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COVID-19 and First Nations' Responses

Aimée Craft,* Deborah McGregor,** and Jeffery Hewitt***

Abstract

This chapter considers the federal government's fettering of jurisdiction through inaction in the areas of clean water and housing. We consider a small sample of First Nations' responses, taken on the basis of their assertions of jurisdiction and responses to the particular needs and circumstances of their communities. We conclude that First Nations are best positioned to make policy and law in response to COVID-19, and that the federal government can and must work with First Nations communities on resourcing their plans for wellness and emergency preparedness in relation to the pandemic, in accordance with a *sui generis* application of the constitutional principle of subsidiarity in conjunction with other constitutional obligations such as the fiduciary duty of the Crown and its duty to act honourably. This chapter is contextualized by the theme of self-determination in Indigenous health, s. 35 of the *Constitution Act*, and the *United Nations Declaration on the Rights of Indigenous Peoples*.

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Résumé

La COVID-19 et les interventions des Premières Nations

Ce chapitre examine comment l'inaction du gouvernement fédéral dans les dossiers de l'eau potable et du logement constitue une entrave à sa compétence. Nous nous intéressons à un modeste échantillon d'interventions des Premières Nations, choisies sur la base de l'affirmation de leur compétence et de leurs réponses aux circonstances et aux besoins particuliers de leurs communautés. Nous concluons que les Premières Nations sont les mieux placées pour concevoir des politiques et des lois en réaction à la COVID-19 et que le gouvernement fédéral peut et doit travailler avec elles et financer leurs plans en matière de mieux-être et de préparation aux situations d'urgence en rapport avec la pandémie, selon une application *sui generis* du principe constitutionnel de subsidiarité en conjonction avec d'autres obligations constitutionnelles telles que l'obligation fiduciaire de la Couronne et son devoir d'agir honorablement. Ce chapitre est mis en contexte à travers le thème de l'autodétermination en matière de santé autochtone, conformément à l'article 35 de la *Loi constitutionnelle de 1982* et à la *Déclaration des Nations Unies sur les droits des peuples autochtones*.

“The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change.”

– Prime Minister John A. Macdonald,
1887

“We need to make sure that all different orders of government, including Indigenous governments, are working together with the same goal, which we all share, which is keeping Canadians as safe as possible, recognizing that certain communities and certain individuals are more vulnerable.”

– Prime Minister Justin Trudeau,

2020

It is no small task to discuss Indigenous responses to COVID-19. In large part, this subject is so daunting due to constitutional obscurities and legal fictions that frame the relationship between Indigenous people and the Crown. Indigenous vulnerability to pandemics must

be understood within a broader context of historical and ongoing colonialism, which has disrupted and undermined the health and well-being of Indigenous people. In sum, the relationship is primarily governed through the Crown's unilateral creation of laws and policies, formed and deformed over centuries, and which aim to position Crown interests above those of Indigenous people, especially in relation to lands and resources. The Supreme Court of Canada refers to this relationship structure as the *reconciliation* of asserted/affirmed Crown sovereignty with the "prior occupation by Aboriginal people."¹

Both prior to and since confederation, Canada adopted a federal project to assimilate Indigenous people into the citizenry, which continues today in a variety of forms, including chronic underfunding of essential services, leaving Indigenous people vulnerable to the COVID-19 pandemic. Indigenous people score far worse on virtually all indicators of health than the general public,² a situation that has been directly attributed to historical and ongoing processes of colonization.³ Further, Indigenous communities currently face multiple health crises and have already experienced devastating pandemics with disastrous and ongoing impacts. The broader context for Indigenous people is characterized by increased risk and vulnerability, yet a capacity for resilience.

This chapter is not the place to recount the long, hostile, and violent history of Indigenous/Crown relations in Canada, but it is a place for attempting to offer a contemporary picture of some of the ways in which the long-standing federal approach has impacted COVID-19 responses for Indigenous people. We have scaled down our discussion to consider only federal COVID-19 responses in a First Nations context and the assertion of jurisdiction by First Nations in relation to their own people and territories. We have not captured Métis or Inuit responses, nor have we canvassed provincial responses. If we had taken on each of

1. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.
2. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy (The Final Report)*, vol 5 (Winnipeg: Truth and Reconciliation Commission of Canada, 2015). See also First Nations Child and Family Caring Society of Canada, "Victory for First Nations Children: Canadian Human Rights Tribunal Finds Discrimination Against First Nations Children Living On-Reserve" (26 January 2016), online (pdf): *First Nations Child and Family Caring Society of Canada* <<https://fncaringsociety.com/sites/default/files/Information%20Sheet%20re%20CHRT%20Decision.pdf>>.
3. James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples" (2014), online: *United Nations* <<https://undocs.org/A/HRC/27/52/AdFREEd.2>>.

these dimensions, we would have only scratched the surface, especially given that the legal and policy context that applies to each First Nations, Inuit, Métis, and non-status people has different implications (what the federal government calls a “distinctions-based approach”). Instead, we have dived more deeply into the affirmations of jurisdiction and corresponding acts of First Nations governments (and their collaborations based on their exercise of jurisdiction). The achievement of Indigenous well-being and resilience must be understood within the context of self-determination, as outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), in conjunction with the ongoing failures by the federal government to address basic human rights issues, such as housing and clean water on reserves, both of which have a direct impact on the ability to ensure the health and safety of First Nations.

Self-determination holds the key to better Aboriginal health by allowing communities to develop programs that are suited to their own needs, and to do so in a holistic way, avoiding the jurisdictional disputes that have plagued progress in health and so many other areas where the residential schools still cast a large shadow.⁴

We have chosen a handful of First Nations examples that reflect First Nations self-determination in the area of health, aimed at mitigating the spread of COVID-19 and maintaining the health and wellness of First Nations people and communities. We suggest that First Nations, as the most proximate government, are best positioned to make policy and law in response to COVID-19 and that they should be supported financially in that endeavour by the federal government—in the form of a *sui generis* application of the constitutional principle of subsidiarity (where authority rests with the government that is closest to the context and the people). Our comments are shared in light of the continued efforts of Indigenous people to maintain and restore good relations and to live in wellness—key pillars of Treaties and Indigenous legal orders in Canada.⁵

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4. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy (The Final Report)*, vol 5 (Winnipeg: Truth and Reconciliation Commission, 2015).
 5. Aimée Craft, “Ki’inaakonigewin: Reclaiming Space for Indigenous Laws” (Paper delivered at the Canadian Administration of Justice Conference, *Aboriginal Peoples and Law: “We Are All Here to Stay”*, Saskatoon, 14 October 2015).

Federal Government's Failure and the Argument for Enhanced First Nations Jurisdiction

Today, there are 634 First Nations in Canada, with more than 50 distinct languages; their financial, geographic, political, cultural, and social circumstances vary considerably.⁶ There is no homogeneous way to refer to an Indigenous experience of COVID-19, other than increased vulnerabilities and risk. Furthermore, within each community there will be a range of opinions and perspectives depending on capacity, geography, and access to resources. Some communities have recent experience with pandemics, including those that were significantly affected by H1N1 and SARS.⁷ Some now have emergency preparedness plans. Others have developed COVID-specific strategies.

As noted above, Indigenous people are confronted with disparities and disadvantages in every conceivable indicator of well-being.⁸ Anne Levesque and Sophie Thériault, in the Equity section of this volume (see Chapter D-6), cover some of these issues, including the lack of responsiveness by governments and the wholly inadequate funding of existing responsibilities, in violation of human rights. Many First Nations communities across Canada are in a continual state of crisis and have declared states of emergency in their communities in the following areas: health (suicide crisis); infrastructure, including inadequate and over-crowded housing and unsafe drinking water; child welfare; and the climate crisis (fires, droughts, and floods). Governmental attempts to address these crises have been inadequate and have left Indigenous people more susceptible to COVID-19. These inequalities will only be exacerbated by the COVID-19 pandemic “largely due to the pre-existing and ongoing impacts of colonialism and racism.”⁹

In our view, the federal government has fettered its jurisdiction by being non-responsive to ongoing human rights violations and by

6. René R Gadacz, “First Nations” in *The Canadian Encyclopedia*, (Toronto: Historical Canada, 2020), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/first-nations>>.
7. Shanifa Nasser, “Early Signs Suggest Race Matters When it Comes to COVID-19. So Why Isn’t Canada Collecting Race-Based Data?”, *CBC News* (17 April 2020), online: <<https://www.cbc.ca/news/canada/toronto/race-coronavirus-canada-1.5536168>>.
8. *Supra* note 4.
9. Ontario Human Rights Commission, “Policy Statement on a Human Rights-Based Approach to Managing the COVID-19 Pandemic”, online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic>>.

failing to provide adequate resources to First Nations people (especially those living on reserve). As a result, applying the constitutional principle of subsidiarity in conjunction with other constitutional obligations such as the fiduciary duty of the Crown and its duty to act honourably, we focus our discussion on the actions taken as a result of Indigenous assertions of jurisdiction. Clearly, there is a need for coordination and transparency across jurisdictions in order to recognize and give effect to the distinct COVID-19 responses of First Nations.

Water and housing are two areas of federal *irresponsibility* that significantly increase the COVID-19 risk for First Nations. One of the cornerstones of COVID-19 prevention is frequent hand washing, which poses a particular challenge for First Nations due to lack of access to clean water: currently, 27 First Nations are under short-term water advisories.¹⁰ The inadequacy of the government's response to this problem is illustrated by Indigenous Services Canada (ISC) advising (on its website) those communities on a "do not use" water advisory "... your water is not safe for any use. Use bottled water with soap or hand sanitizer with at least 60% alcohol to wash your hands. If you do not have access to running water, wash your hands in a large bowl and then throw out the water from the hand-washing bowl after each individual use."¹¹ This "hand-washing" advice ignores the overarching chronic water insecurity already existing in a number of First Nations communities, including the lack of access to bottled water in remote communities. Thus the "solutions" offered are wholly inadequate.

While there are opportunities for emergency responses from federal and provincial governments, both Ontario's *Emergency Management and Civil Protection Act*¹² and the federal *Emergencies Act*¹³ do not specifically allocate federal financial aid for First Nations communities when declaring a state of emergency. In other words, even in the context of a pandemic or similar scale of emergency, Canadian law does not expressly include Indigenous jurisdictional capacity, despite the constitutional requirement to do so based on treaties and the *Constitution Acts, 1867 and 1982*. Thus, it is left to First Nations

10. Note that ISC data do not include B.C. First Nations or those that are part of the Saskatoon Tribal Council.

11. Indigenous Services Canada, *Coronavirus (COVID-19) and Indigenous Communities: Confirmed Cases of COVID-19* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* <<https://www.sac-isc.gc.ca/eng/1581964230816/1581964277298#chapo>>.

12. *Emergency Management and Civil Protection Act*, RSO 1990, c E 9.

13. *Emergencies Act*, RSC, 1985, c 22.

to provide leadership without full constitutionally recognized jurisdictional authority, given the occupation of the legislative field by the federal and provincial governments and their control over First Nations' financial and other resources.

The Ontario Human Rights Commission, as well as Thériault and Lévesque, argue for a human rights-based approach to managing COVID-19, with independent oversight and additional funding to protect Indigenous people's health and human rights, and the application of Jordan's Principle when jurisdictional disputes arise.¹⁴ This failure to remedy water and housing insecurity puts First Nations citizens in more precarious positions in relation to COVID-19 than other citizens. In sustaining the precariousness, the federal government has abdicated responsibility, breached the Honour of the Crown and its fiduciary duty, and fettered its jurisdiction. In response, many First Nations have expressly (re)asserted their jurisdiction and continued with their responsibilities, examples of which are illustrated below.

The Federal COVID-19 Response

Despite all efforts, there are some cases of COVID-19 in First Nations. As of June 9, according to ISC there were 234 confirmed cases of COVID-19, 22 hospitalizations, 206 recovered cases and 6 deaths in First Nations communities (reserves) in Canada.¹⁵ Some of the ISC data differs from First Nations' reporting,¹⁶ although in some regions,

14. Lévesque & Thériault, this volume, Chapter D-6. See also Ontario Human Rights Commission, "Policy Statement on a Human Rights-Based Approach to Managing the COVID-19 Pandemic", online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic>>. See also TRC Call to Action 3; Canadian Human Rights Commission "Statement—Inequality Amplified by COVID-19 Crisis", online: *Canadian Human Rights Commission* <<https://www.chrc-ccdp.gc.ca/eng/content/statement-inequality-amplified-covid-19-crisis>>.
15. *Supra* note 12. ISC updates the numbers daily. Indigenous Services Canada, *Coronavirus (COVID-19) and Indigenous Communities: Confirmed Cases of COVID-19*, (2020). Online: <<https://www.sac-isc.gc.ca/eng/1581964230816/1581964277298#chapo>>. However, as commentators have noted (see <<https://www.cbc.ca/news/indigenous/coronavirus-indigenous-data-gap-1.5556676>>), community reporting is outpacing ISC data. The ISCs data do not include the number of recovered cases, the number, or names of First Nations communities affected, or account for First Nations members living off reserve. Further, the ISC only tracks cases of COVID in First Nations and Inuit communities.
16. Courtney Skye, "Colonialism of the Curve: Indigenous Communities & Bad COVID Data", Yellowhead Institute (12 May 2020), online: *Yellowhead*

the numbers are likely to be significantly under-reported because of a lack of testing. Health Canada is said to be mobilizing testing capacity, shipping personal protective equipment (PPE), and sending bottled water, hand sanitizer, isolation tents, and additional health professionals to communities. However, no concrete plan of action has been made publicly available, nor have the unique challenges of dealing with an outbreak on reserve been acknowledged, including issues with limited health infrastructure and services and those relating to the ability to self-isolate, quarantine, and physically distance.¹⁷

ISC's general COVID-19 strategy (see Figure A2.1 at the end of the chapter) has reported that the federal government will pay what it costs to respond to possible outbreaks in Indigenous communities. The media reports that, as of April 24, the government has allocated \$145.6 billion in direct support for COVID-19 responses.¹⁸ While Indigenous people make up roughly 4.5% of the Canadian population¹⁹ as a whole, Indigenous-specific funding only accounts for 0.56% of the federal government's COVID-19 funding allocation. This has been widely criticized as insufficient and lacking an understanding of the issues that First Nations communities are facing.²⁰

On March 18, 2020, the Minister for ISC announced the Indigenous Community Support Fund,²¹ which includes \$305 million for Indigenous people in Canada, with funds set aside to support regional, urban, and off-reserve Indigenous organizations. The allocation between First Nations (\$215 million), Inuit (\$45 million),

Institute <<https://yellowheadinstitute.org/2020/05/12/colonialism-of-the-curve-indigenous-communities-and-bad-covid-data/>>.

17. Teresa Wright, "COVID-19 Outbreaks in 23 First Nations Prompt Worries", *CTV News* (1 May 2020), online: <<https://www.ctvnews.ca/canada/covid-19-outbreaks-in-23-first-nations-prompt-worries-1.4920181>>.
18. Karina Roman, "By the Numbers: Federal Projected Spending on Direct Supports Due to COVID-19 Hits \$145B", *CBC* (24 April 2020), online: <<https://www.cbc.ca/news/politics/covid-19-economic-programs-1.5543092>>.
19. Statistics Canada, *Aboriginal Peoples Highlight Tables*, 2016 Census (Ottawa: Statistics Canada, 2016), online: *Statistics Canada* <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/abo-aut/Table.cfm?Lang=Eng&T=101&S=99&O=A>>.
20. Teresa Wright, "Ottawa Response for COVID-19 Outbreak in Indigenous Communities Troubling", *National Observer* (15 March 2020), online: <<https://www.nationalobserver.com/2020/03/15/news/ottawa-response-covid-19-outbreak-indigenous-communities-troubling>>.
21. Indigenous Services Canada, *Indigenous Community Support Fund* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* <<https://www.sac-isc.gc.ca/eng/1585189335380/1585189357198>>.

and Métis (\$30 million) is based on population (2016 census), remoteness, and community well-being. For a breakdown by province/territory, see Figure A2.2 at the end of the chapter.²² According to the Minister, “these new funds will provide Indigenous leadership with the flexibility needed to design and implement community-based solutions to prepare for and react to the spread of COVID-19 within their communities.”²³ Indigenous organizations providing services to Indigenous people in urban centres/off reserve received \$15 million. The adequacy of the funding provided is contested: the Congress of Aboriginal Peoples filed an application in Federal Court claiming inadequate and discriminatory funding for off-reserve and urban Indigenous people.²⁴ Following this application, on May 21, 2020, the federal government announced an additional \$75 million in COVID-19 funding for Indigenous individuals living off-reserve.²⁵ Other pockets of funds have been allocated by ISC to Indigenous communities for: a) public health short-term needs (implement pandemic plans, and for public health and primary care related to a COVID outbreak) (\$100 million); b) short-term, interest-free loans and non-repayable contributions for businesses (up to \$306.8 million); c) increased subsidies for the Nutrition North program (\$25 million); d) “distinctions-based” support for post-secondary students (\$75.2 million); and e) funds to support families in the Northwest Territories to move onto the land as a physical distancing measure (\$2.6 million).²⁶

22. *Ibid.*

23. *Ibid.*

24. Kristy Kirkup, “Congress of Aboriginal Peoples File Court Application Over Federal Funding Levels During COVID-19”, *The Globe and Mail* (May 14 2020), online: <https://www.theglobeandmail.com/politics/article-congress-of-aboriginal-peoples-file-court-application-over-federal/?utm_source=First+Peoples+Law+Blog&utm_campaign=3cocf73dd4-EMAIL_CAMPAIGN_2019_07_10_09_19_COPY_01&utm_medium=email&utm_term=0_84105b31a3-3cocf73dd4-196448785>.

25. Rachel Aiello, “PM Offering \$75 Million More in COVID-19 Aid to Indigenous People Living Off-Reserve”, *CTV News* (21 May 2020), online: <<https://www.ctvnews.ca/canada/pm-offering-75-million-more-in-covid-19-aid-to-indigenous-people-living-off-reserve-1.4947961>>.

26. *Supra* note 22; Indigenous Services Canada, *COVID-19 Specific Funding Announced by Government of Canada to Support First Nations Public Health Response* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* <<https://www.sac-isc.gc.ca/eng/1584819394157/1584819418553#b>>; Indigenous Services Canada, News Release, “Indigenous, Territorial and Federal Leaders Mobilize Funding to Support Unique Northern Physical Distancing Initiative” (30 March 2020), online: *Indigenous Services Canada* <<https://www.canada.ca/en/indigenous-services-canada/news/2020/03/>>

The federal government's Indigenous COVID-19 response continues to evolve as First Nations advocate for increased funding to address their distinct challenges and needs. Many First Nations are vulnerable to COVID-19, both the disease itself and the adverse consequences of measures taken in response, due to existing and long-standing economic, social, and health disparities. Recently, Grand Chief Perry Bellegarde of the Assembly of First Nations expressed concerns to the Standing Committee on Indigenous and Northern Affairs regarding the government's removal of pandemic restrictions that would impact First Nations. He stated that some "provincial governments are refusing to accept lawful decisions by First Nations to restrict traffic flow and gatherings among people" as part of First Nations exercising their inherent jurisdiction in their response to COVID-19.²⁷

Indigenous Responses Relating to COVID-19

First Nations governments are the best placed and most proximate government to respond to needs, and to act in accordance within a variety of jurisdictional fields, including the management of health emergencies on their reserve. However, this must be understood in conjunction with the ongoing treaty and constitutional obligations of the federal government to fund the operation of this First Nations authority in response to COVID-19.

indigenous-territorial-and-federal-leaders-mobilize-funding-to-support-unique-northern-physical-distancing-initiative.html>; Indigenous Services Canada, *Relief Measures for Indigenous Businesses* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* <<https://www.sac-isc.gc.ca/eng/1588079295625/1588079326171>>; Health Canada, *Canada's COVID-19 Economic Response Plan: Indigenous Peoples (Making Personal Hygiene Products and Nutritious Food More Affordable)* (Ottawa: Health Canada, 2020), online: *Health Canada* <<https://www.canada.ca/en/department-finance/economic-response-plan.html#individuals>>; Health Canada, *Canada's COVID-19 Economic Response Plan: Indigenous Peoples (Providing Support to Indigenous Post-Secondary Students)* (Ottawa: Health Canada, 2020), online: *Health Canada* <<https://www.canada.ca/en/department-finance/economic-response-plan.html#individuals>>.

27. Teresa Wright, "Canada's Indigenous Leaders Say More Help Is Needed as COVID-19 Outbreaks Rise", *Global News* (8 May 2020), online: <<https://globalnews.ca/news/6923971/coronavirus-canada-indigenous-concerns/>>. See also House of Commons, "Standing Committee on Indigenous and Northern Affairs, INAN Meeting, No 7" (8 May 2020), online (video): *House of Commons*, <<https://parlvu.parl.gc.ca/Harmony/en/PowerBrowser/PowerBrowserV2/20200508/1/33202?Language=English&Stream=Video>> [House of Commons].

Indigenous responses to the COVID-19 pandemic have been multiple and varied across Canada. However, they all build on multiple sources of authority for assuming the jurisdiction needed to protect citizens of First Nations. Some Nations have chosen to enact bylaws (a power granted to band councils under subsection 86(1) and (4) of the *Indian Act*) or have claimed their authority and rights under treaties. Others have affirmed their ongoing and inherent jurisdiction, recognized in the unceded title to their traditional territories, or have anchored their responses in their Indigenous legal orders, both in the exercise of customary laws and modern codified and legislated authority. Many have invoked their sovereign rights of self-determination, as provided for in UNDRIP and which is grounded in multiple sources of authority. Many First Nations have decided to continue with measures stricter than those of the provinces and adjoining municipalities, in the face of eventual multiple waves and spikes of infection. First Nations communities are not typically located near large urban centres and, therefore have increased vulnerability to infectious diseases such as COVID-19. By virtue of being Indigenous, there is also less health care infrastructure.

An increasing number of First Nations have declared a pandemic and a state of emergency, and have implemented COVID-19 responses, including restrictions consistent with federal and provincial jurisdictions. Some First Nations have implemented lockdowns, travel restrictions, curfews, 24-hour surveillance, checkpoints, as well as failure-to-comply fines. First Nations have limited options to enforce their pandemic responses through *Indian Act* bylaw provisions. It should be noted that First Nation responses vary and change over time as new information and cases emerge in their communities.

The following examples illustrate the affirmations of jurisdiction by many First Nations in Canada in core areas relating to the overall wellness and protection of citizens of those Nations, for example, in areas of: transport; trade and commerce; health; education; matters of a local and private nature; property and civil rights; and emergency law-making powers. By regulating the “who, what, and where,” First Nations have taken positive and preventive measures to ensure the health and wellness of their community members; have created emergency responses and regulated trade; and have also limited travel to, from, and within their territories (both reserves and traditional territories). They have collaborated among themselves and with other governments to ensure these orders are respected. They have also

called upon others to account for their actions, including municipal, provincial, and federal governments, particularly where there has been conflict in the application and implementation of their orders. This is illustrative of the extent to which First Nations' governmental responsibilities are impacted by municipalities, provinces, and the federal government, yet most First Nations operate without the benefit of a taxable base, the security of multi-year funding, or the ability to incur debt. In sum, the current funding for First Nation communities is one that relies on agreement between the federal and provincial Crowns. The lack of specific inclusion of Indigenous people in emergency legislation along with a disregard by the settler population (access to tobacco, cottages) of the interests and needs of Indigenous people is demonstrative of the ongoing asymmetrical Indigenous/Crown relationship that places the existence of Indigenous people at risk in favour of the settler population.

Trade, Land Leases, and Mobility

To contain COVID-19, by early April a number of communities in Ontario, such as Six Nations,²⁸ Rama First Nation,²⁹ and Wahta First Nation,³⁰ temporarily closed their communities to varying degrees, including their tobacco retailers.³¹ Councils issued these orders through their inherent rights jurisdiction and via *Indian Act* powers. Restrictions on gatherings (no more than five people) and requests to stay at home were already in place for the general population in Ontario.³² However, the response of many non-residents to Six Nations and Rama's notices of temporary closure was to ignore the stay-in-place protocol and

28. Jennifer K Baker, "Chief Calls for Closure of Smoke Shops After Two COVID-19 Cases Reported in Six Nations", *CTV News* (29 March 2020), online: <<https://kitchener.ctvnews.ca/chief-calls-for-closure-of-smoke-shops-after-two-covid-19-cases-reported-in-six-nations-1.4873315>>.
29. Justin Rydell, "Wahta First Nation Also Closes Non-Essential Business, Ending Tobacco Sales", *CTV News* (8 April 2020), online: <<https://barrie.ctvnews.ca/wahta-first-nation-also-closes-non-essential-business-ending-tobacco-sales-1.4888729>>.
30. *Ibid.*
31. Lindsay Richardson, "Influx of Non-Residents Chasing Gas, Smokes and Pot Putting First Nation Communities at Risk" *APTN News* (7 April 2020), online: <<https://www.aptnnews.ca/national-news/influx-of-non-residents-chasing-gas-smokes-and-pot-putting-first-nation-communities-at-risk/>>.
32. Ontario Ministry of Health, "Statement from the Chief Medical Officer of Health" (30 March 2020), online: *Ontario Ministry of Health* <<https://news.ontario.ca/mohlct/en/2020/03/statement-from-the-chief-medical-officer-of-health.html>>.

travel to these First Nations communities to stock up on cigarettes. Simultaneously, there was an increase in online racism against First Nations communities that issued temporary closures.³³

To mitigate against the risk of infection within the Nation, some First Nations communities are limiting access to the reserve to residents only (and in some cases excluding non-resident citizens of the nation). This is in step with, for example, a province closing its borders to others (as Quebec has done, for example) or Canada closing the border to the United States to slow the spread of COVID-19. As we write, warmer weather approaches and many First Nations in Ontario are discouraging non-resident cottagers from travelling to their communities due to the increased potential for the spread of COVID-19. Another unique constitutional question arises in this context: can non-resident mobility rights under section 6 of the *Charter* be restricted by the application of First Nations jurisdiction and the protection of “rights or freedoms that pertain to the aboriginal peoples of Canada” against charter claims?³⁴

There have been tensions between First Nations that have exercised their jurisdictional assertion to protect the health of their people and non-resident cottagers. Cottage leases located on reserves are subject to various laws, including the *Indian Act*³⁵ and the *First Nation Lands Management Act*.³⁶ Generally, reserve lands cannot be privately owned, though they can be leased to non-residents and are often used for non-resident cottagers. First Nations retain the right as to whether or not to renew a cottage lease by way of statute³⁷ or inherent right.³⁸ A different question arises when First Nations communities wish to exercise public health authorities to prevent a non-resident cottager from entering their community, where to do so would put the community at risk.

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33. Kim Uyede-Kai, “COVID-19 and the Racism Pandemic We Need to Talk About” (April 2020), online: *Shining Waters Regional Council* <<https://shiningwatersregionalcouncil.ca/wp-content/uploads/2020/04/COVID-19-and-Racism-Pandemic-SWRC-revised.pdf>>; Roberta K Timothy, “Coronavirus Is Not the ‘Great Equalizer’ — Race Matters: U of T Expert”, *U of T News* (8 April 2020), online: <<https://www.utoronto.ca/news/coronavirus-not-great-equalizer-race-matters-u-t-expert>>.
34. *Canadian Charter of Rights and Freedoms*, s 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
35. *Indian Act*, RSC, 1985, c I-5, ss 38 and 53.
36. *First Nation Land Management Act*, SC 1999, c 24, s 18(1)(b).
37. *Williston v Canada (Minister of Indian Affairs and Northern Development)*, 2005 FC 829.
38. *Devil’s Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812.

For example, Walpole First Nation, located at the Michigan border, has advised non-residents and cottagers not to come to the community.³⁹ Whitefish River First Nation (WRFN) commenced a phased approach to pandemic planning and implemented travel restrictions, which have become increasingly restrictive over time as COVID-19 cases increase. Currently, only “residents” are permitted access to the community (and can leave for essential services). Chief Shining Turtle pointed out “that phase one of the response was signage, phase two was a letter informing cottagers that they could not access their seasonal dwellings and phase three was bringing in concrete barriers” in case they were required to physically prevent people from entering the reserve. “I get it,” he said. “People don’t want to be in Sudbury, Toronto, or Hamilton while this is going on. But the question you have to ask yourself, ‘is this essential?’” Some cottagers with leased shoreline property in WRFN seem to be startled with the First Nation asserting their inherent jurisdiction during a pandemic, complaining about their restricted access to the reserve, stating that their seasonal cottages are their only “residences” and that they therefore meet the residency requirement. The cottage leases clearly indicate the cottagers are seasonal residents only. However, First Nations’ jurisdiction was challenged by settler seasonal cottagers, despite the fact that similar measures were being suggested in adjoining municipalities in Ontario. It was observed that a “number of summer residents were flocking to their properties, many returning from COVID hot spots such as Florida and Toronto.”⁴⁰ The WRFN updated their trespass by-law to address emergency measures and support the community pandemic plan.

First Nations communities will continue to face challenges from those who do not respect their inherent jurisdiction, particularly if their pandemic and recovery plans are not coordinated across jurisdictions. The Assembly of First Nations has stated that First Nations must be at any table dealing with the health crisis, and arguably should be the ultimate decision-making authority with respect to the wellness and safety of their communities.⁴¹

39. “Walpole Island First Nation Restricts Access to Non-Residents Due to COVID-19”, *CBC* (2 April 2020), online: <<https://www.cbc.ca/news/canada/windsor/walpole-island-first-nation-restricts-access-covid19-1.5518628>>.

40. Michael Erskine, “Birch Island Denies Access to Cottagers with Leased Lots”, *Manitoulin Expositor* (15 April 2020), online: <<https://www.manitoulin.ca/birch-island-denies-access-to-cottagers-with-leased-lots/>>.

41. House of Commons, *supra* note 28.

Wellness and Cultural Appropriateness

The Truth and Reconciliation Commission of Canada (TRC) called on the federal government to close the gap in health outcomes between Indigenous and non-Indigenous communities and for the recognition of Indigenous healing practices.⁴² First Nations have stepped into this jurisdictional sphere in response to COVID-19, often with limited resources and funding. Combining the authority to act with respect to both wellness and emergency, some First Nations have enacted and implemented their own “disease emergency” by-laws under the *Indian Act*.⁴³ The by-laws range from mandating self-isolation or quarantine; mandating physical-distancing; restricting travel; restricting access to public spaces or businesses; and establishing emergency shelters for citizens who are homeless or living in precarious housing situations. Orders have been enforced through fines (and in some cases provide for imprisonment).

Proactive and culturally appropriate efforts relating to wellness, including the harvesting and distribution of traditional medicines, is supported through formal and informal networks that build on the jurisdiction of Nations, and is given effect through various forms of leadership, including those who have the responsibility to harvest, make, share, and look after medicines (including traditional foods). In addition, some of the formal COVID-19 preparedness plans include instructions for traditional methods of cleaning, harvesting, and preparing traditional medicines and guidance on ceremonies.⁴⁴ Some indicate that Elders and healers should be involved in incorporating traditional medicines and wisdom pertaining to contagious illnesses like COVID-19.⁴⁵ Many have also included information on sustaining well-being and mental health during physical distancing.

An important component of cultural appropriateness includes methods of communication of information, including in Indigenous

42. Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission, 2015).

43. Heiltsuk Nation, “By-Law No 21, Heiltsuk Disease Emergency By-Law” (2020), online (pdf): *Heiltsuk Nation* <<http://www.heiltsuknation.ca/wp-content/uploads/2020/04/2020-03-31-Disease-Emergency-By-law.pdf>>.

44. Six Nations of Grand River, “Coronavirus (COVID-19) Preparedness” (2020), online (pdf): *Six Nations of Grand River* <<http://www.sixnations.ca/hpnsCovid19PreparednessImportantInformation.pdf>>.

45. Nishnawbe Aski Nation, “COVID-19 Pandemic Plan” (2020), online (pdf): *Nishnawbe Aski Nation* <<http://www.nan.on.ca/upload/documents/community-covid-19-pandemic-plan-templat.pdf>>.

languages; see, for example, the Protecting Our Home Fires initiative from the Morning Star Lodge in five Indigenous languages.⁴⁶ Other examples include collaborations relating to the release of information in culturally and linguistically appropriate ways, including using humour, health care workers, and Elders to engage in online platforms like Kahkakiw, a Cree-speaking Raven puppet.⁴⁷

Conclusion

Many First Nations have decided to continue with measures stricter than those of the provinces, in the face of eventual multiple waves and spikes of infection. Further, the positive reclamation of jurisdiction, wellness, language, and culture by Indigenous communities, as well as the continued practices rooted in a holistic approach derived from a connection with land, water, and other parts of creation will affirm the continued and ongoing wellness of Indigenous Nations in the face of the COVID-19 pandemic and beyond. By most accounts, First Nations approaches seem to be working. The difficult decisions made by many First Nations communities have contributed directly to the well-being of those communities.

In an unprecedented data-sharing agreement between First Nations and the Province of Manitoba, Indigenous rates of COVID infection are being tracked. As of June 5, there were no cases on First Nations reserves in Manitoba (only 16 cases off reserve).⁴⁸ First Nations in Northern Manitoba had set strict rules as to who can enter into their communities. Against the wishes of local First Nations, Manitoba Hydro was planning for a massive 1000+-person shift change, the third week in May, including workers from other jurisdictions in Canada and other countries, a business decision that would put the local First Nations citizens' health and well-being at risk. Citizens of the Tataskweyak Cree Nation turned vehicles away from their territory, specifically from going up to the Keeyask Dam construction

46. Morning Star Lodge, "Protecting Our Home Fires" (last visited 26 May 2020), online: *Indigenous Health Lab* <<http://www.indigenoushealthlab.com/protecting-our-home-fires>>.

47. Kitatipithitamak Mithwayawin, "Indigenous-led Countermeasures to Coronavirus (COVID-19) and Other Pandemics Then, Now and Into the Future" (2020), online: *Kitatipithitamak Mithwayawin* <<https://covid19indigenous.ca/>>.

48. Manitoba First Nations COVID-19 Pandemic Response Coordination Team PRCT BULLETIN, <https://d5d8ad59-8391-4802-9foa-f5f5d600d7e9.filesusr.com/ugd/38252a_861c0280bab14bfab61cceaee7121320.pdf?index=true>.

camp. Manitoba Hydro then filed an injunction against the respective First Nations to end the “protests”. Leaders of the four Keeyask Cree Nations (who are partners in the Keeyask project) have called for First Nations’ participation in a new plan to resume construction and manage the movement of workers. Examples like this illustrate the need for First Nations’ forward jurisdiction, with coordinated support from the provinces and the federal government to put the health and safety of First Nations ahead of the non-essential construction of hydroelectric infrastructure.

The TRC has stated that UNDRIP is the framework for reconciliation in Canada. UNDRIP finds its root in the recognition of Indigenous self-determination. Although Canada has committed to implementing UNDRIP, only the British Columbia government has passed legislation to that effect. In light of the COVID-19 pandemic, the United Nations has asked governments to consider the application of UNDRIP and, as a first recommendation, the recognition of “Indigenous peoples’ representative institutions, authorities, and governments as the legitimate representatives of Indigenous peoples.”⁴⁹

We have argued in this chapter that Indigenous-led responses, as affirmations of First Nations’ jurisdiction and self-determination, are supported by one of the basic tenets of federalism, namely the principle of subsidiarity, as well as by s. 35 of the *Constitution Act* and all corresponding obligations, together with commitments in international law pursuant to UNDRIP. In this light, the federal government can and must work with First Nations on resourcing their plans for wellness and emergency preparedness in relation to the COVID-19 pandemic.

49. UN Department of Economic and Social Affairs, “Indigenous Peoples & the COVID-19 Pandemic: Considerations”, online (pdf): *United Nations* <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/COVID19_IP_considerations.pdf>.



Figure A2.1 Information for Indigenous People and Communities
 Source: Indigenous Services Canada, *Preparedness and Response to COVID-19* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-FLHT/STAGING/texte-text/preparedness_response_COVID-19_1584463875030_eng.pdf.

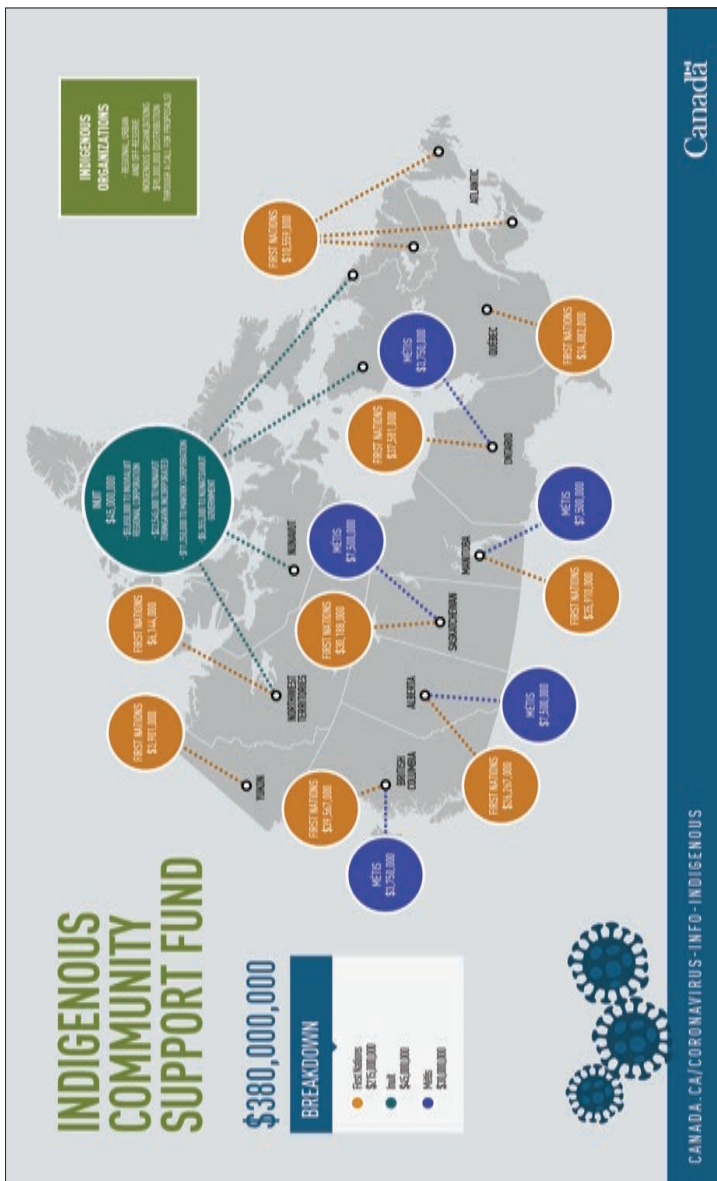


Figure A2.2 Indigenous Community Support Fund

Source: Indigenous Services Canada, *Indigenous Community Support Fund* (Ottawa: Indigenous Services Canada, 2020), online: *Indigenous Services Canada* <https://www.isc.gc.ca/eng/1585189335380/1585189337198>.