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Alexandra Flynn

*Allard School of Law at the University of British Columbia, [flynn@allard.ubc.ca](mailto:flynn@allard.ubc.ca)*

Signa Daum Shanks

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ARTICLE



## Colonial fault lines: First Nations autonomy and Indigenous lands in the time of COVID-19

Alexandra Flynn<sup>a</sup> and Signa Daum Shanks<sup>b</sup>

<sup>a</sup>Allard School of Law, University of British Columbia, Vancouver, British Columbia, Canada; <sup>b</sup>Faculty of Law, University of Ottawa, Ottawa, Ontario, Canada

### ABSTRACT

The COVID-19 crisis has exposed the political and economic fault lines in the exercise of power across multiple jurisdictions. This article focuses on the power of First Nations to make enforceable decisions in respect to reserve lands, specifically the powers First Nations have to enforce public health restrictions during the pandemic. We argue that Canadian law both enables First Nations to assert decisionmaking in respect to their lands, and undermines Indigenous authority in relation to enforcement and intergovernmental status. This paper is part of the SPE Theme on the Political Economy of COVID-19.

### KEYWORDS

Aboriginal and treaty rights; COVID-19; Indigenous health; Indigenous lands; Indigenous sovereignty

### Introduction

In Canada, public and state responses to the COVID-19 pandemic have highlighted fundamental conflicts over political and economic power. Federal, provincial, and municipal governments have each asserted jurisdiction to justify restrictions to protect their citizens. Governmental actions in the time of COVID-19 draw from measures taken in past pandemics, with state “learnings” inspired by historical responses. Governmental actions have also triggered pushback by activists and others, including recognition of anti-Black, Indigenous, and other people of colour (BIPOC) racism in relation to COVID-19 enforcement.

This article focuses on Indigenous control of reserve lands, which are defined under the *Indian Act*, an antiquated federal law enacted in 1876.<sup>1</sup> The *Constitution Act*, amended in 1982, states that the federal government has responsibility over Indigenous Peoples, yet it recognized and affirmed Aboriginal and treaty rights. The *Indian Act* asserts federal oversight over First Nations lands and Peoples, micromanaging the governance of Band Councils, the colonial bodies that represent on-reserve Indigenous citizens.<sup>2</sup> Newer legislation enables First Nations to enact land codes or create rules to enable economic development on reserves, and there exists a plethora of funding agreements regarding First Nations governance. The result is that First Nations’

**CONTACT** Alexandra Flynn ✉ [flynn@allard.ubc.ca](mailto:flynn@allard.ubc.ca) 📍 Allard School of Law, Allard Hall, 1822 E Mall, Vancouver, British Columbia V6T 1Z1; Signa Daum Shanks ✉ [signa.daumshanks@uottawa.ca](mailto:signa.daumshanks@uottawa.ca) 📍 Fauteux Hall 57 Louis Pasteur St Ottawa, Ontario K1N 6N5

decisionmaking in relation to reserve lands is constitutionally protected under Canadian law, yet at the same time First Nations' power is complicated by a motley combination of funding models, bureaucracies, and legislation.

This legal complexity is especially acute during the time of COVID-19. Attention to Indigenous experiences is critical in any analysis of pandemics in the postcontact history of Canada, given the historical impact of diseases brought by colonizers, including missionaries, on Indigenous Peoples,<sup>3</sup> with dramatic implications for political autonomy, economic stability, military strength, and food security.<sup>4</sup> Disease was used as a colonial tool to eliminate Indigenous laws and Peoples.<sup>5</sup> Even before the most recent pandemic hit, Indigenous populations suffered far higher disease and mortality levels than their non-Indigenous neighbours, especially on reserve, many of which lack clean drinking water and have unsafe and inadequate housing.<sup>6</sup> The pandemic has exacerbated these hardships.<sup>7</sup> Off reserve, Indigenous Peoples, together with other racialized community members, have faced higher rates of policing throughout the pandemic, bringing attention to the acute need for enforceable Indigenous decisionmaking on reserve.<sup>8</sup>

This paper explores how COVID-19 has exposed the fault lines of Indigenous jurisdictions over the public health of their citizens, namely the power of Band Councils to make enforceable decisions in respect to reserve lands during the COVID-19 pandemic, and specifically the powers First Nations have to enforce public health restrictions during the pandemic. We build on the work of Shiri Pasternak by framing "jurisdiction" as the exercise of exclusive decisionmaking by First Nations governments over their sovereign land, in this case the crafting of law that dictates who may and may not access their territories.<sup>9</sup> This paper does not engage with the Indigenous rights of those who live outside of reserve contexts, including the more than 50 percent of Indigenous Peoples who live in urban centres, nor do we imply that Indigenous sovereignty applies only in relation to reserve lands. Canadian laws awkwardly spell out the exercise of Indigenous power, and many members of the Canadian public are unaware of their responsibilities to comply with Indigenous laws. This paper explores how the overlap of the Canadian Constitution, the *Indian Act*, and other legislation means that reserve spaces are legally distinct from surrounding municipalities. Moreover, non-Indigenous arrangements on reserve land must be approved by Canada and, just as importantly, must be agreed upon by Indigenous leaders.<sup>10</sup> Even where Canadian governments have endorsed Indigenous decisionmaking in relation to their lands, many First Nations have struggled to protect citizens through enforcement of community lockdowns, and to access funding for COVID-19 testing and treatment.

First, we discuss the relationship between disease and colonialism in Canada, showing that European settlement is inextricably linked to the eradication of Indigenous populations. This history, we assert, has particular relevance in this time of COVID-19. Second, we set out the legal basis of First Nations jurisdiction over reserve lands. In this section, we examine the early and urgent calls at the outset of COVID-19 for the protection of Indigenous Peoples by First Nations leaders, including the closure of Indigenous lands, particularly reserve land, to noncitizens.<sup>11</sup> Crucially, First Nations did not wait for federal and provincial governments to make decisions in respect of Indigenous lands, nor did they tolerate violations of their enacted laws; they positioned

themselves as governments protecting their citizens. Third, we examine the colonial fault lines that have appeared in respect of Indigenous responses to COVID-19, including the lasting implications for First Nations as governing authorities in creating sovereign pandemic responses, enforcing their laws, and navigating bureaucratic systems.

### **A brief and embedded history of disease and colonialism**

As COVID-19 unfolded in Spring 2020, immediate comparisons were made with the bubonic plague and other devastating pandemics.<sup>12</sup> These comparisons have laid bare the similarities of pandemics over history: the struggle to contain disease and epidemic;<sup>13</sup> the reality that viruses can overtake any population;<sup>14</sup> the likelihood that particular populations will be hit with greater devastation;<sup>15</sup> the corresponding economic devastation, including less tax revenue and greater deficits and debt;<sup>16</sup> and jeopardized trade and foreign relations.<sup>17</sup> In previous pandemics, remediation took centuries.<sup>18</sup> As COVID-19 lingered, this grim data was used to urge people to have patience with mobility restrictions and public space closures, and to heed medical advice.

The North American experience of disease and pandemic has impacted Indigenous Peoples disproportionately. When what are now Canada and the United States were first visited, colonial visitors sought solutions to the financial problems of their representative countries and decided to make parts of North America their satellite colonies.<sup>19</sup> In the process of colonization, explorers brought disease. Many Indigenous nations in North America perished from diseases with fatality rates nearing 50 percent and, tragically, some Indigenous nations suffered fatality rates of up to 90 percent.<sup>20</sup>

The epidemics that ravaged Indigenous communities did not develop accidentally. Representatives of far-off nations that were bound and determined to overtake Indigenous nations witnessed diseases break down Indigenous military sectors, hub communities and access to food sources and, ultimately, bolster colonialism. For example, the use of smallpox “blankets” caused sickness within Indigenous communities<sup>21</sup> and disease among Indigenous captives during European military entrenchments.<sup>22</sup> Originally detailed as an unusually hostile nation disrespecting the regularly benevolent actions of visiting missionaries,<sup>23</sup> the Huron are now also understood as having been ravaged by diseases brought by the missionaries, with requests for aid denied.<sup>24</sup> Prime Minister Sir John A. Macdonald allowed policies to continue despite other government officials pleading with him to change his views and prevent more deaths across the prairies.<sup>25</sup> These are only a few examples of how European powers facilitated the spread of disease to further colonialism.<sup>26</sup> After centuries of disease, coupled with neglect and what the former Chief Justice of the Supreme Court of Canada termed “cultural genocide,”<sup>27</sup> the death rates of on-reserve Indigenous Peoples are “among the highest ever reported in a human population,” and Indigenous Peoples are far more likely to live in poverty than other Canadians.<sup>28</sup> Long into the twentieth century, Indigenous communities experienced death statistics higher than what we face today, had those diseases used as a tool of oppression, and had their own cultural and economic relationships pulled apart.<sup>29</sup>

The lingering impact of disease among Indigenous nations is discussed infrequently, yet was an important backdrop to First Nations' responses to COVID-19.<sup>30</sup> First Nations responded to COVID-19 far more quickly than other Canadian governments, influenced by their extreme vulnerability in relation to past disease. As Saskatchewan health geographer Paul Hackett noted:

Pandemics similar to COVID-19 are alive in the memories of many First Nations communities. They know what to do, and they know it because of history . . . They've dealt with smallpox. They've dealt with measles and influenza, and then more recently they've dealt with tuberculosis and diabetes. These kinds of health challenges are woven throughout the history of First Nations communities.<sup>31</sup>

Given the dire implications, First Nations' responses to COVID-19 typically included limiting access to their territories.

### The limits of the Canadian Constitution

Section 91(24) of the *Constitution Act, 1867* states that the federal government has authority over “Indians, and Lands Reserved for the Indians.” Canada has used that section to justify almost every policy it has invented and implemented about Indigenous Peoples, including the creation of the *Indian Act*.<sup>32</sup> This provision enabled the creation of reserves, residential schools, disallowing Indigenous Peoples to be considered “persons,” and denying Indigenous Peoples the right to access legal counsel.<sup>33</sup> The *Indian Act* and section 91(24) have been used as legal tools to reinforce colonialism, racism, and endless forms of socioeconomic inequality.<sup>34</sup>

While Canada claimed it was the Crown authority implementing reserve policies, there are also times when the legal fight is not about the federal government having rights, but about Canada denying responsibilities, including medical treatment when disease ravaged Indigenous communities.<sup>35</sup> Challenging the federal Crown about failing to comply with its own standards has been, at times, almost impossible. Making legal arguments about government inaction in relation to Indigenous Peoples—that schools were not provided, water was not potable, or reserve space was temporarily assigned to another party, etc.—rarely succeeded. These administrative injustices were exacerbated by the inaccessibility by First Nations of using the law to hold the federal government accountable. For years, Canadian law made it illegal for reserve residents to leave the reserve,<sup>36</sup> hire legal counsel, or even acquire legal representation for free.<sup>37</sup>

While many First Nations associations and governments, along with various Indigenous and non-Indigenous researchers, have repeatedly explained how often federal action and inaction about reserves broke Crown law, courts and society have been largely indifferent. With such insurmountable limitations and such incredible indifference from Canadian society over the years, the socioeconomic standards and cultural stability on reserves have often become damaged, ignored, and ultimately blamed on reserve residents themselves.<sup>38</sup> Whether having a legal fight about whether Inuit are actually “Indians” and therefore not a federal responsibility,<sup>39</sup> or squabbling about which level of government pays for a reserve child's health emergency,<sup>40</sup> Canada—and the provinces—have shown on numerous occasion that they actually do not want to have an active governing relationship with First Nations. Instead, they

want the First Nations on reserve to legally disappear.<sup>41</sup> On many occasions, Indigenous Peoples have literally lost their lives as they waited, and continue to wait, for a Crown department to proactively provide amenities available to non-Indigenous Canadians.<sup>42</sup>

When the *Constitution Act* was amended in 1982, a new provision was introduced for the first time since Canada became a country in 1867. Section 35(1) states that “The existing aboriginal and treaty rights of the aboriginal Peoples of Canada are hereby recognized and affirmed.”<sup>43</sup> In general, this section has been interpreted narrowly by the courts. As Anishinaabe scholar John Borrows writes, “[S]ection 35(1) has generally been very disappointing for most groups. It has been narrowly interpreted ... [F]or the most part, section 35(1) has further embedded Aboriginal Peoples in colonial relationships. They have not secured recognition of what is integral to the distinctive cultures in contemporary terms.”<sup>44</sup> A key impediment to moving forward is the flawed framework for Indigenous governance, a method used to assimilate Indigenous Peoples when created under the *Indian Act*, and which dismantled the traditional governing structures created by First Nations, with the result that “In day-to-day terms, Canada’s Constitution has little relevance for improving the health, welfare, and security of most Aboriginal Peoples. In fact, the Constitution seems to stand in the way of such reform.”<sup>45</sup>

Under Indigenous laws, much of what is now Canada is unceded territory, or is subject to Treaty promises that exceed the interpretations by Canadian officials. There is a rich body of scholarship that explores the application of Indigenous laws across First Nations, including how the United Nations’ Declaration on the Rights of Indigenous Peoples (UNDRIP) should serve as a framework for Indigenous-Crown relationships, and the extent to which Canadian law will ever be able to recognize Indigenous law given repeated assertions of Crown sovereignty. Moreover, colonial structures create competing authorities within First Nations communities; for instance, the colonial Band Council structure, created with the *Indian Act*, gives power to these officials to represent citizens on reserve. Outside of Band Councils, traditional forms of Indigenous governance remain in operation and insist on their legitimacy in representing Indigenous interests on reserve and in dealings with colonial officials. We acknowledge this troubling conflict in relation to decisionmaking on reserve, where differing colonial legacies complicate the exercise of First Nations power.

## Decisionmaking on reserve lands

Land can be titled to an Indigenous nation rather than to a municipal, provincial, or federal government.<sup>46</sup> Canadian law recognizes reserve lands as Indigenous-only space. Under the *Indian Act*, a reserve is defined as a “tract of land, which has been set apart by the Crown” for the use and benefit of a specific First Nation, and the underlying legal title is held by the federal Crown. Demonstrating the colonial nature of the *Indian Act*, the federal government oversees the management of the reserve, but may delegate power to the First Nation. First Nations that have partly or entirely removed themselves from the *Indian Act*, through legislation like the *First Nations Land*

*Management Act*, modern treaties, or self-government agreements, have express authority in relation to the use and access of their lands.<sup>47</sup>

Reserves are always closed to non-Indigenous people unless announced as open by the Band Council based on its authority vested from Canada. As of 1876, going onto a reserve is not possible unless approved officially.<sup>48</sup> Under section 81 of the *Indian Act*, a Band Council has the power to enact a bylaw that deals with matters that are “local” to the reserve in nature, such as traffic control, residency, public health, nuisances, and wildlife control.<sup>49</sup> Decisions made by Band Councils must conform to the letter of the *Indian Act* or else they will be deemed unenforceable by the courts.<sup>50</sup> A bylaw under section 81 can impose a fine up to \$1,000 on any person for failure to respect the *Indian Act*, or imprisonment for a term not exceeding 30 days, or both.<sup>51</sup> In 2014, the Government of Canada removed the oversight and disallowance powers of the Minister of Aboriginal Affairs and Northern Development such that First Nations no longer need approval from the federal minister for the bylaws to be in effect.<sup>52</sup> Naomi Metallic observes the potential of section 81 to further Indigenous autonomy over a wide range of matters, including child welfare (Figure 1).<sup>53</sup>

This means that entry onto reserves is at the discretion of a Band Council and Band Councils may make laws in respect of reserve lands. A reserve is not available for general entry and guests must comply with First Nations conditions, as illustrated by Figure 2.<sup>54</sup> In cases like casinos, a First Nation may welcome non-Indigenous residents for financial or other purposes, but not without the approval of the Band Council. The power of Band Councils to exclude noncitizens is influenced by the *Indian Act*, reinforced by court decisions, and enforced by the Indigenous law tenets. As years pass and more litigation is taken through the courts, it has become clear that non-Indigenous arrangements on reserve land must be approved by Canada, but, as importantly, agreed upon by the Band Council, the governing body that may make decisions in relation to reserve land as recognized under the *Indian Act*.<sup>55</sup> The result is

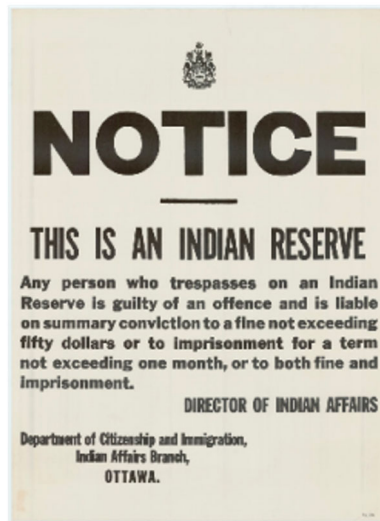


Figure 1. Notice: This is an Indian Reserve.





**Figure 2.** Matsqui Trail Regional Park.

that provincial laws and municipal bylaws ought not to stretch inside a reserve's space, although some exceptions are made where a provincial law is of "general application" and a Band Council has not made decisions in relation to that policy area (Figure 2).<sup>56</sup>

Canadian law does not make it easy for First Nations to exercise power. Canada has failed repeatedly to protect the reserve land. For example, some provincial highways run through reserves,<sup>57</sup> park lands have been claimed and established on reserves, and, perhaps the most familiar to Canadians, certain profitmaking institutions such as casinos and golf courses are located on reserves. Recent case law states that "Subject to certain restrictions that may apply under Canadian law, the mandate of the Indigenous government of Kahnawà:ke extends both to the protection of land and the preservation of language and culture."<sup>58</sup> The "Subject to certain restrictions" is notable. The federal government may at any time claim that its interpretation of the rules supercedes those of the First Nation. As more legal battles ensue about the interpretation of another section within Canada's Constitution, section 35 of the *Constitution Act, 1982*, more acts of independence by reserves are framed as ways to reinforce treaty or Aboriginal (site-specific or title) rights that they have. Whether on a map that highlights how a First Nations community assigned a reserve also deems itself "unceded,"<sup>59</sup> or in the recent battles about the effect of oil and gas pipelines on Wet'suwet'en territory, Indigenous challenges to Crown and private actions will only increase in number.<sup>60</sup>

There is ongoing conflict between the colonial state, which assumes its right to act on reserves and unceded lands, and Indigenous assertions of self-determination. For Indigenous Peoples, it is self-evident that they have the right to control and limit access to their lands, an affirmation that is made clear through signs showing where the reserve starts,<sup>61</sup> or in other announcements about matters such as speed limits, taxation on gas or pets, or even entry itself.<sup>62</sup> Although this fact is contested by the

colonial government, Indigenous jurisdiction means that when we receive permission to go into what we know is a reserve, we venture into a new legal regime as well.<sup>63</sup>

## Indigenous governance and COVID-19

As COVID-19 swept across the country, many First Nations immediately implemented measures to control access to their lands, alongside the actions of federal, provincial, and municipal governments.<sup>64</sup> First Nations actions were not unprecedented: Canadian law allows First Nations to declare states of emergency.<sup>65</sup> Despite Band Council lawmaking, however, reserve lands across the country were entered despite having clear signage, and emergency recommendations and laws were flaunted.<sup>66</sup> For example, Rama First Nation, located adjacent to Orillia, a small city in Ontario subject to Treaty, suddenly had more individuals enter the reserve contrary to posted restrictions. Orillia residents seem to have decided that if an activity would not be permitted in their city, those activities could be done within Rama's reserve boundaries instead.

Whether it was not keeping physically distant when passing other pedestrians, buying cigarettes in a pre-pandemic style, not wearing a mask or leaving space between another patron, or walking a dog in a reserve park when the city's parks were closed, non-reserve people entered the space without the permission of the reserve's government. An Orillia dogwalker might not have even heard of the concept "terra nullius," a colonial political-legal fiction that claims that Indigenous lands were not occupied, in legally and politically meaningful ways, prior to the arrival of the colonizers. But through her actions she is reinforcing that concept, and asserting sovereignty over Indigenous Peoples, when she thinks her decisions can trump any standards and laws in place on the "rez."<sup>67</sup>

Furthermore, there are consequences for such disregard of Indigenous rights to control movements on their own lands. When non-Indigenous persons on reserves such as Rama either intentionally or accidentally dismissed any legal mechanisms as applying to them while within the reserve's metes and bounds, they facilitated the spread of COVID-19 in the Indigenous community. Through their actions, they prioritized non-Indigenous convenience (for example, the desire to walk a dog in a park) over Indigenous health, well-being, and survival. Finally, even if Rama and other reserves had not legally restricted non-Indigenous presence before and during the pandemic, the decision by non-Indigenous interlopers on Indigenous reserves to move illegally onto Indigenous lands flagrantly ignored Canadian governments and media guidelines on how to "flatten the curve," that is, limit the spread of the virus. In choosing to ignore these health and safety guidelines on Indigenous reserves and unceded lands, non-Indigenous persons put Indigenous Peoples at risk.

First Nations authority continued to be exercised, but also questioned, by non-Indigenous persons as the pandemic wore on. Entry restrictions were applied to everyone entering and exiting from Kyuquot Sound, for instance, home to the Kyuquot/Cheklesath First Nation on the West Coast of Vancouver Island.<sup>68</sup> The Kyuquot First Nations demanded travel permission papers and/or proof of residency at the manned gates, and licence plate numbers are either recorded or photographed. But this assertion of First Nation authority was questioned. One of us received an

email urging that “The situation should be examined from a legal perspective” to determine who gets to decide access, who is affected, how long will these restrictions apply, and whether the restrictions are “necessary, effective or legal.”<sup>69</sup> This email did not accept but rather questioned whether First Nations have the legal right to determine access onto their traditional lands in entirety, and the author seemed to insist (or rather assumed) that non-First Nations living within their territories have democratic representation from First Nations governments.

These vignettes illustrate the purported confusion about who holds power to make decisions in respect of Indigenous lands, including during a pandemic. No single level of government is responsible for health, and past pandemics, including SARS, revealed the degree to which Canadian governments have ignored Indigenous knowledge and decisionmaking.<sup>70</sup> The history of Crown officials making decisions about Indigenous Peoples quickly and without hearing from Indigenous Peoples themselves is well-documented and of considerable concern to First Nations.<sup>71</sup> When the initial pull and push across governments began in response to COVID-19, First Nations urged immediate action that included a clear role for First Nations in decisionmaking.<sup>72</sup> Other than in British Columbia, governments generally left Indigenous leaders out of decisionmaking related to COVID-19 planning.<sup>73</sup> Even so, numerous Band Councils introduced mechanisms such as declaring states of emergency, denying on-reserve entry to noncitizens, setting up separated dwelling units for those who tested positive to the virus, and introducing social distancing.<sup>74</sup> In British Columbia, Indigenous governments were deemed to be “essential services” in the early days of the pandemic, leading to questions about the applicability of provincial law on reserve.<sup>75</sup>

In addition to assertions based on their inherent jurisdiction, on-reserve Indigenous governments, acting through Band Councils, began restricting access to noncitizens.<sup>76</sup> First Nations decisions were exercised in many different ways, unique to their geographies and other criteria. On-reserve First Nations used a range of tools, from advisories, Band Council Resolutions (BCRs), and bylaws, to land codes enacted further to the *First Nations Land Management Act*.<sup>77</sup> First Nations with power under modern treaties or self-government agreements enacted rules based on specific provisions in binding legislation, and other Indigenous nations asserted power based on unceded Aboriginal rights.<sup>78</sup> First Nations also used a range of enforcement mechanisms, including checkpoints, trespass notices, and requirements to observe safety protocols.<sup>79</sup>

The tools and approaches depended on the local needs of the Nation itself. Advisories, which urge visitors not to come, are quick to implement, but do not have the force of law. For example, the Council of the Haida Nation discouraged all nonresident travel to their Islands in March 2020, stating that “Prevention and preparedness are fundamental to our communities’ health and well-being. If you can, please stay home and continue to support the most vulnerable members of our communities, together we can save lives.”<sup>80</sup> Following a community outbreak in July 2020, and in collaboration with the Haida Nation, other First Nations, and municipalities, the provincial government issued extraordinary powers under the provincial state of provincial emergency to restrict nonresident travel to the archipelago.<sup>81</sup>

One of the main mechanisms for Band Council government decisionmaking was the use of section 81(1)(a) of the *Indian Act* to create bylaws to “provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases.”<sup>82</sup> The *Indian Act* sets out strict criteria, including that the bylaws be published on an Internet site, in the *First Nations Gazette*, or in a newspaper that has general circulation on the reserve of the band, and to provide copies of their bylaws upon any person’s request.<sup>83</sup> The bylaw allows for the removal and punishment of those trespassing on the reserve, and allows on-reserve Indigenous government to set out penalties in the bylaw and apply for an injunction or other remedies.<sup>84</sup> However, bylaws can be challenging for Indigenous governments in the time of COVID-19, as Band Council decisionmaking may not contravene other sections of the *Indian Act*, including procedural requirements under the *Indian Act* to meet in a manner that is open to members, a particular challenge in the time of COVID-19.<sup>85</sup>

The bylaw must set out enforcement mechanisms, however; First Nations have long struggled to enforce their bylaws, owing to silence in the *Indian Act* as to who is responsible for prosecuting violations of Indigenous-enacted laws—First Nations themselves, provinces and territories, or the federal government.<sup>86</sup> While there are isolated examples of law enforcement officials sanctioning breaches of reserve laws,<sup>87</sup> there is a lack of leadership among federal and provincial/territorial law enforcement officials as to who is in charge, often leading to no enforcement at all.<sup>88</sup> The federal government, with its oversight over the *Indian Act*, could introduce mechanisms for enforcement, in full partnership with First Nations, that would allow bylaws to be enforced through sanctions and fines.<sup>89</sup> Municipalities, with which First Nations are incorrectly compared, routinely have bylaw officers enforce local laws. While Metallic rightly notes the potential of using bylaws to assert jurisdiction, the relative inability to enforce such rules is especially distressing during a pandemic.<sup>90</sup>

## Indigenous jurisdiction and enforcement during COVID-19

As of July 31, 2020, the percentage of on-reserve Indigenous individuals testing positive for COVID-19 was one-quarter the rate of that of the general Canadian population, and the fatality rate is one-fifth.<sup>91</sup> By June 2021, the rate of reported active cases of COVID-19 in Indigenous Peoples living on a reserve was 188 percent of the rate for the general Canadian population. The COVID-19 case fatality rate among Indigenous Peoples living on a reserve was 61 percent of the case fatality rate in the general Canadian population.<sup>92</sup> Indigenous leadership and collaboration, together with assertions of jurisdiction, have been touted as reasons why the rates were significantly lower for First Nations than initially anticipated, and certainly lower than those in past pandemics.<sup>93</sup> Lisa Richardson and Allison Crawford note the centrality of Indigenous leadership to lower COVID-19 cases in a peer-reviewed medical journal:

Anticipating further waves of COVID-19, it is important that the design, implementation and leadership of public health by First Nations, Inuit and Métis communities continue in Canada. At its foundation, Indigenous public health must be self-determined: adapted for the needs of specific nations and grounded in local Indigenous language, culture and ways of knowing; developed, implemented and led by

Indigenous Peoples; and informed by ongoing monitoring of data as governed by appropriate data sovereignty agreements. Moreover, all levels of government in Canada must address the social determinants of health both in the short term—to facilitate prevention, control and containment of COVID-19—and in the long term through investments in infrastructure, food security and chronic disease prevention and management. This will require the decolonizing of health care at individual, organizational and policy levels.<sup>94</sup>

Going forward, troubling fault lines remain in the exercise of First Nations jurisdiction in respect of reserve lands, including difficulties in enforcing bylaws, administrative roadblocks in access to federal funding, lack of closures in neighbouring municipalities, and the economic hardship experienced by on-reserve Indigenous Peoples, all of which have urgent repercussions for First Nations working to quell COVID-19 rates.<sup>95</sup> Moreover, federal government allocations to First Nations fall woefully short of what is needed to adequately address the needs of community members.<sup>96</sup> At the start of the second wave of the pandemic in the fall of 2020, Canada's top doctor warned about rising Indigenous case numbers.<sup>97</sup> These fears were realized as the pandemic continued, with the number of active cases rising sharply over the fall and winter of 2020, from 275 cases on October 4, 2020, to a peak of 4,977 in early January 2021.<sup>98</sup> Despite incorrect accusations of vaccine hesitancy, Indigenous peoples are no less likely to get vaccines, which demonstrates tremendous resilience given the problematic history of medical (mis)treatment.<sup>99</sup>

The federal government must comply with section 35(1) of the *Constitution Act*, to ensure that First Nations have the legal tools they need to rightly enforce their laws. This goes beyond respecting bylaws enacted by Band Councils to enabling them to be enforced, together with providing flexible and adequate funding to mitigate COVID-19. Like the plethora of ways in which First Nations have responded to the pandemic, Indigenous governments must be given flexibility to tailor their responses to local community needs. As Pam Palmater stated at the start of the COVID-19 lockdowns, “First Nations deserve better than this from a country that controls all the wealth from First Nations’ lands—and thus holds all the life-saving resources in its hands. In our treaties, the Crown promised to come to our aid in the case of famine or pestilence. Now is the time for the Crown to step up for First Nations and prevent this preventable loss of life.”<sup>100</sup>

## Conclusion

Canadian law recognizes First Nations autonomy in passing bylaws to control reserve lands, but undermines this power through lack of enforcement and funding. The first wave of COVID-19 demonstrated the knowledge, expertise, and strong leadership of Indigenous communities.<sup>101</sup> Unfortunately, this leadership was undermined by non-Indigenous actors who ignore Indigenous laws, including on reserve and unceded lands, and was further complicated by the lack of clear jurisdiction. We argue for recognition of the inherent right to self-determination of Indigenous Peoples, including with respect to pandemic-related bylaws, in addition to the resources necessary to carry out that self-determination in meaningful ways.

There are important policy reasons for including Indigenous knowledges in decisionmaking from the start to the end of health crises. UNDRIP states the “right to autonomy or self-government in matters relating to their internal and local affairs” and “the right to maintain and develop their political, economic and social systems,” emphasizing the need to develop solutions suitable to particular Indigenous spaces.<sup>102</sup> First Nations are better positioned to understand the impact of on-reserve policy decisions, such as the conditions of access roads, what a health care unit shares space with, language needs, and when schools expect families will want their youth to participate in hunting.<sup>103</sup> These local circumstances are meaningful when making decisions regarding policy responses to COVID-19.<sup>104</sup>

In addition to policy and legal reform, there is a general shift needed for non-Indigenous Peoples to understand the legal weight of First Nations jurisdiction. Current ignorance about on-reserve decisionmaking has troubling implications that undermine the Canadian legal system. Appreciating the legal basis of Indigenous jurisdiction in respect of reserves is especially needed given the historical context of loss and death amidst past pandemics.<sup>105</sup> As author Thomas King has encouraged us to realize, you are never the same after you learn stories that reveal landscapes and people and actions you did not know before.<sup>106</sup> Colonialism used sickness, and sickness has spread colonialism; both can and should be stopped.

## Notes

1. “Indigenous Peoples” include First Nations, “bands” as defined by the *Indian Act*, Inuit, Métis, and other Indigenous Peoples affected by municipal planning decisions. “First Nations” refers to Indigenous governments. “Aboriginal” refers to Indigenous Peoples and their rights as identified under Canadian law.
2. *Constitution Act, 1867*.
3. Kelm, “British Columbia First Nations.”
4. Podruchny and Labelle, “Wendat Voices”; Carson, “Brébeuf.”
5. Fenn, “Biological Warfare”; Steele, *Setting all the Captives Free*.
6. Kelm, “British Columbia First Nations.”
7. Malone, “No Doubt Second Wave”; Government of Canada, *What We Heard*.
8. Canadian Civil Liberties Association, “Stay Off the Grass.”
9. Pasternak, “Jurisdiction and Settler Colonialism.”
10. Linden, *Ipperwash Inquiry*.
11. Canadian Press, “Saskatchewan Defends COVID-19 Checkpoints.”
12. Hartog, “Black Death Historian”; Olaya, “The Surprising Similarities”; Pamuk, “What the Great Pandemic Novels Teach Us.”
13. Harper, “Pandemics and Passages.”
14. Robbins, “A Comparison of the Effects.”
15. Alfani and Murphy, “Plague and Lethal Epidemics”; Newman, “Shutt up.”
16. Caferro, “Petraarch’s War,” 163; Henneman, “The Black Death.”
17. Scheidel, *The Great Leveller*. DeWitte, “Age Patterns of Mortality.” Jedwab et al., “Negative Shocks.”
18. Wright, *Stolen Continents*.
19. Gordon, *The Hero and the Historians*; Jones, “The Matthew of Bristol, 791.”
20. Alfani and Murphy, “Plague and Lethal Epidemics”; Hackett, *A Very Remarkable Sickness*, 93.
21. Fenn, “Biological Warfare,” 1554; Hackett, “Averting Disaster,” 608.
22. Steele, *Setting all the Captives Free*, 187–88.

23. Bishop, Book Review, 311.
24. Podruchny and Labelle, “Wendat Voices,” 102; Carson, “Brébeuf,” 239–40, 242.
25. Daschuk, *Clearing the Plains*, 104.
26. Hackett, “Averting Disaster,” 233; Kelton, *Cherokee Medicine*, 6–7; Trigger, *Natives and Newcomers*, 245–46.
27. Fine, “Chief Justice.”
28. Ibid.; Raphael, *Poverty in Canada*.
29. Hick, “The Enduring Plague.”
30. Kelm, “British Columbia First Nations,” 47.
31. Putnam, “Canada Could Learn.”
32. Backhouse, *Colour-Coded*.
33. Truth and Reconciliation Commission of Canada.
34. Truth and Reconciliation Commission of Canada.
35. Daschuk, *Clearing the Plains*, 104.
36. Carter, *Aboriginal People*, 162–63.
37. Mathias and Yabsley, “Conspiracy of Legislation,” 35–36.
38. Council for Canadians, “Safe Water for First Nations”; Robertson, *Reservations Are for Indians*; Human Rights Watch, *Make It Safe*, 4.
39. Backhouse, *Colour-Coded*; *Re Eskimo*; *R v Blais*.
40. *First Nations Child and Family Caring Society of Canada*; Ballingall, “Ottawa Won’t Say.”
41. Lavoie et al., “Negotiating Barriers,” 306.
42. Tennant, “A Mountain of Power.”
43. *Constitution Act*, 1982.
44. Borrows, “Challenging Historical Frameworks,” 121.
45. Borrows, “Challenging Historical Frameworks,” 121.
46. *Tsilhqot’in Nation v. British Columbia*.
47. Faille and Brown, “COVID-19 and Indigenous Communities.”
48. Marshall McLuhan Collection, “Notice.”
49. Government of Canada, *An Act to Amend the Indian Act*.
50. *Gamblin v. Norway House Cree Nation Band*.
51. *Gamblin v. Norway House Cree Nation Band*.
52. *An Act to Amend the Indian Act*.
53. Metallic, “Indian Act By-Laws”; Marshall McLuhan Collection, “Notice.”
54. JvL, “Matsqui Trail Regional Park.”
55. Linden, *Ipperwash Inquiry*, 251–52.
56. Linden, *Ipperwash Inquiry*, 251–52.
57. Kurial, “Aamjiwnaang.”
58. *Miller v. Mohawk Council Of Kahnawà:ke*, 268.
59. Wiikwemkoong Unceded Territory.
60. Palmer, “Canada and BC”; *Delgamuukw v British Columbia*; *Haida Nation v British Columbia (Minister of Forests)*; *R v Sparrow*; *Taku River Tlingit First Nation v British Columbia*; *Tsilhqot’in Nation v British Columbia*.
61. Lopshinsky, “Horse Lake.”
62. Staff reporter, “Sagkeeng First Nation.”
63. Kennedy, “Federal Government.”
64. Staff reporter, “Sagkeeng First Nation”; Condon, “Indigenous Leaders”; Kirkup and McLeod, “Are We a Top Priority?”; Robertson, “First Nation Puzzled.”
65. *Attawapiskat First Nation v. Canada*.
66. Dawson, “Traffic Chaos Erupts”; Deer, “Mohawk Communities”; Gill, “Costal Community Lockdowns.”
67. Gershon, “How Conservation.”
68. Ka:’yu:’k’t’h’/Che:k’tles7et’h’ First Nations.
69. Confidential correspondence.

70. Vipond, “1787 and 1867.”
71. Lawford et al., “This Policy Sucks.”
72. Canadian Press, “Saskatchewan Defends.”
73. Forester, “COVID-19 Situation”; Taylor [Noyes], “Meili Says”; Indigenous Corporate Training, Inc., “Dr Bonnie Henry.”
74. Banning, “Why are Indigenous Communities Seeing so few Cases of COVID-19?”
75. McDonald, “Which Services.”
76. Craft et al., “COVID-19.”
77. Faille and Brown, “COVID-19.”
78. Faille and Brown, “COVID-19.”
79. Saltman, “Protecting Communities.”
80. Haida Nation, “Non-resident Travel.”
81. North Coast Regional District, “Province Restricts Travel.”
82. *Indian Act*.
83. *Indian Act Amendment and Replacement Act*.
84. Faille and Brown, “COVID-19”; *Indian Act*, 81(1).
85. Shury, “Band Council Remote Decision-Making.”
86. Sowsun, “Solving the Indian Act.”
87. Poland, “RCMP Supports Thunderchild.”
88. Sowsun, “Solving the Indian Act.”
89. Sowsun, “Solving the Indian Act.”
90. Metallic, “Indian Act By-Laws.”
91. Government of Canada, “Coronavirus (COVID-19),” 2020.
92. Government of Canada, “Coronavirus (COVID-19),” 2021.
93. Richardson and Crawford, “COVID-19.”
94. Richardson and Crawford, “COVID-19.”
95. Kirkup and Fiddler, “Anxiety Grows.”
96. Craft et al., “COVID-19.”
97. Malone, “No Doubt Second Wave.”
98. Government of Canada, “Epidemiological Summary.”
99. Coburn, “Contrary to Sensational Reporting.”
100. Palmater, “First Nations.”
101. Richardson and Crawford, “COVID-19.”
102. Cambou, “The UNDRIP.”
103. Helmer, “Burden of Trust,” A4.
104. Risom, “Caribou Meat.”
105. Teillet, *Submissions*; Sinclair, “The Legal Industry.”
106. King, *The Truth About Stories*.

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## About the authors

*Alexandra Flynn* teaches in the Allard School of Law at the University of British Columbia in Vancouver, British Columbia, Canada.

*Signa Daum Shanks* teaches in the Faculty of Law at the University of Ottawa in Ottawa, Ontario, Canada.

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