Why the *Indigenous Languages Act* of 2019 places Canada in violation of the International Covenant on Civil and Political Rights and how Canada can remove this stain on its record of compliance with the Covenant

A Brief to the Standing Committee on Indigenous and Northern Affairs by David Leitch[1] Submitted February 3, 2023

In June 2019, the Parliament of Canada adopted the *Indigenous Languages Act*. Section 6 of the *Indigenous Languages Act* states:

> The Government of Canada recognizes that the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* include rights related to Indigenous languages.

The *Indigenous Languages Act* thus confirms that all Indigenous Peoples living in Canada (IPLCs), that is, the "Indian, Inuit and Métis Peoples" referred to in section 35 of the *Constitution Act, 1982*, possess constitutional rights related to their respective Indigenous languages. This makes IPLCs the second group of citizens in Canada with constitutionally recognized language rights.

The first group of citizens with constitutionally recognized language rights can be referred to collectively as Canada's official language minorities (COLMs), that is, the francophone minorities living outside the Province of Quebec and the anglophone minority living inside the Province of Quebec. COLMs' language rights were entrenched by the *Constitution Act, 1982* through the *Canadian Charter of Rights and Freedoms* (the *Charter*). COLMs also possess what are often described as "quasi-constitutional" language rights under the *Official Languages Act*.

However, Canadian law does not offer IPLCs and COLMs equal protection of the law. The *Indigenous Languages Act* fails to either define the language rights of IPLCs or provide effective remedies for their enforcement. The *Charter*, on the other hand, does both: it defines the language rights of COLMs and provides effective remedies for their enforcement.

My submission to this Committee is that this state of affairs places Canada in violation of the International Covenant on Civil and Political Rights, an international Treaty which Canada ratified in 1976. My specific submissions are:

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1. Canadian law discriminates against IPLCs on the ground of language, contrary to Article 26 of the Covenant[2];

2. Canadian law provides no effective remedy to put an end to this discrimination, contrary to Article 2(3)(a) of the Covenant[3];

3. Through its violation of Articles 26 and 2(3)(a), Canadian law infringes upon the right of IPLCs to enjoy their cultures and use their languages in community with other members of their groups, contrary to Article 27 of the Covenant[4].

That said, I will conclude by explaining how Canada can stop violating the Covenant by amending the *Indigenous Languages Act* to incorporate the most important language right in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 14.

The Violation of Article 26 of the Covenant

The importance of defining language rights is clearly established in Canadian law. In the case of *Caron v. Alberta*, 2015 SCC 56, the Supreme Court of Canada noted that "Parliament knew how to entrench language rights"; such rights must be defined "expressly", "explicitly", in "very clear terms".

The *Indigenous Languages Act* does not meet this standard. While it purports to confirm that IPLCs do have language rights, it says nothing about what those rights are. The courts cannot fill in this gap. As the Supreme Court of Canada observed in *R. v. Beaulac* [1999] 1 S.C.R. 768, "Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided." And IPLCs can only compel governments to provide those means if the *Indigenous Language Act* defines clear rights and provides effective remedies.

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[2] Article 26 states: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, **language**, religion, political or other opinion, national or social origin, property, birth or other status.

[3] Article 2(3((a) states: Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[4] Article 27 states: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Section 27(1) of the *Act* may allow IPLCs to file complaints with the newly created Office of Commissioner of Indigenous Languages. But section 27(2) stipulates that the Commissioner may only make recommendations. Here again, the language rights of COLMs are better protected by the *Official Languages Act*. It empowers the Commissioner of Official Languages to commence court proceedings to enforce the language rights created by that *Act*.

It is perhaps possible that protracted and expensive litigation in Canadian courts could define some of the language rights included in section 35 of the *Constitution Act, 1982*. But this imposes a discriminatory burden on IPLCs to undertake such litigation, a burden that is not borne by COLMs because they already have clearly defined language rights (and remedies).

In short, the defined rights and effective remedies of COLMs provide them with much greater legal protection than the undefined, unenforceable rights of IPLCs. This deprives IPLCs of the equal protection of the law through discrimination based on language and is contrary to Article 26 of the Covenant.

The Violation of Article 2(3)(a) of the Covenant

Most of Canada's human rights laws, including the *Canadian Human Rights Act* and section 15 of the Charter, do **not** prohibit discrimination on the ground of language. It is only in Quebec and the Yukon that this form of discrimination is remediable.

In any event, as stipulated in Article 50 of the Covenant, "the Covenant shall extend to all parts of federal States without any limitations or exceptions". In most of Canada, there simply is no remedy for discrimination based on language.

IPLCs, therefore, have no effective remedy to achieve equal protection of the law without discrimination based on language as required by Article 26 of the Covenant. This should perhaps not be surprising: the discrimination in question is, in fact, the creation of Canadian law itself. But it is, nevertheless, contrary to Articles 26 and 2(3)(a) of the Covenant.

The Violation of Article 27 of the Covenant

The United Nations Human Rights Committee is the international adjudicative body charged with the interpretation and application of the Covenant. In its decision No. 2668/2015, adopted on November 1, 2018, the Committee expressed the following opinions regarding the importance Article 27 in the indigenous context. It wrote:

> … although the rights protected under article 27 are individual rights, they depend in turn on the ability of the group to maintain its culture, language or religion. The Committee further recalls that the preamble of the United Nations Declaration on the Rights of Indigenous Peoples establishes that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples. In view thereof, the Committee considers that in the context of indigenous peoples' rights, articles 25 [dealing with political participation rights] and 27 of the Covenant have a collective dimension and some of those rights can only be enjoyed in community with

> others. … Consequently, when considering the individual harm in the context of this complaint, the Committee must take into account the collective dimension of such harm.

IPLCs and COLMs are important minority groups in Canada. They both have Article 27 rights to enjoy their cultures and use their languages in community with other members of their groups.

But the ability of IPLCs to enjoy their Article 27 right is undermined and diminished by the violations of their Articles 26 and 2(3)(a) rights. These violations cause IPLCs harms and handicaps of a "collective dimension" that are not suffered by COLMs. This is contrary to Article 27 of the Covenant.

How Canada can remove this stain on its record of compliance with the Covenant

In his speech on February 14, 2018, the Prime Minister proposed an alternative to "costly and drawn-out" litigation under section 35 of the *Constitution Act, 1982*. He said: "To preserve, protect, and revitalize Indigenous languages, we are working with Indigenous partners to co-develop a First Nations, Inuit, and Métis Languages Act."

This news was greeted in the hope that the legislation would do what, for example, section 23 of the *Charter* does: explicitly entrench COLMs' right to educate their children in their own languages in publicly funded schools. Unfortunately, IPLCs are still waiting for this, or any other right or remedy, to be written into the *Indigenous Languages Act*.

The harmful effect of delay in implementing language rights as been noted by the Supreme Court in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, the most recent section 23 case to reach that Court. It wrote:

> To fully achieve its remedial purpose, s. 23 must be implemented vigilantly. As this Court has noted, the likelihood of assimilation and of cultural erosion will increase with each passing school year if nothing is done to prevent them. The result is that the actual effectiveness of s. 23 is particularly vulnerable to government inaction [citations omitted]. This means that the courts have a crucial role to play, as the framers made them responsible for overseeing the implementation and protection of Charter rights.

Sadly, due to the failure of the *Indigenous Language Act* to equip IPLCs with either rights or remedies, the courts cannot play this crucial role for them. But this Committee can play a central role in fixing that defect in the *Act*. It can strongly recommend the rapid amendment to the *Indigenous Languages Act* to enact Article 14 of the Declaration of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 14 reads as follows:

> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
>
> 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Of course, UNDRIP contains many important Articles, including other Articles that refer to language rights. But Article 14 is the right place to start implementing UNDRIP in Canada for a number of reasons.

First, given the perilous state of most Indigenous languages in Canada, this amendment could not be more urgent. The closing of residential schools, by itself, does nothing to achieve intergenerational transmission of Indigenous languages. Most Indigenous children are still required by law to attend schools where they don't learn to speak their own languages fluently and where they learn and interact with others in English or French. This amounts to ongoing forced assimilation of these children, contrary to Article 8 of UNDRIP.

Second, the revitalization of Indigenous languages in Canada depends, as it always has, on intergenerational transmission. In the modern context, this requires state-supported educational systems and institutions that both teach Indigenous children their own ancestral languages and that teach other subjects in those languages. And, significantly for Canada, Article 14 recognizes that such systems must exist both on and off reserve.

Third, while the implementation of other Articles of UNDRIP may prove more contentious, Article 14 will not threaten the interests of non-Indigenous Canadians in any way. All Canadians of good faith will immediately appreciate the capacity of indigenous language revitalization to promote reconciliation.

And lastly, incorporating Article 14 into the *Indigenous Languages Act* will make it enforceable in Canadian law, thus putting an end to Canada's violations of the of Articles 26, 2(a) and 27 of the International Covenant on Civil and Political Rights as outlined in this Brief.

Merci!

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