structures would need to be developed in full partnership with Indigenous peoples.

In conversation with Senator Tannas, Deputy Chair of the Senate Aboriginal Peoples Committee, Senator Sinclair discussed FPIC as a meaningful process of accommodation. FPIC is something for committee members to take a closer look at and to report back to us their findings.

[*Translation*]

Another issue that was discussed during study of the bill at the other place was the characterization of Indigenous rights as human rights. Honourable colleagues, there is no doubt that Indigenous rights are human rights and that these rights are defined individually or collectively by individuals or Indigenous groups.

[*English*]

Human rights are universal and inherent in all human beings. They represent a consensus of shared values that crosses faiths and cultures. Article 1 of the UN declaration recognizes that Indigenous peoples have the right to full enjoyment of all

human rights and fundamental freedoms. This includes the right to self-determination and self-government, which are core elements of the UN declaration.

Turning the tide and shifting our laws, policies and operational practices to require the rights of Indigenous peoples will require a range of measures as set out in Article 38 of the UN declaration. These include legislative measures like those in Bill C-262.

Honourable senators, we are working towards a longer-term transformation that includes a vision of healthy, prosperous, self-determining and self-governing Indigenous nations. Bill C-262, by requiring consistency between the laws of Canada and the UN declaration, provides further conceptual foundation for this vision. It is this foundation upon which we will accelerate progress towards reconciliation.

With this goal in mind, I was inspired by a recent comment about UNDRIP at our Fisheries Committee meetings on Bill C-55, where John G. Paul, Executive Director of the Atlantic Policy of First Nations Chiefs Secretariat, said the following about the importance of UNDRIP to Indigenous communities:

> Even when UNDRIP was declared years ago, it was really us that were proud that the United Nations declared it. This is providing a real opportunity for Canada to be proud of us and our perceptions under UNDRIP which we've also believed.

Honourable senators, I think this is great way to look at UNDRIP and this bill, as an achievement of Indigenous leaders and partners about which we can all be proud.

Finally, in closing, I would like to acknowledge on the record the determined grassroots work of faith communities in support of this bill, including my Mennonite faith. I would like to read an excerpt of a letter sent by the leaders of the Anglican Church of Canada, the Canadian Baptists of Western Canada, the Quakers, the Christian Reformed Church, the Evangelical Lutheran Church, the Canadian Ecumenical Justice Initiatives, the Mennonite Church of Canada, the Mennonite Central Committee, the Presbyterian Church in Canada and the United Church in Canada. I want to quote just briefly from that letter, where it says:

> We are at a critical juncture in Canadian history. In 2010, the Federal government, led by Prime Minister Stephen Harper, issued a statement of support endorsing the principles of the Declaration. In 2016, the Federal government, led by Prime Minister Justin Trudeau, stated that Canada is "a full supporter of the Declaration, without qualification." Now is our chance to breathe life into these public affirmations with tangible action. Together, we can make a non-partisan decision in support of legislative reconciliation.

The letter goes on to say:

> Indigenous peoples are calling Canada to a path of mutual and authentic relationship. Non-Indigenous Canadians of all ages and backgrounds are asking the Federal government to honour Indigenous peoples' human rights.
>
> The Senate holds decision-making power to bring Canada closer to honest and fair relationship.

The letter closes in saying:

> Please support Bill C-262.

> Our prayers and hopes are with you.

Honourable senators, faith gives many Canadians the hope and the will to work toward a more just world. As we are working to make a positive difference in Canadian society through this democratic institution, I'd like to close by sharing a quote from one of my favourite theologians, Reinhold Niebuhr, where he says:

> Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary.

Colleagues, let us trust in our democratic processes. Let us see whether the Senate endorses the proposition that our laws ought to be in harmony with the United Nations Declaration on the Rights of Indigenous Peoples. I believe that this chamber will if it's given the chance.

The Hon. the Speaker: Senator Tannas, question?

Hon. Scott Tannas: Senator, thank you very much for your speech. I listened carefully, as I did to Senator Sinclair. As you know, I'm deeply involved and active in the Indigenous affairs committee.

I want to point something out and ask you a question, because I think this goes to the heart of it. I have been present in committee meetings when Indigenous leaders have told us in no uncertain terms that full, prior and informed consent means a veto.

Now, I've been in committee meetings where the minister has said, no, it doesn't. I see on the website of the United Nations a growing number of documents that say no, it isn't. But our own people believe it is.

This, to me, goes to the heart of some of the hypocrisy that we see, where we bring symbolic gestures forward that are seized upon for hope, when in fact they are mirages.

We have to stop piling hypocrisy on hypocrisy.

My question to you is this: If we take this to committee, and if we do not get a consensus from First Nations' leaders, Indigenous people, that FPIC is not a veto, what do you suggest we do?

Senator Harder: I thank the honourable senator for the question. It is one that he also engaged in with Senator Sinclair. Senator Sinclair spoke very eloquently of his view, which will inform the committee's discussion as well.

Given the specific question you ask, I really think it's up to the committee to decide what it decides in that circumstance. If he would like to consult me at that time, should that event happen, I'd be happy to give him my advice.

The Hon. the Speaker: Senator Massicotte, a question?

Hon. Paul J. Massicotte: Bill C-262 refers to free, prior and informed consent. Meanwhile, the Supreme Court, over decades now, is finally getting pretty clear what it means by meaningful consultation. We're finally getting to a clear definition on that.

Should I be concerned about the fact we're now introducing a new word called "consent." If you look at the dictionary, consent means approval; approval means you have to do so, and it nearly suggests that they have a right to say no.

(1740)

The Supreme Court ruling is clear. In some circumstances, it may require consent, but it depends upon the degree of harm and whom it affected.

I've been trying to get clarity on what "consent" means. I've read all the documents and most of the treaties. I've read the rapporteur. However, it seems to me there's still a lack of clarity in terms of what it means.

Could you tell us for the record that that does not mean veto? And why do you have that opinion, when the document says otherwise?

Senator Harder: I thank the honourable senator for his question. Again, this is at the heart of what I hope the committee will delve into.

I would like to quote again Senator Sinclair's intervention, where he parsed out exactly the circumstances in which consent may be required but other circumstances in which it would not. In other words, there is a continuum and circumstances. The courts have given guidance to governments of all levels in this matter.

What we are dealing with here is, frankly, bringing reconciliation and justice and aligning our domestic obligations with commitments we made when we signed on to the declaration.

Senator Massicotte: I appreciate that, and I can appreciate a continuum of consent. However, the document refers to consent in every instance, which is inconsistent with the Supreme Court ruling.

Don't you think we're sort of kidding ourselves? As you know, there were six months of negotiations where the nations sought the words "seek consent," and the Aboriginal community said, "No, not good enough."

Maybe somebody is expecting something and we're liberally interpreting it differently to avoid discussing the real issue, which is an inconsistent interpretation of the word "consent."

Senator Harder: Again, I would reference the debate we had when this matter was introduced in this chamber, in which it was pointed out that, of course, the Canadian Constitution is the supreme document in this regard and that the obligations the courts have directed must be respected.

That is the circumstance in which we find ourselves now. With the adoption of the UN declaration, we are looking to ensure that Canada, by its laws and practices, is adopting the commitments made by Canada 10 years ago when we agreed to the principles in the declaration.

Senator Lankin: I have one more question to pursue in understanding this.

In terms of the recent meetings that, for example, some of us have had with the North Pacific communities around Trans Mountain, I found myself wondering how to resolve different opinions coming forward from First Nations tribal and hereditary chiefs.

This doesn't speak to who gives consent. I'm asking this question to get your opinion but also to prod — and I am sure the committee will do this — the committee to explore this as well to help us understand its full impact.

Senator Harder: I would have to concur that that is one area where the committee would want to do its work.

You will know, by virtue of my support for that legislation, where I would come out in terms of my view on this as it reflects itself in the legislation. However, this is clearly an issue that this chamber will have to deal with, not only on the issue of Bill C-262 but in terms of other legislation that comes forward that touches on consultation and reconciliation.

Hon. Dan Christmas: Honourable senators, I rise today to speak in emphatic support of 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 People.

As I begin, I acknowledge that we meet today on the unceded lands of the Algonquin Nation. I also want to acknowledge and offer thanks to Member of Parliament Romeo Saganash for his tireless work in developing this bill and in seeing it passed by the other place. I'm honoured to be working with Senator Sinclair and many of our colleagues here in the Senate towards seeing the hopefully swift passage of Bill C-262 by this chamber.

As most of you know, I have been a member of this place now for a little over two years. In that time, I have sat and I have watched; I have listened and I have learned. I have seen the best of this place and I have realized the significant impact we can have here in our capacity as senators, as legislators. When I was named to this noble institution, I made a pledge to myself that I would do all I could to help enact the 94 Calls to Action of the Truth and Reconciliation Commission. Absolutely fundamental to fulfilling that pledge was and is the United Nations Declaration on the Rights of Indigenous Peoples.

I believe I have been called to this place at this time to help make this happen. As President Abraham Lincoln once said of his own journey and calling, "I will prepare and some day my chance will come." Today, in your midst, I'm proud to say that I have prepared and my chance has come — a chance to speak to the meaningful purpose of Bill C-262 and the opportunity it represents to be a true instrument of reconciliation. You see, I view the adoption of the United Nations declaration as ground zero in the reconciliation between Canada and its Indigenous peoples.

The key reference point in the 94 Calls to Action can be found in the tenets of the UN declaration. Quite simply, everything in the Calls to Action flow from the ultimate adoption of the UN declaration. The reason for this is simple, if only people will see it: The declaration gives everyone — the Government of Canada, the provinces, the territories, the people of Canada and all of its Indigenous peoples — a common denominator.

What is this legislation all about? Bill C-262 calls for Canada, through the adoption of this legislation, to make a number of commitments, which Senator Harder just outlined: first, that Canada would recognize UNDRIP as a universal human rights instrument with application in Canadian law; second, that Canada will take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP; third, that Canada, in

consultation with Indigenous people, will develop a national action plan to achieve the objectives of UNDRIP; and, fourth, that annually the government will provide a report back to Parliament identifying the implementation of measures taken by Canada and the national action plan.

In order to fully appreciate the legal implications of the adoption of Bill C-262, it is important to first understand the legal status of UNDRIP as a piece of international law.

In the international context, there are two primary sources of law, as defined by the International Court of Justice. Such sources of law are considered the "hard law," or *lex lata*, of international law — laws that are considering binding upon those states that are a party to it. This would include instruments such as international treaties and international conventions, which, once committed to by a state, bind the state to adhere to them.

However, there exists another source of law in the international realm that is also significant to states, although it is not legally binding on the state in the same manner as hard law. Such law is often referred to as "soft law," or *lex ferenda*, and can take the form of UN declarations, UN resolutions, handbooks of UN agencies, and other international communications.

UNDRIP, as an international declaration, is a form of soft law and, as such, is not binding upon the state in the same manner as international conventions and treaties.

The fact that UNDRIP is a form of "soft law" and not "hard law" is key and fundamental to understanding the legal implications of both Bill C-262 and UNDRIP in the Canadian context. Thus, in its present state, UNDRIP will never have the same legal weight as an international convention or international treaty.

Honourable colleagues, it is very important that, when considering arguments or evidence as to why Bill C-262 should not be passed, this reality should be made clear. The bold truth of the matter is this: If we can all agree that the UN declaration is the standard for achieving reconciliation, then for once we're in the same room, all together.

So what has been preventing this from happening? What I've found is that the right to self-determination hasn't been the stumbling block. As we've been hearing over and over again as of late, and even today, the big fear is free, prior and informed consent by and from Indigenous peoples. This is due in no small part to the way it's been painted in the public discourse, particularly around resource development, that free, prior and informed consent constitutes an Indigenous veto on any project.

(1750)

I was grateful to Senators Sinclair and Tannas for beginning the dialogue on consent here in the chamber last November and for beginning the dialogue on the notion of Indigenous veto. I'm anxious that the debate be permitted to continue when the bill is referred to committee. But to remind honourable colleagues, Senator Sinclair pointed out that we have ". . . a growing body of case law here in Canada which has very clearly indicated that free, prior and informed consent does not, in fact, amount to a veto."

And yet, there remains much public discourse about the Indigenous peoples being considered as "anti-development" when it comes to energy, oil and gas projects.

I'm sorry, but I subscribe to a much different school of thought. My perspective is that in order for Canada to really allow Indigenous people to buy into Canada, they need to be allowed the freedom and the choice to say either yes or no. Many seem afraid that Indigenous people will say, "no." I believe there are a lot of Indigenous people today who are ready, even eager, to say, "yes."

There are myriad things that Canadians don't often consider in respect of the Indigenous perspective. I'd like to share some of those with you now. There have been and are a lot of projects that are undertaken on our territories, on our lands and upon our waters. Up until recently, we've been pretty much excluded from participating in them. Given this, you might be able to understand why Indigenous people might choose to say, "no."

This "no" is understandable because in the past we've been basically cut off from our own lands. Now that the law has changed and the courts have said that Indigenous people must be consulted, a lot of Indigenous people, after having been excluded for so long, default to their natural reaction, which has been to say, "no."

Canada needs to realize that this is changing. There are other people out there across Canada, a rising, emerging economy of young Indigenous people eager to develop their lands and their resources, keen to gain employment, driven by entrepreneurship to want their own businesses and build their own prosperity. For this growing segment in the Indigenous community, the UN declaration is no less than the road map to prosperity, and not just prosperity for us as Indigenous communities, but indeed prosperity for all of Canada. That's why I think this is so important. That's why I believe that this bill is legislation whose time has come. That's why we must get to committee as soon as possible and ultimately pass it without delay.

We should all remember that the development of the UN declaration itself took more than 30 years culminating in its adoption by the UN General Assembly in 2007. Its 46 articles characterize the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world. In May 2016, the Government of Canada endorsed the UN declaration with a commitment to its full and effective implementation. In doing so, it was acknowledged that it was time for the Government of Canada to take action to ensure that the standards set out in the UN declaration were reflected in all federal laws, policies and operational practices.

Honourable colleagues, let me be candid. I wish that this bill was government legislation. The fact that it is not in no way diminishes its importance. Its purpose and intent are nothing but noble. Its core elements are pivotal to the broader transformative shift under way in terms of the recognition and implementation of the rights of Indigenous people.

Clause 3 of the bill acknowledges that the UN declaration, like other human rights instruments for which Canada has expressed support, has application in Canadian law as a source that can be drawn upon to inform the interpretation of domestic law and the exercise of administrative discretion under domestic law.

The bill also provides for important and lasting mechanisms that will require the government to continue the work that it has already undertaken to review federal laws,

policies and practices with a view to harmonizing them with section 35 of the Constitution as well as the UN declaration and the Truth and Reconciliation calls to action.

Likewise, clause 4 of the bill creates a legislative statute which requires the Government of Canada to take all measures necessary to ensure the laws of Canada are in harmony with the UN declaration. The bill doesn't specify what measures will need to be aligned with federal laws. This leaves considerable room for the government to work in partnership with Indigenous peoples and in a way that builds on Canada's constitutional framework to develop these new measures.

In that sense, the bill respects article 38 of UNDRIP, which states:

> States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this declaration.

In addition, Bill C-262 provides accountability mechanisms, including a national action plan, to be developed in partnership with Indigenous peoples, to achieve the objectives of the UN declaration and the obligation to report on progress to Parliament. Through these mechanisms, the government's progress will be monitored and measured, as it should be.

Reconciliation means many different things to different people. However, one commonly understood aspect of reconciliation is that we acknowledge our past and take actions to build an improved future. In that sense, as a first step, we must acknowledge the breadth of transformation that is required to enable a tangible and lasting change to Crown-Indigenous relations. The history, in which Indigenous people have had to survive the imposition of colonialism, is long. The impacts have been devastating.

At the same time, the roots of colonialism have long settled into our institutions, our legislative frameworks, and our perceptions of the world around us. Sometimes it's visible and sometimes it's harder to see. We cannot transform this reality with one bill alone. To truly turn the tide, a new foundation, which includes the UN declaration, and living up to the promise of section 35 of our Constitution, is required. From this foundation, we can begin to deconstruct our colonial reality and in its place see an increase in self-determining and self-governing Indigenous nations that are able to thrive socially, economically and culturally. This is what reconciliation means.

As I close, I'd like to share some words of wisdom I received recently. Steve Bell is a veteran Canadian singer/songwriter and author from Winnipeg. He recently wrote to me, and I believe to all honourable senators, as he states:

> This country that we mutually hold dear is at a watershed moment of great importance.

Steve offered prayers for our courage and wisdom as we consider all that we must do in order to move us forward according to the best intentions to be a "fair" nation. By "fair" he invoked a double meaning of the word. Fair as in "fair is the meadow" and fair as in "fair play." In other words, fair according to both beauty and justice.

He reminded us, and again I'm quoting from Mr. Bell's letter:

> Countless individuals, institutions, civil and religious organizations agree that we need legislation to hold current and future governments to account to uphold this minimum of human rights standards for all people, but with particular attention to First Nations, Inuit and Metis peoples who have suffered systemic exclusion from the benefits of these basic rights.

Great harm has been done —

The Hon. the Speaker: Your time has expired. Are you asking for more time?

Senator Christmas: Yes, please.

The Hon. the Speaker: I should caution you as well that we're one minute away from 6 p.m.

Senator Christmas: And for healing to occur, there first needs to be a commitment to stop harm. Bill C-262 is such a commitment and sets the stage for a new and mutually fruitful relationship with Canada's First Nations, whom John Ralston Saul rightly calls "the senior founding pillar of our civilization."

We look forward to the day that we can truly call our country "fair" in accordance with both beauty and justice.

Honourable senators, there is perhaps nothing more fair, more beautiful than pursuing the affirmation of rights. And it's a key reason why we sit in this place.

(1800)

This is a bill, the provisions of which build upon our nation's Indigenous policy framework regarding our place and our role on the international stage and our constitutional duty to protect and advocate on behalf of minorities. I'm asking that we all work with vigour and determination to see second reading debate concluded by no later than March 21 in order to get this bill to committee and one step closer to adoption.

This is the right thing to do. This is the fair thing to do. This is the honourable thing to do.

As I close, let me leave you with the words of John Fitzgerald Kennedy who affirmed that, "In giving rights to others which belong to them, we give rights to ourselves and to our country." This bill helps us to do just that. I commend to you its referral to committee without any delay. *Wela'lioq*. Thank you.

Hon. Senators: Hear! Hear!

The Hon. the Speaker: Honourable senators, it being now 6 p.m., pursuant to rule 3-3.(1), I'm required to leave the chair until 8 p.m. unless there is an agreement that we not see the clock.

Is it agreed, honourable senators?

Some Hon. Senators: No.

The Hon. the Speaker: Accordingly, the sitting is suspended until 8 p.m.