

Who sets the course in a health crisis response?

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Introduction

On March 11, the World Health Organization declared the COVID-19 outbreak a pandemic. In Canada, the response has been scattered: provinces and territories are making decisions to restrict the movements of their citizens, Canada is making decisions that affect our borders and national economy, and Indigenous people are caught in the middle.

History has shown that the government response to health crises in Indigenous communities failed the people it promised to protect. Children in residential schools were taken away from their communities and exposed to deadly infections and disease.¹ From the 1940s to '60s, while tuberculosis attacked northern communities, the solution was to quarantine the sick thousands of kilometres away from family. Many of those who were sent to the south never returned, and their families had no way of knowing what had happened to them.² Until recently, legacies of separating families persisted; parents of children medivacked to southern hospitals from Northern Quebec were denied boarding and were forced to wait for commercial flights before they could sit by their children's bedsides.³

Communities share a common goal during this pandemic. Preventing the spread of COVID-19 is crucial, regardless of whether decisions are being made by the federal government, provinces, territories, or Indigenous nations. The problem is figuring out how to manage this crisis and who gets to set the course. This paper will look at some of the responses to COVID-19 in Indigenous communities. It will provide an overview of what treaties and statutes tell us about

1 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 90–99.

2 Inuit Tapiriit Kanatami, News Release, "March 8, 2019 — Prime Minister delivers apology to Inuit for the federal government's management of tuberculosis epidemic from the 1940s-1960s" *Nanilavut* (8 March 2019), online: <<https://www.itk.ca/nanilavut/>>.

3 Philippe Teisceira-Lessard & Gabrielle Duchaine, "Évacuations médicales en avion: Un premier enfant inuit évacué avec sa mère", *La Presse* (5 July 2018), online: <https://plus.lapresse.ca/screens/655b14e4-277a-4961-a4d1-7c1752511fdc__7C__0.html>.

emergency responses. Finally, it will study how we can learn from Indigenous laws, in particular *wahkohtowin* and *Inuit Qaujimagatuqangit*, and the role of the Crown's fiduciary duty in emergency response.

1. COVID-19 responses and concerns so far

The federal government has acknowledged the greater risk facing Indigenous communities because of geography, socio-economic conditions, and the lack of resources available to them. Aside from their own communities' responses to COVID-19, Indigenous people are affected by federal, territorial and provincial decisions. In general, Indigenous leaders are worried about decisions being made without their input, especially when it comes to travel within their territories and environmental disaster relief plans. Every spring and summer, reserves and other remote communities are already under pressure to cope with environmental disasters, often reactively instead of proactively.

The number of confirmed cases of COVID-19 on reserve is being tracked by Indigenous Services Canada. As of June 11, 239 people on reserve in five provinces tested positive for COVID-19, not including Inuit, Métis or anyone living off-reserve.⁴ Federal money has been set aside for post-secondary education, violence prevention, and a \$305-million Indigenous

4 Indigenous Services Canada, "Coronavirus (COVID-19) and Indigenous communities" (accessed 11 June 2020) online: <<https://www.sac-isc.gc.ca/eng/1581964230816/1581964277298>>.

South of the border, the Navajo Nation has been hit especially hard, reporting over 2,000 positive cases according to Indian Health Services: Amy Horowitz & Sharon Nelson, "How the Pandemic Is Affecting the Navajo Nation", *Smithsonian Magazine* (24 April 2020), online: <<https://www.smithsonianmag.com/smithsonian-institution/video-conversation-about-how-pandemic-affecting-navajo-nation-180974743/>>; Indian Health Service, "Coronavirus COVID-19" (updated 2 May 2020), online: <<https://www.ihs.gov/coronavirus/>>.

Community Support Fund.⁵ The Canadian military is standing by to respond to any outbreaks in remote communities.⁶

It has been three months since self-isolation orders began, and Indigenous communities and provinces may not agree on what the response should look like going forward. The Assembly of First Nations and many communities declared states of emergency and created COVID-19 response committees, while leaders have been regularly communicating with residents.⁷ They have closed businesses, set up checkpoints to limit traffic, and imposed lockdowns and curfews.⁸ Kahnawake, which has its own emergency response legislation, created a COVID-19 task force,⁹ and the local hospital began providing drive-through testing for residents.¹⁰ Curve Lake First Nation implemented a colour-coded window flag system to get resources to residents.¹¹ Other community initiatives include mobile testing units, pre-ferry

5 Canada, News Release, "Addressing urgent needs in Indigenous communities related to COVID-19", (26 March 2020), online: <<https://www.canada.ca/en/indigenous-services-canada/news/2020/03/addressing-urgent-needs-in-indigenous-communities-related-to-covid-19.html>>.

6 Robert Fife & Michelle Cabaret, "Military ready to respond to outbreak of COVID-19 in isolated Indigenous and northern communities", *The Globe and Mail* (2 April 2020), online: <<https://www.theglobeandmail.com/politics/article-military-set-to-deploy-to-indigenous-and-northern-communities-to-fight/>>.

7 See e.g. Nishnawbe Aski Nation, News Release, "NAN Announces COVID-19 Task Team", (16 March 2020), online: <<http://www.nan.on.ca/march-16-2020>>; Éric Duguay "Apprendre du leadership autochtone en temps de crise", *La Presse* (20 April 2020), online:

<<https://www.lapresse.ca/debats/opinions/202004/19/01-5270043-apprendre-du-leadership-autochtone-en-temps-de-crise.php>>; Assembly of First Nations, News Release, "Assembly of First Nations Declares State of Emergency on COVID-19 Pandemic", (24 March 2020), online: <<https://www.afn.ca/assembly-of-first-nations-declares-state-of-emergency-on-covid-19-pandemic>>.

8 Jessica Deer, "Curfews, lockdowns, and checkpoints: How First Nations are grappling with the COVID-19 pandemic", *CBC News* (20 April 2020), online: <<https://www.cbc.ca/news/indigenous/curfew-checkpoint-first-nations-coronavirus-1.5535961>>.

9 Mohawk Council of Kahnawake, News Release, EDO-COMM-0001, "Kahnawà:ke COVID-19 Task Force mandate renewed" (9 April 2020), online: <<http://kahnawake.com/news/pr/pr04142020c.pdf>>.

10 Kateri Memorial Hospital Centre, "KMHC COVID-19 DRIVE-THRU TEST SITE", (27 March 2020), online: <<http://covid-19.kmhc.ca/2020/03/27/kmhc-covid-19-drive-thru-test-site/>>.

11 Curve Lake First Nation, News Release, "Curve Lake First Nation COVID-19 Community Colour Flag Protocol" (26 March 2020), online: <<https://www.curvelakefirstnation.ca/2020/03/26/curve-lake-first-nation-covid-19-community-colour-flag-protocol/>>. Five colours were assigned different meanings: White signified "Everything is alright"; Blue signified "We need water"; Yellow signified "We need food"; Red for "We are sick"; and Green for "We need help, but not for health reasons".

screening, and distribution of food hampers and soap.¹² Most nations made resources and services available online. The Northwest Territories, Nunavut and the organization representing Nunavik Inuit closed their borders to non-residents and non-essential workers and began screening passengers.¹³ BC First Nations also restricted access to their communities as the summer season begins.¹⁴ Elders in those communities remember devastating epidemics of tuberculosis and Spanish influenza, and the history of smallpox and measles epidemics remain part of collective memory.¹⁵

Exceptions for industrial activity were worrying for communities situated near work and camp sites. Federal and provincial government responses to industry demands during the pandemic also have implications for land rights and governance. After talks with BC and Canada moved online, the Wet'suwet'en nation announced its decision to ratify a memorandum of understanding that was reached at the end of February.¹⁶ The agreement, however, does not

12 "COVID-19 In Community: How Are First Nations Responding?", *Yellowhead Institute* (7 April 2020), online: <<https://yellowheadinstitute.org/2020/04/07/corona-in-community-the-first-nation-response/>>.

13 Makivik Corporation, News Release, "Makivik Announces Passenger Screening to Nunavik at Trudeau International Airport and bans Intercommunity visits" (22 March 2020), online: <<https://www.makivik.org/makivik-announces-passenger-screening-to-nunavik-at-trudeau-international-airport-and-bans-intercommunity-visits/>>; Makivik Corporation, News Release, "Do not come to Nunavik unless you really have to, Inuit Leaders say" (17 March 2020), online: <<https://www.makivik.org/do-not-come-to-nunavik-unless-you-really-have-to-inuit-leaders-say/>>; Government of Nunavut, *Travel Restriction Order*, (26 April 2020) online: <https://gov.nu.ca/sites/default/files/travel_restrictions_order_3_april_26_2020.pdf>; Government of Northwest Territories, Public Service Announcement, "Chief Public Health Officer Orders Travel Restrictions and Self-Isolation for those entering NWT" (22 March 2020) online: <<https://www.gov.nt.ca/en/newsroom/chief-public-health-officer-orders-travel-restrictions-and-self-isolation-those-entering>>.

14 Letter from the First Nations and municipalities of the north and central BC coasts to Premier John Horgan, et al, "Re: Haida Gwaii, North and Central Coast Travel Restrictions", (7 April 2020) online: *Haida Nation* <<http://www.haidanation.ca/?news=letter-from-the-first-nations-and-municipalities-of-the-north-and-central-coasts-re-haida-gwaii-north-and-central-coast-travel-restrictions>>.

15 John Price, "First Nations Know Pandemics. This Time, They Say, Will Be Different", *The Tyee* (1 April 2020), online: <<https://thetyee.ca/Analysis/2020/04/01/First-Nations-Know-Pandemics/>>.

16 Andrew Kurjata, "After feast hall and Zoom meetings, Wet'suwet'en chiefs set to negotiate rights and title agreement", *CBC News* (30 April 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/wetsuweten-memorandum-agreement-rights-title-1.5551616>>. See also Amber McGuckin, "Deal struck between 4 First Nations and Manitoba Hydro to end blockades", *Global News* (24 May

address the Coastal GasLink project which is still being built.¹⁷ Large-scale projects in Indigenous territory are often the source of disputes over title, and during the pandemic their continued operations may contradict Indigenous governance. In NWT and Nunavut, despite the travel ban for non-residents and non-essential workers, mining employees were permitted to fly in as long as they avoid hamlets.¹⁸ In March, Rankin Inlet residents blocked off the road to the nearby mine in protest. Mines continue to operate at reduced capacity, although Nunavut employees were sent home at the request of the territorial government.¹⁹ In BC, First Nations were concerned about ongoing industrial projects.²⁰ First Nations in the Yukon were also concerned about miners travelling through. “We’re always waiting, waiting, and with a pandemic you don’t have the time to wait,” said Janet Vandermeer, lands director for White River First Nation after asking the territory to close mines and bar entry to non-residents.²¹ Two months after self-isolation orders came into effect, provincial leaders began saying they would reopen non-essential businesses, which led to disputes over governance.

Makivik Corporation, which represents Inuit in Nunavik under the James Bay and Northern Quebec Agreement, was outraged that mines in the region were reopening with

2020), online: <<https://globalnews.ca/news/6980881/coronavirus-manitoba-hydro-4-first-nations-blockades/>>.

17 Kate Gunn, “Indigenous Peoples and COVID-19: Protecting People, Protecting Rights”, *First Peoples Law* (8 April 2020), online: <<https://www.firstpeopleslaw.com/index/articles/449.php>>.

18 Erica Cirino, “Mining and Petroleum Workers: ‘Essential’ or ‘an Enormous Risk’?”, *The Tyee* (1 April 2020), online: <<https://thetyee.ca/News/2020/04/01/Mining-Petroleum-Workers-COVID/>>.

19 Agnico Eagle Mines Ltd., News Release, “Unprecedented Times, Unprecedented Response” (10 April 2020), online: <<https://www.agnicoeagle.com/English/the-eagle-blog/blog-news-details/2020/Unprecedented-Times-Unprecedented-Response/default.aspx>>; Baffinland “Health & Safety COVID-19 Update”, online: <<https://www.baffinland.com/sustainability/health-and-safety/>>.

20 Amanda Follett Hosgood, “Blueberry First Nations Warned of COVID-19 Threat. Now the Pandemic Has Reached Them”, *The Tyee* (23 April 2020), online: <<https://thetyee.ca/News/2020/04/23/Blueberry-First-Nations-Pandemic/>>.

21 Chris Macintyre, “Alaska Yukon First Nations want mining operations suspended over Covid-19”, *APTN News* (13 April 2020), online: <<https://aptnnews.ca/2020/04/13/yukon-first-nations-want-mining-operations-suspended-over-covid-19/>>.

Quebec's go-ahead.²² Sixteen cases had been confirmed in Nunavik, but by early May all had recovered, and the region is slowly reopening its services.²³ In Nunavik villages, as in many Indigenous communities, adequate housing is in short supply and self-isolation is impossible. The reopening of the Raglan Mine brought workers from the south back in their positions, including Inuit who live outside Nunavik, but their travel was restricted to limit the possible spread in nearby Salluit and other villages. In April, Makivik said Quebec had not responded to its letters, and that decisions made without consultation were contrary to the James Bay and Northern Quebec Agreement.

Indigenous leaders were also worried extractive industry executives were trying to use the emergency to their advantage at the expense of communities. In a letter to federal cabinet members, the Canadian Association of Petroleum Producers (CAPP) made requests to bypass environmental monitoring requirements. It also asked the government to delay implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.²⁴ Said Mary Ellen Turpel-Lafond in response to CAPP's letter: "We need to make significant progress on supporting First Nations governments, addressing land issues, making some fundamental shifts in Canadian

22 Jane George, "Nunavik's Raglan mine reopens despite outrage from Makivik Corp", *Nunatsiaq News* (21 April 2020), online: <<https://nunatsiaq.com/stories/article/nunaviks-raglan-mine-reopens-despite-outrage-from-makivik-corp/>>; Philippe Teisceira-Lessard, "Les Inuits veulent stopper l'activité minière dans le Grand Nord québécois", *La Presse* (22 April 2020), online: <<https://www.lapresse.ca/affaires/economie/202004/21/01-5270350-les-inuits-veulent-stopper-lactivite-mini%C3%A9re-dans-le-grand-nord-quebecois.php>>.

23 Nunavik Regional Board of Health and Social Services, News Release, "COVID-19: 14th confirmed case in Nunavik" (19 April 2020), online: <https://nrhss.ca/sites/default/files/PR_14th_case_EN.pdf>; Sarah Rogers, "Nunavik daycares set to open next week", *Nunatsiaq News* (10 June 2020), online: <<https://nunatsiaq.com/stories/article/nunavik-daycares-set-to-open-next-week/>>.

24 See Terry Teegee, "Big Oil Leaders Should Stop Trying to Push Back Indigenous Rights", *The Tyee* (23 April 2020), online: <<https://thetyee.ca/Opinion/2020/04/23/Big-Oil-Leaders-Indigenous-Rights/>>. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007) (supported without qualification by Canada May 2016, commitment reaffirmed to adopt and implement the Declaration in accordance with the Canadian Constitution).

society to make it a more fair and just society, and to say that that's a project that we can't do because of a pandemic is really a concern."²⁵

Many First Nations were preparing for two emergencies as self-isolation orders coincided with annual disasters in remote parts of Canada. At the beginning of April, Thunder Bay declared it would not host evacuees from Northern Ontario reserves.²⁶ Last year, for example, Pikangikum First Nation was forced to evacuate due to forest fires. Every spring, people in Kashechewan are flown out to Thunder Bay and nearby towns because of flooding.²⁷ This year, Kashechewan First Nation is in talks with the military to build an evacuation camp on higher ground instead of looking for new hosts, but progress is slow.²⁸ The inadequacy of disaster response is well-documented. An Auditor General of Canada report from 2013 recommended more spending on prevention, reducing administrative burdens, and clearer agreements between First Nations and government about their roles and responsibilities.²⁹ The report found most communities did not have a pandemic plan, despite the H1N1 outbreak in 2009 that posed a serious risk to health on reserves. The report authors were not able to conclude whether reserves

25 Ainslie Cruickshank, "Canadian oil lobby's demands to skip environmental monitoring put public health at risk, experts warn", *The Narwhal* (24 April 2020), online: <<https://thenarwhal.ca/capp-oilsands-trudeau-coronavirus-climate-change-response/>>.

26 CBC News, "Thunder Bay won't host evacuees from northern communities this year", *CBC News* (1 April 2020), online: <<https://www.cbc.ca/news/canada/thunder-bay/thunder-bay-evacuees-1.5517911>>.

27 Erik White, "Kashechewan hopes to move 2,000 people into tents to avoid flooding and COVID-19", *CBC News* (27 Mar 2020), online: <<https://www.cbc.ca/news/canada/sudbury/kashechewan-flooding-evacuation-covid-19-1.5510515>>.

28 Brett Forester, "Military in talks with Kashechewan as municipalities say no to evacuees", *APTN News* (1 April 2020), online: <<https://aptnnews.ca/2020/04/01/military-in-talks-with-kashechewan-as-municipalities-say-no-to-evacuees>>; Nick Dunne, "COVID-19 and flooding: How Kashechewan is prepping for two natural disasters", *TVO* (27 April 2020), online: <<https://www.tv.org/article/covid-19-and-flooding-how-kashechewan-is-prepping-for-two-natural-disasters>>.

29 Auditor General of Canada, *2013 Fall Report of the Auditor General of Canada: Chapter 6—Emergency Management on Reserves*, (Ottawa: Auditor General of Canada, November 2013), online: <https://www.oag-bvg.gc.ca/internet/English/parl_oag_201311_06_e_38800.html>. See also Crystal Verhaeghe, Emma Feltes & Jocelyn Stacey for the Tsilhqot'in National Government, *The Fire Awakened Us: Tsilhqot'in Report - 2017 Wildfires*, (Tsilhqot'in National Government, April 2019), online: <http://www.tsilhqotin.ca/Portals/0/PDFs/2019_TheFiresAwakenedUs.pdf>.

were receiving emergency services that were comparable to other communities in Canada, because the department of Aboriginal Affairs and Northern Development Canada did not have that information at the time.

2. Emergencies and health crises in treaties and legislation

When it comes to jurisdiction over the well-being of Indigenous people, it is not always clear who is responsible for taking action. The *Constitution* places “Indians, and Lands reserved for the Indians” among the federal government’s heads of power, while hospitals and social services are provincial responsibilities.³⁰ The *Indian Act* sets out the responsibilities of band councils and the federal government, but the provincial exception in s 88 for laws of “general application” raises questions about whether provincial laws apply. Motions like Jordan’s Principle, for example, are supposed to address problems with jurisdictional overlap by making access to health care easier for children on reserve—whichever government department is put on notice of the needed care is responsible for its delivery.³¹ This section gives an overview of relevant legislation and constitutional documents that show conflicting jurisdiction over health emergencies.

Mutual aid between First Nations and colonizers can be traced back to the first treaties that speak of shared land and alliances.³² Post-Confederation treaties included various promises to ensure the well-being of signatories, creating a formal relationship between Indigenous people and settlers. Treaty Six, for example, included a famine and pestilence clause as well as the

30 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(24), 92(7), reprinted in RSC 1985, Appendix II, No 5 [*Constitution 1867*].

31 See e.g. *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342.

32 See e.g. the Covenant Chain and Peace and Friendship treaties.

provision of a medicine chest to be used at the discretion of the “Indian Agent”.³³ Recently, at least four Treaty Six First Nations declared a state of emergency in order to invoke the clause.³⁴

In the past, epidemics felt by communities gave new impetus to treaty negotiation. As told by Chief Frank Beardy to the Royal Commission on Aboriginal Peoples:

I would like to take you back in time. I would like to take you back to the days and years before 1929 [when the adhesion to Treaty 9 was signed]....What happened in the 1800s and early 1900s, I am told by the elders, is that certain diseases swept across our lands and the lands of the Big Trout Lake people. Smallpox, chicken pox, tuberculosis, mumps, measles. Diseases that [our healers] didn't know how to heal or how to counter with their herbal medicines. [These diseases] totally decimated our villages. [They] totally decimated the clan structure that we knew, the clan system that governed our lives.³⁵

In addition, the *Royal Proclamation*—which is thought to be one source of the Crown's fiduciary duty—guaranteed protection of the Indigenous people.³⁶ (The role of the Crown's fiduciary duty in COVID-19 and emergency management will be discussed later.) The Proclamation and treaties are recognized as being constitutional in nature,³⁷ and they all provide for some degree of protection and concern for the well-being of Indigenous peoples in Canada.

33 *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, 24 February 1877, online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028710/1581292569426>>:

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

34 Stephanie Dubois, "Maskwacis activates 'medicine chest' treaty clause, declaring state of emergency", *CBC News* (24 March 2020), online: <<https://www.cbc.ca/news/canada/edmonton/maskwacis-state-of-emergency-medicine-chest-treaty-clause-covid-19-coronavirus-1.5507902>>.

35 *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996) at 126 [RCAP].

36 *The Royal Proclamation*, October 7, 1763, By the King, A Proclamation, George R (reproduced in RSC 1985, App II, No 1):

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds (emphasis added).

See also *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].

37 *Constitution Act, 1982*, s 35 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The ongoing confusion over the division of powers regarding accessible health services on reserve is briefly described above. Responsibility for health emergencies, like COVID-19, may fall under the *Indian Act*, which allows the federal executive (“Governor in Council”) to make regulations concerning health, medical treatment, and disease prevention.³⁸ Band councils also have the power to make by-laws for health care and to prevent diseases from spreading.³⁹ Kahnawake, for example, has enacted a communal law for emergency preparedness through its Community Decision Making Process.⁴⁰ The law contains a paramountcy clause that declares it to be paramount to any federal or provincial law concerning disaster response, and gives the Mohawk Community exclusive jurisdiction to regulate safety and protective measures during emergencies.

When an emergency is declared, such as a pandemic, the federal government, provinces, territories, and Indigenous governments have more discretionary powers available to them. Under s 91 of the *Constitution*,⁴¹ Parliament can make laws for “peace, order, and good governance,” including laws of national concern or emergencies, such as “war and pestilence.”⁴² The federal *Emergency Management Act*⁴³ allows the Minister of Public Safety to coordinate response and preparedness with provinces and government bodies. This Act does not just grant the Minister of Public Safety power, it makes each federal minister responsible for preparing and testing emergency plans and makes them accountable to Parliament.⁴⁴ This means an

38 *Indian Act*, RSC, 1985, c I-5 s 73(1) [*Indian Act*].

39 *Ibid* s 81(1).

40 *Kahnawá:ke Emergency Preparedness Law*, KRL, 1997, c E-2. See also *Kahnawá:ke Public Health Law*, KRL, 1885, c P-5, which was created under the *Indian Act* in 1885 to prevent a cholera outbreak on reserve.

41 *Constitution 1867*, *supra* note 30, s 91.

42 *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 416; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

43 *Emergency Management Act*, SC 2007, c 15.

44 *Ibid*, s 6.

investigation into the response to the COVID-19 pandemic by Indigenous Services and Crown-Indigenous Relations should consider whether adequate plans—which are prescribed by the law—were in place.⁴⁵

Federal statutes like the *Emergencies Act*⁴⁶ and the *Quarantine Act*⁴⁷ give Parliament extraordinary powers in times of crisis. Similar laws in provinces and territories allow their cabinets to take emergency measures.⁴⁸ According to the federal *Emergencies Act*, a “national emergency” is a temporary critical situation that endangers lives and exceeds the capacity of provinces.⁴⁹ Public welfare emergencies are defined as real or imminent natural disasters, disease in humans, animals or plants, and even pollution or accidents if they are a danger to life, property or the flow of essential goods.⁵⁰ Other categories of emergencies are public order emergencies, international emergencies, and war emergencies.

Canada has not declared a public welfare emergency or invoked any of its powers under the *Emergencies Act* to respond to COVID-19. Doing so would give the government the power to make orders that prohibit travel, dispose of property, control distribution of goods, impose criminal sanctions for breaching orders, etc.⁵¹ The powers are subject to review by the House of Commons. Provinces and territories have used similar legislation for emergency management to limit travel into territories, order physical distancing and sanction anyone who breaks self-isolation rules.⁵² The *Quarantine Act*, which gives the federal Minister of Health power to make

45 See e.g. Auditor General of Canada, *supra* note 29.

46 *Emergencies Act*, RSC, 1985, c 22 (4th Supp) [*Emergencies Act*].

47 *Quarantine Act*, SC 2005, c 20.

48 See e.g. *Emergency Management and Civil Protection Act*, RSO 1990, c E9; *Civil Protection Act*, CQLR c S-2.3.

49 *Emergencies Act*, *supra* note 46 s 3.

50 *Ibid*, s 5.

51 *Ibid*, s 8.

52 David Boire-Schwab et al, "COVID-19: Emergency Measures Tracker", *McCarthy Tetrault* (1 May 2020), online: <<https://www.mccarthy.ca/en/insights/articles/covid-19-emergency-measures-tracker>>.

mandatory and enforceable quarantine orders, was invoked at the end of March to order a 14-day quarantine for all travellers crossing Canadian borders.⁵³

The Canadian government has stressed it is taking a supportive role, rather than invoking the *Emergencies Act* or directing provinces and territories and Indigenous communities as to how to manage their response. For example, Public Safety Canada published recommendations for essential services during the pandemic, but it reiterated that municipalities, provinces, territories, and Indigenous governments have the authority to legislate as they see fit.⁵⁴ When band councils raised concerns about having to hold elections while physical distancing was being recommended, the Minister of Indigenous Services responded with a regulation to allow councils to extend their term for six months.⁵⁵ The changes were made under the *Indian Act* powers to regulate in order “to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable.”⁵⁶ Still, the Minister’s response came after a number of bands had already held elections under the direction of officials within Indigenous Services.⁵⁷ And the legislative tools employed were at the discretion of the Minister, not the communities. For instance, the new regulation provided extensions for customary elections

53 Public Health Agency of Canada, News Release, "New Order Makes Self-Isolation Mandatory for Individuals Entering Canada" (25 March 2020) online: <<https://www.canada.ca/en/public-health/news/2020/03/new-order-makes-self-isolation-mandatory-for-individuals-entering-canada.html>>.

54 Public Safety Canada, "Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic" (Updated 30 April 2020), online: <<https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/crtcl-nfrstrctr/esf-sfe-en.aspx>>.

55 Angel Moore & Brett Forester, "Feds dig into the Indian Act to allow band councils to extend term during pandemic", *APTN News* (8 April 2020), online: <<https://aptnnews.ca/2020/04/08/feds-dig-into-the-indian-act-to-allow-band-councils-to-extend-term-during-pandemic/>>.

56 *Indian Act*, *supra* note 38, s 73(1)(f).

57 Pamela Palmater & Maggie Wenthe, "First Nation elections pose significant health risk", *The Lawyer's Daily* (27 March 2020), online: <<https://www.thelawyersdaily.ca/articles/18349/first-nation-elections-pose-significant-health-risk-pamela-palmater-and-maggie-wenthe>>.

where necessary to prevent COVID-19 spread.⁵⁸ But those elections are founded on Indigenous law, to a certain extent. The reliance on the *Indian Act* is a reminder of how much authority is still delegated by the federal government, and that communities' responses on reserves to the pandemic are subject to federal approval.

Land claims agreements appear to be more generous about sharing jurisdiction over emergency planning, but are still subject to federal and provincial authority.⁵⁹ Modern agreements in BC provide that Indigenous nations have the power to make laws about emergency preparedness and declare a state of emergency, although the powers are that of a “local authority”.⁶⁰ The agreements state that Indigenous governance can be supplanted by federal and provincial emergency measures; municipalities have similarly subsidiary powers during emergencies.⁶¹ The James Bay and Northern Quebec Agreement does not contain sections

58 Drew Lafond, Sonia Eggerman & Josh Morrison, “Changes to the First Nation Election Rules: Questions Surrounding Indigenous Rights of Self-Determination Remain Unresolved”, *MLT Aikins* (13 April 2020) online: <<https://www.mltaikins.com/aboriginal/changes-first-nation-election-rules-unresolved-rights-self-determination>>.

59 See Paul Rynard, “Welcome In, But Check Your Rights at the Door: The James Bay and Nisga’a Agreements in Canada” (2000) 33 *Can J of Poli Sci* 211.

60 See e.g. *Tsawwassen First Nation Final Agreement*, 6 December 2007, online: *Indigenous and Northern Affairs Canada* <<https://www.aadnc-aandc.gc.ca/eng/1100100022706/1100100022717>>; *Nisga’a Final Agreement*, 27 April 1999, online: *Nisga’a Lisims Government* <<https://www.nisgaanation.ca/treaty-documents>>;

61 *Tla’amin Final Agreement*, 5 April 2016, online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1397152724601/1542999321074>>, ss 130-134:

130. The Tla’amin Nation has:

- a. the rights, powers, duties and obligations; and
- b. the protections, immunities and limitations in respect of liability

of a local authority under Federal and Provincial Law in relation to emergency preparedness and emergency measures on Tla’amin Lands.

[...]

133. For greater certainty, the Tla’amin Nation may declare a state of local emergency and exercise the powers of a local authority in respect of local emergencies in accordance with Federal and Provincial Law in relation to emergency measures, but any declaration and any exercise of those powers is subject to the authority of Canada and British Columbia under Federal and Provincial Law.

134. Nothing in this Agreement affects the authority of:

- a. Canada to declare a national emergency; or
- b. British Columbia to declare a provincial emergency,

under Federal and Provincial Law.

on emergency preparedness like the agreements with BC.⁶² But the land claims in Quebec did create health care and police bodies that are managed by Inuit and Cree organizations. Additional regional legislative powers over public health were included in the most recent agreement between Eeyou Istchee and Canada.⁶³ Land claims agreements in BC also contain “public order, peace and safety” clauses, which allow nations to make laws to control any activities that are a danger to public health. But again, these laws do not apply when they conflict with federal or provincial law.⁶⁴

3. *wahkohtowin*, Inuit *Oaujimajatuqangit*, and fiduciary duties

Indigenous communities are often distrustful of government policy and of health care systems.⁶⁵ Responses to previous health crises have not evoked confidence in the government. During the 2009-2010 H1N1 pandemic, when First Nations in Manitoba requested assistance in acquiring hand sanitizer and medicine, they were shocked to receive body bags.⁶⁶ Studies show higher rates of hospitalization and death among Indigenous people during both waves of the H1N1 pandemic. To this day, tuberculosis continues to disproportionately affect First Nations and Inuit,

62 *Convention de la Baie-James et du Nord québécois et conventions complémentaires*, 11 November 1975, online: <<http://www3.publicationsduquebec.gouv.qc.ca/produits/conventions/lois/loi2/pages/page1.fr.html>> [JBNQA].

63 *Agreement on Cree Nation Governance Between The Crees of Eeyou Istchee and the Government of Canada*, 18 July 2017, online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1504798011685/1542989671051>>, s 6.2(1)(f).

64 See e.g. *Tla'amin Final Agreement*, *supra* note 61, s 139.

65 Gina Starblanket & Dallas Hunt, "Indigenous communities and COVID-19: The virus may not discriminate, but responses to it do", *The Globe and Mail* (27 March 2020), online: <<https://www.theglobeandmail.com/opinion/article-indigenous-communities-and-covid-19-the-virus-may-not-discriminate/>>.

66 CBC News, "Ottawa sends body bags to Manitoba reserves", *CBC News* (16 September 2009), online: <<https://www.cbc.ca/news/canada/manitoba/ottawa-sends-body-bags-to-manitoba-reserves-1.844427>>.

although it is all but eradicated among non-Indigenous populations.⁶⁷ Tuberculosis, like COVID-19, is often a silent, symptomless disease when it is transmitted, and it requires intense treatment in isolation when active. Increased risk factors for Indigenous communities, such as being geographic distant from major health institutions, an unacceptable number of boil-water advisories, and disproportionate representation in poor health indicators are common knowledge, yet Canada has failed to eliminate health disparities.

As discussed above, the response to COVID-19 has largely been made up of orders and decrees from Canada, provinces and territories, and Indigenous governments. These orders are based on constitutional documents, statutes and nation-to-nation agreements; their general objectives, when spelled out, are prevention of harm and preservation of life. Indigenous law can provide further guidance for decision-makers, for example, in considering *wahkohtowin* and *Inuit Qaujimajatuqangit*. Crown fiduciary duties also imply obligations toward Indigenous people.

The Cree and Métis legal concept of *wahkohtowin* recognizes interdependence and non-duality. *wahkohtowin* refers to reciprocal legal obligations within kinship networks, which guide conduct in all relationships.⁶⁸ *wahkohtowin* is the kinship to all creation, not just human beings.⁶⁹ In harvesting law, *wahkohtowin* ensures respect and harmony with others.⁷⁰ Honouring and

67 John Borrows & Constance Macintosh, "Opinion: Indigenous communities are vulnerable in times of pandemic. We must not ignore them", *The Globe and Mail* (15 April 2020), online: <<https://www.theglobeandmail.com/opinion/article-indigenous-communities-are-vulnerable-in-times-of-pandemic-we-must/>>.

68 Val Napoleon, *Thinking About Indigenous Legal Orders*, research paper for the National Centre for First Nations Governance (10 June 2007) at 15, online: <http://www.fngovernance.org/ncfng_research/val_napoleon.pdf>; Maria Campbell, "We Need to Return to the Principles of Wahkotowin", *Eagle Feather News* (November 2007) 5, online: <https://www.eaglefeathernews.com/quadrant/media//pastIssues/November_2007.pdf>.

69 Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing néhiyaw Legal Systems* (Saskatoon: Purich, 2015) at 60.

70 Kerry Sloan, "Wakotowin and Lived Law: Interdependence and non-duality" *CMPL 500 – Session #3* (Faculty of Law, McGill University, 14 January 2020).

respecting principles of kinship and interconnectedness are essential in a pandemic response that has forced most people to avoid social gatherings and self-isolate. *wahkohtowin* should remind us all that this pandemic requires a collective effort, not an individualistic one.

Inuit Qaujimagatuqangit (IQ) refers to Inuit societal values and laws, and like *wahkohtowin* these laws promote a better understanding of best practices in emergencies. The Government of Nunavut uses eight IQ principles to guide its decision-making: *Inuuqatigiitsiarniq* (respect for others), *tunnganarniq* (being open, welcoming and inclusive), *pijitsirniq* (providing for family and community), *aajiiqatigiinni* (consensus and discussion), *pilimmaksarniq/pijariuqsarniq* (growth through observation and mentoring), *piliriqatigiinni/ikajuqtiigiinni* (collective action), *qanuqtuurniq* (resourcefulness), *avatittinnik kamatsiarniq* (respect for the land).⁷¹ These principles are adopted in legislation,⁷² regulations,⁷³ and by justices in the territory.⁷⁴

We see elements of *wahkohtowin* and IQ in the way governments have responded to COVID-19 so far. The federal government's community funding is meant to give nations access to money in order to achieve a common goal of preventing the spread of viruses. Communications about the spread of the virus on reserve and in communities are discouraging people from blaming or shaming others.⁷⁵ All governments and nations are, above all, concerned

71 See Government of Nunavut, "Inuit Societal Values", online: <<https://www.gov.nu.ca/information/inuit-societal-values>>; Nunavut Department of Education Curriculum and School Services Division, *Inuit Qaujimagatuqangit Education Framework*, (Nunavut Department of Education, 2007), online: <<https://www.gov.nu.ca/sites/default/files/files/Inuit%20Qaujimagatuqangit%20ENG.pdf>>.

72 See e.g. *Education Act*, SNu 2008, c 15.

73 See e.g. *Dispute Resolution Regulations*, Nu Reg 012-2012.

74 See e.g. *R v Itturiligaq*, 2018 NUCJ 31.

75 See e.g. Government of Nunavut, News Release, "Confirmed case of COVID-19 in Nunavut" (30 April 2020), online: <<https://www.gov.nu.ca/executive-and-intergovernmental-affairs/news/confirmed-case-covid-19-nunavut>>. Interestingly, shaming is not antithetical to *wahkohtowin* and was adopted in laws such as the Metis Law of the Hunt, 1840 as a last resort, see Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State* (Edmonton: Hurtig Publishers, 1972).

with protecting elders.⁷⁶ One example of IQ in response to COVID-19 is a program that teaches young people traditional skills while schools in the territory are closed.⁷⁷ By learning skills on the land, young people are able to self-isolate while strengthening their connection with their environment.

IQ principles such as respect for Elders may also be what drove Nunavut to impose the strictest travel requirements in the country.⁷⁸ Only essential workers and residents are approved to fly into communities, and only after a 14-day quarantine. After landing, travellers must self-isolate for another 14 days. For the most part, COVID-19 messages have stressed community support and respect for each other. Self-isolation and mask-wearing are intended to limit the spread of disease to *others*, especially older people. Indigenous and non-indigenous communities adopt an ethic of care when they support neighbours through deliveries of food and other examples listed in Part One of this paper.

Kinship, as described by *wahkohtowin*, or in the IQ principles of respect for others and openness, must play a role in people's interactions during stressful times. According to Robert Innes, kinship defies legal and anthropological definitions of Indigeneity (or any divisions based on ethnicity).⁷⁹ Although race-baiting is mostly absent from official communications on COVID-19, racism against East Asians is very much present in street harassment and ugly political

76 Angela Sterritt, "Pause sweat lodges and pipe ceremonies, restrict contact to stop COVID19, say Indigenous doctors", *CBC News* (21 March 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/covid-suspend-sweat-lodges-pipe-ceremonies-1.5504541>>.

77 Meagan Deuling, "On the land during a pandemic", *Nunatsiaq News* (24 April 2020), online: <<https://nunatsiaq.com/stories/article/on-the-land-during-a-pandemic/>>.

78 Jessica Penney & Patricia Johnson-Castle, "COVID-19 And Inuit Nunangat: Research, Responsibility & Infrastructure Inequality", *Yellowhead Institute* (31 March 2020), online: <<https://yellowheadinstitute.org/2020/03/31/covid-19-and-inuit-nunangat-research-responsibility-infrastructure-inequality/>>.

79 Robert Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013) at 7-9.

attacks, and even Inuit in Montreal have become targets because they are mistaken for being East Asian.⁸⁰ These acts are harmful and divisive and do nothing to prevent the spread of COVID-19.

As explained above, there have also been breakdowns in nation-to-nation relations over disaster management and travel restrictions. The federal government response generally described in Parts One and Two of this paper might be seen as promoting legal pluralism or dialogue between various legal orders.⁸¹ In contrast, Professor Aaron Mills or Paul Rynard might consider the hierarchy of control in emergencies: an “imposed constitutional order” or minimization of Aboriginal rights.⁸² Respect for Indigenous law may also mean abandoning notions of “jurisdictional authority” over beings, and instead focusing on mutual responsibilities.⁸³

Does *wahkohtowin* or IQ have a role to play in negotiations over emergency management? Sylvia McAdam suggests laws of kinship and relations also provide the foundation of respectful boundaries.⁸⁴ *wahkohtowin* therefore is present in treaty and land claims agreements, and in the negotiations that happen between people every day. Opening the lines of communication between Indigenous leaders and provincial premiers, for example between Makivik and the Quebec government, could be an example of following this law as well as respecting fiduciary obligations.

80 Anna Junker, "New national group forms to combat racism against Asian Canadians", *Edmonton Journal* (27 April 2020), online: <<https://edmontonjournal.com/news/local-news/new-national-group-forms-to-combat-racism-against-asian-canadians/>>; Lindsay Richardson, "Inuit getting caught up in anti-Asian hate crimes in Montreal, advocates say", *APTN News* (14 April 2020), online: <<https://aptnnews.ca/2020/04/14/inuit-getting-caught-up-in-anti-asian-hate-crimes-in-montreal-advocates-say/>>.

81 John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153.

82 Aaron Mills, "Constitutional Stories: Pride, Violence and Citizenship in Canada" (2015) 17 *Cairo Review* 115 at 120; Rynard, *supra* note 59 at 240.

83 Robert YELKÁTFE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)", (2016) 61:4 McGill LJ 755 at 760.

84 McAdam, *supra* note 69 at 63.

In *Guerin v The Queen*,⁸⁵ the Supreme Court of Canada recognized a unique fiduciary relationship between the Crown and First Nations people in statutory schemes such as the *Indian Act*, which confirm the Crown's historic responsibility to look after the pre-existing rights of Indigenous people. In *Guerin*, Dickson J (as he then was) points to the *Royal Proclamation* as the Crown's awareness of this duty. In *Sparrow*,⁸⁶ the Court found the effect of s 35 of the *Constitution Act, 1982* was to incorporate the fiduciary obligation into the constitution as a restraint on Crown exercise of power. In *Osoyoos Indian Band*,⁸⁷ the Supreme Court found that when the public interest conflicts with the Crown's fiduciary obligation—in that case through expropriation of lands—the Indigenous interest must be protected “to the greatest extent practicable.” According to the Royal Commission on Aboriginal Peoples, the relationships in treaty-making imply fiduciary duties that are mutual.⁸⁸ Land claims and other nation-to-nation agreements have complicated implications for federal and provincial fiduciary duties.⁸⁹ Fiduciary relationships impose obligations when there is an imbalance in power. The Royal Commission viewed the Crown's role as one that must restore the balance between the interests of state governments and Indigenous nations by fostering self-reliance and self-sufficiency.⁹⁰ The commission's recommendation on how governments must live up to fiduciary duties imposes a far more positive obligation than the Supreme Court's tests for justifying infringement of Indigenous rights.

85 *Guerin*, *supra* note 36.

86 *R v Sparrow*, [1990] 1 SCR 1075.

87 *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 53.

88 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 39.

89 Rynard, *supra* note 59 at 238.

90 *Supra* note 88 at 40.

Orders and decrees made during the pandemic are clearly acts that, when they infringe on Aboriginal rights under s 35, would create an imbalance of power that triggers the Crown's fiduciary duty. In the dispute between Makivik and Quebec, where the reopening of the Raglan Mine was made on the recommendation of public servants, the province has a responsibility towards Inuit, whose homelands are the site of the mine. By ignoring their protests, Quebec is breaching its responsibilities as a party to the James Bay and Northern Quebec Agreement. Similarly, when the Canadian government ignores calls for precautions, such as medical and military support in First Nation communities, it is failing to act in their best interests as their fiduciary. Both the Supreme Court and the Royal Commission's interpretations can be useful when analyzing nation-to-nation relationships during the pandemic. When public health orders by Indigenous communities and provinces conflict, the Supreme Court's analysis would require a balancing of the "public" (or province's) interest and Indigenous interests. The commission's recommendation might lead to an approach that stems from the mutual relationship and responsibilities to protect the health of all.

Conclusion

This paper sought to explore the responses to COVID-19 and emergency management in Indigenous communities. Government orders and decrees are just one part of the picture: people across Canada are demonstrating resilience in their interactions during the pandemic. Personal relationships are put to the test in a public health emergency response that prohibits social and physical gatherings. And nation-to-nation relationships are tested when decisions by federal, territorial and provincial, and Indigenous leaders do not align. The modern constitutional and statutory foundation for emergency management in Indigenous communities imposes a

hierarchical view of power, while early treaties established a mutually beneficial relationship. After a brief study of Indigenous laws of *wahkohtowin* and *Inuit Qaujimagatuqangit*, we see the way principles of kinship and responsibilities toward others are being lived during the pandemic. But there is room for improvement when relations between people and relations between governments break down. In order to restore a mutual relationship in times of crisis, *wahkohtowin* and *Inuit Qaujimagatuqangit* as well as the Crown's fiduciary duty to Indigenous people provide some guidance about how to keep personal and nation-to-nation relationships strong.

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