Nadjiwan
Law Office
Barristers & Solicitors

Patrick M. Nadjiwan, H.B.S.W., LL.B.
Krista M. Yao, B.A. (Econ.), LL.B.

915 Jocko Point Road, RR4
Nipissing First Nation
North Bay, Ontario
P1B 8G5

Ph: (705) 753-9815
Fax: (705) 753-9795
e-mail: mail@nadjiwanlaw.ca

Legal Backgrounder

TO: **Alberta First Nations Information Governance Centre (AFNIGC)**

RE: **Jurisdiction in First Nations Public Health**

DATE: **June 27, 2016**

Jurisdictional Framework

The current jurisdictional framework for First Nations health within Canada is a patchwork of laws, regulations, policies and programs, from multiple jurisdictions. This is a result of all governments (federal, provincial and First Nation) having jurisdiction to legislate in relation to public health.

As a result, we have federal laws such as: the *Food and Drugs Act*, the *Hazardous Products Act*, the *Quarantine Act*, the *Radiation Emitting Devices Act*, the *Public Health Agency Act,* the *Personal Information Privacy and Electronic Documents Act*, the *Health of Animals Act*, etc. At the same time, provinces have enacted laws that deal with areas such as: health and public health; reportable infectious diseases; immunization and schools; drinking water standards; regulated health professions; health privacy, building standards; sale of liquor; social services, etc.. Both Canada and Alberta have also enacted laws in areas such as quarantines, employment health and safety, tobacco, and environmental protection.

The complexity of health regulation is difficult enough with both the federal and provincial governments exercising jurisdiction. When introducing First Nations jurisdiction over health, the issues become more complex. First Nations derive their jurisdiction from two sources. The first source of jurisdiction is First Nations' inherent right of self-government. This inherent right and jurisdiction pre-existed colonial governments and the subsequent confederation of provinces and constitutional division of powers. It is dependent upon no Canadian law for its existence or recognition. Both the Royal Commission on Aboriginal Peoples and the federal government acknowledge that the Aboriginal inherent right of self-government includes jurisdiction over health.[1]

The second source of jurisdiction for First Nations is the *Indian Act* by-law making powers. These provisions of the *Indian Act* are powers or jurisdiction, which is delegated by Canada in the same way that

[1] RCAP, Recommendation 3.3.2; Canada, Federal Policy Guide - Aboriginal Self-Government.

powers are delegated to the territories. Under the *Indian Act*, First Nations may enact by-laws in a number of areas, including but not limited to: "to provide for the health of residents on the reserve" and "to prevent the spreading of contagious and infectious diseases." Until recent *Indian Act* amendments, the Minister of Indian Affairs had the power to veto band by-laws. However, the Minister no longer has that power.

Principle: All three levels of government (First Nations, federal and provincial) have jurisdiction to legislate in relation to public health. Federal and provincial jurisdiction in based upon the division of powers in the Constitution Act, 1867. First Nations jurisdiction is based upon two sources: inherent right and delegated authority under the *Indian Act*.

Jurisdictional Conflicts

Canada has explicitly acknowledged its jurisdiction over public health of First Nations through the *Indian Act*, by giving the Governor in Council regulation-making capacity in relation to a range of health categories in s.73 of the *Indian Act* which includes authority to enact regulations, such as:

> (f) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;
>
> (g) to provide medical treatment and health services for Indians;
>
> (h) to provide compulsory hospitalization and treatment for infectious diseases among Indians;
>
> (i) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;
>
> (k) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves.

Until 1991, the federal government exercised its jurisdiction through the "Indian Health Regulations". Canada revoked the regulations in 1991 and now exercises its authority over First Nations' health exclusively through direct spending and transfer payments, which is achieved through policy rather than legislation.

Since the provincial government has no jurisdiction to legislate specifically and directly in relation to "Indians and Lands reserved for Indians" there is currently no federal or provincial legislation aimed only at First Nations health. However, laws of general application in Alberta will apply to First Nations as a result of s.88 of the *Indian Act* with a number of exceptions.

Provincial legislation will not apply:

- If it is found to unjustly infringe upon an existing Aboriginal or treaty right, or
- If it is inconsistent with any federal legislation, or
- If it is inconsistent with any applicable *Indian Act* by-law, or
- If it attempts to regulate "Indians or Lands reserved for Indians" directly.

Principle: The federal government has chosen to exercise its jurisdiction over First Nations health through its power of spending and transfer payments, rather than through enacting legislation.

Principle: Provincial health legislation of general application may apply to First Nations.

Jurisdictional Gaps

The above principles apply and are of assistance where there is a conflict or inconsistency in legislation enacted by jurisdictions. However, they do not help where gaps exist due to lack of legislation – where one or more governments may have jurisdiction, but either have not enacted legislation (such as in the case of the repealed Indian Health Regulations), or where the legislation does not capture First Nation members, organizations or territory. For example, Alberta's *Municipal Government Act* only deals with municipalities in Alberta, and the *Freedom of Information and Protection of Privacy Act* only deals with provincial government institutions.

Another example is privacy legislation on-reserve. The federal *Personal Information and Electronic Documents Act* (PIPEDA) applies in a limited way to Band Council personnel records and commercial operations, and the Alberta *Health Information Act* (HIA) applies to health professionals operating in First Nation health clinics. This results in a gap in privacy legislation on-reserve, unless the information is personnel records, commercial records or client files. The best way to resolve that gap is for First Nations to enact their own privacy laws.

Principle: The jurisdictional framework for First Nations' health has resulted in gaps where no legislation may exist, or where the legislation does not extend to First Nation members or on-reserve.

Principle: Gaps can be filled with enactment or amendments to existing (federal/provincial) legislation or through the exercise of First Nations' jurisdiction (FN laws).

Exercise of First Nations Jurisdiction

First Nations have authority to enact *Indian Act* by-laws as described above. These by-laws are equivalent to federal regulations and will be paramount to any conflicting provincial legislation. An example of where this has been done is with some First Nations' smoking by-laws, which regulate smoking on the reserve and thereby ousts the jurisdiction of some or all provisions of provincial anti-smoking laws.

First Nations also have jurisdiction, pursuant to their inherent rights, to enact their own First Nation laws, independent of the *Indian Act*. This may also be the source of authority for First Nation privacy laws.

Although unlikely in the area of privacy, these laws may be challenged in court on the basis of the scope or content of the inherent right, by individuals or other jurisdictions (federal or provincial governments) that feel they have been adversely affected by the law.

Krista Yao
Nadjiwan Law Office
krista@nadjiwanlaw.ca