

IMPLEMENTING UNDRIP IN BC: A DISCUSSION PAPER SERIES
BY THE RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

Indigenous Rights in Times of Emergency



The Indian Residential School History and Dialogue Centre (IRSHDC) at the University of British Columbia has been publishing a series of short papers on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in Canada, and in particular British Columbia's Declaration on the Rights of Indigenous Peoples Act. The discussion paper series can be accessed at <http://irshdc.ubc.ca/undrip-papers/>.

With the rapidly growing COVID-19 pandemic, it is timely and important to consider and assess the relationship between the work of reconciliation and advancing the human rights of Indigenous Peoples, and domestic and global emergencies. As such, the Centre will be periodically adding papers on Indigenous rights in times of emergency to the discussion paper series. While the specific topics of the papers will evolve as events do, we expect the papers to address a range of topics including how human rights are impacted in times of emergency, how they should be restored after emergencies end, the relationship between Indigenous self-government, decision-making, consultation and emergency preparedness, and how the current pandemic may change the trajectory of the use of the court system to address Indigenous rights matters.

To initiate the discussion of these topics, this short paper provides some high-level commentary on how emergencies can impact human rights generally, and Indigenous rights specifically. This paper is only intended to be a jumping off point for more in depth dialogue and examination in the coming weeks and months.

We welcome your feedback on these commentaries, as well as ideas you may have for other topics that would be helpful for us to focus on in the future.

Introduction

The passage of the Declaration on the Rights of Indigenous Peoples Act (DRIPA) in November 2019 by the Government of British Columbia in partnership with Indigenous Peoples was rightfully heralded. It was a landmark step in the generational struggle to respect Indigenous rights. DRIPA confirmed the application of the United Nations Declaration on the Rights of Indigenous Peoples to the laws of British Columbia and called for a province-wide action plan to ensure the objectives of the UN Declaration were achieved in a co-operative manner.

Six months later, in the context of a pandemic driven emergency, it is important to consider the relationship between the work mandated by DRIPA and the UN Declaration itself, and the reality that we live in a time – perhaps a prolonged period of time – where governments are faced with extremely hard choices. Canadians from coast-to-coast-to-coast are necessarily undertaking real sacrifices, including in particular those on the front lines, and all Canadians will see their rights impacted. The work of addressing Canada’s colonial legacy, reconciliation, recognizing and protecting the rights of Indigenous Peoples will inevitably also be impacted.

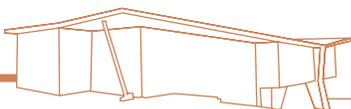
As dialogue and choices about the relationship between emergency action and human rights continues to unfold, it is important to review the reality of how the curtailment of rights disproportionately impacts various groups and peoples in a range of ways. And it is necessary to realize that in this emergency, Indigenous Peoples will inevitably experience some distinct impacts from the limitations on human rights that have already happened and will continue to evolve.

By examining these issues as they unfold, we will all be better prepared to plan the on-going and essential work of reconciliation in Canada – including meeting the standards in the UN Declaration and upholding the constitutional rights of Indigenous Peoples.

Human Rights and Emergencies

In times of emergency, concerns about impacts on civil liberties and human rights always arise. This has been true at many points in Canada’s history, including during times of war, the FLQ crisis, and after 9/11. It is also true today as the COVID-19 pandemic continues to embroil Canada and the globe.

Impacts on basic rights from the current pandemic are already known and experienced by all Canadians. Limitations on the freedom of movement through social distancing, self-isolation,



and quarantines – some through force – are being experienced by all of us. Collateral to this, there are impacts on freedom of religion, expression, and the rights to life, liberty, and security of the person.

To date, the public discourse about civil liberties in the time of COVID-19 has primarily taken place in two interrelated ways.

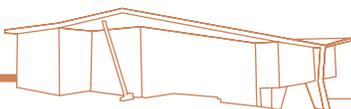
The first is in the form of a sober warning – that civil liberties will be increasingly at risk if Canadians don't do all they can to respond to the COVID-19 virus in ways that are needed. As federal Health Minister Patty Hajdu stated the virus “will put our civil liberties in jeopardy” and “our freedoms around the measures that we're taking right now depend on people taking them seriously.”

The second is about whether to utilize formal declarations such as states of emergency, and legal tools, most notably the federal Emergencies Act, which depending on how they are utilized would potentially result in further, and more serious, impacts on civil liberties. In effect, needing to enact the Emergencies Act would result in civil liberties being curtailed more, as Hajdu warns. The Emergencies Act authorizes extraordinary measures for addressing (in this instance) public welfare, that are necessary in an urgent and critical situation, but not appropriate in normal times. This includes potential outcomes such as the federal government assuming provincial jurisdiction, closing inter-provincial borders, establishing even greater restrictions on movement and travel, directing essential actions by people and organizations, seizing property, evacuating people, and imposing criminal sanctions.

Emergencies and Vulnerable Populations

This public discourse about civil liberties in an emergency is necessary – indeed there should be more of it. In particular, in addition to warning messages and debates about formal actions such as enacting a state of emergency or using the Emergencies Act, awareness needs to increase about the multiple and informal ways that the human rights of many people, and in particular vulnerable populations, are impacted in situations of emergency, including the current pandemic.

Irrespective of formal legal steps that may be taken, in times of emergency vulnerable populations will suffer impacts on their human rights that others will not. The reality of these disproportional impacts is something which must be front and centre in all current and future planning.



For example, there is already well-documented evidence that pandemics disproportionately impact women, and have a negative impact on gender equality.¹ Concerns about the rise in domestic and sexual violence as a result of social isolation and distancing have been discussed by Canadian leaders and the media. But the impacts are potentially far broader, including negative effects on gender equality in the workforce as economies rebuild, increasing challenges on access to obstetric and other specific health care needs for women, and disproportionate impacts on the future financial well-being of women given how different jobs are likely to be effected by disruptions.

Another example are individuals with disabilities and special needs. The reallocation of needed social and medical supports in times of pandemic have near and long term impacts that can be a matter of life and death. The effects can also be subtle and overlooked. For example, most children on the autistic spectrum require completely structured daily routines. The requirements of social distancing and self-isolation disrupt such routines, in a way that can significantly impact the daily well-being of the child and their entire family. Thus, limitations on the freedom of movement can be more challenging for children and families with such special needs and disabilities, than for others.

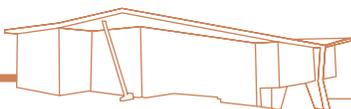
To say it another way, the burdens of heeding government instructions to fight the pandemic can be far greater on the vulnerable than the privileged. It is certainly a disruptive form of suffering for anyone to be locked down in their house for a prolonged period of time. But is far more so for those on the low end of the social-economic scale, already at risk to domestic and sexual violence, disabled and with special needs, and many others.

Indigenous Peoples, Human Rights, and Emergencies

The situation of Indigenous Peoples in a pandemic emergency is also a distinct and unique one, where impacts on civil liberties and human rights can be massively disproportionate.

A starting point for understanding how this is the case is remembering that Indigenous Peoples in much of Canada, and elsewhere in the Americas, have already suffered massively from waves of viruses, including small pox, measles, tuberculosis, and others. Today, Indigenous Peoples continue to suffer disproportionately from many viruses.

1 Lewis, H. (2020). "The Coronavirus Is a Disaster for Feminism." *The Atlantic*. <https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/>



For many Indigenous Peoples today, this experience remains vibrant in collective memory. It is directly intertwined with the period of time in which forced relocation, land dispossession, and the creation of the Indian reserve system took place – all of which, to varying degrees, were facilitated through the massive decline in the Indigenous populations as a result of small pox.

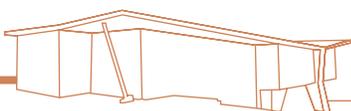
Today many aspects of the colonial legacy remain with us, and these create unique challenges faced by Indigenous Peoples in times of emergency. Three in particular can be highlighted.

The first challenge is connected to the well-established socio-economic gap between Indigenous Peoples and other Canadians which manifests itself in every sector from housing, to education, to child welfare, to economic and food security.

When emergency conditions arise, and civil liberties are curtailed, this gap becomes more pronounced. It goes without saying that the requirements of social distancing and self-isolation – and the restrictions on mobility – are more destructive when one already has inadequate housing. This is compounded in the case of many First Nations peoples who live on isolated and under-serviced Indian reserves where access to supplies, food, and internet connectivity are far less.

Curtailing civil liberties, including economic activity, and assuming more authoritarian legal forms, in order to secure and ensure supplies for the population is typically necessary in emergencies and we are seeing it now. But for those populations already not as connected to the supply chain – like remote First Nations – the dangerous result in an emergency is being left off the supply chain altogether. In this way, the curtailment of human rights that is meant to protect the population, only further exposes those already most vulnerable.

These challenges are even more pronounced when one considers that Indigenous women and children are already specifically and uniquely vulnerable. As we know from the horrendous data on murdered and missing Indigenous women and girls and Indigenous children in care, in normal times the fight for basic equality, the right to life and security, and the enjoyment of fundamental freedoms for Indigenous women and children is fragile and remains an uphill battle. When the civil liberties of all people are curtailed in a time of emergency, the inequality of these groups manifests itself more starkly. Consider for example the growing focus on police enforcement, forced quarantining, and even the subtle encouragement that strangers should report on each other. Such steps will place, or often return, Indigenous women and children to unstable and unsafe settings, putting their well-being at risk. For children this could well include further entrenching a life pattern where they are separated from family, extended family, community, and culture, resulting in negative impacts that will shape their lives into adulthood.



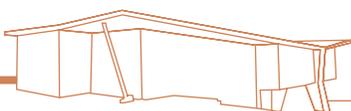
The second challenge is connected to the fact that the recognition and implementation of the human rights of Indigenous Peoples is an on-going struggle, that is occurring far later in time than Canada's history of upholding, legally affirming, and respecting the human rights of other peoples.

We do not need to repeat the facts of Canada's colonial legacy, and how the law historically was a tool of oppression rather than protection that specifically treated Indigenous Peoples differently than other Canadians. What is important to remember, however, is that even where our laws have shifted in recent decades to specifically recognize Indigenous rights, the implementation of those rights has continued to be slow, and behind the pace of respecting other human rights norms.

As former Minister of Justice and Attorney General of Canada Jody Wilson-Raybould has explained, while our Constitution was amended in 1982 to include both the Charter of Rights and Freedoms and section 35 that recognized the collective rights of Indigenous Peoples, the actions government took regarding these new rights protections was different. In relation to the Charter governments accepted and expected to take action to implement and respect those rights. Governments began organizing around them, including making legal, policy, and practice changes. Section 35, on the other hand, was treated differently, with governments denying that it meant anything. It was an "empty box" of rights. The result has been decades of legal battles in courts fuelled by arguments that Indigenous Peoples did not have any rights protected by section 35, or if they did, they have been extinguished or are relatively speaking, meaningless.

One challenge of the fact that Indigenous rights are mid-stream in a struggle for recognition – and that we still have strong remnants of our colonial legacy – is that our legal and governing systems provide the least strength and opportunities to protect Indigenous Peoples and communities in time of emergency. This can be seen quite directly. Consider the case of First Nations and Indian reserves. At a time when all people need clear action by governments to take emergency steps to help people, First Nations on reserve live in a jurisdictional morass created by the colonial *Indian Act*. The legal morass created by this century old colonial legislation has resulted in a situation today where there is tremendous complexity about what powers a province holds that can apply on reserve, what powers the federal government holds, and what Band Councils must do themselves. As well, for a range of reasons including varying agreements that have been entered into, there is no uniformity across First Nations about some of these jurisdictional relationships.

In the midst of this is the reality that most Indigenous governments suffer from significant gaps in governance capacity and very limited streams of revenue. Indigenous governments are in

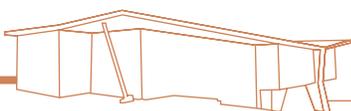


various stages of rebuilding themselves, but the lack of rights implementation generally has made much of this work slower and harder. While many Indigenous governments have declared their own states of emergency to address the crisis, they often do so without the infrastructure, legal frameworks, and governance capacity to consistently implement emergency measures in ways that are urgently needed, while ensuring that the concerns, rights, and needs of their own members of are met.

If we had spent previous decades – even if only since 1982 – more proactively implementing Indigenous rights, including most notably the right to self-government, we would be in a far better situation for dealing with an emergency. Instead of jurisdictional confusion, we would have increasingly clarified authorities. Instead of patterns of entrenched conflict, we would have greater patterns of co-ordinating action as governments. And instead of limited capacity, we would see Indigenous governments in increasing stages of rebuilding, more ready to confront the needs of citizens in times of emergency. Instead, as a result of delays in respecting Indigenous rights, there is a greater inability of all orders of government – federal, provincial, and First Nation – to take needed actions in response to the pandemic emergency to protect a population that has historically suffered great human rights abuses.

Third, and related to the above, is the challenge of how the progress of recognizing and implementing the basic human rights of Indigenous Peoples, including the UN Declaration through DRIPA, will be further stalled or delayed as a result of the pandemic emergency.

As the emergency eases, and civil liberties restrictions are lifted, it is likely that those in the most advantaged and powerful positions will first experience the return to normalcy. For Indigenous Peoples, on the other hand, they will likely be faced with the necessity for continued advocacy for basic human rights recognition in a context where there are human rights demands from many more people and significantly depleted resources. Further, while still advocating for long overdue respect for their human rights, Indigenous Peoples and governments will now (like all others) have to factor complex emergency preparedness into their work, further depleting the already limited resources that Indigenous governments have at their disposal.



Looking Ahead

The pandemic emergency will impact the work of reconciliation well into the future. Real questions will confront this work in the months and years ahead. Will the progress of recent years be stalled? Should the priorities of the work of reconciliation change? How will the necessary investments for ensuring human rights protections be made?

How this future looks, and the challenges it brings, will depend in many ways on the choices made today regarding how civil liberties and human rights are addressed in these unique times. As dialogue and choices continue to be made, we should continue to examine and remind ourselves that those who were vulnerable before this pandemic, are increasingly so during and after it. For the work of reconciliation, this means figuring out how to ensure that while necessary steps are taken in dangerous times, decades of slow but steady progress are not rolled back as a result of the emergency, and the future emerges with more focus, perspective, and tangible ways to move forward.

