My 10 takeaways on Bill C-91

Ian Martin [based on my chapter 'Bill C-91: A Creation Story" to appear in Chacaby, Key and Martin (eds) *Indigenous Language Policy in Canada: the Way Forward* (MQUP date tba)

On the plus side:

1. There is a piece of federal legislation – parallel to the Official Languages Act – so that the two categories of constitutionalized languages in Canada (official and Indigenous) now have both types of recognition. And the passage of this act – allows Indigenous peoples in Canada to be **"IN THE ROOM",** in Murray Sinclair's apt phrase. It needs to be improved (as the OLA has been over the years) and it can be 'a battering ram' (another Murray Sinclair phrase). And represents the beginning, not the end, of a federal response to TRC Calls to Action 13 14 and 15.

2. There will be an **Indigenous Languages Commissioner.** It's almost the only significant piece of content in Bill C-91. The Commissioner's Office will become a national advocate and a national reference point for the Indigenous Languages issue. Not as strong as the OL Commissioner (not an Officer of Parliament, charged with upholding the legislation) but that individual (and the three directors) will be there, and by legislation, can make annual reports on the shortfall in government funding and other critiques of the gaps in legislation. So, the increased profile for Indigenous languages will henceforth be articulated by a major public figure, whose pronouncements in the media and elsewhere will be listened to. Indigenous languages don't have their Cindy Blackstock, but from 2021, they will have the Commissioner.

3. Around the Bill, there has been **more advocacy, more public discourse,** more mainstream media reports on Indigenous languages *as of value* than ever before, and there is a general groundswell of awareness and sympathy and political support for Indigenous languages as a concept…and a sense of justice. In the various advocacy periods post-TRC, there were (i) major conferences in 2016 (ii) major policy developments internal to the NIOs 2017-2018 (iii) extensive engagement sessions across the country, led by DOCH (iv) over sixty formal presentations by expert witnesses to the House and Senate standing committees (Feb – June 2019), media commentary, both in mainstream and Indigenous-specific media throughout. There have never been more policy ideas put forward on Indigenous languages in the period leading up to the Act than in the entire previous 150 years. And the backdrop of UNDRIP held up an international standard for Canada's treatment of behaviour to emulate, and with the TRC Final Report, provided a widely-accepted normative vision of what 'should be' the minimal acceptable treatment of Indigenous languages. Public literacy on the topic has never been higher.

4. The passage into law in 2021 of the UNDRIP Act (C-15) with the Department of Justice as the lead ministry – provides a golden opportunity for existing federal legislation to be reviewed and amended to harmonize Canada's federal laws with UNDRIP Principles. The 2019 version of C -91 is widely seen as providing no clear definition of Indigenous language rights, and no court remedy for infringement of rights. The UNDRIP Act provides a suite of principles related directly to Indigenous languages, in particular Article 14, stating the "*right to establish and control their*

educational systems and institutions, providing education in their own languages…". The existence of both C-91 and C-15 must be seen as a "plus" due to the near-synchronous timing in 2013 of (a) the tabling of the Draft UNDRIPA Action Plan in June and (b) the mandated requirement of a Parliamentary Committee Review of C-91 in the Fall. Therefore, there is a clear pathway forward to enhance the rights language in C -91, especially the language enshrining the right of Indigenous Peoples to publically-supported education in their own languages.

5. The passage of the Act immediately provided **a golden opportunity for comparisons to be made with the Official Languages Act.** The two acts – each concerned with minority language protection and promotion – are markedly different. Although both categories of minority languages (official and Indigenous) now enjoy both constitutional and legislative recognition, the Indigenous language legislation falls considerably short of the protection and promotion available to the languages of their comparator group, the Official Language Minorities. Thanks to the passage into law of C-91, we now can make a clear comparison between the two pieces of legislation (OLA and C-91) and the sharply discriminatory legislative treatment of the two groups - impossible to undertake with such clarity before – needs to be addressed. The remedy proposed above would be a good start. A comparison of the scope of the Office of the Indigenous Languages Commissioner and the Office of the Official Languages Commissioner is also revealing. Yet, this state of affairs must be considered a "plus" since Canada's policies of official bilingualism and commitment to the long-term vitality of official language minorities contain an extensive and valuable repository of experience applicable to the promotion and vitality of Indigenous language communities and their languages. A move toward narrowing the gap between the two categories of minority language communities and their linguistic health makes sense as a reconciliatory end to historic structural discrimination.

ON THE MINUS SIDE

6. **The Inuit** were completely left out in the cold. Despite the government's solemn agreement on 'distinctions-based not pan-Indigenous-based' legislation (part of the June 2017 Agreement between then-DOCH Minister Melanie Joly and the three NIO leaders), the government reneged on this (as they did on ALL the July 2017 principles!). The next DOCH Minister (Rodriguez) said that the Inuit were asking for too much. They wanted federal services offered in Inuktut as well as EN and FR in their territory of Inuit Nunangat. "Just another colonial legislation cooked up without our participation" was the judgement rendered by ITK President Natan Obed. With this critique of one of the three Aboriginal groups, the myth of 'distinctions-based co-development' was shown to be an empty promise. Even the fall-back position proposed by the Senate at the 11th hour – asking the Government to commit to further dialogue with the Inuit – was rejected by the House. The Inuit got nothing from the Bill – a sign that 'strong, vibrant Indigenous languages functioning as majority languages on their traditional territory' is NOT something which federal Indigenous policy is about to embrace.

7. **There is no mention in the Indigenous Languages Act of educational rights or even 'education' or 'schooling' at all.** This is the most glaring absence from the Bill. It is the clearest example that the framers of C-91 had no intention of incorporating UNDRIP rights in the Bill. It's likely the

most surprising, since the overwhelming majority of voices in the DOCH engagement sessions urged the government to respond to the urgent need to teach young people – to redress the harm created by the atrocities of the Residential 'School' system. Surely the government was aware of the demand to make amends for that racist, assimilative language policy by finally implementing 'Indian control of Indian education' in which Indigenous communities could promote their language through immersion or other strong models of bilingual education. Such demands date from the 1970s, if not before. It is confusing and absurd for the Bill to make no mention of language and education.

- One explanation for this is that this bill was designed by a ministry (DOCH) whose mandate has nothing to do with education. Never has, and never will. The TRC Report argued that DOCH was not the proper ministry to handle Indigenous matters at all. To be sure, early in the process of developing the Bill in the first half of 2017, there was talk of inter-ministerial collaboration (between DIAND and DOCH), but toward the end of that year, this talk quietly vanished. In fact, neither DIAND nor the two new ministries created out of DIAND in 2018 (Indigenous Services Canada and CIRNA (Canada-Indigenous Relations and Northern Affairs) were involved in the development of the Bill. True, education was one of the principles agreed to in June 2017 ("*The importance of Indigenous-controlled education systems, no matter where the learners reside, off- or on-reserve"* was how this principle was worded) but by the end of 2017, in a DOCH update document, this principle had vanished from the government discourse on 'co-development' All those people who were pinning their hopes on finally being able to have the right to teach their language, pay their teachers decently, develop curriculum material, set up educational infrastructure following their own customs, traditions, and teacher standards to have their language as a language of instruction throughout their own K-12 schooling system, were duly given the opportunity in the 'early engagement' sessions to express their wishes, but behind the scenes, it appears that the ministry whose mandate included a responsibility for Indigenous education – Indigenous Services Canada – was not being included in the process.

  ISC wasn't the only federal ministry missing in action. CIRNA wasn't at the table either, despite its historic mandate on Crown-Indigenous relations, and in particular its task of working on what is called the "Nation Rebuilding Program". One might have thought that 'nation building' and 'language' would be a natural policy fit. After all, as Murray Sinclair recently noted in an interview, one positive post-TRC development is that Indigenous governments are exercising more and more of their jurisdiction and enacting their own laws, according to their customs and traditions. There is no reason to imagine that, if the government wished to encourage and support Indigenous Nations to develop their own national language policies, including having their language of instruction policies in their schools, this initiative could be reflected in the Bill. However, it doesn't do any such thing. The Bill doesn't say anything like what it should have said if the principle expressed in TRC Call to Action 14 iv. on the prime language management role of Aboriginal People and Communities'. Responding to this Call would have required the Bill to say that 'we recognize that you - FN, Inuit and Metis treaty holders - and your governments have jurisdiction over your national languages. Further, you have the right to declare them official on your own territory as well as in territories and institutions which are off-reserve, where numbers warrant. And we will honour the Crown (and TRC Call to Action 14 iii) by recognizing our historic

fiduciary duty and treaty obligations with regard to financial requirements of this language dimension of your governance.'

8. **There is no enforceability of any right.** (as we have heard on this panel, from David Leitch, Lorena Fontaine and Andrea Bear Nichols, this is a serious flaw in the Bill. The Canadian Bar Association's recommendation (March 2019) agrees, and makes this one recommendation:
   RECOMMENDATION 1.
   The CBA Section recommends that Bill C-91 provide for the justiciability of the Indigenous Languages Act to allow the courts to monitor its implementation by the federal government, and ensure complainants have a means to seek remedy for violations of the Indigenous Languages Act.
   We recommend that Bill C-91 be amended to add, immediately before section 49, a heading "Court Remedy" with sections relating to rights-holders' right of action, the limitation period for such claims, the right of the Commissioner to apply or appear as part of proceedings under the Part, and other necessary specific

9. There is **no infrastructure** to support local efforts, as was recommended by the leadership of the First People Cultural Congress of British Columbia, and as was stated as a co-development principle in the June 2017 DOCH-NIO Agreement: *The importance of adequate funding for regional infrastructure to support local efforts (eg. a national institution with regional hubs).*

10. **Lack of clear definition** of 'Indigenous government bodies' – 'financial flows' and the status of tripartite agreements between feds + Indigenous bodies + provinces/territories. The two main criticisms of the Bill, according to my analysis of twenty selected written briefs to the two parliamentary committees examining the Bill were (a) lack of substantial (defined, justiciable) Indigenous language rights, including the right to Indigenous languages in education and (b) the 'lack of clarity' on the definition of 'Indigenous governing bodies' and the funding arrangements and who is involved apart from the Crown and Indigenous rights-holders points to a larger problem with the government's understanding of 'the Canada-Indigenous Relationship'. This last takeaway suggests that there was a third factor in shaping the government's (few) inclusions and (many) exclusions in the Bill, especially the exclusion of 'education'.

    Without going into detail, it is likely that the failure in the Fall of 2018 of the government's centrepiece legislation – a new "Indigenous Rights Framework" – which was rejected by the AFN, led to both C-91 and a companion piece of legislation on child welfare C-91, being left to stand on their own without being part of a wider rights context.
    As suggested above, the UNDRIPA Bill C-15 (2021) gains in importance as an overarching rights framework in today's context, given the failure of the 2018.