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THE INDIAN ACT VIRUS: COVID-19 OUTCOMES FOR CANADA'S NATIVE PEOPLE

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Abstract: Native people in Canada experienced higher rates of COVID-19 and worse outcomes than non-Native people. COVID-19 data shows that Native people have much higher hospitalization, death, and transmission rates than non-Native people. These inequalities incriminate Canada's failure to uphold sections 1 to 30 of the Universal Declaration of Human Rights and sections 1, 7, 12, 15 of the Canadian Charter of Rights. Discrimination against Native people in Canada is systemic and institutional. Inequality towards Native people is embedded in the Indian Act since 1867 to the present, enacting inhumane treatment of Native people as "wards of the state", which results in higher health risks, including COVID-19, for Native people. Socio-economic and structural inequities place Native people at higher risk for COVID-19. The Crown's role as the land trustee to Canada's Native people indicts them for underfunding, underdevelopment, and inadequate health care in Native communities. Most rural and remote Native communities in Canada lack hospitals, drinking water pipes, adequate housing, all-weather roads, and the bandwidth needed for distance education. The lack of bandwidth caused some Native communities to lose their 2020/21 school year under lockdown. These inequalities contravene the human right to education and a decent living standard. This chapter discusses how the Indian Act behaves like a virus to entrench marginalization, poverty and health risks for Native people. The Indian

Act virus created the perfect storm for COVID-19 to cause maximum devastation to Native people's health, livelihoods and education. Removing the Crown trustee is needed to stop denying Native people's humanity and provide the vaccine needed to heal from the Indian Act virus and rebuild better in Native communities after COVID-19.

Keywords: Indian Act, COVID-19, Indigenous people, Native people, human rights

INTRODUCTION

Native people have elevated COVID-19 rates and deaths in Canada compared to non-Native people.¹ Vaccines were prioritized for Native people recognizing their higher COVID-19 risk without the infrastructure and services to cope.² These higher COVID-19 rates reflect worse infrastructure, services, and legal mechanisms, in "Indian" reserves than in non-Native communities.³

Most rural and fly-in Native communities throughout Canada have deficient infrastructure lacking: hospitals, safe drinking water, adequate safe housing, and the bandwidth needed for distance education.⁴ This substandard infrastructure and services in communities contravene human rights to education and a decent living standard.⁵

¹ Indigenous Services Canada, "Confirmed cases of COVID-19" (20 August 2021) online: *Indigenous Services Canada* <<https://www.sac-isc.gc.ca/eng/1598625105013/1598625167707>> [ISC COVID]; Statistics Canada. (2021, November 25). *Statistics on Indigenous peoples*. Retrieved July 2, 2021, from https://www.statcan.gc.ca/eng/subjects-start/indigenous_peoples; Public Health Agency of Canada, "Guidance on the prioritization of initial doses of COVID-19 vaccine(s)" (2020) online: *Public Health Agency of Canada* <<https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/guidance-prioritization-initial-doses-covid-19-vaccines.html>> [PHAC Vaccines]; Shirley Thompson, Marleny Bonnycastle, & Stewart Hill, "COVID-19, First Nations and Poor Housing" (2020) online (pdf): *Canadian Centre for Policy Alternatives* <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2020/05/COVID%20FN%20Poor%20Housing.pdf>> [Thompson, "Poor Housing"].

² PHAC Vaccines, *supra* note 1.

³ Craig Blacksmith, "Abolish the Indian Act: Truth and Reconciliation" posted on *Mino Bimaadiziwin Partnership* (8 July 2021) online (video): *Facebook* <<https://www.facebook.com/MinoBimaadiziwinPartnership/videos/319336476504961/>>; Thompson, *supra* note 1.

⁴ Bryce Hoyer, "Manitoba First Nations disproportionately hit by COVID-19 with 11 deaths, 625 cases in past week" (4 December 2020) online: *CBC News* <<https://www.cbc.ca/news/canada/manitoba/manitoba-first-nations-covid19-update-december-12-1.5828906>>; Pamela Palmater, "Priority pandemic response needed for First Nations" (20 March 2020) online: *Policy Options* <<https://policyoptions.irpp.org/magazines/march-2020/priority-pandemic-response-needed-for-first-nations/>>; First Nations Information Governance Centre, "RHS Statistics for Shaping a Response to COVID-19 in First Nations Communities" (2020) online (pdf): *First Nations Information Governance Centre* <https://fnigc.ca/wpcontent/uploads/2020/09/09ab2092ec4f6262599ed396de5db3cf0_FNIGC-RHS-Covid-19-Report1.pdf>; Statistics Canada. (2020, April 17). *First Nations people, Metis and Inuit and COVID-19: Health and social characteristics*. Retrieved from <https://www150.statcan.gc.ca/n1/en/daily-quotidien/200417/dq200417b-eng.pdf?st=KEq5MiaX>; Thompson, *supra* note 1.

⁵ Blacksmith, *supra* note 3; Robert Joseph et al, "The Treaty, Tikanga Māori, Ecosystem-Based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa New Zealand—Possible Ways Forward" (2018) online (pdf): *Waikato Print & National Science Challenge Sustainable Seas* <www.sustainableseaschallenge.co.nz/>.

In Canada, the higher COVID-19 rates experienced by Native people than non-Natives incriminate Canada for failing to uphold fundamental human rights.⁶ Higher COVID-19 rates for Native people indicate human rights contravention⁷ of sections 1 to 30 of the Universal Declaration of Human Rights⁸ and sections 1, 7, 12, and 15 of the Canadian Charter of Rights and Freedoms.⁹ According to the Universal Declaration of Human Rights, each state/government must guarantee the right to freedom, security, recognition before the law, equality, access to public services, a standard of living for a healthy life, education, employment, and cultural life of an individual, irrespective of race, class, ethnicity, and nationality.¹⁰

The Canadian Charter reinforces universal human rights protection. However, Native people's rights have been undermined, including rights to life, liberty and security based on the principle of fundamental justice¹¹; no cruel and unusual treatment or punishment¹²; and equal protection and benefit of the law without discrimination.¹³

This article explains how Canada's Indian Act behaves like a virus to exacerbate community transmission and worsen outcomes from COVID-19 through legislating inequality. We first explain our use of the term Native people, rather than Indigenous or Aboriginal, to decolonize terminology. We then review the Indian Act's role in denying human rights, land and resources to Native people in Canada by their designation as non-human "wards of the state." We look at how the denial of Native people's human rights undermined their livelihoods, language, health and culture. We explore how unequal rights resulted in substandard infrastructure, health care and services, which created higher risks for COVID-19. The higher COVID-19 rates and outcomes

for Native people are discussed. Finally, we explain the need to eradicate the racist Indian Act and inhumane living conditions to create healthier Native communities resilient to pandemics, chronic illness, and contagious diseases.

DECOLONIZING TERMS

In this chapter, we use the terms Native people and Native reserves, avoiding the problematic terms of First Nation, Aboriginal and Indigenous. These problematic labels are imposed by governments heavily invested in the doctrine of discovery and are not the terms Native people call themselves. As a result, each of these colonial terms has its controversies.

First Nation also has no legal definition, unlike Indian reserve or Native band. First Nation is a confusing term as no Native bands have any nation-state powers under Canada's jurisdiction. Internationally, "First Nations" are not recognized as nations/states for speaking rights at the United Nations ("UN") unless sponsored by a nation-state endorsed under the European standards/definition of governments. The UN recognizes the colonial state government in Canada but not the Native people's governments in Canada¹⁴, whose Native land the Canadian state occupies. Also, Native people in Canada do not have any seats at the UN.

The term "Indigenous" has prevailed as a generic term for many years. The UN's description of Indigenous is outdated, confusing, and offensive, stating: "In some countries, there may be a preference for other terms including tribes, first peoples/nations, aboriginals, ethnic groups, Adivasi, Janajati."¹⁵ Occupational and

⁶ Stewart L. Hill, Marleny Bonnycastle & Shirley Thompson, "COVID-19 Policies Increase the Inequity in Northern Manitoba's Indigenous Communities" in Andrea Rounce & Karine Levasseur, eds, *COVID-19 in Manitoba: Public Policy Responses to the First Wave* (Winnipeg, University of Manitoba Press 2020) 98 [Hill, "COVID-19 Policies"]; Blacksmith, *supra* note 3.

⁷ Blacksmith, *supra* note 3.

⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

⁹ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [Charter].

¹⁰ UDHR, *supra* note 8.

¹¹ Charter, *supra* note 9 at s 7.

¹² *Ibid.* at s 12.

¹³ *Ibid.* at s 15.

¹⁴ Hayden King, "UNDRIP's fundamental flaw" (2 April 2019) online: *Open Canada* <opencanada.org/undrips-fundamental-flaw/> [King, "UNDRIP's Flaw"].

¹⁵ United Nations Permanent Forum of Indigenous Peoples, "Report on the Twentieth Session" (2021) online (pdf): *United Nations* <<https://undocs.org/E/2021/43>>.

geographical terms like hunter-gatherers, nomads, peasants, hill people also exist and, for all practical purposes, can be used interchangeably with "Indigenous people."¹⁶ Adivasi and Janajati are the terms to represent Indigenous people in India, Bangladesh, and Nepal. Adivasi translates closely to Aboriginal, and Janajati translates to Indigenous; however, these terms, and their criteria, are imposed by the nation states to create division among Native people who lived harmoniously for generations.¹⁷

Further, many terms, such as hunter-gatherer, nomads, hill people, are offensive and are not considered interchangeable with Native people. Native people in Canada typically define themselves by their language, for example, the Dakota, Nehiyew, Anishinaabe, Anishininiw, Haudenosaunee, Dene and Sauk. Thus, to use a blanket term, like Indigenous people or Aboriginal people, in a legal construct is a colonial and divisive approach. Thus, these terms are wholly rejected in this article. Alternatively, the term native is place based but has specificity when applied to Native language, Native people, and Native land without being divisive.

DOES UNDRIP CIRCUMVENT HUMAN RIGHTS? ABORIGINAL RIGHTS?

On December 10th, 1948, the United Nations adopted the Universal Declaration of Human Rights. In 2007, 144 countries adopted the United Nations Declaration on the Rights of Indigenous Peoples.¹⁸ Parallel sets of rights beg the question—why the need for two separate sets of rights? Are Native people not human, under the Universal Declaration of Human Rights, and needing an

enforceable right? While the Universal Declaration of Human Rights is enforceable, UNDRIP is not.¹⁹ Although UNDRIP provides some moral levers for advocacy and international review, this declaration does not disqualify national laws, including the Indian Act which legalizes inequity for Indigenous people.²⁰ Although, the claim is that UNDRIP deepens and expands on the rights of Native people, the reality is that human rights are substituted for UNDRIP regarding Native people's concerns, which allow human rights abuse for Native people to continue.

Despite UNDRIP's profile for recognizing Native people on the world's stage, Canada refused to endorse UNDRIP until 2016. Then, in implementing UNDRIP with Bill 15 in 2021, which some have termed CANDRIP, Canada's state law effectively domesticated Native people's issues by maintaining "the status quo in terms of policy, law and institutional structures."²¹ Thus, the Indian Act land trust and other racist policies remain after CANDRIP.²² CANDRIP is another attempt at extending a "right" to Native people based on the Crown being sovereign when only the Creator, not people, can grant rights.²³ Thus, CANDRIP is merely another layer of colonial policy.²⁴

A parallel rights process to the UN occurs in Canada to deny human rights to Native people.²⁵ In 1982, Canada adopted the Canadian Charter of Rights and Freedoms and a separate charter of Aboriginal rights, section 35 in the Canadian Constitution. Section 36 of the Canadian Constitution states that "Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities, and (c) providing essential public services of reasonable quality to all Canadians."²⁶ The disparities in

¹⁶ *Ibid.*

¹⁷ Blacksmith, *supra* note 3.

¹⁸ *Declaration on the Rights of Indigenous Peoples*, 2 October 2007, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 [UNDRIP].

¹⁹ King, "UNDRIP's Flaw", *supra* note 14.

²⁰ United Nations Permanent Forum of Indigenous Peoples, "Indigenous Peoples, Indigenous Voices Factsheet" (2004) online (pdf): *United Nations* <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

²¹ Sheryl Lightfoot in King, "UNDRIP's Flaw", *supra* note 14, para.23.

²² Blacksmith, *supra* note 3; King, "UNDRIP's Flaw", *supra* note 14.

²³ Blacksmith, *supra* note 3.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Charter*, *supra* note 11 at s 36.

opportunities, economic development, and public services in Native communities compared to other Canadians show that this constitutional commitment does not apply to Native people, despite section 15. Section 15 of the Canadian Constitution states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."²⁷

Although Canada proclaims that human rights are the same for Native people, by creating two sets of "rights," in effect, Native people are not considered humans. This racist approach aligns with the Indian Act, which long defined humans as anyone but Native people.²⁸ If the Charter of Rights and Freedoms applies to "Indians," then Native people should have the same protections and benefits without discrimination and not be considered "wards of the state." Native people are always tried under Aboriginal rights in court, although in many cases public health human rights proceedings would be more effective, except for criminal cases.²⁹ Native people constrained to Aboriginal rights within Canadian courts have little power: "Aboriginal rights reinforce the State's monopoly on power. First Nations are radically constrained in negotiations for their rights."³⁰ This legal constraint shows how the Canadian Charter of Rights and Freedoms does not apply to Native people, as Native people are not human beings under the Indian Act.³¹ Creating a separate Aboriginal right has acted as a diversion that fails to uphold the rights that claim to apply to everyone in Canada to apply to Native people.

THE INDIAN ACT VIRUS: A LEGAL FRAMEWORK FOR HUMAN RIGHTS ABUSE

The Indian Act continues to enact an uneven playing field for Native people in Canada by holding in trust Native lands and resources.³² The basis of this land trust is the denial of Native people's human rights. The Indian Act does not consider "Indians" humans, having originally enshrined in law that, "A person means an individual other than an Indian."³³ This denial of the humanity of Native people in this legal definition, although expunged in later versions of the Indian Act, continues to be enacted in practice, as Native people remain "wards of the state." Canada clarified its paternalistic legal relationship with Native people in this text: "Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State."³⁴ Today, the Canadian government continues to keep Native people in a "condition of tutelage."

The Indian Act constructed the legal category "Indian" for some Native people in a racialized and gendered process of enfranchisement and disenfranchisement.³⁵ The Indian Act is described more recently as a "paradoxical document that has enabled trauma, human rights violations and social and cultural disruption for generations of Indigenous peoples."³⁶ The Indian Act is a land trust to allow Canada to do business connected with Native land. According to Canada's 1969 White Paper: "It is a trust. As long as this trust exists, the government, as a trustee, must supervise the business connected with the land."³⁷

²⁷ *Ibid.* at s 15.

²⁸ House of Commons – Department of Interior, "Annual Report for the Year Ended June 30th, 1876" *Sessional Papers*, No 11 (1877) xiv at 14 [*Sessional Papers*]; *Cf Indian Act*, RSC 1985 c I-5, online (pdf): <<https://laws-lois.justice.gc.ca/eng/acts/i-5/>>.

²⁹ Blacksmith, *supra* note 3.

³⁰ Hayden King & Shiri Pasternak, "Canada's Emerging Indigenous Rights Framework: A Critical Analysis" (5 June 2018) at 13, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf> [King, "Emerging Rights"].

³¹ Blacksmith, *supra* note 3.

³² *Ibid.*; Joseph, *supra* note 5; King, "UNDRIP's Flaw" *supra* note 14.

³³ *Cf Indian Act*, *supra* note 28.

³⁴ House of Commons Department of the Interior, *supra* note 28 at p. xiv.

³⁵ Martin Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada" (2007) online (pdf): *Aboriginal Policy Research Consortium International* <ir.lib.uwo.ca/aprci/97>.

³⁶ Zach Parrot, "Indian Act", The Canadian Encyclopedia, December 16, 2020, <https://www.thecanadianencyclopedia.ca/en/article/indian-act-Para-1>.

³⁷ Government of Canada, "Statement of the Government of Canada on Indian Policy" (1969) sec. 6 para 2, online (pdf): *Government of Canada* <publications.gc.ca/collections/collection_2014/aadnc-aandc/R32-2469-eng.pdf>.

The racist enactment of the doctrine of discovery led to British laws over-ruling Native laws to take Native land for the Crown.³⁸ An eleventh-century British law changed the land tenure system dramatically to rule that the Crown alone could "own" land. This medieval British law applies today to all of Canada: "British law could be universal here because no Indigenous law existed, according to the racist decree."³⁹ However, Native laws were previously recognized when the British signed the Peace and Friendship treaties. These Peace and Friendship treaties were not disqualified with the Indian Act.⁴⁰ Based on racist assumptions and British land tenure laws from medieval times, Canada's courts and government presume that the Crown holds underlying title to all lands today.⁴¹ All Native lands are thus legislated Crown lands whether Native people signed a treaty or not.⁴² Even where courts recognize unceded territory, the courts give the Crown title to these unceded lands. In the numbered treaties, the Crown claims the land was ceded⁴³; the same way they claim all the land for the Crown by disregarding the humanity of Native people. The written version of these numbered treaties provides a biased colonial story that denies the treaty's oral version to share some land.⁴⁴ Reportedly no land cessation was agreed to, despite duress from the scorched earth policies, Indian wars and disease.⁴⁵

In denying Native peoples human rights and legal standing, the Crown claimed ownership of all Native land. This Crown claim remains in place today for 89% of Canada's land considered Crown land. The remaining 11% is fee-simple land, which the Crown rents in perpetuity to land "buyers," on which taxes are levied.⁴⁶ Lands reserved for Indians" held "in trust" by the federal government occupy below 0.02% of Canada's land, a tiny fraction of the 10 million square kilometres of mostly Crown land.⁴⁷ However, Native people's lands constitute 100% of Canada.⁴⁸

The Crown demonstrates their control over land by continuously alienating Native people from Native land through expropriation, mining permits, forestry licenses, conservation zones, transmission corridors and fee simple lands. For example, the Dakota Oyate or Dakota Family group has never surrendered by treaty or recognized the Crown as a sovereign god.⁴⁹ In 1890 a small group of Dakota purchased land in Portage la Prairie and remained independent from the government for 21 years.⁵⁰ The government in 1911 used the Indian Act to economically sanction the Dakota people by expropriating their fee-simple land and removing the Dakota people to an Indian reserve.

The Crown, Canada's constitutional monarchy, gave itself judicial, legislative, and executive powers to enact laws and systems for self-benefit.⁵¹ The Indian Act trustee erects a barrier for Native people to capitalize on their

³⁸ Joseph, *supra* note 5.

³⁹ King, "Emerging Rights", *supra* note 29 at 24.

⁴⁰ King, "UNDRIP's Flaw" *supra* note 14.

⁴¹ Joseph, *supra* note 5.

⁴² King, "Emerging Rights", *supra* note 29.

⁴³ Joseph, *supra* note 5.

⁴⁴ Stewart L. Hill, "The Autoethnography of an Ininiw from God's Lake, Manitoba, Canada: First Nation Water Governance Flows from Sacred Indigenous Relationships, Responsibilities and Rights to Aski" (2020) online: *University of Manitoba Libraries* <hdl.handle.net/1993/35329> [Hill, "Water Governance"].

⁴⁵ Blacksmith, *supra* note 3; Hill "Water Governance" *supra* note 43.

⁴⁶ Blacksmith, *supra* note 3; Alex Wilson, "Becoming Intimate with the Land" (10 September 2019) online: *Briar Patch* <<https://briarpatchmagazine.com/articles/view/becoming-intimate-with-the-land>>.

⁴⁷ Wilson, *supra* note 45.

⁴⁸ Blacksmith, *supra* note 3.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

Native land and resource wealth.⁵² Under this regime, Crown land is equally divided between provincial and federal lands.

The Crown trustee promotes industrial extraction and settler development, inconsiderate of Native people's consent: "Provincial and federal authorization for extraction and development on Indigenous territories take place without Indigenous consent."⁵³ Despite the benefactor named in the Indian Act land trust being solely Native people, the winner of court injunctions over land use is typically industry. Aboriginal rights within Canadian courts have little power compared to industry: "First Nations are radically constrained in negotiations for their rights and by the oppressive socio-economic structures of settler society, where industry interests often drive politics."⁵⁴

Native people are typically losers in litigating for their homeland and water protection, with high legal costs. Oppositely, companies are granted injunctions for negligible risk of economic loss to permit extraction and pollution.⁵⁵ Approximately 82% of the 100 injunctions filed against corporations and the Canadian government were denied.⁵⁶ In contrast, "76% of injunctions filed against Native people by corporations were granted."⁵⁷ Recently, the BC Supreme Court granted an injunction to Coastal GasLink Ltd, barring members of Wet'suwet'en from preventing the construction of a pipeline in their homeland. This injunction violated both Wet'suwet'en law and UNDRIP Articles 26-2 and 19, which read: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess because of traditional ownership or other traditional occupation or use, as well as those which

they have otherwise acquired" and "States shall consult and cooperate in good faith with the Indigenous people concerned through their representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."⁵⁸

Land, revenues, and resources are commandeered by the Crown, under the trustee clause of the Indian Act.⁵⁹ From the late 19th century to this day, the Crown usurped Native band money earned from the sale of land, timber, energy, gravel, gold and other resources.⁶⁰ For example, the Crown collected \$50 million as the trustee from energy royalties earned from oil patch activity on Bearspaw Cree land. Chief of Bearspaw, Darcy Dixon, alleges the Crown mismanages Native money while alleging that Native communities cannot handle their own money: "We're not asking for handouts. All we're asking is to manage money that belongs to us."⁶¹

A few Native bands in Western Canada fought the Crown for decades in court to take past and future revenues into their trust fund.⁶² Stephen Buffalo of the Samson Cree Band describes their legal struggle which they won in 2005: "The federal government fought tooth and nail. They spent millions and millions of dollars to prove that they were right and to really force the colonialism that we could not take care of our own money."⁶³ The Samson Cree Band had their \$349 million transferred into Kisoniyaminaw Heritage Trust Fund from the Crown Trustee. At the beginning of 2017, the fund had a balance of \$456 million, while \$202 million was used for community building by the Samson Cree. Since then, two nearby Cree reserves, Ermineskin and Onion Lake, have both set up their trust funds after many years of delays.

⁵² Kyle Bakx, "Alberta's Bearspaw First Nation fighting federal government for right to manage own savings" (7 July 2021) online: *CBC News* <www.cbc.ca/news/canada/calgary/bakx-bearspaw-first-nation-government-savings-1.6117818>; Blacksmith, *supra* note 3; Hill, *supra* note 43; Joseph, *supra* note 5; King, "UNDRIP's Flaw" *supra* note 14; Thompson, "Poor Housing" *supra* note 1.

⁵³ King, "Emerging Rights" *supra* note 29 at 44.

⁵⁴ *Ibid.* at 13.

⁵⁵ *Ibid.* at 8.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 12.

⁵⁸ UNDRIP, *supra* note 8 at Articles 19, 26-2.

⁵⁹ Blacksmith, *supra* note 3; Bakx, *supra* note 51.

⁶⁰ Bakx, *supra* note 51.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Stephen Buffalo in Bakx, para 18.

The wealth controlled by Native bands sponsors community development. The Ermineskin trust was established in 2011 with \$123 million, earning \$214 million more money than when under Ottawa's control. The fund's annualized rate of return would be 10% currently, compared to 2% if the Crown controlled the money. Onion Lake's fund began in 2016 with more than \$44 million with an annualized rate of return of nearly 11%. The National Indigenous Economic Development Board recommends dismantling the legislative barriers that impede Native communities' control over Indian money, stating: "Indian money should be in the hands of First Nations, not the Government of Canada."⁶⁴ Crown control over Native band revenues is belittling: "The current financial arrangement with Ottawa is similar to having to ask your parents in advance for every dollar that you spend."⁶⁵

The denial of Native people's human rights, intended and enabled by the Indian Act⁶⁶, was applied in Indian residential schools, child welfare, Indian registration rules, Native people's mass incarceration and the Sixties Scoop.⁶⁷ Over 150,000 Native children were forcibly removed from their families and taken to schools designed "to kill the Indian in the child."⁶⁸ The children suffered terribly during this systematic assimilation plan of the Federal Government, carried out by the churches and police. The number of children who died in Canadian Indian Residential Schools ("IRS") from starvation, disease and abuse away from their family, culture, and community is higher than 6,000 children.⁶⁹ Some of

these children were found in a mass grave at the former Kamloops Indian Residential School in British Columbia in May 2021. Hundreds of others lie in unmarked graves. 6750 survivors and their families have provided documented formal statements about this genocide.⁷⁰

The claims of many that IRSs provided an educational service goes against the Truth and Reconciliation Commission ("TRC") findings. The TRC found every manner of genocide in IRS, according to the United Nations definition: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."⁷¹

The Indian Act and these other policies are "slow-moving poison, like a virus that infects a host community."⁷² The traumas created by the Indian Act, reserve system, residential school system and other colonial policies were debilitating at the individual, family, community, and nation levels. These harms caused both an acute and long-term impact on Native people's livelihoods, health, and economic development.⁷³ The colonial system curtailed Native people's food activities, economic development, and legal rights. The Indian Act prohibited

⁶⁴ National Aboriginal Economic Development Board, "Recommendations on First Nations Access to Indian Moneys" (2017) at 3 online (pdf): *National Aboriginal Economic Development Board* <[recommendations-on-first-nations-access-to-indian-moneys.PDF](https://www.naebd.ca/recommendations-on-first-nations-access-to-indian-moneys.pdf)>.

⁶⁵ Bakx, *supra* note 51.

⁶⁶ *Indian Act*, *supra* note 27.

⁶⁷ Myra Parker Pearson et al, "Beyond the Belmont Principles: A Community-Based Approach to Developing an Indigenous Ethics Model and Curriculum for Training Health Researchers Working with American Indian and Alaska Native Communities" (2019) 64:1–2 *American J Community Psychology* 9.

⁶⁸ Stephen Harper (June 11, 2008) "Statement of Apology to former students of Indian Residential Schools", online (pdf): *Statement of Apology to former students of Indian Residential Schools* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>>

⁶⁹ Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: The History, Part 2 1939 to 2000 (Vol. 1)" (2015) online (pdf): *Truth and Reconciliation Commission of Canada* <<http://www.trc.ca/websites/trcinstitution/index.php?p=890>>.

⁷⁰ Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press 2014).

⁷¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) at Article 2.

⁷² Kiera L. Ladner, "Political Genocide: Killing Nations through Legislation and Slow-Moving Poison" in Alexander L Hinton, Andrew Woolford & Jeff Benvenuto, eds, *Colonial Genocide in Indigenous North America* (Durham: Duke University Press, 2014) 226 at 226.

⁷³ James W. Daschuk (2013) *Clearing the Plains: Disease, Politics of Starvation and the Loss of Aboriginal Life* (Regina: 2013 University of Regina Press) 432; Francis D. Boateng & Isaac Nortley Darko, "Our Past: The Effect of Colonialism on Policing in Ghana" (2016) 18:1 *Intl J Police Science & Management* 13; Kristin Burnett, Travis Hay & Lori Chambers: "Settler Colonialism, Indigenous Peoples and Food: Federal Indian Policies and Nutrition Programs in the Canadian North Since 1945" (2016) 17:2 *J Colonialism & Colonial History*; Parker, *supra* note 65.

Native people to hire a lawyer, vote, or run in elections until the 1960s.⁷⁴ The Indian Act's denial of human rights keeps Native communities underdeveloped. As a result, Native reserves are at high risk for COVID-19 and many other diseases.⁷⁵

LACK OF INFRASTRUCTURE IN NATIVE COMMUNITIES' INCREASES COVID-19 RISKS

Infrastructure and services differ significantly between Native and non-Native communities in Canada. Most rural and remote Native communities in Canada lack hospitals, drinking water pipes, adequate housing, all-weather roads, and the bandwidth needed for distance education.⁷⁶ The limited infrastructure available in Native communities contravenes rights to education, health, and a decent living standard. Structural inequities in Native communities include economic poverty, high unemployment and lower school funding resulting in higher risk and tremendous suffering under COVID-19.

Systemic racism explains why COVID-19 is hitting Native people harder, according to Kinew:

Indigenous people are more likely to have poor housing, less likely to have access to a family doctor and less likely to have access to clean drinking water... The pandemic is now revealing how the lack of access to health care for First Nations people is a major issue that needs to be addressed.⁷⁷

Although Native reserves have higher health care needs per person, reserves lack hospitals without doctors residing on reserves. Health services on reserve typically meet only basic needs.⁷⁸ People living on a Native reserve typically travel great distances for health and dental care,

including giving birth or treating cavities. As a result, many Native people—one in ten in the preceding 12 months—residing on reserves live with unmet health care needs.⁷⁹ Due to pre-existing health conditions and weak immune systems, people on reserves face higher risks for developing COVID-19 complications.⁸⁰ Unequal health services compromise Native people's health and human rights.

Overcrowded housing is a crisis in many Native reserves, causing a health risk for many diseases, including COVID-19. In 2016, 8.5% of non-Canadians lived in unsuitable housing ("NOS"), amounting to roughly one-quarter of the 37% for Native people on.⁸¹ In northern and remote communities, unsuitable housing rates can be more than six times higher than non-Native communities, for example, 53% for both Garden Hill and Wasagamack Reserves. The housing crisis on Native reserves is linked to elevated rates of contagious diseases, including a 50 times higher prevalence of tuberculosis ("TB") for Native people on reserves than other Canadians.⁸² With COVID-19 being more contagious than TB, the overcrowded housing crisis on Native reserves poses unacceptable risks for COVID-19 transmission.⁸³

Inequity and poverty amplify risk and harm from the COVID-19 pandemic. Worse outcomes apply to the disease as well as the experience of the restrictions and lockdown under COVID-19. Without bandwidth and computer access on reserve in remote and rural communities, no online schooling options were possible under lockdown on many reserves. Garden Hill and other Native communities reported that all children and youth must repeat their school year as limited educational programming could occur under lockdown.

People living on Native reserves have limited access to healthy food on reserve, particularly during COVID-19 lockdowns. Before COVID-19, food insecurity across

⁷⁴ Indian Act, sec.141.

⁷⁵ Hill, "COVID-19 Policies" *supra* note 6; Thompson, "Poor Housing" *supra* note 1.

⁷⁶ Hoyer, *supra* note 4; Palmater, *supra* note 4; Thompson, "Poor Housing" *supra* note 1.

⁷⁷ Hoyer, *supra* note 4.

⁷⁸ First Nations Information Governance Centre, "National Report of the First Nations Regional Health Survey (Phase 3: Volume Two)" (2018) online (pdf): *First Nations Information Governance* <fnigc.ca/rhs3report> [FNIGC Health Report].

⁷⁹ FNIGC Health Report, *supra* note 76.

⁸⁰ Statistics Canada 2020.

⁸¹ Statistics Canada 2016.

⁸² Thompson, "Poor Housing", *supra* note 1.

⁸³ Statistics Canada, *supra* note 1.

Canada was six times higher at 51% for households in Native communities than other Canadians⁸⁴ and 75% in remote and rural Native communities.⁸⁵ As many other necessities are forgone before food, food insecurity indicates hardship across many areas of Native people's lives.⁸⁶ During COVID-19, the limited food infrastructure resulted in 100% of households in two fly-in Native communities having food insecurity during the pandemic.⁸⁷ During COVID-19, emergency funding for food and other crises through charities was restricted to reserves. The barrier was that food was flowing through charities but Native bands, unlike every other level of government, do not receive automatically eligible donee status under Canada's tax laws.⁸⁸ This meant most Native bands could not receive food charities through community food centres and other organizations directly, creating barriers for the neediest.

The inadequate infrastructure for roads, houses, health services, water and food is a recipe for disaster in a pandemic. Spinu and Wapass criticized the lack of addressing the structural inequities of Native communities during the COVID-19 crisis:

Important to look beyond the current [COVID-19] crisis and not lose sight of the broader socio-economic inequalities facing Indigenous communities—particularly remote communities. These include

severe housing shortages, limited healthcare services and resources, and poverty—all of which disproportionately put Indigenous communities at risk. If we do not address these inequalities, we will continue to find ourselves treating the symptoms and not the causes of vulnerability to pandemics.⁸⁹

The First Nations Regional Health Surveys⁹⁰ show negative health impacts in Indian Reserves across Canada from inadequate water/sanitation infrastructure, including the lack of indoor plumbing. Manitoba and Saskatchewan have many homes without piped water, relying on water trucks to deliver water to cisterns on most northern reserves. Cisterns provide an inferior water system to pipes, undermining water quality and quantity. A third of houses (31%) haul water from the water treatment plant by trucks to cisterns in Manitoba reserves—but this rate is much higher in northern Manitoba.⁹¹ An additional 20% in many remote and rural northern Manitoba households have barrels with no water service. O-Pipon-Na-Piwin Cree Nation has one-third of its homes using 500-gallon barrels for all their water needs.⁹² Cleaning hands is vital to stop disease transmission, including COVID-19, but rationing water undermines prevention. Higher rates of diseases on Native reserves are linked to water infrastructure issues.⁹³ Disproportionately high rates of and deaths from the H1N1 virus in Garden Hill Reserve are attributed to their lack of running water.⁹⁴ Barrels and cisterns are breeding

⁸⁴ FNIGC Health Report, *supra* note 76.

⁸⁵ Shirley Thompson et al, "Community Development to Feed the Family in Northern Manitoba Communities: Evaluating Food Activities based on Their Food Sovereignty, Food Security, and Sustainable Livelihood Outcomes" (2012) 3:2 Can J Nonprofit & Soc Economy Research 43.

⁸⁶ Valerie Tasaruk, "Food Insecurity in Canada: Webinar on March 26, 2020" (26 March 2020) online (video): *PROOF Food Insecurity Policy Research* <proof.utoronto.ca/resources/webinar/>; Shirley Thompson & Pepper Pritty, "Damming Food Sovereignty of Indigenous Peoples: A Case study of Food Security at O-Pipon-NaPiwin Cree Nation" in Priscilla Settee & Shailesh Shuklah, eds, *Indigenous Food Systems: Concepts, Cases, and Conversations*. (Toronto: Canadian Scholars Press 2020) 195 [Thompson, "Food Sovereignty"].

⁸⁷ Babajide Oni, Shirley Thompson, Marleny Bonnycastle and Donna Martin. "Do Work Integration Social Enterprises show benefits during COVID--19? Comparing sustainable livelihood indicators before COVID--19 during training and after in Remote Indigenous communities". JANSER (2022, forthcoming September).

⁸⁸ Hill, "COVID-19 Policies" *supra* note 6.

⁸⁹ Oanu Spinu & Jordan Wapass, "Addressing the causes of Indigenous vulnerability to pandemic - not just the symptoms" (26 March 2020) online: *The Conference Board of Canada* www.conferenceboard.ca/insights/blogs/addressing-the-causes-of-indigenous-vulnerability-to-pandemics-not-just-the-symptoms/, para 2.

⁹⁰ FNIGC Health Report, *supra* note 76.

⁹¹ Thompson, "Food Sovereignty" *supra* note 84.

⁹² *Ibid.*

⁹³ Lori Bradford, Udonia Okpalauwaekwe, Cheryl Waldner, Lalita Bharadwaj. "Drinking water quality in Indigenous communities in Canada and health outcomes: a scoping review". *Int J Circumpolar Health*. 2016 Jul 29;75: 32336. doi: 10.3402/ijch.v75.32336. PMID: 27478143; PMCID: PMC4967713. Ajarat Adegun & Shirley Thompson. "Higher COVID-19 rates in Manitoba's First Nations compared to non-First Nations linked to limited infrastructure on reserves." *The Journal of Rural and Community Development*, (2021) 16:4. ISSN: 1712-8277.

⁹⁴ Hill "Water Governance" *supra* note 43.

grounds for water-borne parasites, Hepatitis, *H. Pylori* and other bacteria.⁹⁵

The infrastructure in Canada, with the exception of reserves, is funded through a combination of federal, provincial and municipal resources.⁹⁶ For water, this affords highly controlled and professionally monitored water systems, which pipe water to homes, regulated by provincial governments to ensure the highest water quality.⁹⁷ In contrast, Indigenous Services Canada ("ISC") funds capital costs for Native reserves only up to 80% of the total cost of operation and maintenance, deducted from the annual contribution agreements with Native bands.⁹⁸ This cost-sharing funding rate by the federal government caps at 80% but can be much lower at 50%.⁹⁹ Federal funding from ISC for capital and operating resources funds only the inferior cisterns in northern Manitoba communities rather than piped water systems.¹⁰⁰ Although cisterns have cheaper capital costs upfront, their operation and maintenance leads to higher health care costs resulting from their frequent contamination.¹⁰¹ In summary, the underfunding of infrastructure including water and wastewater systems on Native reserves creates a high-risk situation for contracting the COVID-19 virus for Native people.¹⁰²

INEQUITABLE COVID-19 OUTCOMES FOR NATIVE PEOPLE IN CANADA

Native people in Canada experienced higher rates of COVID-19 than non-Native people and worse outcomes.¹⁰³ In Manitoba, the significant difference of 18 years in the median age of death from COVID-19 for non-Native people at 83 years old compared to Native people at 65 years old signals a grave inequity.¹⁰⁴ Since the pandemic started in spring 2020 until August 8th, 2021, Native people living on reserves recorded 33,342 COVID-19 cases, 1,604 hospitalizations and 384 deaths.¹⁰⁵ Roughly one in ten Native people on reserve contracted COVID-19, which is 2.7 times the rate for the Canadian population.¹⁰⁶ Death rates from COVID-19 are 1.7 times higher for Native people on reserves than that of the Canadian population.¹⁰⁷ Higher COVID-19 rates for Native people were largely located in the western provinces.¹⁰⁸ Manitoba's Native people, compared to non-Native people, had three times higher COVID-19 cases, four times higher intensive care unit hospitalization, twice higher death rates and twice higher transmission rates.¹⁰⁹ These higher COVID-19 rates are blamed on poverty, overcrowded homes and lack of essential infrastructure.¹¹⁰

⁹⁵ Gerald Y. Minuk & Julia Uhanova, "Viral Hepatitis in the Canadian Inuit and First Nations Populations" (2003) 17:12 Can J Gastroenterology 707.

⁹⁶ Hill "Water Governance" *supra* note 43.

⁹⁷ Stewart Hill, Marleny Bonnycastle & Shirley Thompson. COVID-19 Policies Increase the Inequity in Northern Manitoba's Indigenous Communities. In Rounce and Levasseur (Eds) (2021), "COVID-19 in Manitoba: Public Policy Responses to the First Wave. Winnipeg, University of Manitoba Press.: https://uofmpress.ca/files/9780887559501_web.pdf

⁹⁸ Hill "Water Governance" *supra* note 43.

⁹⁹ *Ibid.*

¹⁰⁰ D.W. Smith et al, "Public Health Evaluation of Drinking Water Systems for First Nations Reserves in Alberta, Canada" (2006) 5 J Environmental Engineering & Science S1;

¹⁰¹ Hill "Water Governance" *supra* note 43.

¹⁰² Jerry P. White, Laura Murphy & Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 Intl Indigenous Policy J 1.

¹⁰³ Hoye, *supra* note 4; Lenard Monkman, "Lack of teachers, internet puts Garden Hill First Nation's school year at risk" (18 April 2021) online: CBC News <<https://www.cbc.ca/news/indigenous/garden-hill-school-coronavirus-1.5547148>>; ISC COVID, *supra* note 1.

¹⁰⁴ Statistics Canada, *supra* note 1.

¹⁰⁵ ISC COVID, *supra* note 1.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Thompson, *supra* note 1.

¹¹⁰ Hoye, *supra* note 4

The highest rates of COVID-19 in Canada occurred in remote communities with overcrowded housing.¹¹¹ Overcrowded homes in Manitoba, which predominate in remote Native communities, are strongly and statistically significantly correlated with higher COVID-19 rates in Manitoba.¹¹² The housing crisis in Native communities was critical before COVID-19, but now is deadly.¹¹³ To protect against COVID-19, many remote and isolated Native communities went under strict lockdown, which took an enormous toll on mental health, education delivery and employment.

The high risks for COVID-19 with Native people across Canada led to their prioritization for vaccines. The Public Health Agency of Canada (2020) reported that Native communities were prioritized for vaccines as infection results in disproportionate impacts with less access to healthcare and substandard infrastructure.¹¹⁴

CONCLUSION

The Indian Act overtly denies human rights to Native people in Canada. Very few other countries in the world have blatantly racist legislation similar to Canada's Indian Act to control specific peoples and justify genocide.¹¹⁵ The inhumanity of the Indian Act is enacted every day through Crown policies and funding models, resulting in worse outcomes for COVID-19.¹¹⁶

The Indian Act entrenches the marginalization, poverty, and health risks for Native people in Canada, which results in higher COVID-19 rates and deaths.¹¹⁷ Native people's status as "wards of the state" denies human rights and worsens health and livelihood outcomes.¹¹⁸ Equality of human rights requires dismantling the Crown's systemic barriers, including the Indian Act. Removing the Indian Act trustee is needed to ensure equality, as outlined in Section 36(1) of the Canadian Constitution.

Whether Native people signed treaties is inconsequential to its Crown land status.¹¹⁹ Regardless, the Crown claims to own all land in Canada due to medieval British law and govern it.¹²⁰ On treaty and non-treaty lands, Native bands are subject to Canadian law, including the Indian Act.¹²¹ As the land trustee for Native people, the Crown is supposed to benefit Native people. The wealth from the natural resources in Native homelands should ensure healthy infrastructure to support healthy Native people.¹²² Oppositely, the Crown compromises life on the land by sanctioning extraction and pollution against Native people's efforts to seek injunctions.¹²³ While profiting from the Native homeland, the Crown underfunds Native people's infrastructure and services.¹²⁴ Due to inferior infrastructure, health care services, and education supports, Native communities have suffered disproportionately from COVID-19 health and other impacts.

The Indian Act virus created the perfect storm for COVID-19 to cause maximum devastation to health,

¹¹¹ *ISC COVID*, *supra* note 1.

¹¹² Adegun & Thompson (2021), *supra* note 93.

¹¹³ Marie Saint-Girons at al, "Equity Concerns in the Context of COVID-19" (July 2020) online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/COVID-19%20Equity%20Research%20Brief.pdf>.

¹¹⁴ *PHAC Vaccines*, *supra* note 1.

¹¹⁵ Blacksmith, *supra* note 3.

¹¹⁶ *ISC COVID*, *supra* note 1.

¹¹⁷ Hill, "COVID-19 Policies" *supra* note 6.

¹¹⁸ Blacksmith, *supra* note 3.

¹¹⁹ *Ibid.* King, "UNDRIP's Flaw", *supra* note 14.

¹²⁰ Blacksmith, *supra* note 3; King, "UNDRIP's Flaw", *supra* note 14.

¹²¹ Hill, "Water Governance", *supra* note 43.

¹²² *Ibid.* Shirley Thompson, Keshab Thapa & Norah Whiteway, "Sacred Harvest, Sacred Place: Mapping Harvesting Sites in Wasagamack First Nation" (2019) 9:1 *J Agriculture Food Systems & Community Development* 1.

¹²³ King, "UNDRIP's Flaw", *supra* note 14.

¹²⁴ Thompson, "Poor Housing", *supra* note 1.

livelihoods, and education to Native communities. The Indian Act and racist policies have undermined Native people's collective and individual well-being and agency.¹²⁵ A shift from colonial Government to Native people's self-governance of Native land and resources is needed. For the human rights of Native people, the removal of the Indian Act land trustee is needed to ensure that Native people have control and benefit from their land and resources. Abolishing the Indian Act is required to heal from the Indian Act virus and rebuild in Native communities after COVID-19.

The Indian Act trustee is the virus that the land back movement seeks to overcome. Longman and colleagues describe the land back movement as land protection, guardianship, and ancient Native knowledge systems validation.¹²⁶ The land back movement is "the demand to rightfully return colonized land – like that in so-called Canada – to Indigenous People. The Native people need the system, such as the land, to be recognized as alive to perpetuate itself and perpetuate us as an extension of itself. That is what we want back: our place in keeping land alive and spiritually connected."¹²⁷ Alex Wilson in Longman et al. state: "When we say 'Land Back,' we are acknowledging and invoking those ancient knowledge systems and calling for a validation of them in our contemporary times."¹²⁸ This Native land is and was all of Canada. With the land-back vaccine against the Indian Act virus, diseases should not cause inequitable outcomes for Native communities. By prioritizing human rights and land protection above the Crown and corporate greed, equitable resource sharing should improve services, infrastructure, and health for all Native and non-Native people on this Native land we call Canada.¹²⁹

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¹²⁵ Jesse Thistle, "Reframing the Discussion: Indigenous Definition of Homelessness in Canada" (25 September 2017) online: *Homeless Hub* <<https://homelesshub.ca/blog/reframing-discussion-indigenous-definition-homelessness>>.

¹²⁶ Nickita Longman et al., "Land-Back is more than the sum of its parts: Letters from the Land Back editorial collective" (10 September 2020) online: *Briar Patch* <briarpatchmagazine.com/articles/view/land-back-is-more-than-the-sum-of-its-parts/>.

¹²⁷ *Ibid.* at para 2.

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¹²⁹ Blacksmith, *supra* note 3.