

## WEBINAR REPORT

### UNDRIP and Impact Assessment: Opportunities and Challenges for Reconciliation<sup>1</sup>

*Tuesday, March 30, 2021 at 4:00 pm to 6:00 pm ET*

*Facilitators: Cheryl Chetkiewicz*

*Panelists: Any Avila, Julie Abouchar, Lana Eagle, Danika Billie Littlechild, Kevin Hanna*

*Rapporteur: Frances Wilbur*

#### Webinar Highlights:

##### *Introductory Remarks*

- Opening prayer and welcome provided by Elder Larry McDermott who also thanked OAIA for welcoming him to participate in these conversations.
- Cheryl welcomed the panel members including: Danika Billie Littlechild, Julie Abouchar, Amy Avila, Lana Eagle and Kevin Hanna.

#### Summary of Presentations

*Danika Billie Littlechild: Why the development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is so important for us today.*

- The history, importance and impact of UNDRIP was described noting that the United Nations is run by and for its member states. As such, it took nearly three decades to negotiate UNDRIP. The declaration is not legally binding on states, but is an important lens through which rights can be viewed and implemented. There are forty-six articles of UNDRIP that must be read together as a package that support Indigenous rights.
- UNDRIP has been referred to as a framework for reconciliation in Canada by the Truth and Reconciliation Commission. The courts have used UNDRIP in the course of their judgements in Canada and will continue to do so. UNDRIP should be seen as a floor, not as a ceiling for Indigenous rights. That is, UNDRIP describes the minimum standards for states who are encouraged to do more as a result.
- Danika emphasized the importance of referring to Indigenous peoples with an 's'. She described the difficulty faced by Indigenous peoples in the UN process in keeping Peoples as a plural noun. Indigenous peoples are a diverse group of peoples across the world, with distinct histories and cultures and it is more inclusive as a result.

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<sup>1</sup> <https://oaia.on.ca/opportunities-and-challenges-for-reconciliation/>

### **Julie Abouchar: Bill C15 and relationship to UNDRIP and Impact Assessment (Federal and Provincial)**

- Julie highlighted the content of Article 32 of UNDRIP which calls on states to consult with Indigenous peoples and in doing so, receive their free, prior and informed consent (FPIC). This article is often reduced to a debate about if FPIC provides veto power to Indigenous peoples. Julie argued that FPIC is a process of relationship building and not a “tick box” in project-level impact assessment (IA). Julie shared perspectives of FPIC from the Government of Canada and Indigenous groups.
- Julie introduced Bill C-15, currently before the House of Commons, which affirms UNDRIP and provides a framework for the Government of Canada to implement the articles of UNDRIP. Bill C-15 aims, in consultation and cooperation with Indigenous peoples and with other federal ministers, to ensure that the laws of Canada are consistent with UNDRIP. She noted that Bill C-15 will not change the federal *Impact Assessment Act* (IAA). IAA currently requires proponents and governments to uphold Aboriginal and Treaty rights.
- While there are a number of ways in which FPIC could be considered in IAA, positive outcomes will depend on how IAA is implemented with respect to UNDRIP articles including FPIC. Julie provided some examples including:
  - Working towards consensus
  - Indigenous led assessments
  - Joint review between the panel and an Indigenous led assessment
  - Co-management of resources with Indigenous groups.
- Julie suggested that it remains to be seen if IAA implementation will address FPIC. UNDRIP touches on many aspects of Indigenous peoples lives and IAA does not encompass all of these. Bill C-15 touches many aspects of UNDRIP, but requires an action plan to consider how.
- The last word was in response to the Ontario *Environmental Assessment Act* which has no reference to UNDRIP or Indigenous rights. Bill C-15 only applies to federal legislation.

### **Amy Avila: Experience in B.C. as the first jurisdiction to try to implement UNDRIP as DRIPA**

- The revitalized *Environmental Assessment Act* (EA Act) was passed in B.C. in 2018 and was the first B.C. law to address UNDRIP. The *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) was passed in B.C. in 2019 – the first jurisdiction in Canada to pass legislation on UNDRIP.
- The EA Act is one of the first B.C. laws to address DRIPA and includes a focus on reconciliation by recognizing the inherent jurisdiction of Indigenous Nations and their right to participate in decision making that would affect their rights. To this end, the Environmental Assessment Office (EAO) is seeking to move from consultation and engagement to making decisions together with Indigenous Nations. The EAO is also working to engage with Indigenous groups early on in the process, even before there is a project.
- The EA Act requires consensus with Indigenous Nations at a number of points throughout the project, not just at the end; including a readiness decision, information requirements, methodology, referral package. If consensus can't be reached at these points, either group can request dispute resolution. Consensus at the end of the project represents the culmination of a number of consensus points along the way.
- Lessons learned over the last couple of years of implementation include:
  - Emphasis on governance and having these discussions without the pressure of timelines in project review has been helpful
  - Applying lessons learned from other jurisdictions who are also trying to do this work

- Being open to continuous improvement

### ***Lana Eagle: How to better engage with Indigenous communities, specifically around mining and reconciliation in Canada***

- Lana noted that long before UNDRIP, Indigenous peoples have always wanted respect and a voice in decision making about the land. Certainly UNDRIP has started to change the way that government is working with Indigenous peoples, but Indigenous peoples have always wanted to have that voice. UNDRIP and DRIPA have helped amplify this voice and bring it forward, but this has been a long time coming. It is hard to imagine Indigenous peoples not having their human rights recognized before UNDRIP.
- B.C.'s DRIPA means that companies have to work with Indigenous peoples. Lana emphasized that this is not about a veto, but about relationship development before a project takes shape. Some questions at this stage include how we can “marry” traditional knowledge and western knowledge? When we start these conversations early we can build these into the project planning from the beginning. Lana suggested a mine was not an event that emerges when a license to operate is granted, but it is a relationship with the community that continually evolves. Partnerships are formed and continue past the opening of the mine, they continue during operation and beyond. These kinds of relationships take time and without that time it makes the project difficult and this is where conflicts often begin.
- Companies are recognizing how financially impactful these relationships can be. Lana speculated that perhaps because DRIPA was supported and encouraged by the B.C. government that more investment from mining companies has been made in B.C. Clearly, there are financial implications when we know how to develop the relationships between Indigenous peoples and mining proponents well.

### ***Kevin Hanna: UNDRIP and Impact Assessments in the spirit of reconciliation and implementation***

- Kevin began by noting that reconciliation means different things to different people but overall, it is about establishing and maintaining a respectful relationship with Indigenous peoples across Canada. Relationship is the most important word and reconciliation is a journey, including learning about the history of the land and the relationship.
- DRIPA and the EA Act in B.C. is a positive step forward. A lot of important groundwork needs to occur up front and relationship building is so important. Knowledge forms and systems need to be acknowledged, and we need to work towards understanding those knowledge systems. Both DRIPA and the federal IAA provide an opportunity for Indigenous-led IAs and implementation of these assessments may be complicated. We will have to see how this evolves. Kevin suggested that a lot more work needs to be done to understand consent and what happens when there isn't consent.
- A lot of expectations have been added to the IA process through both the new federal IAA and the B.C. EA Act. Both UNDRIP and DRIPA are considered aspirational. How do you implement something that might be very aspirational at the ground level? There are lots of questions about implementation, both at the government level and for Indigenous peoples. This is a difficult and conceptual piece of legislation and will take time to implement. Kevin felt that ultimately success depends on the people who are involved in implementing the policy and anticipates we will see different approaches to implementing this legislation requiring evaluation from different perspectives. Kevin concluded this is a learning process that may be slow and will require a lot of good will. He felt there were lots of questions, some optimism, and lots of work to be done.

## Key Questions and Answers

### *The role of legislated timelines in relationship building*

- Without timelines we would have no support from government or industry partners. But if we get out ahead of when projects are being proposed and focus on relationship development without the limitations of timelines, we are better served.
- Strategic work needs to take place outside of project timelines. This could include finding out what kind of data is available and trusted? What kind of support does the Indigenous community need and want? Are there land use plans? This kind of relationship building can all be done before a project is proposed.

### *How do you see Bill C-15/UNDRIP/DRIPA inspiring/changing the Impact Assessment Act?*

- IAA is too new. The opportunities to address Indigenous rights is all there in IAA, we just have to use it in the right way. It is all about implementation so let's give it a chance. We can certainly look at best practices from B.C. as well.

## Conclusions

Relationship development is most important to ensure we are working within the spirit of UNDRIP. This takes time and cannot be rushed and tied to project timelines. If we want free, prior and informed consent we need to work on developing relationships and trust. We need to adjust the way we think about the project and focus on the process of relationship development rather than project completion.

### *Recommendations:*

- UNDRIP has been referred to as a framework for reconciliation in Canada. Canadians should read and understand UNDRIP. Canadian courts have made decisions based on UNDRIP<sup>2</sup>.
- UNDRIP should be seen as a floor, not as a ceiling, they are minimum standards, we should be striving for more.
- Indigenous peoples are a diverse group of peoples across the world, with distinct histories and cultures. This should be respected by consistently referring to Indigenous peoples in our work and in IA.
- It is too early to tell how IAA will be implemented as it has provisions to implement UNDRIP principles. It is unlikely that Bill C-15 will be come into force before the next election.
- There are a number of lessons being learned from B.C. as they implement the EA Act and DRIPA.
- Relationship building is key. A project is not an event, when a license to proceed is granted, it is a relationship with the community and continually evolves. Partnerships are formed and continue past the construction of the project to well beyond operation. This relationship needs time to develop, without that time, conflict will certainly take place.

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<sup>2</sup> Examples include *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 69; *Québec (AG) v 9147-0732 Québec Inc.*, 2020 SCC 32 at para 35; and, *NunatuKavut Community Council Inc. v Canada (AG)*, 2015 FC 981 at paras 103-104

- DRIPA has had a financial impact in B.C. and companies are more willing to invest because they understand that B.C. cares about and is working on these relationships.
- DRIPA and Canada's efforts to legislate UNDRIP are complicated and will take time to implement. There is going to be lots of learning as these processes evolve.

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