

The “New Normal”: Defending First Nations Jurisdiction During COVID-19

By: Jade Dumoulin

WE BEGAN 2020 with all eyes on Wet’suwet’en as the RCMP forcibly removed land defenders from their territory, tore down blockades, and sought to protect private interests while the land defenders declared that reconciliation is dead. However, jurisdictional disputes like this did not end with the onset of the COVID-19 pandemic. First Nations have also been experiencing direct jurisdictional challenges to their COVID-19 responses, facing up against a longstanding tradition of being undermined by Canada in their ability to defend their territory and rights.

INTERNATIONAL GUIDANCE

Numerous international organizations have issued COVID-19 guidance that addresses the unique needs and circumstances of Indigenous peoples. United Nations bodies have been particularly vocal in this regard. Bodies like the UN Special Rapporteur on the Rights of Indigenous, the Expert Mechanism on the Rights of Indigenous Peoples, and the Permanent Forum on Indigenous issues have released guidance for governments during COVID-19.¹ The international guidance ranges from concerns such as ensuring Indigenous participation in decision-making, accessible COVID-19 information and data, as well as culturally relevant and consensual healthcare delivery and containment measures.

Some international reports also include specific guidance relevant to protecting Indigenous territory, the environment, and land defenders. For example, the UN Special Rapporteur and the Office of the United Nations Commissioner for Human Rights guidance called for a moratorium on logging and other extractive industries on Indigenous territories during COVID-19.² The UN Special Rapporteur and the Inter-Agency Support Group on Indigenous Peoples’ Issues also called for the protection of Indigenous land defenders and the removal of state militaries from Indigenous communities.³

Despite international guidance on respecting and upholding Indigenous jurisdiction, particularly during COVID-19, it continues to be undermined amid the largest public health emergency in recent history.

COVID-19 JURISDICTIONAL CHALLENGES

First Nations are exercising their jurisdiction to respond to COVID-19, but they are experiencing direct systemic and institutional constraints on their responses. These constraints may look different for First Nations in different regions simply due to the provincial nature of responding to emergencies. The constraints also vary depending on which authority a First Nation is trying to use to act under, whether Indian Act by-laws,

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advisories, modern treaties, or self-government agreements. Nonetheless, the constraints are very real and challenging to navigate during the public health emergency.

For example, the T̓silhqot̓in Nation won a landmark 2014 Supreme Court of Canada case that finally recognized T̓silhqot̓in Nation has title to their land. Even still, the T̓silhqot̓in Nation has experienced challenges over coordinating COVID-19 emergency response with provincial and federal governments. On March 18, 2021, the T̓silhqot̓in Nation released the very detailed report Dada Nentsen Gha Yatastig (“I am going to tell you about a very bad disease”) which described their largely successful pandemic response.

However, the report also explained the systemic and institutional constraints on coordinated emergency response. These constraints include poor data-sharing and communication in British Columbia, inadequate funding and processes, and lack of by-law enforcement assistance. The report culminates in 40 Calls to Action for harmonization of provincial and federal measures with T̓silhqot̓in jurisdiction.

These direct jurisdictional challenges to COVID-19 responses are perhaps the most noticeable since the pandemic began. However, these are not the only jurisdictional challenges that First Nations are struggling with during the pandemic. While attention is on COVID-19, governments and private companies have tried to undercut inherent Indigenous jurisdiction and rights to move ahead with private interests. While this is not a new experience for First Nations, it does pose an additional layer of risk and frustration during the pandemic.

Private companies and governments are trying to move forward with resource extraction or other projects without respect for Indigenous consent. Many federal and provincial environmental regulators have been complicit by weakening environmental protections in response to COVID-19, which prioritized alleviating any strain on these industries. This forces Indigenous people into the position that they must defend their land and rights while putting them more at risk to COVID-19, which is especially true when police criminalize land defenders — as they often do. For example, Indigenous youth with Braided Warriors were criminalized and arrested for their peaceful protest of the Trans Mountain pipeline expansion in February 2021. Indigenous people are put at risk by the mere act of having to protest these projects, as well as their constant criminalization given concerns about increased COVID-19 risks in jails and prisons.

DEBUNKING THE NARRATIVE OF “UNPRECEDENTED” TIMES

In the year since the pandemic began, many communities have raised concerns about the lack of consultation over resource and infrastructure projects that were moving ahead. These projects raise concerns about the safety of protestors, the safety of communities due to man camps, and the safety of the land — all of which COVID-19 amplifies.

First Nations’ struggles in responding to COVID-19 and protecting their territories are deeply connected. These are not separate fights.

Emergencies like COVID-19 highlight once again a lack of governmental coordination with First Nations jurisdiction. COVID-19 is an exceptional time, so many can try to rationalize the jurisdictional struggles that First Nations experience in trying to protect their community from COVID-19 as part of this exceptionalism. However, these challenges are a direct continuation of longstanding challenges like First Nations trying to protect their land from development or extraction. These jurisdictional challenges enable the more direct struggles we are witnessing as First Nations try to protect their communities during the pandemic. It is all part of the same fight for the recognition and respect of Indigenous jurisdiction.

Land defenders have continued to fight for their jurisdiction and rights at 1492 Land Back Lane over Mi’kmaq fisheries and on Secwépemc territory over the Trans Mountain pipeline. Police have continued to meet these land defenders with force and arrests. Demonstrations

continued outside of these communities in solidarity with the land defenders who fought to protect their inherent rights. Many Wet'suwet'en people have continued to fight for their safety since the designation of oil and gas work as an essential service has allowed man camps to continue without consent on Wet'suwet'en territories and even led to an outbreak. The prioritization of private interests and the policing of Indigenous land defenders did not cease with the onset of the pandemic. Instead, land defender demonstrations and complaints from First Nations about inadequate consultation seemed to headline throughout 2020.

Government officials keep reminding us that we are in unprecedented times. However, these jurisdictional struggles are not unprecedented; they were normalized before the pandemic and rose to the forefront in different ways during COVID-19. The lack of respect and cooperation with First Nations jurisdiction has continued throughout the pandemic, largely ignoring international guidance about how states should respond to the pandemic in consideration of Indigenous peoples and their rights. The pandemic will end, but the jurisdictional struggles highlighted during this time will continue until the various levels of government recognize and holistically address the constraints they are placing on First Nations jurisdiction.

ENDNOTES

¹UN. Secretary-General, UN. Human Rights Council, Special Rapporteur on Rights of Indigenous Peoples. Rights of Indigenous Peoples. New York, NY: UN Headquarters, 2020. <https://undocs.org/en/A/75/185>; United Nations, Permanent Forum of Indigenous Issues. "Message from the Chair of the Permanent Forum on Indigenous Issues to Ensure Indigenous People Are Informed, Protected, and Prioritized During the Global COVID-19 Pandemic." New York, NY: UN Headquarters, 2020. https://www.un.org/development/desa/indigenous-peoples-es/wp-content/uploads/sites/34/2020/04/UNPFII-Chair-statement_COVID19.pdf <https://undocs.org/en/A/75/185>; <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf>; https://www.un.org/development/desa/indigenous-peoples-es/wp-content/uploads/sites/34/2020/04/UNPFII-Chair-statement_COVID19.pdf

²UN. Rights of Indigenous Peoples <https://undocs.org/en/A/75/185>; UN. Human Rights Office of the High Commissioner. "COVID-19 and Indigenous Peoples' Rights." Geneva, Switzerland, 2020. https://www.ohchr.org/Documents/Issues/IPeoples/OHCHRGuidance_COVID19_IndigenousPeoplesRights.pdf

³UN. Rights of Indigenous Peoples. <https://undocs.org/en/A/75/185>; UN. The Inter-Agency Support Group (IASG) on Indigenous Issues. "Indigenous Peoples and COVID-19: A Guidance Note for the UN System Prepared by the UN Inter-Agency Support Group on Indigenous Issues." New York, NY: UN Headquarters, 2020. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/Indigenous-peoples-and-COVID_IASG_23.04.2020-EN.pdf

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