

# ***Exercising Indigenous Jurisdiction Amidst the COVID-19 Pandemic***

Individuals and communities around the globe have been impacted by the COVID-19 pandemic. As federal and provincial governments introduce emergency measures in response to the evolving situation, the actions being taken often fail to take into consideration the unique vulnerabilities of Indigenous communities.

As a result, Indigenous governments are acting to safeguard their citizens and communities from the spread of the COVID-19 virus. Unfortunately, due to chronic underfunding and the suppression of Indigenous governance structures by the Crown, the majority are doing so without the infrastructure and governance capacity required to fully implement these measures.

Below, we highlight some of the ways in which Indigenous communities are exercising their own jurisdiction and decision-making authority in response to the COVID-19 pandemic, and the challenges they face in doing so.

## **Pandemic Planning**

With housing, water, community and health infrastructure deficits common among many Indigenous communities, these communities are [particularly vulnerable](#) to the health impacts of the COVID-19 crisis.

In an effort to curtail the spread of the COVID-19 virus within their communities, many Indigenous governments have declared states of emergency.

A number of Indigenous communities have developed [local pandemic plans](#), identifying worst case scenarios and the steps required to address these situations should they materialize. Other communities have enacted their own [disease emergency by-laws](#) which authorize strong preventative actions to help maintain the health and safety of their citizens.

Some First Nations are taking these emergency measures in accordance with section 81 of the *Indian Act*, which authorizes band councils to make by-laws providing for the health of their residents and the prevention of the spread of disease. Other Indigenous governments are exercising this authority in accordance with their inherent right to self-government and traditional governance practices.

However, regardless of which authority Indigenous leaders rely on to introduce the emergency measures, a common concern is their limited capacity to implement these measures. Even the most comprehensive emergency plan is meaningless without the resources necessary to implement it.

In most cases, the limited revenue streams of Indigenous governments are overtaxed just trying to keep up with the realities of everyday life within their communities. Essential social services in many Indigenous communities are chronically underfunded, while health needs remain high. Any sudden increase in critical illness within Indigenous communities would only serve to overwhelm an already overburdened system.

While the federal government and certain provincial governments have committed funding to address pandemic measures within Indigenous communities, this funding is [only a fraction](#) of what is being offered to the average Canadian. At this point, it is still unclear how and when this funding will be made available to Indigenous communities.

### **Gaps in Governance Recognition**

The ability of Indigenous governments to respond to the urgent needs of their citizens during the COVID-19 pandemic is made all the more challenging by the Crown's continued lack of recognition of their governance and decision-making authority.

The experience of First Nations operating under the *Indian Act* is particularly noteworthy in this regard. Many First Nations continue to hold elections in accordance with the provisions of the *Indian Act*, which establishes two-year terms for the members of the First Nation's council. The *Indian Act* does not provide for the possibility to extend these terms.

As emergency measures around physical distancing and limiting group gatherings were being advocated by Canadian health authorities, Indigenous communities with upcoming elections were being given contradictory information on how to maintain stable governance structures.

Concerned about the [potential health risk](#) to members if in-person voting were to proceed, a number of First Nations with elections scheduled for mid- to late-March appealed to the federal government to postpone their elections. In response, the federal government advised that postponing the election would not extend the council's term in office and would result in a "governance gap".

Concerned about the [instability that would result](#) in a situation where the federal government did not recognize the authority of their governments, many First Nations felt [pressured to proceed](#) with their elections.

The Crown's initial response to the question of postponing First Nation elections placed Indigenous governments in the impossible position of having to choose between maintaining their ability to govern during a time of pandemic and the health and safety of their citizens.

The federal government has now [approved regulations](#) that will enable First Nations to postpone their elections and extend the term of their council if necessary to prevent, mitigate or control the spread of diseases on the reserve. Meant to serve as a temporary emergency measure, these regulations will expire on the first anniversary of their enactment.

These regulations confirm, at least for the foreseeable future, that First Nations may continue to govern in accordance with the *Indian Act* and address their citizens' needs during the COVID-19 pandemic without fear of penalty.

However, the regulations only serve as a stop gap measure. Long term, more fulsome change is required to recognize the inherent decision-making authority of Indigenous governments and develop a more permanent solution to a serious gap in the governance provisions of the *Indian Act*.

## **Looking Ahead**

As is often the case, moments of crisis highlight the serious socio-economic deficit experienced by Indigenous Peoples in Canada as a result of persistent underfunding and the Crown's continued suppression of their governance structures.

While Indigenous leaders continue to make every effort to protect their communities in the midst of the COVID-19 pandemic, these efforts are only as effective as the governance resources and mechanisms available to implement them.

There is no denying the importance of emergency measures being enacted by Canadian governments to address and support Indigenous communities during the current COVID-19 crisis. These measures are critical and urgently required to ensure the immediate health, safety and well-being of Indigenous communities.

To ensure their effectiveness, these measures must be developed in collaboration with Indigenous governments to ensure that the measures, and the resources provided for their implementation, meet the actual needs of community members.

However, if Indigenous governments are to continue to address the health and welfare needs of their communities, and improve the quality of life of their citizens going forward, long term solutions are required. The conversation about how to address the socio-economic inequities faced by Indigenous communities must continue beyond the current crisis.

The recognition and proactive implementation of the title and rights of Indigenous Peoples, including the inherent decision-making authority of Indigenous governments, must be the starting point for these discussions.

With this, Indigenous and Canadian governments alike may move beyond concerns over limited capacity and conflicts about jurisdictional uncertainty, and instead focus on rebuilding relationships and creating a path towards sustained prosperity, in times of crisis and beyond.

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