Assembly of First Nations

Submission on Bill C-53 *Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan and Métis Self-Government Act*

November 17, 2023

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About the Assembly of First Nations

The Assembly of First Nations (AFN) is a national advocacy organization advocating for First Nations for over 50 years. The AFN seeks to advance First Nations Inherent, Treaty, and Aboriginal rights, title, and jurisdiction through policy development, public education, and where applicable, the co-development of legislation.

Every First Nation in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada, who are themselves elected by their citizens. The AFN comprises over 630 member nations within its Assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective, and co-operative measures on any subject matter delegated by First Nations for review, study, response, or action, and to advance the aspirations of First Nations.

The AFN supports First Nations by coordinating, facilitating, and advocating for policy change, with the Chiefs, and the First Nations they represent, playing an integral role in achieving sustainable, transformative policy change.

The AFN is mandated by Resolution 44/2023, *Protect First Nations Rights and Interests from Unfounded Métis Rights Assertions*. This resolution directs the AFN to nationally amplify First Nations opposition to unfounded Métis rights assertions and the role of governments in recognizing those unfounded assertions.

Context

Bill C-53 is inconsistent with the *10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,* which recognizes that "the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.*"* This principle must permeate

all of the Government of Canada's engagement with First Nations, and it is in this vein that the following considerations are being advanced with respect to Bill C-53.

Background

First Nations are rights holders who hold Inherent rights set out in our own governance and legal systems, as well as constitutionally protected rights under section 35 of the *Constitution Act, 1982*. First Nations alone interpret and describe our Inherent rights through our laws and legal traditions, customary law, and international law. In practice, this means that First Nations rights cannot be undermined by colonial interpretations of these rights (e.g., section 35).

From First Nations perspectives, the inherent right to self-government cannot be separated from land. Our harvesting rights, spirituality, culture, and nationhood all arise from deep, longstanding connections to the land, occupied by our ancestors since before the arrival of European settlers. For Indigenous peoples, the laws upon which we govern ourselves are based upon our relationship to our lands and territories. These laws lay the foundation for First Nations' concepts of sovereignty and self-determination.

The notion of Canada's sovereignty and territorial integrity fundamentally rest upon the sovereignty of First Nations. For the millennia prior to contact with European explorers, First Nations exercised control over their territories through their own governance authorities. These governance authorities enabled First Nations to enter into international relationships, which formed the legal basis for them to enter Treaties with foreign Nations. This, in turn, formed the very basis of Canada and its claims to sovereignty.[1]

[1] *Haida Nation v British Columbia,* 2004 SCC 73.

Broad Recognition of Métis Inherent Right to Self-Government and Jurisdiction

Section 8 of Bill C-53 recognizes certain Métis governments as Indigenous governing bodies authorized to act on behalf of the Métis collectivity which holds the right to self-determination, including the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*. Bill C-53 allows future treaties to be negotiated between the specified Métis governments and the Crown. Bill C-53 does not limit the scope of these future treaties and allows ratification by Governor in Council, rather than requiring scrutiny by Parliament and First Nations. Given the potentially significant and adverse impacts on First Nations rights and interests, Bill C-53 should be subject to approval by Parliament with an opportunity for meaningful input from First Nations. This level of scrutiny is appropriate and necessary due to the potentially broad scope of any future negotiated treaties.

The broad sweeping recognition of Métis rights under Bill C-52 also fails to consider how this will impact First Nations Inherent, Treaty, and Aboriginal rights. While the Government of Canada has stated that the intent of the legislation is limited to Métis internal governance matters, Bill C-53 makes no explicit limitation on the scope of future treaties. Section 9 provides that a "Métis government that is a party to a treaty has the jurisdiction set out in that treaty, including the authority to make laws in relation to the matters set out in that treaty and the authority to administer and enforce those laws." If the true intent of Bill C-53 is to address internal Métis governance matters only, then the legislation must explicitly state that.

Further, future negotiated Métis treaties have the potential to address broader issues related to land and resources. If Bill C-53 and Métis treaties negotiated pursuant to the legislation result in the recognition of Métis section 35 rights (e.g., hunting, harvesting, fishing, resource

management), First Nations section 35 rights will be infringed. However, Bill C-53 makes no reference to how overlapping First Nations rights, jurisdiction, and interests are to be addressed.

Failure to Recognize First Nations Rights

Currently, no clear, effective, and transparent mechanisms exist for First Nations to secure recognition of their Inherent rights, including the right to self-government. In this context, the broad recognition of Métis rights through Bill C-53 lays bare the arbitrary and unfair processes related to the recognition of Indigenous rights. Bill C-53's broad recognition of Métis rights creates concerns and a deep sense of unfairness for First Nations, whose rights have systematically been denied and obstructed by the Government of Canada.

For centuries, the Government of Canada has failed to recognize, implement, and uphold First Nations rights. The assertion of Crown sovereignty, which is a legal fiction based on the Doctrines of Discovery and Terra Nullius, was used to sanction the theft of First Nations lands and deny First Nations rights. Existing federal policies, such as the Comprehensive Land Claims and Inherent Right to Self-Government Policies, are premised on extinguishing First Nations title and rights and do not provide First Nations with a fair, open, and timely path to rights recognition.

Most advancements made in the realm of rights recognition have been driven by litigation in Canadian courts. First Nations are forced to prove they possess Inherent rights to self-government and jurisdiction through courts as they continue to wait for their Inherent rights to be fully recognized and upheld in Canadian law. These legal proceedings are inherently costly and risky for First Nations, but in many cases are the only way to make progress.

The effect of Bill C-53 will, therefore, create a preferential standard with respect to how the broad rights of Métis governments may exist and further entrench existing unfair practices for how First Nations rights are recognized, upheld, and implemented.

Bill C-53 also privileges the recognition of Métis rights over First Nations established and constitutionally protected Treaty rights, despite serious concerns regarding the unsubstantiated assertion of Métis rights within First Nations' territories. This approach is inconsistent with Canadian law, which prioritizes the Crown's substantive obligations to Indigenous Peoples with *established* rights over the Crown's procedural obligations owed to Indigenous Peoples with *asserted* rights that have not been proven.[2]

Unfair Delegation of Responsibility for Conflict Resolution to First Nations

The intent of section 9 of the proposed legislation is to recognize that Métis governments have the authority to make laws in relation to the subject matters set out in treaties which will be negotiated in the future. However, the Bill provides no process to address and resolve disputes where there are overlapping interests with respect to First Nations rights and jurisdiction. Where a conflict arises, the Bill would leave First Nations with little recourse other than to initiate legal claims and proceedings against Métis governments. In effect, this will unfairly pit First Nations against Métis governments in litigation to resolve disputes as a result of the Government of Canada's decisions.

In the past, there have been an increased number of challenges in rights recognition between First Nations and Métis communities. For instance, Treaty Land Entitlement allocations for First

[2] Procureur général du Québec c Séguin, 2023 QCCS 2108 (CanLII), https://canlii.ca/t/jxqch.

Nations have been hindered by Métis claims to certain lands. This demonstrates the complex and evolving dynamics between Indigenous groups within the country. First Nations, often asserting historical and territorial claims, have taken legal recourse to address issues related to land use, resource management, and cultural heritage. The legal disputes arise from overlapping historical and geographical connections, prompting First Nations to seek clarity and recognition within the legal framework.

The lack of a process in Bill C-53 to resolve such conflicts amounts to the Government of Canada offloading its responsibilities onto First Nations. First Nations do not have sufficient financial resources to engage in litigation to protect their rights and interest. Further, the offloading of the Government of Canada's responsibilities onto First Nations has the potential to create a range of adverse effects and challenges. This may exacerbate existing socio-economic disparities and hinder the overall well-being of First Nations. Moreover, the offloading of responsibilities may strain relationships between the Government of Canada, First Nations, and Métis communities, contrary to the constitutional promise of reconciliation.

Inadequacy of Consultation and Lack of Free, Prior and Informed Consent

The Government of Canada failed to adequately consult with First Nations prior to tabling Bill C-53 and has not met its minimum duty to consult First Nations, whose rights may be negatively affected by this law, nor has it upheld the principles of free, prior and informed consent in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA).

The repeated affirmation of Free, Prior and Informed Consent ("FPIC") in the UN Declaration responds to the urgent necessity of respecting the right of First Nations, as peoples and Nations, to make our own decisions about our lives and our futures. The terms 'free,' 'prior' and 'informed' define the essential preconditions for such decisions to be meaningful and effective. This includes protection from duress and coercion; disclosure of all necessary information; honesty and fair dealing on the part of government and other proponents; as well as capacity to deploy our own knowledge and values through the application of our own laws and to conduct.

Implementation of the UN Declaration means that its principles and obligations should be woven throughout the fabric of the entirety of Bill C-53—from including Indigenous peoples in decision-making in accordance with their own laws and customs, to imposing a requirement that Indigenous peoples' consent must be sought before any actions are taken that could impact First Nations rights.

The development of Bill C-53 failed to include a process for First Nations to voice their concerns regarding the potential negative impacts of overlapping Métis rights assertions or concerns regarding unfounded Métis rights assertions. Many First Nations across the country are deeply concerned with the proliferation of unfounded Métis rights assertions. In the case of Bill C-53, specific concerns exist about the Métis Nation of Ontario's (MNO) membership. Extensive expert reports provided to the Government of Canada demonstrate compelling evidence that six of the alleged "communities" recognized by the MNO do not meet the criteria set out by the Supreme Court of Canada in *R v. Powley*, 2003 SCC 43. First Nations have expressed similar concerns with emerging Métis organizations in other regions.

It is essential that all governments engage in thorough consultations with First Nations when legislation may negatively affect Inherent, Treaty, and section 35 rights. In *Mikisew Cree*, the

Supreme Court was unanimous in encouraging the Crown to consult Indigenous groups, as a matter of policy, when developing legislation that may adversely affect their rights.[3] All members of the Court emphasized that legislation that infringes section 35 First Nations and Treaty rights may be challenged and declared invalid, as per the *Sparrow* test.[4] A relevant consideration in determining whether such infringement is justified is whether the government consulted with the affected Indigenous group. In the end, the failure of government to consult on legislation that could adversely affect Indigenous rights is a determining factor with respect to the ability of legislation to withstand the scrutiny of the courts.

The development of Bill C-53 failed include a process for First Nations to voice their concerns regarding the potential negative impacts of overlapping Métis rights assertions or concerns regarding unfounded Métis rights assertions. Therefore, the only appropriate remedy is to withdraw Bill C-53 in its entirety and develop a national consultation process with First Nations regionally, to ensure that all potential impacts of this legislation are thoroughly considered, and First Nations rights and interests are upheld in accordance with the UN Declaration and the Government of Canada's obligations to First Nations pursuant to section 35 of the Constitution.

Non-Derogation Clause

Members of the Standing Committee on Indigenous and Northern Affairs suggested that a non-derogation clause could be used to remedy conflicts which may arise with respect to First Nations rights. However, the addition of a non-derogation clause alone does not remedy the concerns First Nations raised with respect to the legitimacy of MNO's member organizations. Furthermore, given

[3] *Mikisew Cree First Nation v Canada (Governor in Council)*, 2018 SCC 40.
[4] *R. v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075.

the broad nature of rights recognized under sections 8 and 9 of Bill C-53, a court may interpret a non-derogation clause as merely preventing provisions in the Act from negatively impacting or infringing section 35 rights. This interpretation may not extend to Métis treaties negotiated pursuant to the Act and in practice, may simply act as a reminder that First Nations section 35 rights exist with no remedial effect at all.

Recommendation

The AFN calls for Bill C-53 to be withdrawn and that a national consultation process be developed with First Nations regionally to ensure that all potential impacts of this legislation are thoroughly considered, and First Nations rights and interests are upheld in accordance with the UN Declaration and Canada's obligations to First Nations pursuant to section 35 of the Constitution.

The withdrawal of Bill C-53 and the establishment of a national consultation process with First Nations will enable the Government of Canada to develop a respectful process to recognize Métis Inherent rights and jurisdiction while ensuring adequate safeguards to address overlapping claims and infringement of First Nations rights. The withdrawal of this Bill will also provide an opportunity for the Government of Canada to work with all Indigenous Peoples to establish fair, open, and timely mechanisms to secure recognition of rights.