

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

Emergencies, Indigenous Governance, and Jurisdiction



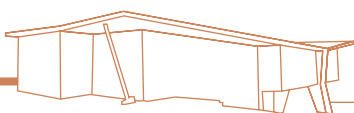
For decades it has been recognized that a foundation for true reconciliation is through Indigenous Peoples rebuilding their governments grounded in their inherent right of self-government. In various ways, this work has progressed. Many First Nations are in various stages of rebuilding their institutions, increasing their capacity, and forging new relations with other governments.

Yet, while progress continues, we have known for a long time that the work of addressing Canada's colonial reality is urgent. We have also known what has to be done. The challenge has been the will to act. In 2018, then Minister of Justice and Attorney General of Canada Jody Wilson-Raybould reminded a gathering of the Premier and Cabinet of British Columbia and all First Nations leaders from across the province of this urgency:

'The time is always right to do what is right.' These words by Martin Luther King Jr. evoke a truth that Indigenous Peoples in this country know all too well. The work that needs to be done is urgent – and it has been urgent for generations. There have always been excuses for delay and inaction. We know them well. We often hear – 'It is hard,' 'it is complicated,' 'we don't understand.'

But the reality is that we know what must be done. We have the solutions. Indigenous Peoples have articulated what needs to happen for decades. Studies and reports have laid out paths forward, including comprehensively in the Royal Commission on Aboriginal Peoples and the Calls to Action of the Truth and Reconciliation Commission. We have hundreds of court cases about section 35 of the Constitution, and a global consensus around the standards for survival, dignity, and well-being of Indigenous Peoples in the *United Nations Declaration on the Rights of Indigenous Peoples*.

The COVID-19 pandemic is a stark reminder of the enduring impacts of colonialism, and the urgent necessity for a rapid acceleration in the recognition and implementation of the inherent right of self-government. To govern properly in ordinary times Canada's system of co-operative federalism requires all orders of government to have integrity, capacity, and strength. In extraordinary times this need is even more pronounced. And what becomes clear is that it is vitally important that going forward all governments – Indigenous, provincial, and federal – need to get real and get serious in practical and tangible ways about Indigenous self-government, and clarify the relationship between laws, jurisdictions, and authorities.



The Necessity for Coherent Government Action

In federal systems such as Canada's, cohesiveness of action by and between orders of government is always a focus. Our system of government is like a jigsaw puzzle, and different orders of government hold certain pieces of the puzzle. To effectively meet many issues and challenges, a cohesive response will require all governments to bring their pieces to the table and fit them together.

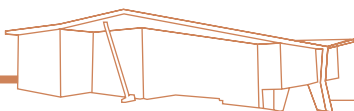
In normal circumstances building such a cohesive response takes a long time, and often cannot be done with maximum effectiveness or efficiency. Building cohesion between orders of government is a process of negotiation and adjustment, which can be hampered by everything from different priorities and ideologies, to the difficulties of trying to ensure diverse systems and bureaucracies work in tandem. We see the challenge of fitting the pieces together on almost all public policy matters, from climate change, to economic regulation, health, and housing.

In times of emergency the challenge of achieving cohesion become paramount - effective responses require cooperative approaches on an urgent basis. Governments must act decisively to align actions and measures to ensure necessary public health, economic, and public safety responses. This is why, when such need for rapid cohesion exists, we see an emphasis on the use of powers by one level of government to override those of another. For example, in various ways provincial governments have used emergency powers to assume jurisdiction normally held and exercised by local governments. Similarly, the on-going dialogue about potentially invoking the *Emergencies Act* is about taking a step that would see the federal government assume jurisdiction and authorities typically held and exercised by the provinces in an effort to advance a more cohesive response to COVID-19.

Indigenous Governments and the Challenge of Responding Cohesively to Emergencies

Where do Indigenous governments, and in particular First Nations governments, fit in this essential work of achieving cohesive responses to emergencies, including the COVID-19 pandemic?

The short answer is that Canada's colonial history poses a significant, and dangerous, obstacle to achieving the necessary cohesive government response in times of emergency. As a result of colonialism, Indigenous governments, and in particular those of First Nations, exist within a morass of jurisdictional confusion and complexity. The solution, as we have known for a long



time, lies in Indigenous self-determination and self-government. Indeed, in the weeks and months before the COVID-19 emergency, Canada witnessed the complexities of colonialism's impact on governance and jurisdiction in the context of the Coastal GasLink pipeline project in British Columbia.

To illustrate the dangers we face today as a result of colonialism's impact on Indigenous governance, consider some elements of the jurisdictional complexities that arise regarding emergency measures and First Nations.

Everyone recognizes the essential work of having a consistent public health and economic response to COVID-19 across provinces. COVID-19 like all viruses, utterly rejects human made boundaries and jurisdictions. We have all become accustomed to provincial governments, often through public health officers issuing orders regarding the size of gatherings, closures, isolation and quarantine. Across the country we have also seen the assumption of jurisdictional powers by provinces which are normally held by local governments for a range of purposes including to secure supply chains and shipping routes.

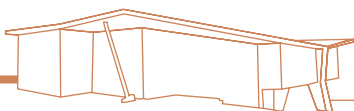
What is not well understood is the relationship of First Nations to these steps that provinces are taking.

For example, consider the issue of Indian reserves. Indian reserves are specific geographic areas across the country governed by the *Indian Act*. The *Indian Act*, and the creation of reserves, was an exercise of federal government jurisdiction under section 91(24) of the *Constitution*. On these reserves, many provincial orders and directives will not apply.

Take British Columbia as an illustration. In British Columbia there are approximately 200 *Indian Act* Bands each with their own Band Council. There are well over 1,600 Indian reserves, that in total cover approximately 350,000 hectares.¹ This means that for many provincial public health and economic orders and directives to apply consistently throughout British Columbia's borders – something that is vitally important in responding to a pandemic – approximately 200 *Indian Act* Band Councils would have to take steps to adopt the same or complementary measures.

Indian Act Band Councils could take such steps under the by-law powers in section 81 of the *Indian Act*. Section 81 allows by-laws for a range of matters that are relevant to the response of the pandemic, including “to provide for the health of the residents on the reserve and to prevent the spreading of contagious and infectious diseases;” “the observance of law and order;”

1 Indigenous and Northern Affairs Canada. 2010. “The Indian Reserve Land Base in Canada.” <https://www.aadnc-aandc.gc.ca/eng/1100100034846/1100100034847#analysis>



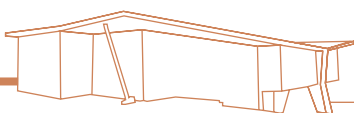
“the prevention of disorderly conduct and nuisances;” and “the removal of and punishment of persons trespassing” on the reserve. The scope of these powers would allow for by-laws to be applied regarding many matters we currently see in government orders and directives, including physical distancing, the size of gatherings, and requirements of isolation and quarantine.

But the challenge is obvious. Consistent and cohesive responses to an emergency cannot be forged when hundreds of governing entities need to take similar action in similar time frames. As well, further complexities exist. Three of these highlight how colonialism continues to haunt us as we try to respond cohesively to COVID-19.

First, is the issue of enforcement of *Indian Act* by-laws. Provincial orders and directives are enforceable by the police, and in some instances local government by-law officers have also been ordered to play a role in enforcement. Technically, Band by-laws are enforceable by a local policing agency, or by-law officers employed by the Band. The reality, however, is far different. Police forces are often reluctant to enforce these by-laws – and effectively resist doing so. In such a scenario, unless a Band has their own police force (which is rare), a Band would have to have dedicated by-law enforcement officers. However, due to the costs and complexities involved, many Bands do not have such capacity.

Second, is the fact that there remain – even in 2020 – certain important issues related to Indian reserves that are the subject of jurisdictional uncertainty. Consider, for example, the issue of road access. We see provinces acting to secure certain access as part of the supply chain and shipping routes, particularly in more remote and rural areas. British Columbia, for example, issued orders on March 26 for the purposes of “taking a more active role in co-ordinating essential goods and services movement by land, air, marine and rail; and suspending any bylaws that restrict goods delivery at any time of day.”

The application of such orders, however, is not always clear. There are many roads in British Columbia that run through Indian reserves on which the jurisdiction remains unclear. Is the road a “provincial” road? Or is it part of the Indian reserve? This longstanding uncertainty is well-known, and there are negotiation processes between the provincial government and First Nations to address this uncertainty where it exists, with the typical outcome being that the roads are confirmed as provincial, in exchange for compensation. In many instances, however, despite years of work, these negotiations are not complete. At the same, many *Indian Act* Bands, acting under their authority in the *Indian Act*, will use their by-law powers to close access to their Indian reserves, including by closing roads. Indeed, we see this occurring in many parts of British Columbia in an effort to stop the spread of COVID-19. The end result is one of



jurisdictional uncertainty combined with jurisdictional complexity. This is never a good situation in a time of emergency.

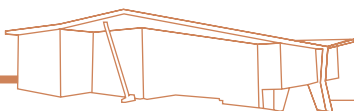
Third, and perhaps most fundamental, is that in speaking about the *Indian Act* and Indian reserves we are only speaking to one aspect of First Nations jurisdiction.

Governance and jurisdictional rights of Indigenous Peoples also arise as part of the title and rights, including treaty rights, that are recognized and affirmed by section 35 of the Constitution. Such title and rights, as confirmed in numerous ways in decisions of the Supreme Court of Canada, are inherent in that they were held and existed prior to the arrival of Europeans, and remain valid and have legal meaning and authority today. Title and rights are held by collectives of Indigenous people who share language, customs, traditions, historical experience, and territory. *Indian Act* Band Councils may have roles in representing the proper title and rights holding collective, but are typically not the same as the collective itself. [The matter of the proper title and rights holder is discussed at length in the paper in this series "*Indigenous Governing Bodies*" and *Advancing the Work of Re-building Indigenous Nations and Governments* at https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article2_GoverningBodies.pdf]

The Supreme Court has not interpreted the full nature of the governance and jurisdictional rights of Indigenous Peoples that are recognized and affirmed by section 35 of the *Constitution*. However, it is important to recognize that Aboriginal title has a decision-making component to it, including the requirement of consent, and extends to large land areas – it is territorial in nature (*Delgamuukw*; *Tsilhqot'in*). Resource rights – such as hunting, fishing and gathering – also carry with them priorities and management and decision-making roles and responsibilities. In addition, we know the duty to consult and accommodate – which is a role in how decisions are made – are broad and extensive, even where title and rights may remain unclear or yet to be specifically determined (*Haida*).

Indigenous self-determination and self-government are also reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* including in articles 3, 4, and 5. A decision-making aspect of self-government is present in numerous additional articles of the UN Declaration that uphold free, prior and informed consent. In British Columbia, the application of the UN Declaration has been affirmed through the passage of the *Declaration on the Rights of Indigenous Peoples Act*. The federal government has fully endorsed the UN Declaration, and is expected to pass similar legislation in the near future.

Moreso, governments have re-iterated the existence and importance of the right of self-government. This was made explicit in the federal government's *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, developed under the leadership of

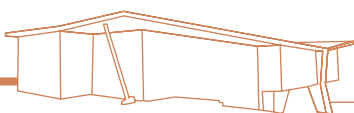


the former Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, who is also a leading expert and author on self-government. The *Principles* have also been adopted in draft form by British Columbia. The *Principles* open by acknowledging that “the Government recognizes that Indigenous self-government and laws are critical to Canada’s future.” Principle 1 affirms that “it is the mutual responsibility of all governments to shift their relationships and arrangements with Indigenous Peoples so that they are based on recognition and respect for the right to self-determination, including the inherent right of self-government for Indigenous nations.” Principle 4 acknowledges Canada’s “evolving system of cooperative federalism,” “affirms the inherent right of self-government as an existing Aboriginal right within section 35” and that “recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.”

The nature of section 35 title and rights, including Indigenous decision-making, authority, and self-government, raises another complexity and uncertainty regarding coherent government response to emergencies. While section 35 is almost four decades old, choices were made by governments to challenge the existence, nature, and scope of title and rights before taking steps to implement them. As such, the political work of forming proper patterns of relations with Indigenous governments has been long delayed. As a result, even though we know as a matter of law that title and rights exist and have legal impact and authority, including over large areas, we have few examples of coherent arrangements between how Indigenous and Crown governments, laws, and jurisdictions will work together.

Unsurprisingly we have begun to see in response to the emergency, and will likely continue to see, Indigenous governments exercise their inherent governance authority and jurisdiction throughout their territories. In some instances this is supported by declarations of states of emergency by the Indigenous government, as well as the passing of laws. These actions are not tied to Indian reserve lands, but to larger areas where provincial orders and directives are also being applied.

The use of inherent governance authority by Indigenous governments could in many ways be used to cohesively complement federal and provincial measures to deal with the emergency. By having the governing body of an Indigenous people state under its own laws such measures, their importance and efficacy could be reinforced for the Indigenous population. Such an exercise of powers could also be used to help ensure that members of a Nation on and off-reserve, who come from the same families and communities, are being given the same guidance and direction from their governing institutions.



But tensions, conflicts, and complexities also potentially emerge.

Like Band Council by-laws, enforcement of the exercise of inherent Indigenous governance jurisdiction by police forces or other non-Indigenous legal institutions is unlikely. This is compounded because many non-Indigenous actors may not understand or see as legitimate the exercise of that authority.

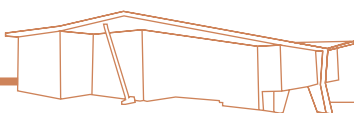
At the same time, it should be expected that the exercise of inherent governance jurisdiction by some Indigenous governments may relate to rights which connect to food security, including hunting and fishing. In times of emergency Indigenous governments may increasingly look to manage hunting and fishing in specific ways that secure food sources for their community, consistent with constitutionally protected rights, and their vital social, cultural, economic, and spiritual connection to those resources. In normal times, management of hunting and fishing resources have been one of the main flashpoints of conflict regarding the implementation of Indigenous rights. In times of significant emergency, such flash points could be amplified.

Related is the issue of access, especially in remote areas. Many Indigenous governments may wish to restrict access on highways and roads beyond reserve boundaries in order to slow the spread of the disease to remote communities, as well as to regulate access to the area for other purposes. Such an exercise of powers will be expressed as part of the inherent jurisdiction over title lands, or as part of managing a resource. If Indigenous governments do choose to exercise this inherent jurisdiction it may lead to tensions and conflict, especially as Indigenous governments may seek to enforce access restrictions themselves.

Of course, collaboration and co-operation is always the preferred and possible approach to such challenges. For example, provinces will often have laws which allow restrictions on travel – such as the *Emergency Programs Act* in British Columbia. But the reality is that we should not be faced with the need to work to achieve jurisdictional clarity as a basis for coherent and co-operative approaches in times of emergency. Indeed, in times of emergency where rapid response is required, fitting together the jigsaw puzzle of Indigenous and Crown jurisdictions – a challenging enough task in normal times – will often prove impossible.

Moving Forward

The current emergency must propel all governments – Indigenous, provincial, and federal – to get real and get serious in practical and tangible ways about Indigenous self-government, and clarify the relationship between laws, jurisdictions, and authorities. We cannot wait for perfection in shifting from the *status quo*. Indeed, in times of emergency one would hope to see



matters such as enforcement of Band by-laws by police forces resolved – some of the obstacles to which are based on outdated perspectives and positions. As well, this is the time for accelerated cooperation between governments based on recognition of the inherent jurisdiction and self-government of Indigenous Peoples.

The work ahead is to build a tangible self-determination and self-government recognition and implementation agenda, guided by the UN Declaration, that achieves clarity for how all order of governments will co-operate in normal, and abnormal times. The requirements for the alignments of provincial laws with the UN Declaration and the development of an action plan in the *Declaration on the Rights of Indigenous Peoples Act* is one opportunity to advance this in British Columbia. However, broader actions are needed, including by the federal government and Indigenous governments. The failure to act – to continue colonial confusion about jurisdiction and governance – would be to allow a triumph of complacency that we can ill-afford.

