Revitalizing and Promoting Indigenous Languages through Rights Recognition, Self-Government, and Effective Consultations[1]

Submission to the Senate of Canada Standing Committee on Aboriginal Peoples regarding Bill C-91: An Act respecting Indigenous Languages

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[1] This brief expands on an op-ed published by the authors: Emmanuelle Richez, Rebecca Major and Tejas Pandya, "Richez, Major and Pandya: Indigenous Languages Act a good act but needs more teeth" *The Ottawa Citizen* (19 February 2019), online: <https://ottawacitizen.com/opinion/columnists/richez-major-and-pandya-indigenous-languages-act-a-good-start-but-needs-more-teeth>.

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Introduction

The Government of Canada recently tabled Bill C-91, titled "An Act Respecting Indigenous Languages", in the House of Commons.[2] This long awaited and overdue piece of legislation is a step forward in revitalizing and promoting Indigenous languages that have suffered greatly due to centuries of colonization and cultural genocide. Bill C-91 establishes an Office of Commissioner of Indigenous Languages, that will be responsible for conducting research on the use and vitality of Indigenous languages, funding language revitalisation and promotion programs, and managing complaints made under the Act. Unfortunately, the proposed bill does not recognize new enforceable language rights for Indigenous Peoples, nor does it give official status to Indigenous languages that French and English already enjoy. Crucially, it does not give Indigenous communities a central role in the revitalisation and promotion of their languages. The bill outlines consultations in several places, however there are concerns regarding the process of consultation. Many rights-bearing communities were not notified or provided an opportunity to participate. This is problematic as the community level is where language revitalization and programming take place.

Official Language Status

An Act Respecting Indigenous Languages states that "[t]he Government of Canada recognizes that the rights of Indigenous [P]eoples recognized and affirmed by section 35 of the Constitution Act, 1982 include rights related to Indigenous languages." Nevertheless, it does not articulate clearly what those language rights are, apart from the "soft" right to revitalise and promote Indigenous languages. While it is true that Bill C-91 strives to advance the language rights goals of the United Nations Declaration on the Rights of Indigenous Peoples,[3] it does not do so fully. For example, it does not provide for Indigenous Peoples to be understood in all political, legal and administrative proceedings in their native tongue. UNDRIP states in Article 13.2, "[s]tates shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means."[4] Bill C-91 allows federal institutions to translate documents and to provide

[2] Bill C-91, *An Act respecting Indigenous languages*, 1st Sess, 42nd Parl, 2019.

[3] *United Nations Declaration on the Rights of Indigenous Peoples*. GA Res. 61/295, UN GAOR, 107th Sess., Supp. 49, UN. Doc. A/61/49 (2007).

[4] *United Nations Declaration on the Rights of Indigenous Peoples*. GA Res. 61/295, UN GAOR, 107th Sess., Supp. 49, UN. Doc. A/61/49 (2007), s 13(2).

interpretation services, but it is not mandatory. Under the Official Languages Act of Canada, a fuller set of rights are recognized to French and English speakers. Thus, Bill C-91 fails to elevate Indigenous Peoples to an equal standing. To remedy this lacuna, Indigenous languages should be given official language status at the federal level, which would entail the recognition of new language rights in Parliament, the courts and in governmental services delivery.

Since November 2018, Members of Parliament (MPs) can speak Indigenous languages during legislative debates in the House of Commons.[5] The new procedure asks MPs to provide interpretation services a two-day notice to ensure simultaneous interpretation in French and English can be offered. This welcomed procedural change does not however provide for the interpretation of all Indigenous languages in the Senate.[6] Furthermore, this newly acquired right is not protected by law and could easily be abolished or reduced in scope. The right to speak Indigenous languages in Parliament should be guaranteed by Bill C-91, just like it is for the French and English in the Official Languages Act of Canada.[7]

Indigenous litigants do not benefit from the right to a trial in their native tongue like the francophones and anglophones do at the federal level. Regardless of the type of case and court, Indigenous Peoples may rely on section 14 of the Canadian Charter of Rights and Freedoms which grants a right to an interpreter for individuals involved in a proceeding conducted in a language they do not understand.[8] Very few Indigenous Peoples in Canada are monolingual in their native tongue, and almost all can speak one of Canada's official languages.[9] There are however exceptions in rural and northern communities, where some elders still do not speak French or English. For those that speak one of Canada's official languages, it remains uncertain if a court would grant them the constitutional right to an interpreter. Too often, individuals who have an Indigenous mother tongue will resort to French or English, but this might impact the accuracy of their testimony and their understanding of the legal proceedings. Additionally, Indigenous courts, also known as Gladue courts,[10] have been put in place specifically for Indigenous persons who plead guilty of a criminal offence, but their proceedings are rarely conducted in an Indigenous language.[11] In this matter, Canada could learn from New Zealand which protects the right to speak Maori in legal proceedings.[12]

Arguably, recognizing over 90 Indigenous languages in Canada as official languages would involve spending astronomical sums of money when it comes to the delivery of governmental services. However, just like services in French and English are dependent on demand in certain territorial areas,[13]

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[5] House of Commons, Report of the Standing Committee on Procedure and House Affairs, *The Use of Indigenous Languages in Proceedings of the House of Commons and Committees* (June 2018) at 25 (Chair: Larry Bagnell).

[6] The Senate of Canada only allows for the use of Inuktitut. See Senate of Canada, *Senate Procedure in Practice* (June 2015) at 84.

[7] *Official Languages Act*, RSC 1985 c 31, s 4(1).

[8] *Canadian Charter of Rights and Freedoms*, s 14, *Part 1 of the Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[9] Statistics Canada, Aboriginal peoples and language: Most Aboriginal people can converse in English or French." Statistics Canada (Ottawa: 15 September 2016) online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011003_1-eng.cfm>.

[10] R v Gladue [1999] 1 SCR 688.

[11] One exception is the Cree Court of Saskatchewan which hears criminal cases entirely or partially in Cree. See Courts of Saskatchewan, "Cree Court" (8 October, 2018), online: Courts of Saskatchewan <https://sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc>.

[12] *Te Pire mō Te Reo Māori / Māori Language Ac*t 2016 (NZ), 2016/17, s 7.

[13] *Official Languages Act*, RSC 1985 c 31, s 22-23.

the same principle could apply to Indigenous languages. As it stands, Bill C-91 has less teeth than legislation that recognizes Indigenous languages as official languages in the Canadian Territories. For example, the Northwest Territories (NWT) Official Languages Act decrees that nine Indigenous languages hold official status, alongside English and French.[14]Moreover, NWT language laws allow for Indigenous languages to be used in legislative proceedings and courts, as well as access to government programs and services in official languages, to a reasonable extent.

Inclusion of Languages Rights in Treaties

Although Bill C-91 provides for consultation with Indigenous governments, it does not give them the responsibility to promote and revitalize their languages. Bill C-91 specifies that the federal government may enter into agreements to further the revitalisation of Indigenous languages,[15] but this is not mandatory nor the main focus of the legislation. Understanding language revitalization happens at the community level, we believe the optimal method of language promotion is the inclusion of language rights provisions in treaties between Indigenous communities and the Crown.

Currently, Treaty Commissions acknowledge language rights and protections as potential elements of modern-day agreements. Instead of imposing a "one-size-fits-all" solution, treaties take into account the differing needs of communities and thus have a greater chance of success. This approach is the preferred option of Indigenous Peoples because treaties permit a nation-to-nation relationship recognizing inherent rights to self-government. An Office of the Commissioner of Indigenous Languages does not ensure that languages will continue to exist, just as an Office of the Treaty Commissioner does not ensure treaties are honoured or settled, but provides oversight and support. The work happens at the Indigenous grassroots level and must rely on adequate resources for language expansion.

In some cases, modern day treaties and agreements include language provisions built in, and as a result are protected under section 35(3) of the Canadian Charter of Rights and Freedoms.[16] For example, the Tlicho Agreement of 2005 guarantees the Tåîchô Government's power to enact primary and secondary school education laws for Tåîchô citizens, communities, or on Tåîchô lands. This includes laws such as the teaching of Tåîchô language, history, and culture.[17] Bill C-91 protects languages beyond settlement agreements with Indigenous Peoples.[18] Problematic with this method for protecting and promoting language rights is that not all agreements are mandated to include language provisions. Currently, under the comprehensive claims policy, there is an interim document in place: *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Rights*.[19] Under this policy, there is nothing that mandates language protection. When settling specific claims, there are no language instruments as the process is dedicated to grievances that result when treaties are not fulfilled. It is due

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[14] *Official Languages Act*, RSNWT 1988, c O-1, s 4.

[15] Bill C-91, *An Act respecting Indigenous languages*, 1st Sess, 42nd Parl, 2019, cl 10(b).

[16] *Canadian Charter of Rights and Freedoms*, s 35(3), Part 1 of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[17] *Land Claims and Self Government Among the Tlicho and the Government of the Northwest Territories and the Government of Canada*, 2005, online: <https://www.eia.gov.nt.ca/sites/eia/files/tlicho_land_claims_and_self-government_agreement.pdf>.

[18] Bill C-91, *An Act respecting Indigenous languages*, 1st Sess, 42nd Parl, 2019, cl 26.

[19] Canada, Aboriginal Affairs and Northern Affairs Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (September 2014).

to the current lack of language protections through other means that Bill C-91 is pivotal for protecting and promoting Indigenous languages in Canada.

The Consultation Process

There are concerns regarding the federal government-led consultation process regarding Bill C-91 as many rights-bearing Indigenous communities were not notified. While Bill C-91 provides "[t]he Minister must consult with diverse Indigenous governments and other Indigenous governing bodies and diverse Indigenous organizations" for Indigenous languages matters, Canadian Heritage did not follow Duty to Consult (DTC) guidelines during the policy formulation process. Specifically, notice was not served to all rights-bearing communities.[20] It is proper protocol, based on past practices, to send written notification and provide an opportunity to participate in the process when a government chooses to engage the consultation process.[21] The level of participation is dependent on the scope of consultation needed as determined by the government. If authorities choose to consult with Indigenous stakeholders however, they cannot limit their consultation to the executive of national Indigenous governmental organisations and must engaged all rights-bearing communities at the local level. In the case of Bill C-91, even the national organization Inuit Tapiriit Kanatami believes that there has not been enough consultation on this legislation, and is therefore yet another colonial framework.

The *Mikisew Cree First Nation* (2018) ruling stipulates that the development of legislation pertaining to section 35 rights does not trigger the DTC doctrine as is the case for executive actions affecting those same rights.[22] Yet, this decision also declares that Parliamentary sovereignty over legislative matters "does not mean the Crown is absolved of its obligation to conduct itself honourably."[23] According to the case of *Haida Nation* (2004), the "honour of the Crown is always at stake in its dealings with Aboriginal peoples."[24] Furthermore, UNDRIP mandates that "states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[25] Interpretation of the *Royal Proclamation of 1763* of "Nations or Tribes of Indians" involves understanding the rights-holders being at a local level.[26] Consultation based at the community level is illustrated in governmental practices and policies pertaining to land that are already in place. The closer to the grassroots, or local level, the more people government will reach in consultation and consequently receive meaningful input.

The lack of consultation can already be observed in section 13 of Bill C-91 which specifies how the Commissioner of Indigenous languages will be selected.[27] In the effort to respect Call to Action 15 of the

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[20] At this time, we await further details regarding the consultation process from Canadian Heritage. In conversations with local level community leaders, none were notified of the development of this legislation or asked to participate in the process.

[21] Rights-bearing communities are already established with other federal ministries, such as Agriculture Canada.

[22] *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at para 32.

[23] *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at para 8.

[24] *Haida Nation v British Columbia*, 2004 SCC 73 at para 18.

[25] *United Nations Declaration on the Rights of Indigenous Peoples*. GA Res. 61/295, UN GAOR, 107th Sess., Supp. 49, UN. Doc. A/61/49 (2007), s 19.

[26] *Royal Proclamation*, 1763, RSC 1985, App II, No 1.

[27] Bill C-91, *An Act respecting Indigenous languages*, 1st Sess, 42nd Parl, 2019, cl 13.

Truth and Reconciliation Commission (TRC) final report, the appointment of a languages commissioner for the promotion of Indigenous languages is included in Bill C-91.[28] However, part of Call to Action 15 is the element of consultation. To truly honour the intent of this Call to Action, rights-bearing communities should be part of deciding the appointment process to ensure it is not perceived as paternalistic. There may be an interest by stakeholders that measures be put in place to secure the position as one exclusively held by an Indigenous person. There may also be a preference that measures balancing interests of the three Indigenous Peoples recognized in section 35(2) — Indian, Inuit and Métis[29] — be adopted. Bill C-91 currently provides "up to three directors" may assist the Commissioner of Indigenous languages, but remains silent as to the qualifications and attributes these directors should have. Inspiration could be taken from New Zealand's Māori Language Act which stipulates some members of the of Te Mātāwai — an independent statutory entity responsible for promoting the Māori language — must be appointed by different iwi clusters."[30]

In the spirit of nation-to-nation relationship building, an accessible consultation process for rights-bearing communities regarding section 35 rights legislation is warranted. Language preservation and revitalization are of the utmost importance for communities today, as the language contributes to maintaining their knowledge systems and worldviews. Many Indigenous Peoples have expressed a sense of personal loss with the dispossession of their traditional language.[31] Since language supports are delivered for the most part at the community level, the latter would best know what is needed and should be consulted. By not having wide consultation on linguistic rights, areas deemed important by Indigenous language keepers may be overlooked or undeveloped by those writing the legislation. Nevertheless, Bill C-91 is an important piece of legislation and as time is of the essence, it must be passed in its best form. Although further consultation cannot be completed now, future consultations should imperatively follow processes that engage the grassroots level, the right-bearing communities.

Summary of Recommendations

The United Nations had declared 2019 "The Year of Indigenous Languages" in an effort to bring awareness to the peril of Indigenous languages and acknowledge the roles languages play in cultural diversity.[32] The Government of Canada has understood the urgency of revitalizing and promoting Indigenous languages and the proposed legislation has taken positive steps to address a dire situation. As Indigenous and ally scholars, we hope the bill will be amended in its subsequent readings to reflect the true aspirations of Indigenous Peoples: rights recognition, equal status as a founding nation in Canada, self-government, and effective consultation. Our specific recommendations for Bill C-91 are as follows:

1. That Indigenous languages be recognized as official languages of Canada.

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[28] Canada, Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* at 321, online: <http://caid.ca/TRCFinExeSum2015.pdf>.

[29] *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(2).

[30] *Te Pire mō Te Reo Māori / Māori Language Ac*t 2016 (NZ), 2016/17, s 20(1)(a).

[31] The Canadian Press, "Indigenous People impacted by Sixties Scoop finally getting day in court", *CBC News* (22 August 2016), online: <https://www.cbc.ca/news/indigenous/sixties-scoop-court-day-but-case-to-drag-on-1.3730989>.

[32] International Year of Indigenous Languages 2019, (March 2019), online: <https://en.iyil2019.org/>

2. That everyone be given the right to use Indigenous languages in any debates and other proceedings of Parliament and to guarantee interpretation in French and English.
3. That Indigenous languages may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
4. That any member of the public in Canada be given the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or Government of Canada in Indigenous languages where there is a significant demand for communications with and services from that office in such language; or due to the nature of the office, it is reasonable that communications with and services from that office be available in Indigenous languages.
5. That additions be made to the current treaty process to ensure Indigenous languages are accounted for in comprehensive claims.
6. That future consultation with diverse Indigenous governments and other Indigenous governing bodies and diverse Indigenous organizations follow established DTC protocols and UNDRIP.

About the Authors

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