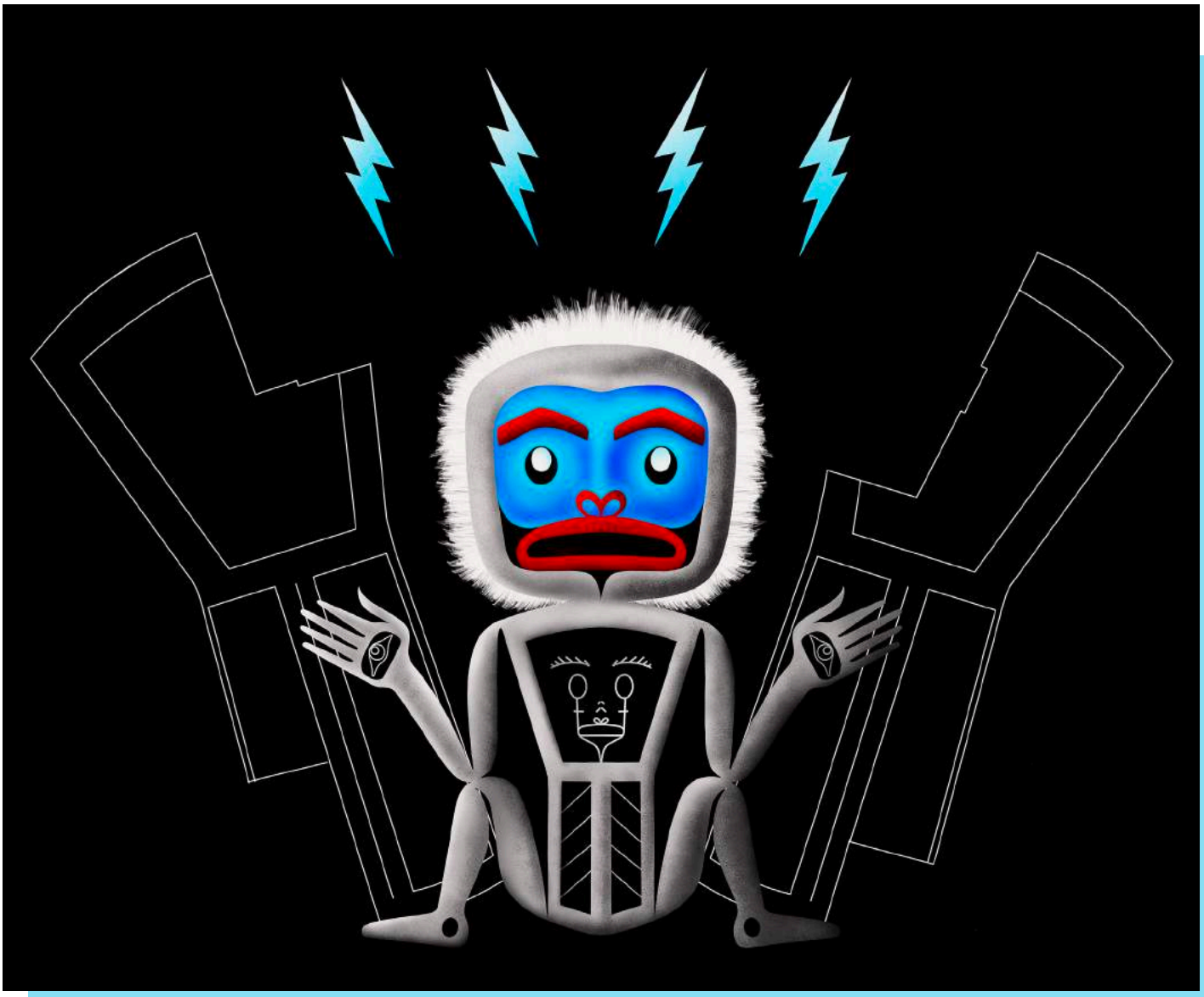
SPECIAL REPORT

DECEMBER 2020

The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C.



FEATURING

John Borrows, Christina Gray,
Darcy Lindberg, Shiri Pasternak & Judith Sayers

EDITED BY

Hayden King

ARTWORK BY

Bracken Hanuse Corlett

Yellowhead Institute

ABSTRACT

In November 2019, the province of British Columbia passed the first law in Canada aimed at implementing the United Nation's *Declaration on the Rights of Indigenous People.* This Special Report – with contributions from six primarily Indigenous authors – considers the promise of that legislation but also some of the challenges that have emerged, specifically around implementation. Hayden King offers some historical context for the Declaration and draws links between B.C.'s law and newly introduced federal UNDRIP legislation. Christina Gray's interview with John Borrows explains how a Declaration works and imagines a resulting legal pluralism that braids Western and Indigenous legal orders together. Judith Sayers considers the B.C. *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) and outlines the mistakes that were made, but opportunities that still exist. Shiri Pasternak critiques how UNDRIP was incorporated into Canadian law, which may permit the ongoing use of injunctions against Indigenous people defending the land. And, finally, Darcy Lindberg looks to the courts, where the Declaration will inevitably end up, and considers the legal tools judges require to interpret the law. Taken together, this resulting Yellowhead Special Report offers both caution and insight for communities working towards realizing the Declaration in Canada.

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@YELLOWHEAD_

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Ryerson University Faculty of Arts

CONTRIBUTORS

John Borrows
Christina Gray
Hayden King
Darcy Lindberg
Shiri Pasternak
Judith Sayers

EDITOR

Hayden King

COPY EDITORS

Stephanie Matchiwita
Damien Lee

COVER ART BY BRACKEN HANUSE CORLETT

***Broken* (2020)**

ARTIST BIO

Bracken Hanuse Corlett is an interdisciplinary artist hailing from the Wuikinuxv and Klahoose Nations. He began working in theatre and performance around 20 years ago and eventually transitioned towards his current practice that fuses sculpture, painting and drawing with digital-media, audio-visual performance, animation and narrative. Some of his notable exhibitions, performances and screenings have been at Grunt Gallery, Vancouver Art Gallery, Institute of Modern Art, Three Walls Gallery, Ottawa International Animation Festival and Toronto International Film Festival.

@WUULHU

ARTIST STATEMENT

This piece is about systems and ways of knowing. The implementation of *UNDRIP* is a minimum standard that should have been in place long ago. Whether it is legally binding or not I take a cynical approach to it, as it would be filtered through the same system that banned our Potlatches on the West Coast from 1885 to 1951. My family is in the process of throwing our first Potlatch within memory and this directly ties to the ban that was put in place. The *Tlakwa* or Copper is a significant symbol of the Potlatch. Breaking copper can be seen as an act of transgression, defiance or as a challenge. We are taking our coppers back into ceremony regardless of what is happening with systems in the outside world.

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Manufacturing Free, Prior, and Informed Consent: A Brief History of Canada vs. UNDRIP

2007

After UNDRIP's introduction to the UN General Assembly, Minister of Aboriginal Affairs Chuck Strahl shared Canada's position: "I am sorry we can't sign on...It's not balanced, in our view, and inconsistent with the Charter."

2010

As New Zealand, Australia, and the United States changed their position on the Declaration, the Harper Government "endorsed" it as well, though with a condition, stating they have "learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

2014

Despite their "endorsement" Minister of Aboriginal Affairs Bernard Valcourt responded to an article in Nunatsiaq News that "free, prior, and informed consent...could be interpreted in a way that would legally provide a veto to Aboriginal groups, and therefore, cannot be reconciled with current Canadian law."

2015

Campaigning during the federal election, Justin Trudeau remarked that on pipelines, mining, or industrial forestry in Indigenous territory, "no would absolutely mean no" and promised to implement the Truth and Reconciliation Commission's Calls to Action and UNDRIP, both of which emphasize free, prior, and informed consent (FPIC).

2016

NDP MP Romeo Saganash introduced Bill C-262, a Private Member's bill that would commit the federal government to implement UNDRIP. Minister of Natural Resources, Jim Carr, claimed it wasn't necessary because government is working on a "Canadian definition" of the Declaration.

2016

Later that year, Minister of Indigenous and Northern Affairs Carolyn Bennett announced at the UN that Canada will "fully implement UNDRIP without qualification" through a "section 35 framework.

2018

The Liberals - and a majority of the House of Commons - ultimately support Bill C-262.

2019

The Senate fails to review and pass Saganash's Bill before the deadline. According to Conservative Senator Don Plett, the delay was a result of, "no agreement on whether consent means a veto."

2019

British Columbia becomes the first jurisdiction in Canada to pass UNDRIP legislation. NDP Premier John Horgan remarks, "free, prior, and informed consent is not the end of the world."

2019

NDP MP Sol Mamakwa introduces a Private Member's Bill on UNDRIP Implementation into the Ontario Legislature. It has been delayed at the committee stage since then.

2020

The Government of Northwest Territories establishes an UNDRIP Implementation Working Group and commits to having an implementation plan in place for Summer 2022.

2020

The Federal Government introduces Bill C-15 The United Nations *Declaration on the Rights of Indigenous Peoples Act*. While "consent" does not appear in the legislation, federal literature suggests FPIC means "striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests. Despite what some have suggested, it is not about having a veto over government decision-making."

"While it may be some time before UNDRIP is realized in this country legally, the legislation in B.C. and in Canada is a helpful tool for Indigenous communities to hold governments accountable politically.

In an atmosphere where justice is seemingly and perhaps ironically only won by Indigenous communities through conflict in the public square, in the courts, and on the ground, the Declaration offers an opportunity."

- HAYDEN KING

EDITOR'S INTRODUCTION //

The Declaration of Slow

BY HAYDEN KING

SO MUCH HAS CHANGED since the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous People* in 2007. And yet so much remains the same.

Back then members of Six Nations of the Grand River had just stopped the Douglas Creek Estates housing development at Kanonhstaton. Today, Haudenosaunee land defenders at 1492 Land Back Lane seek to stop yet another real estate development on their land. Back then, there were regular "Days of Action" in the name of Indigenous land rights that shut down rail and vehicle transit along Ontario's busiest transportation corridor. Today, the #ShutdownCanada movement that paralyzed rail traffic across the country for weeks in the name of Indigenous land rights still smolders. Back then, Arthur Manuel was challenging a ski resort on unceded Sepwepmec lands. Today his daughters Kanahus and Mayuk stand in the way of a pipeline on unceded Sepwepmec lands.

This exercise in remembering is a sobering one. A reminder of the inertia that characterizes the relationship between Indigenous peoples and Canadians.

But there is some change, too.

In 2007 Canada was steadfastly opposed to the United Nations *Declaration on the Rights of Indigenous People* (UNDRIP). In fact, they were leading a charge against it, rallying the United States, New Zealand, and Australia to vote no in the General Assembly. In the years that followed, these states, one after another, conceded and pledged their support for the rights of Indigenous people. This left Canada the lone voice of opposition.

Here, public officials were steadfast. John Duncan, Chuck Strahl, and Bernard Valcourt - Conservative stewards of Indian Affairs stasis - held the line. Fears of "free, prior, and informed consent" were used as an excuse to avoid engaging with the Declaration. When a Liberal government was elected in 2014, they, too, hedged and contorted their opposition until so embarrassed on the world stage that Carolyn Bennett finally announced in May 2016 that Canada will "fully implement UNDRIP without qualification" through a "section 35 framework." (To mark the occasion I wrote a chronology of Canada's long meander to UNDRIP).

But a few more years and one failed attempt later, we have arrived, on the eve of the realization of new federal legislation to implement UNDRIP. This, a year after the province of British Columbia scooped the federal government and passed their own version.

This Yellowhead *Special Report* reviews closely the work of the province of British Columbia to glean lessons for what's next in that province but also UNDRIP at the national level; to assess the shape and nature of that rarest of qualities in our collective relationship: change.

The authors that have contributed to this work share some of the lingering optimism from 2007 but also skepticism, raising important questions around the vision of UNDRIP into the future.

Christina Gray's interview with John Borrows explains the nature of a declaration and considers UNDRIP in B.C. as part of a legal pluralism that braids Western and Indigenous legal orders together. Meanwhile Judith Sayers, involved in the UNDRIP process at the international, federal, and provincial level in B.C. considers the B.C. *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) in pragmatic terms, outlining the mistakes that were made, but hopes that still exist. Shiri Pasternak critiques the method of UNDRIP incorporation into Canadian law, which may allow for B.C. (and Canada) to continue to deploy injunctions and impact benefit agreements to smother resistance. And, finally, Darcy Lindberg looks to the courts, where the Declaration will inevitably end up, and considers the legal tools that judges will require to truly realize the promise that Gray and Borrows describe.

Taken together, these chapters offer cautions and insights on preparing and responding to the Declaration in Canada. They build on the work of Sharon Venne, Sheryl Lightfoot, Jeff Corntassel, Charmaine White Face, Sákéj Henderson and many others who have warned about selective endorsement, domestication, and divide and conquer tactics in the context of UNDRIP.

In addition to these lessons, and after a year of assessing the first UNDRIP legislation in Canada, we can add another: the glacial speed of implementation.

Even before the COVID-19 pandemic arrived in Canada, the collaborative action plans and progress reports required by the provincial legislation were painfully slow to materialize. After the legislation passed in B.C., the NDP government there sanctioned an infringement on the rights and title of the Wet'suwet'en to build a natural gas pipeline. In response to outraged and confused constituents, reconciliation-politicians had to break the news that UNDRIP in the province – and consent in particular – was *a process* and to be patient. This is partially a result of the need to review older laws and policy to bring them into alignment with UNDRIP, a tedious case-by-case negotiation that will take years to produce results.

Considering that Canada modeled their legislation on B.C., we can expect more of the same at the national level. Indeed, the federal government gave itself three years to merely develop the first action plan on implementation, plenty of time for current and future Ministers of Indian Affairs to urge patience.

While it may be some time before UNDRIP is realized in this country legally, the legislation in B.C. and in Canada is a helpful tool for Indigenous communities to hold governments accountable politically.

In an atmosphere where justice is seemingly and perhaps ironically only won by Indigenous communities through conflict in the public square, in the courts, and on the ground, the Declaration offers an opportunity.

So despite all the backdoors, obfuscation, and delay tactics that have characterized UNDRIP's path internationally and now into Canada, it is worthwhile recognizing the activism of Indigenous leaders that got us here, forcing the change now before us, however slow.

“No government is absolute on this earth. And there are responsibilities that accompany leadership. Responsibility has limitations and obligations...

If I have a right to spiritual practice, somewhere there’s an obligation not to infringe against that spiritual practice and that obligation should be there at the Canadian level, at the provincial level and also in our own political communities. ”

- JOHN BORROWS

PART 01 //

Rights & Responsibilities: Implementing UNDRIP in B.C. and in our own Communities

BY CHRISTINA GRAY & JOHN BORROWS

AS BRITISH COLUMBIA passed and turned toward implementing their *Declaration on the Rights of Indigenous Peoples* Act, Yellowhead Research Fellow Christina Gray met with constitutional law scholar John Borrows to better understand the prospects of B.C.'s law, the difference between a declaration and customary international law when it comes to domestic legislation, and the role of Indigenous communities in implementing the Declaration on our own terms.

CHRISTINA GRAY: **What is an international legal declaration? I ask this because in the title it is the B.C. *Declaration on the Rights of Indigenous Peoples Act*.**

JOHN BORROWS: An international declaration is a statement of intent for future action. This directs the parties' work in a particular field, in this case in the field of human rights as it deals with Indigenous peoples. It is distinguished from an international treaty. Treaties are binding on the parties (sometimes called conventions). A declaration is not binding in that same way, it's a statement of what they hope to do in the future, and usually a declaration comes before a treaty. So it's non-binding, it's a statement of intent to act, and it sets out the aspirations.

However, some declarations are binding because they incorporate customary law. Customary international law is binding on the parties. For instance, before there were any declarations around torture, it became a part of international law, a custom, that you wouldn't torture other people, and likewise with slavery. So, it may be that some of the principles in the declaration are not binding as a declaration, but are binding as a principle of customary international law because they reflect the practice in the world or they reflect the customs in the world around that area.

CG: **This question builds off of something you just mentioned that is important and worth pointing out: some principles in declarations are also customary international law. What are the principles in this Declaration that might make it binding?**

JB: James Anaya, a leading scholar of international law who has written much on Indigenous peoples and international law, says that most of the Declaration contains customary principles of international law or general principles of international law. These include the recognition of the title of Aboriginal peoples in public spaces, the treaty relationships of Indigenous peoples should be recognized and affirmed, the ability to practice religion and culture and pass it on through family relations; our identity and affiliations may be international law. There is an argument that the Declaration just takes existing law and packages it.

CG: Right, I've heard that everything that's in the UNDRIP comes from pre-existing elements of international law.

JB: That's right. It builds on the UN's *Declaration on Human Rights* or the Covenant on the Economic, Social and Cultural Rights or the Convention on the Rights of the Child. It consolidates law that's already there in the international sphere. So, there's kind of two arguments right?

First, it's a declaration, it's aspirational and not binding, simply a plan to act in the future. And the other view is that most of the things in here can already be considered international law because they're customary law or principles of international law that the world now has affirmed either by their societies or by enacting this.

CG: So while not a treaty, it could still be very powerful. I want to talk more about the B.C. Act. Do you think it binds provincial governments along the lines you suggest?

JB: The normal way that political communities would implement international law is through legislation. So the process would identify our treaty standards, our principles of customary international law or general principles of international law and they would say "okay – that's what the standard is, now we need to put it into our own legislative sphere to give that force, to give that greater certainty."

If the B.C. government sees this "merely" as a declaration and not a treaty they wouldn't be obligated to put this into legislation, they could have taken other measures to work with Indigenous peoples, or to work with the federal government to enact the rights. But, to the extent that it does represent principles of international law, customary international law, there would be an obligation that must be fulfilled again through legislative instruments.

CG: That gets to the next question I was going to ask you, in regard to section 3 of the Act with the specific wording around consultation.

JB: Yeah, so section 3 states, "in consultation and cooperation with the Indigenous peoples of B.C,. the government must take all measures necessary to ensure the laws of B.C. are consistent with the Declaration." One way of doing that is by creating legislation that commits itself to a process of working with Indigenous peoples, and in that process, figuring out what are those measures that are necessary to bring its laws in line or to be consistent with the Declaration. That is B.C. can't just assume it knows what is best to make our laws in this province consistent with the Declaration; B.C. would have to talk with – and then execute – what they hear from those rights holders. This is the standard we spoke about earlier. Through this process, you would uphold that standard. But in order to do that in the most human rights compliant way, you actually work with the people concerned to make sure your legislative action aligns with the international instrument.

CG: You have worked previously with the Centre for International Governance and Innovation (CIGI), and on UNDRIP implementation. Were there any findings you can share for how to implement the UNDRIP through B.C.'s Act?

JB: What we're trying to do at CIGI is weave together international law, domestic law, and Indigenous law kind of in a braiding analogy, and so that each one of those strands will support one another and nations are strengthened. A possible downside of this approach is getting all parties on the same page, and here I mean First Nations.

We often call ourselves nations and part of a nation-to-nation relationship with the federal government, and so if we are nations with the right to self-determination, we should act like Canada or B.C. acts, which is to say that we can implement the Declaration ourselves, according to our methods. For example, in communities with clans and chief structures, they may use feasting to affirm their rights. If it's a band council, they could take that Declaration and say that's our constitution; that every member is guaranteed the rights in the Declaration, and this could be interpreted by a Cree, or Anishinaabe, or Haudenosaunee, or Mi'kmaq lens. It doesn't necessarily mean that our law is just going to look exactly the same as Canada or the United States, or say Bolivia; each nation will implement those rights in a little bit of a different way. That's the point of a declaration in international law. There is a global standard, and that global standard has to be implemented locally, or internationally, or regionally as

the case might be. How Anishinaabe people talk about assembly, or speech, or say spirituality or religion, might be a bit different from how the Haida would do it, or the Blackfoot would do it. We would still be trying to implement the rights that our people can speak freely. But you know, just as Poland is going to do that differently from Australia and Japan, our own people are going to have the same law that we're trying to implement, but it'll reflect our own legal traditions.

CG: So, it's work on all fronts. I mean, it's not just B.C. that has responsibility here.

JB: That's right. We are just as responsible for implementing the Declarations as the provinces or federal government would be. Maybe we can be a leader in implementation. We're saying, "here's what we've done with our people, here's how we protected these rights, B.C. or Canada. Here is what you might consider as measures necessary for implementing the Declaration with our self-determination in mind."

No government is absolute on this earth. And there are responsibilities that accompany leadership. Responsibility has limitations and obligations. In other words, it's not just a Declaration of Indigenous rights, it's also embodying obligations. If I have a right in Canada to freedom of speech, the Government of Canada has an obligation not to infringe that speech. It's reciprocal. If I have a right to spiritual practice, somewhere there's an obligation not to infringe against that spiritual practice and that obligation should be there at the Canadian level, at the provincial level, and also in our own political communities.

Self-determination means that we have the right to govern ourselves and make our own decisions, but that's constrained by the principles in the Declaration. But this isn't like a Trojan horse of western rights moving in and suddenly taking over. Each society in the world has to make rights their own, they have to find ways to really take it up on their own terms. That is what I'm encouraging, what is the way within our society, not within an assimilative measure by just cutting and pasting from someone else's law and then trying to implement that right, but what on our own terms can we take up in the meaning behind that law?

CG: Do you want to talk a little bit about ways in which Indigenous peoples are already doing that work?

JB: Yeah. You have constitutions that are being ratified and have been ratified by Anishinaabe people in Ontario; they talk about doing this with our Seven Grandfather and Grandmother Teachings about love, respect, kindness, honesty, wisdom, humility, and truth. The treaty nations in B.C. also have constitutions which will often set out rights, but sometimes those rights aren't just for the human world, they could be for the rights of animals, or fish. There's a consultation protocol that the Chippewas of the Thames called *Wiindmaagewin* about how they expect others to deal with them when there's going to be development in their territory. This is about Free, Prior, and Informed Consent – found in the Declaration – but what the Chippewas of the Thames talk about is *Mino-bimaadiziwin*, which is good living and *Gdinawendimi* (which means we are all related to one another). That's an example of taking a principle of international law and making sure it speaks to and draws from the local understanding of what that law requires.

If you don't do that then it's assimilation right, that cutting and pasting just to take from somewhere else and say now we're just going to implement our law in this way that's indistinguishable from people around the world. In B.C.'s legislation, they actually encourage this and they're committing to work with First Peoples to get this right.

CG: I think that's a really great place to end.

JB: Yes, I think it also brings us back to the question, what are we going to do about this?

CG: And what are we already doing?

JB: And what are we already doing, exactly. It's not reinventing the wheel you know, working on these fronts. We've been doing it for generations.

CG: Since forever right, we've always had laws.

JB: That's right, exactly.

"One of the biggest challenges to implementing UNDRIP will be in determining what the terms in UNDRIP actually mean. Terms like self-determination, restitution, free prior, and informed consent. How do we find common ground here?

...B.C. will need to remove from legislation any systemic barriers that stop First Nations from determining their economic, social, and cultural development in their own way, in their own time. Recognition, too, of First Nations laws."

- JUDITH SAYERS

PART 02 //

Opportunities and Barriers for the B.C. Declaration of Rights Act

BY JUDITH SAYERS

THE UNITED NATIONS *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (UNDRIP) has been an effective piece of international law since its adoption by the General Assembly on September 13, 2007. It has taken twelve years for it to become law in British Columbia. B.C. is the first jurisdiction in the world to pass legislation to bring into law UNDRIP which makes it notable.

It has been a year since Royal Assent was given to bring *British Columbia's Declaration on the Rights of Indigenous Peoples Act* (DRIPA) into effect. Prior to November 28, 2019, the B.C. government had worked with the leaders of the three First Nation provincial organizations to determine what should be in this law. It should be noted that they did not work with individual First Nations themselves. Despite this, there was hope in the air when this law was passed and much attention was given the Premier and Minister of Indigenous Relations and Reconciliation for the "historic law."

Planning for Action, Mechanisms for Change

So what's in the legislation and what is required to implement it?

DRIPA calls for an Action Plan that the B.C. government must prepare and implement to achieve the objectives of the Declaration. Those objectives include affirming the application of the Declaration to the laws of B.C. to ensure effective implementation of the Declaration. This has been the first big challenge for the B.C. Government and Indigenous peoples: what should go into the action plan, what are the priorities, and on what time frame?

Further, DRIPA sets out two mechanisms to implement UNDRIP.

One mechanism is to change legislation to make all laws consistent with UNDRIP. There are over 5000 laws in B.C. and determining what laws are First Nations priorities will be difficult; there will be many and they will be varied.

Of course, legislative changes must be done with the consultation and cooperation with Indigenous Peoples and article 19 in UNDRIP calls for the Free, Prior, and Informed Consent (FPIC) of First Nations before adopting or implementing legislation. There are 203 First Nations in the province and bringing them all together to decide on what should be done as important pieces of legislation will be an immense task.

As a priority, B.C. will have to make changes to its legislative drafting processes. There is a great deal of secrecy in legislative drafting and, at the moment, it does not include Indigenous Peoples. This must change. Then if the legislature asks for amendments, those too must go back to Indigenous representatives for their approval.

The second mechanism is joint decision making or consent prior to decisions on the use of statutory powers. The legislation empowers B.C. to enter into agreements with First Nations to facilitate this.

Joint decision making and consent have rarely been reached in this province and whether there will be political will remains uncertain. While a new Horgan Government has just formed a majority, this legislation was not a large part of the campaign. And what about future governments?

Can we put in place an independent body to help facilitate agreements? To date, any requests to negotiate a joint decision making agreement is discouraged as that "mandate" has not been established. We are also being told that legislation has to be changed so that the Minister's discretion can be fettered or constrained. This is a delay and a change from what First Nations understood a year ago.

Annual Progress?

This law has now been in effect for over 12 months. At the nine month mark, the B.C. governments presented its review of the legislation.

The report states that work on an action plan with various Indigenous organizations and modern treaty Nations has begun. This means they still have to work with 194 First Nations if they are to be true to the principles in UNDRIP (free, prior, and informed consent as well as article 18, participation in decision making institutions). Indeed, most First Nations did not see a draft of the Action Plan nor had input into it, as they were promised.

This is the same old behaviour of government. DRIPA requires a collaborative process on an action plan.

In the last legislative sitting, the B.C. Government tabled at least three bills to amend laws without even letting First Nations know they were going to do so, nor did they seek their input. This sends a strong message to First Nations that B.C. is not serious about DRIPA.

One of the Acts they tried to amend was the *Clean Energy Act* that would do away with plans for B.C. self-sufficiency regarding energy production and allow the government to define what clean energy is. Doing away with self-sufficiency meant that the government could buy their power from outside B.C. that would deny opportunities to First Nations to create clean energy for economic purposes. This at a time when there is a strong desire to do so.

The Remaining Challenges for B.C.

For this law to have been more effective, there should have been more than two mechanisms to achieve implementation and interim measures for use while the legislation is updated.

One of the biggest challenges to implementing UNDRIP will be in determining what the terms in UNDRIP actually mean. Terms like self-determination, restitution, free prior, and informed consent. How do we find common ground here?

In order to implement UNDRIP, B.C. will need to remove from legislation any systemic barriers that stop First Nations from determining their economic, social, and cultural development in their own way, in their own time.

There must be recognition of First Nation ownership of their lands and resources, a recognition that guarantees them access. Recognition, too, of First Nations laws.

Free, prior, and informed consent will be the most contentious term as the B.C. government has said repeatedly that it does not mean a veto. Doesn't consent mean yes or no? (see UNDRIP articles 11, 19, 28, 29, 32). B.C. can no longer get away with engagements, feedback, and a lack of proper process regarding consultation and cooperation to get to FPIC.

More, no one as of yet has explored restitution of lost lands, resources, and sacred sites. Indigenous Peoples must bring their proposals forward to B.C. and try and work out what that restitution means.

These are not easy issues to work through and there is a strong need for an independent body to bring the parties together to decide on definitions is a possible solution.

The Era of DRIPA

First Nations and the B.C. government are in a new era, the era of DRIPA. They must move quickly to implement changes to legislation and not delay. They need to negotiate agreements on joint decision making and consent. There needs to be real action to show that this law can work and show the commitment of B.C. to implement this law. There must be processes established on how to do the work collectively and inclusively.

There are some big challenges with implementing DRIPA, but if these challenges can be met, there is great opportunity to change the landscape of laws, development, and real working relationships.

There is also an opportunity to provide a model for other jurisdictions, including the federal governments and their proposed UNDRIP law. But if these challenges cannot be met, then relationships will quickly fall apart.

Are the B.C. government and First Nations up to the challenge? Only time will tell if UNDRIP will be a living instrument in this province.

“While DRIPA recognizes Indigenous peoples’ right to FPIC, are there currently any protections in the legislation that could mitigate the alarming rates of success corporations and provinces have had in using the injunction mechanism to remove title holders from their lands? ”

- SHIRI PASTERNAK

PART 03 //

B.C. might want to align with UNDRIP, but does UNDRIP align with B.C.?

BY SHIRI PASTERNAK

ARTHUR MANUEL, the late Secwepemc leader, used the international world of finance and trade to force Canada's hand on Indigenous issues. For example, he met with Standards and Poor's, the global credit ratings giant, in a Manhattan high-rise to convince them to downgrade Canada's sovereign credit rating. He argued that Canada was selling lands that it did not own.

What Arthur understood was that many different spheres of law control the action of states. If the provinces – with jurisdiction over natural resources – would not recognize that Indigenous people in Canada own every blade of grass on their territories, maybe companies would? International trade law has rules about risk disclosure – warnings to potential investors – that can actually be useful to Indigenous title holders.

Likewise, the meaning of UNDRIP law in British Columbia (B.C.) will take place in the context of multiple legal and policy contexts.

So, while *The Declaration on the Rights of Indigenous Peoples Act* (DRIPA) aims "to ensure the laws of British Columbia are consistent with the Declaration," how will its principles, particularly free, prior, and informed consent (FPIC), fit into the maze of Canadian and provincial policy and law that currently denies this protection to Indigenous communities?

I answer this question in two parts. The first argues that DRIPA is a domestication of UNDRIP that may compromise its international requirements by governments. The second is the possible limitation – but also potential – of UNDRIP's domestication into some spheres of law, like injunctions and the private commercial law of Impact Benefit Agreements (IBAs).

Federal Domestication of UNDRIP

The first and most significant way that UNDRIP principles may be contained through their domestication into provincial law are constitutional in nature. In other words, though DRIPA's implementation over the past year in B.C. has been extremely flawed, its relationship to Canadian constitutionalism presents further challenges.

Here, Canada's adoption of UNDRIP is material to DRIPA. Long before the Liberals announced on December 4, 2020, their own draft federal legislation on UNDRIP, they have been qualifying its interpretation for years.

In 2016, Minister of Crown Indigenous Relations, Carolyn Bennett announced Canada's commitment to UNDRIP "without qualification." Yet, in August 2018, Canada's Department of Justice released "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples," with a new approach to domesticating UNDRIP. By domesticate, I mean the simultaneous adoption of international principles and their containment through common law, policy, and legislation.

Principle 6 states that the, "Government of Canada recognizes that meaningful engagement with Indigenous peoples *aims* to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources." The UNDRIP articles that protect Indigenous peoples' FPIC do not include qualifications. For example, article 10 states: "Indigenous peoples shall not be forcibly removed from their lands or territories" (articles 11, 19, 28, and 29 also explicitly protect FPIC). Yet, Canada's weak language that "aims to" do something is not equivalent to a government commitment. We don't ask that men "aim" not to rape women; we legally require them not to.

Likewise, Nicole Schabus, a law professor at Thompson Rivers University and co-founder of the Indigenous Network on Economies and Trade, calls the "domestication" of international law the process of watering down or changing the principles themselves, as defined. As she stated in March 2020 at a forum on international law and Indigenous rights, "Any qualification of international law by states should be understood as a *disqualification* of international law."

At the same forum where Schabus spoke, Mohawk policy analyst Russell Diabo argued that without explicitly addressing the colonial frameworks of Canada's constitution, UNDRIP legislation will only entrench federal policy interpretations of Aboriginal rights. Specifically, Section 91(24) of the British North America Act that places "Indians and the lands reserved for Indians" under the federal head of power. In other words, in Canadian law the ultimate authority over First Nations still sits with the federal government, and not the nations themselves.

This brings us to 1(3) of DRIPA, which states that, "For certainty, nothing in this Act, nor anything done under this Act, abrogates or derogates from the rights recognized and affirmed by section 35 of the Constitution Act, 1982." Indigenous peoples' rights have been determined, not through divisions of jurisdictional power, but through interpretation by the Supreme Court and federal government of Section 35(1)'s "aboriginal and treaty rights."

Both the federal and provincial governments have stated that UNDRIP legislation will be interpreted in line with Section 35 of the *Constitution*. This means that domestic legal precedents will be paramount over international principles. While this may protect Aboriginal and treaty rights in some cases, it also may narrow the realm of possibility from what is being imagined through UNDRIP.[1]

The difficulty here is that there are few legal precedents that recognize Indigenous consent, without significant allowance for infringement. This is precisely why Indigenous peoples advocated internationally for recognition of their right to FPIC.

IBAs and Injunctions

One of the most prevalent legal methods to remove Indigenous people from land today is through legal actions known as injunctions. As Yellowhead has shown, almost 90 percent of injunctions sought against First Nations by corporations have been granted. We have argued that the tests for obtaining injunctions are weighed against Indigenous peoples since they consistently prioritize potential financial loss over all other forms of value and inherent rights for land, resources, and territories.

There are some important questions to ask now about injunctions in light of the legislation in B.C..

While DRIPA recognizes Indigenous peoples' right to FPIC, are there currently any protections in the legislation that could mitigate the alarming rates of success corporations and provinces have had in using the injunction mechanism to remove title holders from their lands?

Could DRIPA be used in court by Indigenous peoples to support their case against injunctions? Or would the province need to legislate these changes to the common law to align it with DRIPA? It is worth noting that injunctions tend to be filed in response to First Nation individuals and groups using their bodies to say no to a proposed development.

[1] This is cause for concern across the policy landscape, too. See, for example, the Ministerial Recommendations released in November, announcing the need for "certainty and finality for section 35 rights related to land and other natural resources" in self-government and comprehensive claims agreements.

At least one clear avenue for legislative reform exists to align B.C. law with UNDRIP as is called for by the Act. B.C. should pass legislation and/or amend current civil procedure statutes to amend the common law of injunctions and contempt as they apply to First Nations and other Indigenous groups. As Yellowhead's research has shown, injunctions serve to bypass not only Aboriginal rights enshrined in Canadian law, but are fundamentally incompatible with UNDRIP. Simply put, B.C.'s legal framework cannot and will not align with UNDRIP until the operation of injunctions as a tool of dispossession and criminalization is explicitly addressed.

A year into DRIPA's enactment, we're still waiting to see whether it will be integrated into the environmental regulatory processes. Judging by the poor integration of FPIC into the Impact Assessment Act, we may not hold our breath. However, this is a critical containment of UNDRIP law if not amended.

For example, the injunction that Coastal GasLink (CGL) sought against the Wet'suwet'en was required because the hereditary leadership of the Wet'suwet'en Nation did not consent to the natural gas project. Their lack of consent was clearly communicated to the province of B.C. during the provincial environmental assessment process, where they stated:

> Considering the magnitude of cumulative environmental effects on Wet'suwet'en territory and the lack of recovery plans or strategies to address those effects, and as well, the lack of Crown–Wet'suwet'en title, rights, and interests reconciliation, the Wet'suwet'en and the Office of the Wet'suwet'en protests and rejects the Coastal GasLink concept and Application.

Provincial authorization is where the violation of consent began, and what legitimated CGL's lawsuit against those who were forced to express this dissent through blockades when all formal channels failed.

A deeper problem here is also that the extent and meaning of Section 35 Aboriginal rights are increasingly offloaded onto corporations to negotiate, as seen in the Impact Benefit Agreement (IBA) a Wet'suwet'en band signed with Coastal GasLink in 2016. What some companies seek to secure, as CGL did here, was an attempt to elicit the First Nation's "irrevocable consent" for the pipeline, defining the extent of Section 35(1) assertions.

Therefore, how will private, commercial contracts impact the free, prior, abd informed consent of Indigenous peoples? How can they even be reconciled with domestic law, when they contradict the Supreme Court of Canada's decisions on the proper title holders, since IBAs take place on a band-by-band basis, rather than at the level of the nation? Will DRIPA/UNDRIP support or undermine the binding nature of these contracts?

Conclusion

The conundrum is that international human rights mechanisms, like declarations adopted by the UN General Assembly, are considered "soft law" until adopted by states – the same states doing the colonizing.

UN bodies do recognize this issue. The Committee for the Elimination of Racial Discrimination sent a cease and desist letter to Canada in December 2019, warning of violations to UNDRIP, in particular the FPIC principle, by allowing the construction of Site C, Coastal GasLink pipeline, and the TransMountain pipeline against the wishes of Indigenous peoples on these lands.

The UN was responding to submissions by these groups to the Early Warning and Urgent Action Procedure mechanism of the UN Covenant on the Elimination of Racial Discrimination. Since Canada is a signatory, the letter "encouraged" it "to seek technical advice from the United Nations Expert Mechanism on the Rights of Indigenous Peoples." In other words, call a grown up to help you figure out what consent means.

A cease-and-desist order from the United Nations is a pretty extreme, unprecedented, and damaging indictment of Canada's failure to align its policies with Indigenous procedures to gain meaningful consent.

Note that all three cases were unfolding in B.C.. Yet the man camps for these construction sites remain operative and development continues even today, even in the wake of a global pandemic where everyone else, except essential workers, are required to stay home.

"Deference to Indigenous legal traditions and the decision-making processes within them may full commitments to obtain free, prior, and informed consent within Article 28. The duty to consult has been ineffective in fostering relationships based upon fairness and trust between Indigenous nations and the Crown. Free prior, and informed consent guided by Indigenous legal traditions would go a long way in repairing these relationships."

- DARCY LINDBERG

PART 04 //

Judicial Expertise, UNDRIP & the Renewed Application of Indigenous Laws

BY DARCY LINDBERG

"Let's face it, we are all here to stay"

- Justice Lamer in the *Delgamuukw* Decision (1997)

THIS BLUNT ASSESSMENT of "reconciliation" is the type that often shape-shifts to require Indigenous nations to reconcile their laws and governance to the imposition of Crown sovereignty. It was not asked for by the Wet'suwet'en and Gitksan nor was it necessary, then or now.

This reality – reconciliation by what is effectively coercion – bears out in Indigenous lives each day, especially those who stand in opposition of industrial developments through their territories. As John Borrows says, "reconciliation has problematically dominated the jurisprudence dealing with Indigenous issues and is a flawed metaphor in this field."

This article reflects on the Crowns' fickle interpretation of Lamer's statement, though one that focuses on Indigenous law and governance practices that are here to stay. Taking this seriously means the courts must acknowledge their mistakes in the interpretation of Indigenous laws and acknowledge they are not experts in this area. While compelling them on this point might be difficult ordinarily, B.C.'s attempt at implementing UNDRIP legislation could offer a solution in the form of systemic humbleness. A long overdue correction to hollow appeals to reconciliation.

But can the province get it right?

Coastal GasLink & The Common Law Presumption of the Expertise of the Court

A recent test of the court's acceptance of Indigenous laws being here to stay (or not) relates to Wet'suwet'en law in *Coastal GasLink v. Huson* (2019 B.C.SC. 2264). The defendants, Freda Huson and Warner Naziel, filed an application to set aside an interim injunction regarding access to Wet'suwet'en territory by Coastal GasLink Ltd. The corporation filed a corresponding suit for injunctive relief against checkpoints the Wet'suwet'en had set-up to restrict workers accessing the territory.

Huson and Naziel raised Wet'suwet'en law as a defence to the injunctive relief sought by the plaintiffs. This was largely unsuccessful, as Justice Church's judgment made clear. Church dismissed Wet'suwet'en law as not being an "effectual" part of the common law, which diminished the weight it provides as evidence of the "Indigenous perspective."

This narrow interpretation of Indigenous laws in Coastal GasLink (and previous cases) within the common law is concerning. The case that Justices in *Coastal GasLink* primarily relied upon to avoid applying Wet'suwet'en law was *Alderville v. Canada 2014 (FC 747)*, an opinion of the federal court dealing with whether Anishinaabe laws have extended into the common law in the past. But this case actually leaves ample room for the common law to take up and apply Indigenous laws. Their rationale also ignores the long history of recognizing Indigenous law (for example, Cree marriage laws, and adoptions according to the respective laws of the Inuit, Tłı̨chǫ, and Dakelh) within the common law dating back to 1867.

More troubling though, the *Alderville* decision touches upon a systemic flaw within Canadian jurisprudence that is often fatal to the application of Indigenous laws. Within Canadian courts, judges are considered to carry the requisite expertise on all areas of domestic law. Because of this assumption, opinions about *what the law is* are generally refused, as the court does not require the assistance of outside legal expertise.

But the *Coastal GasLink* case reveals the obvious reality: aside from exceptional instances, the Canadian judiciary is not currently competent to receive and apply Indigenous laws, legal traditions, and legal processes in a robust manner without significant assistance from the Indigenous peoples and nations whose laws they are tasked with applying.

In contentious situations like the construction of the Coastal GasLink pipeline, where expertise of Indigenous law and governance from Indigenous nations will be highly scrutinized, the adversarial system provides too many "outs" for the judiciary to properly apply or give deference to Indigenous legal orders.

Aside from a narrow reading of the reception of Indigenous laws before the courts, the decision uses the newness of reconciliation between Indigenous and Canadian legal orders as one of these outs. Justice Church writes, "The reconciliation of the common law with Indigenous legal perspectives is still in its infancy." The Wet'suwet'en would hardly characterize this relationship in such infantile terms: they have hundreds of years of opposition to Crown sovereignty on their territory, a title case that cost years of their lives and millions of dollars, and negotiated attempts at resolving these issues since.

The circular reasoning in *Coastal GasLink* stunts a vital avenue towards actual reconciliation, the conciliation between Indigenous legal orders, and the common law.

UNDRIP and the Promise of Centering the Expertise within Indigenous Laws

You may read my criticism of the Coastal GasLink decision with a sympathetic eye to the court. Injunctive proceedings move quicker than other civil processes, providing less opportunity for complex issues to be fully addressed. The court is also bound in a manner that the legislature is not. British Columbia's commitment to implementation of the United Nations *Declaration of Indigenous Peoples* (UNDRIP) provides a significant opportunity to remove these barriers and use Indigenous legal orders within the courts, to provide deference to Indigenous law and governance in conflicts involving Indigenous territories generally, and to address the glaring weakness in the presumption that the judiciary holds the requisite expertise in Indigenous laws at this time. In short, these issues need to be approached with a humbleness that allows Indigenous nations and people to direct resolutions for these weaknesses within current law.

UNDRIP offers a vehicle towards systemic humbleness in this regard. Article 11 plainly implies the province has an obligation to aid the protection, revitalization, and application of Indigenous legal orders. Article 8 calls for "effective mechanisms for the prevention of, and redress for...forced assimilation or integration." Both articles suggest that B.C. should legislate a *sui generis* (unique and flexible) approach to the admissibility of evidence on Indigenous laws.

In particular regard to industrial developments on Indigenous territories, article 27 provides a requirement for Indigenous laws be given due recognition in the adjudication of rights of Indigenous peoples in conflicts of lands, territories, and resources. Given that injunctions are now a favourite legal tool of proponents of large-scale industrial developments because of their ability to limit the protections offered by section 35 of the Constitution, article 27 is all the more important.

As the Yellowhead Institute has highlighted in national research on injunctions, Indigenous nations are far less likely to have favourable rulings in injunctive proceedings.

In Coastal GasLink, Wet'suwet'en law is not recognized as a factor in consideration of the broader public interest. Redressing the lack of use of Indigenous laws in these proceedings through the creative and flexible reception of Indigenous law in these cases can correct this imbalance in injunction proceedings. This could make room for, and even defer to, Indigenous laws in these situations.

Deference to Indigenous legal traditions and the decision-making processes within them may fulfill commitments to obtain free, prior, and informed consent within article 28. The duty to consult has been ineffective in fostering relationships based upon fairness and trust between Indigenous nations and the Crown. Free, prior, and informed consent guided by Indigenous legal traditions would go a long way in repairing these relationships.

Reconciliatory Political Rhetoric vs. Legal Conciliation

Of course, B.C., like the rest of Canada, does not need UNDRIP to make these changes. What UNDRIP offers is a guide to B.C. and the rest of Canada in substantive commitments to the conciliation of legal systems, and to move beyond the political rhetoric about reconciliation.

I agree with Gwich'in lawyer Kris Statnyk when he says: "I do not think Canada understands the weight and significance of Indigenous youth all across the country proclaiming that reconciliation is dead. There is no coming back from this. We are in a different world now."

The reality is that Indigenous youth know that legal conciliation – where Indigenous law and legal processes are fully respected – should be one of the first orders of this new world beyond political reconciliation. It provides clear, substantive goals that UNDRIP can help deliver.

If B.C.'s legislation lives up to the promise – and it may be too early to tell at this point – the use of reconciliation as an empty symbol may even die if we go down this path. And if we do, we should choose the soil we bury it in very carefully, for legal conciliation can grow in new seasons.

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