

First Nations and Canada's *Emergencies Act*

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ABSTRACT

Canada has legislated its commitment to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This legislation requires Canada to reform its laws to be consistent with UNDRIP and to recognize Indigenous peoples' right to self-determination. Little has been written on Indigenous peoples' role in federal emergencies. Canada's *Emergencies Act* and *Emergency Management Act* do not mention Indigenous peoples. As such there is no requirement for Canada to engage with, or report to, Indigenous peoples at times of emergencies in spite of the often devastating impacts on their people, territories, resources and infrastructure. This paper explores the ways that Canada can recognize First Nation jurisdiction and work with Indigenous peoples at times of emergencies. Experiences with forest fires, floods and invasion of the military provide lessons for how to reform Canada's emergency laws. These reforms must be enacted through engagement with First Nations and with particular attention to capacity building, protocols and agreements for coordination and support. Canada's emergency laws have an important role to play in implementing UNDRIP and the rights and title of First Nations in Canada. With so many natural disasters being caused by climate change, it is critical that First Nations play a strong role in Emergencies in their own territories.

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I. INTRODUCTION

Canada's *Emergencies Act*¹ and *Emergency Management Act*² must be amended to make them consistent with the United Nations Declaration on the Rights of Indigenous Peoples³ (UNDRIP) as is required by the *United Nations Declaration on Indigenous Rights Act*⁴ (UNDA). Right now, there is no mention of First Nations' governments⁵ and no statutory responsibility of the government to notify them or work with them in times of emergencies. This is out of step with Canadian constitutional law, it is inconsistent with UNDA, and is not acceptable.

First Nations have been on the lands now known as Canada since time immemorial, longer than any mind can know and so have their governments. First Nations governments were the first governments on these lands and thus the first to govern 'emergencies' on these lands. First Nations have made laws and protocols, communicated between themselves, and managed, controlled, and protected their own lands and resources long before the first settlers arrived. Canadian governments like to refer to this as the 'inherent right of self-government', but for First Nations their governments have always been in place.

All of the lands in Canada have First Nations or Inuit title on them and are within the territories of over 633+ First Nations. Some of these lands have numbered treaties 1-11⁶ with which First Nations shared the land to the depth of the plow with the settlers, and there are the historical treaties, like the Robinson and Douglas treaties.⁷ There are also aboriginal title lands in BC⁸ which have never been subject to treaties, cession, or discovery. Then

¹ *Emergencies Act*, RSC 1985, c 22 (4th Supp).

² *Emergency Management Act*, SC 2007, c 15.

³ United Nations Declaration on the Rights of Indigenous Peoples, A Res 61/295, UNGAOR, Supp No 53, UNDRIP (2007).

⁴ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

⁵ 'First Nations' is used in this paper on a distinctions based approach as they have different rights than Metis and Inuit. 'Indigenous' is a broad term including all three groups and is used when citing UNDRIP or UNDA.

⁶ Wabi Benais Mistatim Equay (Cynthia Bird), "The Numbered Treaties" (30 April 2018) *Canada's History*, online: <www.canadashistory.ca/explore/settlement-immigration/the-numbered-treaties> (accessed 22 march 2023).

⁷ Government of Canada, "Robinson Treaties and Douglas Treaties (1850-1854)" (modified 15 February 2013), online: <www.rcaanc-cirnac.gc.ca/eng/1360945974712/1544619909155> accessed (22 March 2023).

⁸ *Indigenous Foundations, First Nations & Indigenous Studies The University of British Columbia*,

there are modern treaties like the Tsawwassen Final Agreement⁹ where the issue of lands has been negotiated, and self government agreements like the Westbank First Nation Self-Government Agreement¹⁰ where management of lands is delineated. Section 35 of the *Constitution Act, 1982*¹¹ recognizes and affirms these aboriginal and treaty rights, which include title.

Despite First Nations' inherent governance and the variety of legal relationships between Canadian and First Nations laws across Canada, neither the *Emergencies Act* or the *Emergency Management Act* mention First Nations as governments. Both Acts are silent on the federal government's roles and responsibilities in relation to First Nations for dealing with emergencies. Yet when emergencies happen, it is First Nations' lives at stake, their critical infrastructure, their lands and resources and their ability to carry out their section 35 protected rights. Often First Nation communities are on the front lines of an emergency whether it is a forest fire, tsunami, flooding, oil spills, or other natural disasters. A few brief examples illustrate the harms of ignoring First Nations in emergency decision-making:

The Lytton Fire¹² in June of 2021 which destroyed much of Lytton First Nation homes and 90% of their village. Cooks Ferry is another First Nation which suffered massive flooding after the atmospheric rivers in November 2021. They lost homes, infrastructure (including water systems), land and river systems which resulted in the loss of fish. They also lost the highway which connected their communities.¹³

Early in the pandemic, the federal government closed the Canada-US border. This border is a colonial creation. Many First Nations have communities on both sides of the border or travel across the border to

"Aboriginal Title" online: indigenousfoundations.arts.ubc.ca/aboriginal_title/ (Accessed 22 March 2023).

⁹ Tsawwassen First Nation Final Agreement (Minister of Indian Affairs and Northern, Ottawa, 2010) online: tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf.

¹⁰ Westbank First Nation, "Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation" (Ratified 24 May 2003) PDF, online: www.wfn.ca/docs/self-government-agreement-english.pdf.

¹¹ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹² Renee Bernand, "B.C.'s response to First Nations members fleeing Lytton fire 'woefully inadequate': leader" (2 July 2021) City News online: vancouver.citynews.ca/2021/07/02/lytton-bc-fire-first-nations-response/

¹³ Amy Smart, "After the flood: First Nations along B.C.'s Highway 8 work on recovery from disaster and trauma" (13 April 2022) CBC News, online: www.cbc.ca/news/canada/british-columbia/shackan-first-nation-highway-8-communities-1.6418296.

support family members or gather medicines in traditional areas.¹⁴ Consultation and cooperation with First Nations could have arrived at possible solutions to reduce impact on First Nations. Yet, no consultation took place.

Relatedly, many First Nations communities closed their communities during covid longer than other governments. Provincial and federal governments alike ‘reopened’ without talking to First Nations who were distinctly impacted. For example, they opened up waters around isolated communities where leisure boats from the US and others that thought it was an invitation into those communities.¹⁵ Businesses were opened when that raised the risk of spreading covid within First Nations communities. The failure of provincial and federal governments to engage in dialogue foreclosed the possibility of finding agreements and solutions that worked for all.

Other forms of Canada’s emergency measures have distinct impacts on First Nations. The use of the military to help with forest fires or other emergencies must be done in a way that does not recall the use of tanks and troops on Mohawk lands in the Oka crisis.¹⁶ Evacuation centres in floods and fires must not recall residential school experiences. These are the kinds of mistakes that cannot be repeated and can be readily avoided through appropriate dialogue between Canada, the provinces and First Nations.

Everyone stands to gain from greater involvement of First Nations in provincial and federal emergency management. Recognizing First Nations’ jurisdiction includes utilizing Indigenous knowledge of their territories in dealing with emergencies – they know the land, the waterways, the winds, and the environment and can provide advice on how to fight forest fires, floods, environmental issues, and health matters.¹⁷

¹⁴ Fred Caron, “Report on First Nation Border Crossing Issues” (31 August 2017) online: <rcaanc-cirnac.gc.ca/eng/1506622719017/1609249944512> (accessed 22 March 2023).

¹⁵ Joe Alphonse, Judith Sayers, & Marliyn Slett, “B.C.’s COVID-19 reopening plans continue to put Indigenous people at risk” (24 June 2020, updated 26 June 2020) CBC News, online: <www.theglobeandmail.com/opinion/article-bcs-covid-19-reopening-plans-continue-to-put-indigenous-people-at/>.

¹⁶ Rosalyn LaPier “Perspective: Canada’s Oka Crisis marked a change in how police use force” (21 July 2020) High Country News, online: <www.hcn.org/articles/indigenous-affairs-canadas-oka-crisis-marked-a-change-in-how-police-use-force>.

¹⁷ United Nations Office for Disaster Risk Reduction, “*The Sendai Framework for Disaster Risk Reduction 2015-2030*” (Sendai: UNISDR, 2015), online: <www.undrr.org/quick/11409>.

II. THE NEED FOR LAW REFORM

Canada's political leaders are often quick to signal their respect for Indigenous peoples. Prime Minister Justin Trudeau repeatedly states that First Nations are a priority. Beyond mere political rhetoric, Canada has committed through legislation to "take all measures necessary" to make its laws consistent with UNDRIP.¹⁸

UNDRIP contains a number of articles that are specifically relevant to emergencies. For instance, Article 26 states:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership...States shall give legal recognition and protection to these lands, territories and resources...

Article 10 states:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

And Article 18 states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

The current *Emergencies Act* flies in the face of all these articles by ignoring the existence of First Nations peoples and governments. The danger of First Nations being excluded from crucial decisions of emergency management is that other governments assume authority over the lives and lands of First Nations without their consent or a proper understanding of the issues and thereby usurp the rightful authority of First Nations. This cannot happen.

As a first recommendation, the federal government must amend the *Emergencies Act* and the *Emergency Management Act* to include First Nations governments. This amendment process must be inclusive of all First Nations in Canada as to how First Nations will exercise their authorities during emergencies, how they wish to be involved in federal decision-making processes, what information and resources they will need to be provided to ensure their people, rights, lands and resources are protected.

Canada has an obligation to work with First Nations on amendments to the emergency statutes as well as an obligation to embed further

¹⁸ UNDA, *supra* note 4 at s5.

obligations in relation to First Nations within these statutes.¹⁹ This is stated clearly in Article 19 of UNDRIP:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measure that may affect them.

The bar is set high: First Nations must be involved in drafting legislation with the view of obtaining their free, prior and informed consent (FPIC) before passing legislation.

Commissioner Rouleau's recommendation 34 that "[t]he federal government should engage in discussions with Indigenous communities to establish the appropriate parameters for consultations regarding possible recourse to the Act"²⁰ is a positive first step. But it is only a first step, since the UNDA requires Canada to seek the free, prior and informed consent of First Nations as it works to "take all measures necessary to ensure" its emergency statutes are consistent with the UN Declaration.²¹

III. CHANGES TO THE EMERGENCIES ACT AND EMERGENCY MANAGEMENT ACT

Flowing from the right to self-determination and principle of free, prior and informed consent, set out in UNDRIP, specific changes will be required for the federal *Emergencies Act* and *Emergency Management Act* to be consistent with UNDRIP. Moreover, the federal government can learn from recent experiences developing agreements and protocols through emergency response.

First, both emergency statutes must place a duty on federal government to report on and engage First Nations in an appropriate manner as, that is not being done and must now be done in the light of UNDA.

Second, key definitions in emergency management legislation must be inclusive of First Nations and their distinctive perspectives on emergency governance. First Nations must have input into the definition of emergency under the Act.

¹⁹ *Ibid.*

²⁰ Canada, *Report of the Public Inquiry into the 2022 Public Order Emergency*, vol 3: Analysis (Part 2) and Recommendations (Ottawa: Public Order Emergency Commission, 2023) (Chair: Hon Paul S. Rouleau) [Rouleau Report] at 314.

²¹ *Ibid.*

First Nations must also be able to determine what is critical infrastructure and services. Often infrastructure for remote or small communities are not considered critical infrastructure because they only affect a small number of people, yet the infrastructure is critical to the community that relies on it. During recent major wildfires in British Columbia, I was meeting with a Minister pleading him to get some helicopters to help stop a fire about to destroy a whole reserve community. They had not received any help because they were not considered critical infrastructure. It was critical to the First Nation. The good news is that he made it happen, but it should not be the case that we have to ask a Minister for help and not know whether it will be provided. It should be a given.²²

Third, government-to-government arrangements and proper coordination must be required by the *Emergencies Act* and spelled out through protocols and agreements with rights and title-holders, the First Nations. How do First Nations expect to be consulted prior to a declaration of national emergency? What kinds of emergency measures will give rise to distinctive concerns for First Nations peoples that will need to be accounted for? Answers to these types of questions can be worked out through protocols and agreements that will really help the federal government and First Nations define how they will work with one another, communicate, and provide services. Developing these protocols and agreements can and should be done well in advance of the next emergency. It is an obvious responsibility that should be assigned to the minister under the *Emergency Management Act*.

For example, during the flooding in BC in the fall of 2021, gas supplies were limited due to transportation corridors being shut down.²³ Gas was limited to 30 litres per car, but remote communities could not get to the nearest town and back on 30 litres. I had to negotiate with government to provide a mechanism to get those remote communities enough fuel for basic necessities. Respectful and ongoing government-to-government relationships are essential to address the various aspects of emergencies. Legislation that recognizes the roles of all governments in emergency management—including First Nations—is vital to setting the tone for ongoing government-to-government relationships.

An important, specific form of government-to-government arrangement is data-sharing in times of emergencies. Data-sharing is key to First Nations

²² Crystal Verhaeghe, Emma Feltes, Jocelyn Stacey “The First Awakend Us: Tsilhqot’in Report on the 2017 Wildfires” (2017) Online, PDF: <www.tsilhqotin.ca/wp-content/uploads/2020/12/the-fires-awakened-us.pdf>.

²³ British Columbia, “Provincial State of Emergency Declared” (17 November 2021) online: <news.gov.bc.ca/releases/2021PSSG0073-002190> (accessed 22 March 2023)

decision-making and the ability of First Nations to implement their own emergency response. Without good data, errors in decisions can be made. The federal government must be willing to share data that will help First Nations make decisions. This can be done either through legislation or agreements.

Nuu-chah-nulth Tribal Council (NTC), Heiltsuk and Tsilhqot'in successfully negotiated a data-sharing agreement with BC on covid case numbers. Citing privacy reasons, BC initially refused to share covid case numbers with NTC Nations for surrounding cities and towns where members frequented to get supplies and services. First Nations wanted to be able to tell their members places to avoid due to high covid numbers or to exercise caution where the numbers were not so high. An information sharing protocol to receive information on local covid case counts took seven months to negotiate. But, once negotiated, the provision of this information was helpful to communities. Governments and First Nations need protocols in place before emergencies, so processes are already in place to make critical data immediately available.

Fourth, financial aid must be provided after a disaster to rebuild and replace what was destroyed or damaged. First Nations need financial aid when there has been fire or flooding and places like Lytton First Nation²⁴ are still trying to rebuild without enough financial aid. Whether this is addressed through legislation, treaties or other agreements, this needs to be considered a high priority so there is no fighting between federal and provincial governments over who is responsible when emergency strikes.

IV. CONSULTATION AND COOPERATION LEADING TO FREE PRIOR AND INFORMED CONSENT

How does the federal government work with First Nations in light of UNDRIP, UNDA and the TRC calls to Action? It is no longer acceptable to just consult as in the past. We have often heard the federal government say it is not possible to work with 633+ First Nations on consultation, and yet it is their legal duty to do so.

²⁴ "Lytton First Nation gradually returns home, as rebuilding begins 1 year after fire" (30 June 2022) CBC News, online: <www.cbc.ca/news/canada/british-columbia/lytton-first-nation-one-year-1.6506349>; Sidney Chisholm, "Fire-ravaged Lytton lands \$416 million in rebuild funding" (13 May 2022) Western Investor, online: <www.westerninvestor.com/british-columbia/fire-ravaged-lytton-lands-416-million-in-rebuild-funding-5367464>.

As introduced above, UNDRIP requires governments to consult and cooperate with Indigenous peoples to seek their free, prior and informed consent. It is not just “consultation” anymore. Governments often rely on National or provincial organizations to say they have met with First Nations. If the Chiefs have approved the national organization or provincial organization to do that work on their behalf, then this approach would be appropriate. First Nations reserve the right to government-to-government dialogue as opposed to relying on the national organization to do it. Otherwise, the government must engage First Nations through their representative governing bodies on how they want to work with Canada or provincial governments on the issue. Consultations with some First Nations or some organizations do not meet the standards set out in UNDRIP.

If an emergency is occurring on particular First Nations lands and territories, it is those First Nations who must be engaged. If it impacts all the First Nations in Canada, then they all must be consulted and cooperation sought. The federal government failed in this respect during the trucker occupation of Ottawa because consultation occurred with national Indigenous organizations and not with the First Nations whose territories were impacted.²⁵

BC is reforming its *Emergency Program Act*²⁶ now with First Nations using the interim legislative process from the Declaration Secretariat, a new entity created to support the alignment of BC's laws with UNDRIP²⁷. This process can be looked at as an example of how the federal government can work with First Nations. Lessons learned from wildfires, flooding and other natural disasters can guide what must be done in the future.

Determining a process with First Nations on how they wish to work with federal and provincial governments outside of emergency times is needed. Waiting until emergencies occur is too late.

V. CONCLUSIONS

Colonial policies and laws in the past have left out First Nations, their role and their importance in this country and this has to be changed. With every emergency, the need for First Nations involvement in emergencies becomes more apparent. In order for First Nations to exercise their rights

²⁵ Rouleau Report, vol 3, at 241.

²⁶ RSBC 1996, c 111.

²⁷ British Columbia, “New Guidance on Legislation Supports Indigenous Rights” (24 October 2022) online: <news.gov.bc.ca/releases/2022IRR0061-001581> (accessed 22 March, 2023).

over their lands and resources, all laws, policies and procedures must be revisited with First Nations' full involvement and consent. This includes Canada's emergency legislation.

The changed legal and political landscape demands that the *Emergencies Act* and *Emergency Management Act* be amended quickly to make the acts consistent with UNDRIP as required by the UNDA. The law reform process must itself align with UNDRIP through Canada's consultation and cooperation leading to free, prior and informed consent with Indigenous peoples on these amendments. The UNDA requires the federal government to put in place an action plan within two years of the legislation being passed—by June 2023. The Rouleau Commission further underscores that collaborative action with First Nations must be a top priority.

Emergencies are occurring with greater frequency due to climate change and environmental disasters. First Nations need to be prepared as they are on the front-lines of these events. Canada must also be prepared to engage fully with First Nations on emergency management issues, in accordance with UNDRIP.