



# QUEBEC FIRST NATIONS HEALTH AND SOCIAL SERVICES GOVERNANCE PROCESS

## **PORTRAIT OF THE RIGHTS, LAWS, POLICIES AND AGREEMENTS CONCERNING HEALTH AND SOCIAL SERVICES FOR THE ABORIGINAL PEOPLES OF CANADA**

Report produced by the First Nations of Quebec and Labrador  
Health and Social Services Commission



FIRST NATIONS OF QUEBEC  
AND LABRADOR HEALTH  
AND SOCIAL SERVICES  
COMMISSION



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This document aims to provide an overall portrait of the health and social services provided to Aboriginal people in Canada. We identify the levels of government having jurisdiction over First Nations and Inuit health. We present the main legal concepts in Aboriginal law and analyze the main provincial laws, policies and agreements concerning health and social services for Aboriginal people. Our specific focus is directed towards Quebec policies and the funding of health care and social services for the Aboriginal communities in Quebec. Next, we identify the main federal laws, policies and agreements concerning the health of Aboriginal people, as well as address the issue of land claim agreements made between the Crown and Aboriginal communities in Canada for purposes of granting these communities powers in the area of health and social services. Lastly, we draw up a portrait of the main claims put forward by Aboriginal peoples concerning health care and social services.

# 1

## DIVISION OF POWERS

The long-term objective of the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) is to implement a health governance model; health is thus the primary jurisdictional issue at stake in this regard. This broad issue encompasses, among other things, pharmacy care; treatment of diseases; management of hospitals and health care centres, addiction centres, etc.

### 1.1 AT THE PROVINCIAL LEVEL

Health comes under provincial jurisdiction according to the following sections of the *Constitution Act, 1867*<sup>1</sup>:

1. “The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals” [sect. 92(7)];
2. “Property and Civil Rights in the Province” [sect. 92(13)]; and
3. “Generally all Matters of a merely local or private Nature in the Province [sect. 92(16)]”<sup>2</sup>

### 1.2 AT THE FEDERAL LEVEL

The jurisdiction of the Canadian Parliament over health is based on several legislative aspects. For example, it may legislate on health in the areas of corrections and criminality (91(27)), as well as in emergency situations according to the introductory paragraph of Section 91 C.A. 1867, which grants the government the power to maintain peace and order. Consequently, this jurisdiction over health formed the basis for the federal government’s adoption of the *Canada Health Act*,<sup>3</sup> the *Department of Health Act*,<sup>4</sup> and the *Controlled Drugs and Substances Act*.<sup>5</sup> Moreover, the jurisdiction of the government over Aboriginal issues allows it to pass laws for the protection and health of Aboriginal communities.<sup>6</sup> Indeed, Section 91 (24) C.A. 1867 gives Parliament exclusive authority

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<sup>1</sup> *The Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

<sup>2</sup> Peter W. HOGG, *Constitutional law of Canada: 5<sup>th</sup> edition supplemented*, Carswell, 2007, p. 32-1 and 32-2. See also *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457 and *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134.

<sup>3</sup> *Canada Health Act*, R.S.C. 1985, c. C-6.

<sup>4</sup> *Department of Health Act*, S.C., 1996, c. 8.

<sup>5</sup> *Controlled Drugs and Substances Act*, S.C., 1996, c. 19.

<sup>6</sup> P.W. HOGG, “Constitutional law of Canada,” see note 2, pp. 32-3. See also *Wuskwik Sipiik Cree Nation v. Canada (Minister of Health and Welfare)*, [1999] A.C.F. no. 82, par. 17.

over “Indians and lands reserved for the Indians,” with such authority also extending to cover Inuit and Métis.<sup>7</sup> Jurisdiction over health may thus be considered as an ancillary jurisdiction to jurisdiction over “Indians and lands reserved for the Indians.” In short, the jurisdiction of Parliament over health care stems either directly from the introductory paragraph of Section 91 and Section 91 (27) or from a jurisdiction ancillary to those areas of jurisdiction specific to the federal government.<sup>8</sup> The federal government’s jurisdiction over health also derives from “federal spending power,”<sup>9</sup> which is defined as “the power of Parliament to make payments to people or institutions or governments for purposes on which it [Parliament] does not necessarily have the power to legislate.”<sup>10</sup> For example, the Canadian government contributes financially to the health insurance programs of the provinces. These programs must meet the requirements of the *Canada Health Act*<sup>11</sup> in order to be eligible for contributions from the Crown.<sup>12</sup> The Government is therefore able to exercise a certain level of control over health through this “federal spending power.”

### 1.3 RESOLUTION OF JURISDICTIONAL CONFLICTS

A law may be applicable constitutionally only if it is valid, enforceable and effective,<sup>13</sup> and the provisions of a law are valid when adopted within the limitations of an assigned responsibility. Thus, with respect to health, a provincial law of general application, i.e., a valid standard that is not specifically aimed at First Nations can apply to “Indians and lands reserved for the Indians,”<sup>14</sup> as long as the law is not inapplicable. A provincial law will be considered inapplicable if it interferes with an area over which the federal government has exclusive core jurisdiction. The jurisdiction of Canada’s Parliament over “Indians and lands reserved for the Indians” is recognized as such by jurisprudence.<sup>15</sup> However, the power of Parliament to legislate in the area of health is not recognized as an “essential element of Indianness” and therefore is not part of the core and exclusive federal jurisdiction over “Indians and lands reserved for the Indians.” The Supreme Court ruled in the *NIL/TU,O* decision that to be a core federal responsibility, an activity must be “so integrally related to what makes Indians and lands reserved for Indians a fundamental federal responsibility [that it becomes] an intrinsic part of the exclusive federal jurisdiction, such that provincial legislative power is excluded.”<sup>16</sup>

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<sup>7</sup> *Re Eskimo*, [1939] R.S.C. 104 and *Canada v. Daniels*, 2014 F.C.A. 101 (Can LII), *Daniels v. Canada*, [2013] F.C.R. 6.

<sup>8</sup> For example, jurisdiction over “Indians and lands reserved for the Indians,” immigration and “criminal law.” See respectively: *Constitution Act of 1867*, *Supra*, note 1, Sect. 91(24), 91(25) and 91(27).

<sup>9</sup> P.W. HOGG, “Constitutional law of Canada,” *Supra*, note 2, pp. 32-4.

<sup>10</sup> Henri. BRUN and Guy TREMBLAY, “Droit constitutionnel,” 4<sup>e</sup> éd., Cowansville, Éditions Yvon Blais, 2002, p. 431.

<sup>11</sup> *Canada Health Act*, *Supra*, note 3.

<sup>12</sup> H. BRUN, “Droit constitutionnel,” *Supra*, note 10, pp. 32-4.1.

<sup>13</sup> Concerning the rules for resolving conflicts of jurisdiction, see the dissenting reasons of Judge Deschamps in *Quebec (Attorney General) v. Lacombe*, [2010] 2 S.C.R. 453.

<sup>14</sup> See, for example, *R. v. Francis*, [1988] 1 S.C.R. 1025 where provincial legislation of general application applies on reserves.

<sup>15</sup> *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] 2 S.C.R. 696, par. 71.

<sup>16</sup> *Idem.*, par. 73.

Accordingly, there is no need here to invoke Section 88 of the *Indian Act* (hereafter IA),<sup>17</sup> which allows the application of a provincial law of general applicability that is normally inapplicable according to the doctrine of exclusive core jurisdiction, since the provisions of such a provincial act apply to Indians only as defined by the IA. It should, however, be noted that Section 88 IA emphasizes the principle of federal paramountcy. This principle ensures that when two valid and applicable standards conflict, the federal standard will prevail over the provincial standard, except in the case of old age pensions.<sup>18</sup> There must thus be a real conflict for federal paramountcy to apply and this conflict must be either an operational conflict or a conflict of objectives.<sup>19</sup> However, Section 88 IA increases the scope of the principle of federal paramountcy. This principle intervenes even in the absence of an actual conflict when a provincial standard refers to “a matter provided” by the *Indian Act* or the *First Nations Fiscal Management Act*.<sup>20</sup> The constitutionality of this process seems doubtful. It is difficult to believe that a court would render inoperative a valid and applicable provincial standard in the absence of an actual conflict. First, it would go against the constitutional principle of cooperative federalism, a principle reiterated by the Supreme Court recently.<sup>21</sup> Moreover, since the Federal Government will not adopt any legislation on “a matter provided” by the *Indian Act*, a court would not rule against a valid provincial legislation of general application that addresses “a matter provided” by the *Indian Act*. This would have the effect of creating a “legal vacuum.”<sup>22</sup>

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<sup>17</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>18</sup> *Constitution Act of 1867*, Supra, note 1, sect. 94A.

<sup>19</sup> *Quebec (Attorney General) v. Lacombe*, Supra, note 13, par. 118-120.

<sup>20</sup> *First Nations Fiscal Management Act*, S.C. 2005, c 9.

<sup>21</sup> See *Quebec (Attorney General) v. Lacombe*, Supra, note 13, par. 118-119; *Canadian Western Bank v. Alberta*[2007] 2 S.C.R. 3, par. 37 and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86.

<sup>22</sup> See *Canadian Western Bank v. Alberta*, Supra, note 21, par. 44.

## 2 ABORIGINAL LAW

In this section, it is important to address some fundamental concepts of Aboriginal law because these are relevant for a better understanding of the different concepts presented in this document. Therefore, we present the two main legal mechanisms of constitutional law that guarantee the rights of Aboriginal communities. These are Aboriginal rights and treaty rights. Since 1982, Section 35 (1) of the *Constitution Act, 1982*,<sup>23</sup> provides that “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” This constitutionalization of Aboriginal rights means that they receive special protection against being amended or repealed at some future time.<sup>24</sup>

### 2.1 ABORIGINAL RIGHTS

According to the Supreme Court in the *Van Der Peet*<sup>25</sup> case, Aboriginal rights arise from the fact that Aboriginal peoples were autonomous and sovereign entities before the arrival of Europeans. Thus, by virtue of their previous “self-government” and control over their territory, Aboriginal peoples possess Aboriginal rights, which are divided into two categories: Aboriginal title and activity rights. In this section, we will limit ourselves to a brief description of the content of these rights, but without addressing the conditions of their existence.

First of all, Aboriginal title is a *sui generis*<sup>26</sup> right and allows a community to have ownership and control of a territorial space. Thus, a community with Aboriginal title will have the rights not just to the land, but also to everything that extends above and below it. This includes mining rights and waterway beds, for example.<sup>27</sup> Moreover, contrary to activity rights, Aboriginal title contains an inherent limitation characterized by the fact that the community holding this right cannot take any action or use the land in any way that is incompatible with the nature of Aboriginal title.<sup>28</sup>

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<sup>23</sup> *Constitution Act, Schedule B of the Canada Act, 1982*, c. 11 (UK).

<sup>24</sup> However, these rights may be restricted in specific circumstances as was determined in the Sparrow Decision [1990] 1 S.C.R. 1075.

<sup>25</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, par. 30.

<sup>26</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, par. 87.

<sup>27</sup> Ghislain Otis, “Le titre aborigène : émergence d’une figure nouvelle et durable du foncier autochtone?” (2005) 46 *C. of D.* 795, p. 838.

<sup>28</sup> *Delgamuukw v. British Columbia* Supra, note 26, par. 111 and 117.

An activity right is by its nature a *sui generis*<sup>29</sup> right. It is a collective and community right to engage in the practice of an activity and this practice may or may not be related to the territory. Finally, in contrast to Aboriginal title, which is more generic, activity rights are more specific and are determined case by case.

## **2.2 TREATY RIGHTS**

Treaty rights stem from treaties established between the Crown and Aboriginal peoples. Like Aboriginal rights, they are *sui generis*<sup>30</sup> rights. We will come back to treaty rights in the section of this document that discusses treaties between Aboriginal peoples and the Crown.

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<sup>29</sup> *Ibid*, par. 87.

<sup>30</sup> *Simon v. The Queen*, [1985] 2 S.C.R. 387, par. 33.

# 3

## PROVINCIAL LAWS, POLICIES AND AGREEMENTS

Several framework agreements in the area of health have been signed by the provincial governments with band councils or Aboriginal associations. These are administrative agreements whose content may cover various aspects such as funding, infrastructure management or increased participation of the Aboriginal communities in health. They are not considered as treaties in terms of Section 35 (1) C.A., 1982. Also, some Aboriginal communities have joined together to manage their own health services.

Following is a brief description of these agreements and policies affecting Aboriginal people and of the related Aboriginal associations in the various Canadian provinces. With regard to provincial policies, our particular focus will be on the ones in Quebec.

### 3.1 ONTARIO

The establishment in 1994 of the *Aboriginal Healing and Wellness Strategy*<sup>31</sup> provided a provincial program that aims to improve care and access to social services for Aboriginal people living on or off-reserve. In 2010, the Ontario government made some changes to this policy by giving more power to Aboriginal peoples, including supervisory and decision-making power. This program encourages Aboriginal participation in the area of health.

### 3.2 SASKATCHEWAN

Similarly, the *Saskatchewan Northern Health Strategy* is an agreement intended to improve health care for First Nations, Métis and all other people residing in the northern part of the province.<sup>32</sup> Its objective, among other things, is to promote Aboriginal participation in health care.

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<sup>31</sup> GOVERNMENT OF ONTARIO, MINISTRY OF COMMUNITY AND SOCIAL SERVICES: [http://www.mcass.gov.on.ca/en/mcass-programs/community/ahws/goal\\_strategy.aspx](http://www.mcass.gov.on.ca/en/mcass-programs/community/ahws/goal_strategy.aspx) (consulted on March 22, 2014).

<sup>32</sup> GOVERNMENT OF SASKATCHEWAN, *Northern Health Strategy*: <http://www.health.gov.sk.ca/adx/asp/adxGetMedia.aspx?DocID=3af72c54-b79a-4d43-9fff-2a5399d03cf9&MediaID=4159&Filename=Northern+Health+Strategy.pdf&L=English> (consulted on March 22, 2014).

In addition, an association of several Aboriginal communities and tribal councils in Saskatchewan – the *Northern Inter-Tribal Health Authority Inc.*<sup>33</sup> – aims to promote First Nations’ involvement in health care and to manage, among other things, health services along with services concerning infectious diseases protection and prevention.

Lastly, we note the *Athabasca Health Authority*,<sup>34</sup> which is an organization funded by the Saskatchewan government and the federal government. Its operations are integrated into the Saskatchewan health system and it has the mandate to provide and manage health care for five communities in the north of the province.<sup>35</sup>

### 3.3 MANITOBA

In Manitoba, the *Manitoba Inter-Governmental Committee on First Nations Health*<sup>36</sup> is an organization whose mandate is to work towards improving health services for First Nations in the province. This association is composed of members of First Nations communities along with provincial and federal representatives.<sup>37</sup>

The *First Nations Health & Social Secretariat of Manitoba*<sup>38</sup> is an association responsible for negotiating with the provincial and federal governments in order to involve the Manitoba First Nations in the management of health and social services and to obtain greater powers for them in this area.

### 3.4 QUEBEC

In Quebec, the Aboriginal Peoples covered the *James Bay and Northern Quebec Agreement* and the *Northeastern Quebec Agreement* have access to healthcare facilities funded by the federal and provincial governments.<sup>39</sup> Therefore, apart from the Cree, Inuit and Naskapi, no other Aboriginal Nation of Quebec is governed by a treaty. We shall look in greater detail at these agreements’ provisions in the section on modern treaties.

The Quebec government has established three administrative Aboriginal categories: First Nations living in communities not under agreement, First Nations living in communities under agreement, and First Nations living outside the communities.

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<sup>33</sup> NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC.: [http://nithacom.sasktelwebhosting.com/index.php?option=com\\_content&view=Article&id=45&Itemid=58](http://nithacom.sasktelwebhosting.com/index.php?option=com_content&view=Article&id=45&Itemid=58) (consulted on March 22, 2014).

<sup>34</sup> ATHABASCA HEALTH AUTHORITY: <http://www.athabascahealth.ca/home.html> (consulted on March 22, 2014).

<sup>35</sup> The communities bordering Lake Athabasca: Black Lake, Fond du Lac, Stony Rapids, Uranium City and Camsell Portage.

<sup>36</sup> ASSEMBLY OF MANITOBA CHIEFS, *Intergovernmental Committee on Manitoba First Nation Health*: [http://amc.manitobachiefs.com/index.php?option=com\\_content&view=Article&id=136&Itemid=123](http://amc.manitobachiefs.com/index.php?option=com_content&view=Article&id=136&Itemid=123) (consulted on May 2, 2014).

<sup>37</sup> NATIONAL COLLABORATING CENTRE FOR ABORIGINAL HEALTH, *Looking for Aboriginal Health in Legislation and Policies, 1970-2008. The Policy Synthesis Project*, 2011, pp. 7-8: <http://www.nccah-ccnsa.ca/docs/Looking%20for%20Aboriginal%20Health%20in%20Legislation%20and%20Policies%20-%20June%202011.pdf> (consulted on March 22, 2014).

<sup>38</sup> FIRST NATIONS HEALTH AND SOCIAL SECRETARIAT OF MANITOBA: <http://fnhssm.com/>.

<sup>39</sup> NATIONAL COLLABORATING CENTRE FOR ABORIGINAL HEALTH, *Supra*, note 37, p. 35.

### 3.4.1

#### First Nations living in communities not under agreement

This category applies to Aboriginal people who have Indian status according to the *Indian Act*<sup>40</sup> and live on reserve land. For this First Nations group, health and social services are under the responsibility of the federal government by virtue of, among other things<sup>41</sup>, its jurisdiction over “Indians and lands reserved for the Indians.” It is thus the First Nations and Inuit Health Branch (FNIHB) that is responsible for health services. However, the medical care covered by the *Régie de l’assurance maladie du Québec* comes under the jurisdiction of the provincial government.<sup>42</sup> The health services offered in the health centres on the reserves are primary care services (vaccination, maternal health, child health, mental health, substance abuse prevention, etc.). First Nations living on reserves also benefit from the *Non-Insured Health Benefits Program*.<sup>43</sup> Long-term care services in cases requiring hospitalization are provided by the Québec hospital system.<sup>44</sup> Moreover, First Nations living on reserves are governed by provincial law dealing with public health. The provincial system accordingly provides services related to the prevention and control of infectious diseases.<sup>45</sup>

As for social services, the federal department of Indigenous and Northern Affairs Canada (INAC) is responsible for implementing programs and policies intended for Aboriginal peoples residing on reserves.<sup>46</sup> Social services intended for Aboriginal youths are provided by the provincial youth centres,<sup>47</sup> with costs billed to INAC.

The following passage aptly summarizes the federal government’s responsibilities for the funding of transport by ambulance:

“However, regardless of the type of agreement, Health Canada shall only pay an ambulance as a payer of last resort, that is to say, for cases that are covered neither by Québec, under its policies, or by private insurers. Aboriginal people involved in road accidents are covered by the *Société de l’assurance automobile du Québec*, while those involved in work accidents are covered by the Occupational

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<sup>40</sup> An Inuk may benefit from related federal health or social services when he/she is “an Inuk recognized by one of the Inuit Land Claim organizations.” See HEALTH CANADA, *First Nations and Inuit Health: Benefits Information*: <http://www.hc-sc.gc.ca/fniab-spnia/nihb-ssna/benefit-prestation/index-eng.php> (consulted on March 22, 2014).

<sup>41</sup> *Constitution Act of 1867*, Supra, note 1, Sect. 91 (24).

<sup>42</sup> GOVERNMENT OF QUEBEC, *Delivery and Funding of Health Services and Social Services for Aboriginal People (First Nations and Inuit)*, Québec, 2007, p. 7: <http://publications.msss.gouv.qc.ca/msss/fichiers/2007/07-725-02A.pdf> (consulted on March 22, 2014).

<sup>43</sup> See *Infra*, p. 17 of the present document for a description of the *Non-Insured Health Benefits Program*.

<sup>44</sup> GOVERNMENT OF QUEBEC, *Delivery and Funding of Health Services and Social Services for Aboriginal People (First Nations and Inuit)*, Supra, note 42, p. 8.

<sup>45</sup> *Ibid*, p. 15.

<sup>46</sup> GOVERNMENT OF CANADA, *Indigenous and Northern Affairs Canada, National Social Programs Manual*, Ottawa, 2012: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-HB/STAGING/texte-text/hb\\_sp\\_npm\\_mnp\\_1335464147597\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-HB/STAGING/texte-text/hb_sp_npm_mnp_1335464147597_eng.pdf) (consulted on March 22, 2014).

<sup>47</sup> GOVERNMENT OF QUEBEC, *Delivery and Funding of Health Services and Social Services for Aboriginal People (First Nations and Inuit)*, Supra, note 42, p. 10. *Youth Protection Act*, R.S.Q., c. P-34.1, Sect. 37.5.

Health and Safety Commission. For a transfer between health institutions in the Quebec network, the cost for transportation is then paid by the establishments. For Aboriginal people aged 65 and over who reside outside the community, transportation is also paid by the Quebec network of health facilities. Finally, it is the *Ministère de l'Emploi et de la Solidarité sociale* that pays for the cost of ambulance transportation for Aboriginal peoples living outside the community and receiving allowances under the Employment Assistance program.”<sup>48</sup>

By virtue of the federal policy<sup>49</sup> encouraging the transfer of health and social services management from the federal level to the band councils or tribal councils, many communities have a certain level of “autonomy” in these areas. These transfer agreements between Aboriginal communities and the federal government (INAC or FNIHB) provide for the granting of two types of funding to band councils or tribal councils, i.e., flexible transfer payments consisting of lump sums and contribution payments to reimburse actual expenditures incurred by them.<sup>50</sup> Costs of social services provided to Aboriginal youths by provincial youth centres are to be directly billed to the band councils, not to INAC.<sup>51</sup>

The Mohawk reserve of Kahnawake is an exception to the principle of federal funding for health care on reserves. In this case, the provincial government funds the Kateri hospital located on the Mohawk reserve. The administration and operation of this institution is the responsibility of the members of this Aboriginal community.<sup>52</sup>

### **3.4.2 First Nations living in communities under agreement**

This section refers to the communities of the Cree and Inuit communities governed by the James Bay and Northern Quebec Agreement and the Naskapi communities governed by the Northeastern Quebec Agreement. Health and social services for these nations are largely funded by the Quebec government, which must also ensure that they benefit from a program similar to the Federal government’s *Non-Insured Health Benefits Program*.<sup>53</sup> We will come back to these agreements in the section on modern treaties.

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<sup>48</sup> GOVERNMENT OF QUEBEC, *Delivery and Funding of Health Services and Social Services for Aboriginal People (First Nations and Inuit)*, Supra, note 42, p. 14.

<sup>49</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH: [http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/poli\\_1979-eng.php](http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/poli_1979-eng.php) (consulted on March 22, 2014).

<sup>50</sup> GOVERNMENT OF QUEBEC, *Delivery and Funding of Health Services and Social Services for Aboriginal People (First Nations and Inuit)*, Supra., note 42, p. 9.

<sup>51</sup> Ibid, p. 10.

<sup>52</sup> Ibid, p. 7.

<sup>53</sup> Ibid, p. 11. See *Infra*, section 6.2 in this document concerning the provisions in the JBNQA concerning health and social services.

### **3.4.3 First Nations living outside the communities**

Registered Indians and recognized Inuit living outside their communities benefit from the same health and social services as the entire population of the province. Besides enjoying the services of the provincial health system, they participate in all federal benefits related to the *Non-Insured Health Benefits Program*.<sup>54</sup> The fact of living on a reserve or not is thus not a relevant factor concerning eligibility for the Canadian program.

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<sup>54</sup> HEALTH CANADA, *First Nations and Inuit Health: Information on Benefits*, Supra, note 40.

## 4 FEDERAL LAWS, POLICIES AND AGREEMENTS

The Canadian Parliament exercises its jurisdiction over health and social services in respect to “Indians and lands reserved for the Indians” via the *Indian Act*<sup>55</sup> in particular and via other pieces of legislation and regulations. The exercise of that jurisdiction may also coincide with the implementation of a treaty. This section thus focuses on the key federal legislation, policies and agreements in the area of Aboriginal health care.

### 4.1 INDIAN ACT

Under Section 73(1) of the *Indian Act*, the Governor in Council may adopt regulations concerning the reserves with respect to “infectious or contagious diseases,”<sup>56</sup> “medical treatment and health services for Indians,”<sup>57</sup> and “hospitalization and treatment for infectious diseases among Indians.”<sup>58</sup> In addition, the IA allows band councils to adopt measures to “provide for the health of residents on the reserve.”<sup>59</sup> These regulations passed by Parliament stem from the only sections of the IA dealing with health and apply only to Indians as defined under the *Indian Act*.

### 4.2 FEDERAL POLICY ON THE IMPLEMENTATION OF THE INHERENT RIGHT OF ABORIGINAL PEOPLES TO SELF-GOVERNMENT

The jurisprudence does not just recognize a broad and general right of Aboriginal people to self-government. This right is exercised in a more restricted context. The right of Aboriginal peoples to self-government follows a path different from the right to self-determination provided for in the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>60</sup>

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<sup>55</sup> *Indian Act*, *Supra*, note 17.

<sup>56</sup> *Idem*, 73(1) f).

<sup>57</sup> *Idem*, 73(1) g).

<sup>58</sup> *Idem*, 73(1) h).

<sup>59</sup> *Idem*, 81(1) a).

<sup>60</sup> UNITED NATIONS GENERAL ASSEMBLY, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 107<sup>th</sup>, plenary session, September 13, 2007, Art. 3. “Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.” See also Frédéric DESMARAIS, “Le consentement préalable, libre et éclairé des peuples autochtones en droit international : la nécessaire redéfinition de son cadre conceptuel,” (2006) 19 *R.Q.D.I.* no 1, 161-210, par. 99-102 and Guyanne COURCHESNE, “Interprétation excessive ou crainte fondée: pourquoi le gouvernement canadien rejette la Déclaration des Nations Unies sur les droits des peuples autochtones,” (2010) 40 *R.G.D.* 97-144, par. 54-62.

In Canada, the right to self-government can be claimed by an Aboriginal nation as constituting an Aboriginal right<sup>61</sup> under Section 35 (1) of the *Constitution Act, 1982*, and recognized as such by a court of law.<sup>62</sup> The right to self-government may also be the result of agreements negotiated between different levels of government and Aboriginal people. These agreements can take the form of modern treaties and the rights stemming from these treaties can be protected by Section 35 (1) C.A. 1982. The federal government has therefore established a policy to guide the implementation of the right to self-government.

In 1995, the Canadian government put forward its *Inherent Right of Self-Government Policy*,<sup>63</sup> which recognized Aboriginal peoples' right to self-government within the meaning of Section 35 (1) C.A. 1982. This policy allowed certain Aboriginal groups to negotiate self-government agreements granting them numerous powers, notably the power to form a self-governing Aboriginal government able to legislate in many areas, negotiate financial arrangements and provide programs and services to members of the signatory community.<sup>64</sup> For the Canadian government, the right to self-government is not seen as the right of access to sovereignty, and the exercise of this right does not allow the creation of independent and sovereign nation-states under international law.<sup>65</sup>

The power of Aboriginal nations "to legislate," a power which can be found in the provisions of most agreements on self-government, thus enables an Aboriginal community to establish laws and programs dealing with, for example, health and social services.<sup>66</sup>

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<sup>61</sup> See *R. v. Pamajewon*, [1996] 2 S.C.R. 821. In this case, the court established an activity-right to self-government. The Ojibwa community (the applicant) claimed that Section 35 (1) SC 1982 included the inherent right to self-government and the right to legislate and regulate certain activities. The court, however, refused to comment on the right to self-government as such and circumscribed rather a broad right to manage the affairs of the Objiwa Reserve within a right of participation and regulation of gambling (in paragraph 27 of the judgment).

<sup>62</sup> *Constitutional Act, 1982*, *Supra*, note 23.

<sup>63</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *General Briefing Note on Canada's Self-Government and Comprehensive Land Claims Policies and the Status of Negotiations*: <http://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540> (consulted on April 30, 2014).

<sup>64</sup> *Ibid.*

<sup>65</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*: <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> (consulted on April 30, 2014).

<sup>66</sup> See *Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation*, 2003, Sect. 191a): <https://www.aadnc-aandc.gc.ca/eng/1100100031766/1100100031768> (consulted on March 22, 2014). This agreement does not give legislative autonomy in the field of health care or social services as is the case for most agreements on self-government. However, it gives power to the Westbank First Nation to regulate the practice of traditional medicine on the territory of the Westbank. The agreement provides that the nation has the ability to enter into agreements with the federal or the provincial government for the provision of health and social services (Sect. 194). See also *Sioux Valley Dakota Nation Governance Act*, Sect. 19.01: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/sioux\\_valley\\_dakota\\_governance\\_agree\\_1385740747357\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/sioux_valley_dakota_governance_agree_1385740747357_eng.pdf) (consulted on May 8, 2014), *The Sioux Valley Dakota Nation Governance Act*, S.C. 2014, v. 1. The Sioux Valley agreement is the first self-government agreement that was made in the Prairies.

### 4.3 FIRST NATIONS AND INUIT HEALTH BRANCH

Formerly the purview of Indian and Northern Affairs Canada, Aboriginal health care has been a Health Canada mandate since 1945.<sup>67</sup> It is therefore Health Canada, through the First Nations and Inuit Health Branch (FNIHB), which is responsible for the health of the First Nations (status Indians) and Inuit of Canada by supporting public health and health promotion services provided in the communities and by providing drug, dental and ancillary health services to First Nations and Inuit regardless of residence.<sup>68</sup>

The primary mandates of the FNIHB are thus to ensure the availability of health services for First Nations and Inuit individuals, which includes assisting them in overcoming obstacles related to health, thereby helping them to achieve levels of health comparable to those of other Canadians. Another mandate involves building strong partnerships to improve the health system.<sup>69</sup>

The FNIHB programs are administered by five directorates, which are in turn composed of different divisions. The *Business Planning and Management Directorate* is responsible for developing operational policies and funding arrangements, infrastructures and national accountability frameworks. This directorate is also responsible for developing capacities in business planning and management.<sup>70</sup> The role of the *Strategic Policy, Planning and Analysis Directorate* is to provide strategic policy and planning advice to senior management and regional offices of the FNIHB.<sup>71</sup> The *Community Programs Directorate* aims to improve the health of First Nations and Inuit by promoting health and preventing disease.<sup>72</sup> The *Primary Health Care and Public Health Directorate* is responsible for primary health care delivery in partnership with First Nations and Inuit.<sup>73</sup> The fifth directorate, the *Non-Insured Health Benefits Directorate*, is responsible for managing the program that bears the same name.<sup>74</sup>

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<sup>67</sup> NATIONAL COLLABORATING CENTRE FOR ABORIGINAL HEALTH, *Supra*, note 37 , p. 26.

<sup>68</sup> HEALTH CANADA, *First Nations and Inuit Health Branch*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/index-eng.php> (consulted on March 22, 2014).

<sup>69</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Mandates, plans and priorities*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/mandat-eng.php> (consulted on March 22, 2014).

<sup>70</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Business Planning and Management Directorate*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/bpmd-dpga/index-eng.php> (consulted on March 22, 2014).

<sup>71</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Strategic Policy, Planning and Analysis Directorate*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/sppad-dppas/index-eng.php> (consulted on March 22, 2014).

<sup>72</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Community Programs Directorate*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/cpd-dpc/index-fra.php> (consulted on March 22, 2014).

<sup>73</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Primary Health Care and Public Health Directorate*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/phcphd-dsspsp/index-eng.php> (consulted on March 22, 2014).

<sup>74</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Non-Insured Health Benefits Directorate*: <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/nihbd-dssna/index-fra.php> (consulted on March 22, 2014).

Health Canada's *Non-Insured Health Benefits Program* is the only health measure of the federal government that applies to all status Indians and all Inuit, regardless of whether they live on or off-reserve. This program allows Aboriginal peoples who do not have insurance and are not covered by provincial and territorial policies to receive funding of certain benefits requested for prescription drugs, dental care, vision care, medical supplies and equipment, crisis intervention in mental health, and medical transportation.<sup>75</sup>

The two main federal policies on Aboriginal health are the 1979 *Indian Health Policy* and the *Indian Health Transfer Policy*.<sup>76</sup> The 1979 policy's goal in improving health was "to achieve an increasing level of health in Indian communities, generated and maintained by the Indian communities themselves." It provided that Aboriginal communities could at any time take over the administration of their own "community health"<sup>77</sup> programs. Several reports were produced following the publication of the 1979 policy including, in particular, the Berger report (1980) and the Penner report (1983). Berger recommended greater participation of Aboriginal communities in managing health services while Penner favoured greater Aboriginal autonomy in the management of health services.<sup>78</sup>

It is within this context of autonomy<sup>79</sup> in health services management that the *Indian Health Transfer Policy* emerged. That policy set out a framework to transfer health services to First Nations' control as well as a gradual approach inspired by the principle of self-determination in the health sector, with the conditions for transfer negotiated case by case between Health Canada and the community.<sup>80</sup> Communities that requested a transfer<sup>81</sup> of health programs and services in accordance with the 1989 policy are given funding by the FNIHB. This support aims to "cover the planning, capacity development

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<sup>75</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Non-Insured Health Benefits for First Nations and Inuit*: <http://www.hc-sc.gc.ca/fniah-spnia/nihb-ssna/index-eng.php> (consulted on March 22, 2014).

<sup>76</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *1979 Indian Health Policy*: [http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/poli\\_1979-eng.php](http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/poli_1979-eng.php) (consulted on March 22, 2014).

<sup>77</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Ten Years of Health Transfer First Nation and Inuit Control*: [http://www.hc-sc.gc.ca/fniah-spnia/pubs/finance/\\_agree-accord/10\\_years\\_ans\\_trans/index-eng.php#a2](http://www.hc-sc.gc.ca/fniah-spnia/pubs/finance/_agree-accord/10_years_ans_trans/index-eng.php#a2) (consulted on March 22, 2014).

<sup>78</sup> *Ibid.*

<sup>79</sup> In 1986, the federal government adopted the *Sechelt Indian Band Self-Government Act*, SC 1986, c. 27. Following an agreement on self-government between the Canadian government, the British Columbia government and the Sechelt First Nation, the Aboriginal community obtained the power to manage, among other things, its own health services.

<sup>80</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Ten Years of Transferring Control of Health Programs to First Nations and Inuit Communities*, *Supra*, note 77. FNIHB has also developed three handbooks for Aboriginal communities on the process and the different phases of the transfer of health services. See for example, HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Transferring Control of Health Programs to First Nations and Inuit Communities: Handbook 2 - The Health Services Transfer*: [http://www.hc-sc.gc.ca/fniah-spnia/pubs/finance/\\_agree-accord/2004\\_trans\\_handbook-guide\\_2/index-eng.php](http://www.hc-sc.gc.ca/fniah-spnia/pubs/finance/_agree-accord/2004_trans_handbook-guide_2/index-eng.php) (consulted on April 30, 2014).

<sup>81</sup> According to FNIHB statistics from 1999, 244 Aboriginal communities signed agreements on the transfer of health services. This number increased to 349 communities in 2003.

and launching costs associated with the transfer of health services and the integration of community health services,<sup>82</sup> but is also useful during the implementation phase allowing the community to manage its own programs.

A few years later, in 1995, the federal government guaranteed greater autonomy in health services for Aboriginal communities with the development of its *Inherent Right of Self-Government Policy*.<sup>83</sup> Self-government was thus now seen as an additional approach used by Aboriginal groups to benefit from the transfer of health programs.<sup>84</sup> These transfer agreements for health services between communities and Health Canada (FNIHB) appear to be only administrative in nature, contrary to self-government agreements, which require an implementation law to be effective. In addition, health service transfer agreements do not appear to preclude application of the *Indian Act*,<sup>85</sup> contrary to the case of most self-government agreements.<sup>86</sup> Thus, with respect to health services transfer agreements, the federal government retains its regulatory power concerning health, as conferred under Section 73 (1) IA.<sup>87</sup>

Lastly, the *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>88</sup> which was ratified by Canada in 2010, provides that Aboriginal peoples have the right to improve their situation in the area of health<sup>89</sup> and “[that] they have the right to be actively involved in the development and definition of health programs [...] and as far as possible, to administer such programs through their own institutions.”<sup>90</sup>

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<sup>82</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Ten Years of Health Transfer First Nation and Inuit Control*, Supra, note 77.

<sup>83</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *General Briefing Note on Canada’s Self-Government and Comprehensive Land Claims Policies and the Status of Negotiations*, Supra, note 63.

<sup>84</sup> HEALTH CANADA, FIRST NATIONS AND INUIT HEALTH BRANCH, *Ten Years of Health Transfer First Nation and Inuit Control*, Supra, note 77.

<sup>85</sup> *Indian Act*, Supra, note 17.

<sup>86</sup> See for example, *Kluane First Nation Self-Government Agreement*, 2003, Sect. 3.5: <https://www.aadnc-aandc.gc.ca/eng/1100100030696/1100100030698> (consulted on April 30, 2014), *The Carcross/Tagish First Nation Self-Government Agreement*, 2005, Sect. 3.5: <https://www.aadnc-aandc.gc.ca/eng/1100100030664/1100100030681> (consulted on April 30, 2014).

<sup>87</sup> See p. 14 of the present document regarding *The Indian Act*.

<sup>88</sup> UNITED NATIONS GENERAL ASSEMBLY, Supra, note 60.

<sup>89</sup> *Ibid.*, Sect. 21(1).

<sup>90</sup> *Ibid.*, Sect. 23.

## 5 TRIPARTITE AGREEMENTS

The following section focuses on certain tripartite agreements, i.e., agreements between an Aboriginal association, the provincial governments and the federal government.

### 5.1 BRITISH COLUMBIA

In this province, Aboriginal communities have negotiated a tripartite agreement with the provincial and federal governments entitled the *British Columbia Tripartite Framework Agreement on First Nation Health Governance*.<sup>91</sup> Its objective is to provide a healthy governance structure for the transfer of certain powers of Health Canada and the provincial government to band councils. Among other things, it provides for the transfer of “program management and delivery of services.”<sup>92</sup> The agreement also includes a section on funding by the Canadian government and the government of British Columbia allowing the Aboriginal system responsible for health to “implement the provisions outlined in the Framework Agreement.”<sup>93</sup>

### 5.2 SASKATCHEWAN

A tripartite agreement was reached between the Federation of Saskatchewan Indian Nations and the various levels of government. The goal of this administrative agreement, dating from 2008, entitled *Memorandum of Understanding on First Nations Health and Well-Being in Saskatchewan*<sup>94</sup> is to close the “the gap in health status between First Nations members and other residents of Saskatchewan” by promoting Aboriginal participation in the health system.

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<sup>91</sup> *British Columbia Tripartite Framework Agreement on First Nation Health Governance*, 2011: <http://www.hc-sc.gc.ca/fniah-spnia/pubs/services/tripartite/framework-accord-cadre-eng.php> (consulted on March 24, 2014). According to the preamble of the *British Columbia Tripartite Framework Agreement on First Nations Health Governance*, this agreement is inspired by a number of principles from earlier tripartite agreements between the Canadian government, the government of British Columbia and the First Nations in the province. Among these agreements are the *Tripartite First Nations Health Plan* (2007) and the *British Columbia Tripartite First Nations Health - Basis for a Framework Agreement on Health Governance* (2010).

<sup>92</sup> *Ibid.*

<sup>93</sup> HEALTH CANADA, B.C. *Tripartite Health Transfer*: [http://news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVL=11&mthd=advSrch&crtr.dpt1D=6676&nid=943499&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVL=2011&crtr.kw=&crtr.dyStrtVL=7&crtr.aud1D=&crtr.mnthStrtVL=9&crtr.page=1&crtr.yrndVL=2013&crtr.dyndVL=5&\\_ga=1.97453279.1348443693.1446754911](http://news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVL=11&mthd=advSrch&crtr.dpt1D=6676&nid=943499&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVL=2011&crtr.kw=&crtr.dyStrtVL=7&crtr.aud1D=&crtr.mnthStrtVL=9&crtr.page=1&crtr.yrndVL=2013&crtr.dyndVL=5&_ga=1.97453279.1348443693.1446754911).

<sup>94</sup> HEALTH CANADA, *Memorandum of Understanding on First Nations Health and Well-Being in Saskatchewan*, 2008: <http://www.hc-sc.gc.ca/fniah-spnia/pubs/services/2008-sask-mou-pde/index-eng.php> (consulted on May 2, 2014).

In 2009, another tripartite agreement, the Interim Agreement on the Implementation of Jordan's Principle,<sup>95</sup> was also concluded. This agreement provides that "all parties are committing to work together to develop a child-first approach, ensuring the health and well-being of First Nation children with multiple disabilities in Saskatchewan take priority over questions of jurisdiction and responsibility of payment for services and health care."<sup>96</sup>

### **5.3 NOVA SCOTIA**

*Providing Health Care, Achieving Health - Mi'kmaq* is a 2005 agreement between the federal government, the Nova Scotia government and the Mi'kmaq communities in the province.<sup>97</sup> The agreement focuses on improving health care in these communities, the management of health services and Aboriginal participation in health issues.

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<sup>95</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *Canada, Saskatchewan, and the Federation of Saskatchewan Indian Nations Endorse Interim Agreement to Implement Jordan's Principle*: <http://news.gc.ca/web/article-en.do?m=/index&nid=482949>.

<sup>96</sup> *Ibid.*

<sup>97</sup> HEALTH WORKING COMMITTEE, *Exploring Health Priorities in First Nation Communities in Nova Scotia*, 2008: <http://www.tripartiteforum.com/files/health/2TFReportLow.pdf> (consulted on March 22, 2014).

# 6

## TREATIES BETWEEN ABORIGINAL PEOPLES AND THE CROWN

Some agreements between an Aboriginal people and the Crown contain treaty rights for the Aboriginal signatory that are constitutionally protected by Section 35(1) L.C. This means that treaty rights, due to their inclusion in the Constitution, can be modified or repealed only by a special procedure under the *Constitution Act, 1982*, as set out in part V. However, these rights can be restricted in special circumstances as was the case in the Sparrow Decision.<sup>98</sup> In its ruling on the Sioui case, the Supreme Court gave the following definition of a treaty: “What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”<sup>99</sup> In keeping with the division of jurisdictional powers, it is the Federal Crown that has jurisdiction over the signing of treaties with Aboriginal leaders pursuant to the federal jurisdiction over “Indians and lands reserved for the Indians.” Accordingly, we see a broad diversity of treaties that grant various rights and obligations, and whose different characteristics depend on when they were concluded. Thus, there are two types of treaties in Aboriginal law: historical treaties and modern treaties. A good number of these treaties have clauses dealing with health; they are discussed in the following section.

### 6.1 HISTORICAL TREATIES

Historical treaties are the result of agreements between Aboriginal peoples and Europeans. This category is itself divided into three sub-categories: Peace and Friendship Treaties, Pre-Confederation Treaties and Numbered Treaties. The first sub-category includes military and commercial alliances reached between 1725 and 1779. The second one covers agreements concluded between 1701 and 1862, which contain partial cession of Aboriginal title. Lastly, the third sub-category includes eleven treaties concluded between 1871 and 1921, which contain full cession of Aboriginal title.<sup>100</sup>

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<sup>98</sup> *R. v. Sparrow*, *Supra*, note 24.

<sup>99</sup> *R. v. Sioui*, [1990] 1 S.C.R. 1025, p. 1044.

<sup>100</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *Summaries of Pre-1975 Treaties*: <https://www.aadnc-aandc.gc.ca/eng/1370362690208/1370362747827> (consulted on May 5, 2014). We must include the Williams Treaties (1923), which cover territories connecting the Ottawa River and Lake Ontario, with the numbered treaties, since they also provided for the full assignment of all Aboriginal rights on the territories in question.

The only historical treaty that contains provisions pertaining to health care is Treaty No. 6, concluded by the Crown with the Cree and Assiniboine peoples in 1876.<sup>101</sup> This treaty stated, among other things, that the federal government had to provide the involved communities with “medicine chests”<sup>102</sup> to protect them from infectious diseases. The text in this treaty establishes the role of the Federal Crown as protector of Aboriginal health through the following passage: “In the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.”<sup>103</sup> However, this is not what the Saskatchewan Court of Appeal concluded in 1966 in the Johnston case.<sup>104</sup> In this ruling, Judge Culliton interpreted the treaty’s provisions literally and did not see in them an obligation for the Federal Government to provide health care services to signatory communities.<sup>105</sup> But this method of interpreting historical treaties does not reflect the principles established by recent jurisprudence. The perspective of Aboriginal peoples and oral evidence must be considered,<sup>106</sup> and a broader interpretation of the treaty’s provisions is to be favoured.

## 6.2 MODERN TREATIES

Modern treaties are agreements on comprehensive land claims between an Aboriginal people and the Crown. *The Comprehensive Land Claims Policy*<sup>107</sup> of 1973 is a policy that has constantly been modified, and which represents, in its recent form, the current policy of the federal government with respect to comprehensive land claims.<sup>108</sup> Comprehensive claims are an administrative sub-category established by the federal government that must be distinguished from the sub-category of specific claims. Comprehensive claims are based on Aboriginal rights, while specific claims are based on non-compliance with historical treaties as well as on the *Indian Act*. From a legal perspective, this categorization is not effective.

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<sup>101</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*: <http://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783> (consulted on March 22, 2014). Treaty No. 6 covers a large territory that includes parts of current-day Saskatchewan and Alberta.

<sup>102</sup> “That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.” Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> *R. v. Johnston*, [1966] 56 D.L.R. (2d) 749.

<sup>105</sup> Ibid, p. 753.

<sup>106</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, par. 41.

<sup>107</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *General Briefing Note on Canada’s Self-government and Comprehensive Land Claims Policies and the Status of Negotiations*, *Supra*, note 63.

<sup>108</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *Land Claims*: <https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289> (consulted on May 5, 2014).

Agreements on comprehensive land claims (or modern treaties) allow for the establishment of a specific legal regime concerning, for example, resources management, land development and the administration of the land in question. The means used to implement these treaties differ from one to the other, but these treaties generally include recognition of Aboriginal communities' land rights. The land claim negotiation process is also an alternative to the courts for an Aboriginal people seeking the recognition of its Aboriginal rights. The first modern treaty in Canada, the *James Bay and Northern Quebec Agreement* (JBNQA), was concluded in 1975 between the Cree and Inuit peoples of Quebec, the Quebec Government and the Federal Crown.<sup>109</sup> Several comprehensive land claim agreements followed in various Canadian provinces and territories.<sup>110</sup> In this way, the negotiation of such agreements throughout Canada gave birth to several different arrangements in the area of health care and services.

It is important to specify that a modern treaty may not modify the division of powers set out in Sections 91 and 92 of the *Constitution Act, 1987*. Therefore, following the conclusion of a comprehensive land claim agreement, no modifications to the division of powers are permitted under that agreement, nor is any delegation of power from one level of government to another authorized.<sup>111</sup>

Further to the benefits related to land and natural resources, modern treaties also include provisions concerning self-government by the Aboriginal signatories. Therefore, depending on the Aboriginal claims, clauses referring to self-government may allow communities to “legislate” in the area of health care.

## **6.2.1 Yukon**

### ***Umbrella Final Agreement between the Government of Canada, the Council for Yukon First Nations and the Government of the Yukon (1993)***

The Umbrella Agreement<sup>112</sup> defines the specific terms and provisions of agreements negotiated between the federal government, the Yukon government and each of the Aboriginal communities in Yukon. For the negotiation and signing of the Umbrella Agreement, these communities were represented by the Council for Yukon Indians. The agreement does not include a specific chapter on health, but includes provisions

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<sup>109</sup> See the *James Bay and Northern Quebec Agreement and Complementary Agreements, 1975*: [http://www.collectionscanada.gc.ca/webarchives/2007115104340/http://www.ainc-inac.gc.ca/pr/agr/que/jbnq\\_f.html](http://www.collectionscanada.gc.ca/webarchives/2007115104340/http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_f.html) (consulted on March 22, 2014).

<sup>110</sup> Usually, such agreements are reached in provinces and territories that have not been subject to the different legal regimes specific to historical treaties.

<sup>111</sup> *Campbell v. British Columbia*, 200 BCSC 1123 and *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31.

<sup>112</sup> *Umbrella Final Agreement between The Government of Canada, The Council for Yukon First Nations and The Government of the Yukon, 1993*: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_fagr\\_ynk\\_umb\\_1318604279080\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ynk_umb_1318604279080_eng.pdf) (consulted on April 29, 2014). This modern treaty replaced historical treaty No. 11 and the signatory parties of the Umbrella Agreement, through Sections 2.5.1.4 and 2.5.3, waived the application of this Numbered Treaty.

in the area of self-government. Indeed, Chapter 26 states that the “Government shall enter into negotiations with each Yukon First Nation which so requests with a view to concluding self-government agreements...” These agreements on self-government may cover, among other things, health and social services.<sup>113</sup> Therefore, the First Nation in question may negotiate with the Canadian government concerning the “devolution” of programs and services pertaining to health care and social services.<sup>114</sup> Several Yukon First Nations have made agreements on self-government,<sup>115</sup> all of which are generally built on the same framework and which grant legislative powers to the Aboriginal signatories, notably in the area of health and social services.<sup>116</sup>

It is relevant at this point to discuss the issue of conflicts between the laws of “Aboriginal Governments” and federal, provincial or territorial laws. Indeed, the Yukon First Nations Self-Government Act,<sup>117</sup> a law that implements self-government agreements whose conclusions were provided for in the *Umbrella Final Agreement between The Government of Canada, The Council for Yukon First Nations and The Government of the Yukon*<sup>118</sup> and the final agreements, seems to subscribe to the theory of the “occupied field,” according to which the provinces may, in the absence of legislative action by the Canadian Parliament, exercise legislative jurisdiction as per their general powers with respect to property and civil rights, in addition to local and private matters. Thus, the *Yukon First Nations Self-Government Act* rejects the application of a valid territorial law (except for territorial laws on taxation) since the “Aboriginal Government” has also drafted a law on the same issues.<sup>119</sup> The First Nation’s laws therefore take precedence over territorial laws,<sup>120</sup> because the latter are rejected even in the absence of a conflict of norms. The preponderance of “Aboriginal laws” is a specific aspect of this law and contrasts with what some modern treaties set out. In fact, some treaties that include a self-government component reject the theory of the occupied field. Such is the case of the *Nisga’a Final Agreement*<sup>121</sup> and the *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in*

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<sup>113</sup> Ibid, Sect. 24.2.1.8.

<sup>114</sup> Ibid, Sect. 24.3.0.

<sup>115</sup> The following First Nations made such agreements: Champagne and Aishihik First Nations (1993), Nacho Nyak Dun First Nation (1993), Teslin Tlingit (1993), Vuntut Gwitchin First Nation (1993), Little Salmon/Carmacks First Nation (1997), Selkirk First Nation (1997), Tr’ondëk Hwëch’in (1998), Ta’an Kwach’an (2002), Kluane First Nation (2003), Carcross/Tagish First Nation (2005), Kwanlin Dun First Nation (2005).

<sup>116</sup> See, for instance, Chapter 13 of *The Kwanlin Dun First Nation Self-Government Agreement*, 2005: <https://www.aadnc-aandc.gc.ca/eng/1298901032405/1298901521186> (consulted on April 30, 2014).

<sup>117</sup> *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35.

<sup>118</sup> *Umbrella Final Agreement between the Government of Canada, the Council for Yukon First Nations and the Government of the Yukon*, 1993, *Supra*, note 112.

<sup>119</sup> *Yukon First Nations Self-Government Act*, *Supra*, note 112, Sect. 19 (1) (2)- to be read together with Sect. 11.

<sup>120</sup> This preponderance is not applicable, however, in the case of federal laws. Conversely, see *Ibid*, Sect. 16 and 19(1).

<sup>121</sup> *Nisga’a Final Agreement*, 1999, Sect. 2.52 b): <http://www.nnkn.ca/files/u28/nis-eng.pdf> (consulted on March 22, 2014). *Nisga’a Final Agreement Act*, S.C. 2000, c. 7.

*Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*,<sup>122</sup> which both state that “laws are not inconsistent merely because they make provisions for the same subject matter.”

## 6.2.2

### Northwest Territories

#### *The Western Arctic Claim - The Inuvialuit Final Agreement (1984)*

This agreement includes a specific section on the social development of the Inuvialuit community.<sup>123</sup> However, this modern treaty is inconsistent with the logic behind Aboriginal self-government<sup>124</sup> in the areas of health and social services. Rather, it provides for the creation of a fund<sup>125</sup> entirely financed by the federal government in order to improve, among other things, the health of signatory peoples.

#### *Gwich'in Comprehensive Land Claim Agreement (1992)*

This agreement contains no specific provision on health, but includes an entire chapter on self-government. Chapter 5 of this modern treaty states that the governments of Canada and the Northwest Territories must engage in negotiations with the objective of reaching an agreement on self-government.<sup>126</sup> Such an agreement has not yet been reached with the Gwich'in, but it is expected that an agreement on self-government will contain provisions pertaining to health services and social services, in light of what is set out in the *Gwich'in Self-Government Negotiations Process and Schedule Agreement*.<sup>127</sup>

#### *The Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993)*

Like the Gwich'in Agreement, this agreement devotes an entire chapter to the establishment of a tripartite negotiation process for self-government.<sup>128</sup> The Déline First Nation, a Sahtu community, began negotiations in 1996 with the federal and territorial

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<sup>122</sup> *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 2005, Sect. 2.23: <http://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333> (consulted on May 3, 2014).

<sup>123</sup> *The Western Arctic Claim - The Inuvialuit Final Agreement*, 1984, Sect. 17 (1): [http://www.inuvialuitland.com/resources/Inuvialuit\\_Final\\_Agreement.pdf](http://www.inuvialuitland.com/resources/Inuvialuit_Final_Agreement.pdf) (consulted on May 6, 2014).

<sup>124</sup> In 1996, the Inuvialuit Regional Council entered into negotiations with Canada, the Territorial Government and the Gwich'in Tribal Council. However, the agreement in principle was rejected by the Gwich'in in 2003 and the Inuvialuit and Gwich'in nations have since undertaken negotiations separately. See GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *General Briefing Note on the Comprehensive Land Claims Policy of Canada and the Status of Claims*, Supra, note 63.

<sup>125</sup> *The Western Arctic Claim - The Inuvialuit Final Agreement*, Supra, note 123- Sect. 17 (3) “Canada shall establish a Social Development Fund and shall deposit therein seven million five hundred thousand (7,500,000) dollars.”

<sup>126</sup> *Gwich'in Comprehensive Land Claim Agreement*, 1992, Sect. 5.1.1: [http://www.collectionscanada.gc.ca/webarchives/20071115095404/http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic/index\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071115095404/http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic/index_e.html) (consulted on May 6, 2014).

<sup>127</sup> *Inuvialuit Self-Government Negotiations Process and Schedule Agreement*, 2008, Sect. 6.1.13 and 6.1.15: <http://www.aadnc-aandc.gc.ca/eng/1100100025062/1100100025067> (consulted on May 6, 2014).

<sup>128</sup> *The Sahtu Dene and Metis Comprehensive Land Claim Agreement*, 1993, Chapter 5: <https://www.aadnc-aandc.gc.ca/eng/1100100031147/1100100031164#chp5> (consulted on May 6, 2014).

governments to reach an agreement on self-government.<sup>129</sup> In 2003, an agreement-in-principle was reached. Just recently, in 2012, the parties completed the preliminary version of the final agreement on self-government for the Déline First Nation,<sup>130</sup> which provides for the creation of an autonomous government responsible for providing services and programs to the members of the Déline community. Chapter 13 of the 2003 agreement-in-principle stated that the Déline First Nation government would have the power to manage healthcare programs and services.<sup>131</sup> It can reasonably be expected that such provisions will appear in the 2012 final agreement. The other First Nations who are part of the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* have also entered into negotiations.<sup>132</sup>

### **Tlicho Agreement (2003)**

This agreement<sup>133</sup> is a modern treaty that incorporates provisions related to comprehensive land claims and self-government.<sup>134</sup> It provides for the establishment of a Tlicho Government as well as for financial support from the federal and territorial governments, to ensure implementation of the agreement. The agreement includes only one provision pertaining to health, namely a measure that allows the Tlicho Government to legislate in the area of traditional medicine,<sup>135</sup> but it also grants the Aboriginal Government the power to legislate in the area of social services.<sup>136</sup>

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<sup>129</sup> *Déliné Final Self-Government Agreement*, 2014: <http://www.aadnc-aandc.gc.ca/eng/1387314654000/1387314707746> (consulted on May 6, 2014).

<sup>130</sup> However, the final agreement must be accepted by all members of the Déline First Nation and implemented by a territorial and federal law before entering into force.

<sup>131</sup> *First Nations Self-Government Agreement-in-Principle for the Sahtu Dene/ Métis of Déline*, 2003: [http://www.daair.gov.nt.ca/\\_live/documents/content/Deline\\_Self\\_Government\\_AiP.pdf](http://www.daair.gov.nt.ca/_live/documents/content/Deline_Self_Government_AiP.pdf) (consulted on May 6, 2014).

<sup>132</sup> The following First Nations have entered into negotiations: Sahtu Dene and Métis of Colville Lake, Sahtu Dene and Métis of Fort Good Hope, Sahtu Dene and Métis of Norman Wells, Sahtu Dene and Métis of Tulita. See the website of the North-west Territories' Aboriginal Affairs and Intergovernmental Relations: [http://www.daair.gov.nt.ca/\\_live/pages/wpPages/Selfgovernment.aspx](http://www.daair.gov.nt.ca/_live/pages/wpPages/Selfgovernment.aspx) (consulted on May 6, 2014).

<sup>133</sup> The Tlicho Agreement is particular because it partially replaces historical treaty No. 11. See *Tlicho Agreement*, 2003, Sect. 2.5.1 and 2.6.1: <https://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544#chp7> (consulted on May 6, 2014), *Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1.

<sup>134</sup> These agreements on self-government, [because they are] part of the comprehensive land claim agreements, [therefore] contain treaty rights under Sect. 35(1) S.C. 1982. As these agreements on self-government are part of the comprehensive land claims agreements, they contain treaty rights under Sect. 35(1) S.C. 1982. The following treaties are the only ones that incorporate provisions relative to self-government and comprehensive land claims: Nisga'a Final Agreement (1999), Tlicho Land Claims and Self-Government Act (2003), Labrador Inuit Land Claims Agreement (2005), Lheidli T'enneh Final Agreement (2006), Tsawwassen Final Agreement (2007), Maa-nulth First Nations Final Agreement (2009), Yale Final Agreement (2010), Tla'amin Final Agreement (2011).

<sup>135</sup> *Tlicho Agreement*, *Supra*, note 133 Sect. 7.4.4 c).

<sup>136</sup> *Ibid* - see, for instance, social welfare (Sect. 7.4.4 f) and children's services (Sect. 7.4.4 g).

### 6.2.3 Nunavut

#### *Nunavut Land Claims Agreement (1993)*

This modern treaty was concluded with the Inuit people and is the origin of the creation of Nunavut Territory in 1993.<sup>137</sup> All of Nunavut is therefore covered by this modern agreement. The agreement's implementation followed the adoption of the *Nunavut Act*<sup>138</sup> in 1993. This federal law allows the creation of a territorial government for Nunavut and allows the Legislature of this territory to legislate on various matters including health.<sup>139</sup>

### 6.2.4 British Columbia

The negotiation of agreements on land claims in British Columbia is subject to a particular process. The governments of Canada and British Columbia, along with the First Nations of that province, established the British Columbia Treaty Commission<sup>140</sup> in 1992. This is an independent body with a supporting role in territorial negotiations. The objective of the Commission is to promote and facilitate negotiations between the parties. The *Tsawwassen First Nation Final Agreement (2007)*<sup>141</sup> was the first modern treaty to be established in cooperation with the Commission.

#### *Nisga'a Final Agreement (1999)*

This is a tripartite agreement between the Nisga'a people, the Canadian government and the province of British Columbia. The Nisga'a agreement is the first modern treaty in the province of British Columbia. Section 82 stipulates that the Nisga'a Government can "legislate" on health services, while Section 83 allows it to adopt laws in the area of social services.<sup>142</sup>

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<sup>137</sup> *Nunavut Land Claims Agreement*, 1993: [http://www.collectionscanada.gc.ca/webarchives/20071115101800/http://www.ainc-inac.gc.ca/pr/agr/nunavut/index\\_f.html](http://www.collectionscanada.gc.ca/webarchives/20071115101800/http://www.ainc-inac.gc.ca/pr/agr/nunavut/index_f.html) (consulted on May 7, 2014).

<sup>138</sup> *Nunavut Act*, S.C. 1993, c. 28.

<sup>139</sup> *Ibid.*, Sect. 23 (1) h).

<sup>140</sup> B.C. TREATY COMMISSION *About Us*, [http://www.bctreaty.net/files/about\\_us.php](http://www.bctreaty.net/files/about_us.php) (consulted on May 8, 2014).

<sup>141</sup> *Tsawwassen First Nation Final Agreement*: [http://www.bctreaty.net/nations/agreements/Tsawwassen\\_final\\_initial.pdf](http://www.bctreaty.net/nations/agreements/Tsawwassen_final_initial.pdf) (consulted on May 7, 2014).

<sup>142</sup> *Nisga'a Final Agreement*, see prev. note. This agreement is the first modern treaty to incorporate provisions on comprehensive land claims and self-government.

### ***Lheidli T'enneh Final Agreement (2006)***

The signing of the final agreement took place in 2006 but appears not to have come into effect immediately.<sup>143</sup> The agreement included provisions on self-government and allowed the Lheidli T'enneh Government to make laws concerning health and social services.<sup>144</sup>

### ***Tsawwassen First Nation Final Agreement (2007)***

This agreement<sup>145</sup> is the first agreement in Canada to have been reached in urban areas.<sup>146</sup> It provides for the establishment of an “Aboriginal Government” and for funding to support the Tsawwassen First Nation programs and services. Chapter 16 of the agreement contains the relevant provisions allowing the Tsawwassen Government to legislate on health and social services.<sup>147</sup>

### ***Maa-nulth First Nations Final Agreement (2009)***

This agreement grants the peoples in question self-government in the area of health. Indeed, the agreement empowers the Government of the Maa-nulth First Nation to “legislate” concerning child care,<sup>148</sup> health services<sup>149</sup> and social services.<sup>150</sup> The logic behind legislative autonomy is therefore also present in this final agreement.

### ***Yale First Nation Final Agreement (2010)***

This comprehensive claims agreement also includes provisions on self-government for the creation of an “Aboriginal Government.” With regard to health, the agreement provides that “the Government of the Yale First Nation may make laws for the delivery of health services, including public health services [...],”<sup>151</sup> that “the Government of the Yale First Nation may legislate to empower individuals to practice as Aboriginal healers on the lands of the Yale First Nation,”<sup>152</sup> and that “the Government of the Yale First Nation may make laws for the delivery of family services through a Yale First Nation social services institution, particularly in terms of income support and housing.”<sup>153</sup>

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<sup>143</sup> Indeed, the next steps to ensure that the final agreement evolves into a modern treaty are: ratification by the members of the Lheidli T'enneh community through a simple majority vote, adoption of a law implemented by the provincial government and then adoption of implementation legislation by the Government of Canada. However, in March 2007, members of the Lheidli T'enneh community rejected the final agreement.

<sup>144</sup> *Lheidli T'enneh Final Agreement*, 2006, Sect. 71-86 of Chapter 17: [http://www.gov.bc.ca/arr/firstnation/lheidli/down/final/lheidli\\_final\\_agreement.pdf](http://www.gov.bc.ca/arr/firstnation/lheidli/down/final/lheidli_final_agreement.pdf) (consulted on May 6, 2014).

<sup>145</sup> *Tsawwassen First Nation Final Agreement*, *Supra*, note 141.

<sup>146</sup> However, the treaty has yet to be implemented via federal and provincial legislation.

<sup>147</sup> These are sections 84-97 of Chapter 16 that allow the “Aboriginal Government” to “legislate” on traditional medicine and health programs and services, as well as social services.

<sup>148</sup> *Maa-nulth First Nations Final Agreement*, 2009, Sect. 13.18.1: [http://www.maanulth.ca/downloads/treaty/2010\\_maa-nulth\\_final\\_agreement\\_french.pdf](http://www.maanulth.ca/downloads/treaty/2010_maa-nulth_final_agreement_french.pdf) (consulted on March 22, 2014).

<sup>149</sup> *Ibid.*, Sect. 13.22.1.

<sup>150</sup> *Ibid.*, Sect. 13.23.1.

<sup>151</sup> *Yale First Nation Final Agreement*, 2010, Sect. 3.18.1: <https://www.aadnc-aandc.gc.ca/eng/1336660239600/1336660899903#chap3.17> (consulted on May 7, 2014).

<sup>152</sup> *Ibid.*, Sect. 3.17.1.

<sup>153</sup> *Ibid.*, Sect. 3.19.1.

### ***Tla'amin Final Agreement (2011)***

This agreement's provisions concerning Tla'amin self-government allow the "Aboriginal Government" to make laws on all matters under the agreement, in particular health,<sup>154</sup> Aboriginal healers<sup>155</sup> and social services.<sup>156</sup> However, the Tla'amin agreement has yet to come into effect.<sup>157</sup>

## **6.2.5 Newfoundland and Labrador**

### ***Labrador Inuit Land Claims Agreement (2005)***

This modern treaty provides for the creation of an "Inuit Government" with the power to legislate on the matters set out in Chapter 17, particularly in the areas of health<sup>158</sup> and social services.<sup>159</sup>

## **6.2.6 Quebec**

### ***The James Bay and Northern Quebec Agreement (1975)***

As mentioned above, the *James Bay and Northern Quebec Agreement* (JBNQA) is the first modern treaty in Canada. Unlike the comprehensive claims agreements cited above, this agreement contains no provisions for self-government. Chapters 14 and 15 of this agreement focus on health and social services for the Cree and Inuit respectively.

Section 14.o.1 provides that all laws of general application apply to the Cree covered by the agreement. Section 14.o.2 stipulates that Quebec shall create "a Cree Regional Board of Health Services and Social Services, in order to exercise the powers and functions of a Regional Council within the meaning of the Act respecting *Health Services and Social Services* (1971, L.Q. c. 48)."<sup>160</sup> Therefore, the Regional Board will be responsible for the administration of health and social services in the territory.<sup>161</sup> The jurisdiction of the Cree

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<sup>154</sup> *Tla'amin Final Agreement*, 2011, Sect. 86 to 92 of Chapter 15: <https://www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293#chp15> (consulted on May 7, 2014).

<sup>155</sup> *Ibid.*, Sect. 82-85 of Chapter 15.

<sup>156</sup> *Ibid.*, Sect. 93-98 of Chapter 15.

<sup>157</sup> Indeed, the federal implementation legislation was adopted in the House of Commons unanimously, but has not yet received Royal Assent. See GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *Information document - Tla'amin (Sliammon) Final Agreement*: <http://www.aadnc-aandc.gc.ca/eng/1397050017650/1397050094605> (consulted on May 6, 2014).

<sup>158</sup> *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, *Supra*, note 121. Parts 17.13.

<sup>159</sup> *Ibid.*, Part 17.5.

<sup>160</sup> *James Bay and Northern Quebec Agreement and Complementary Agreements*, *Supra*, note 109.

<sup>161</sup> *Ibid.*, Sect. 14.o.3. See the Cree Board of Health and Social Services website: <http://www.creehealth.org/about-us> (consulted on May 8, 2014).

Regional Board in the territory is defined in Section 14.o.5 of the JBNQA. The Cree that are a part of the JBNQA are also governed by the *Act Respecting Health Services and Social Services for Cree Native Persons*,<sup>162</sup> a Quebec law.

Section 15, dealing with Inuit health and social services, describes the establishment of the Kativik Health and Social Services Council.”<sup>163</sup> Section 15.o.1 provides that all general laws of the province (including the AHSSS) will apply to the Kativik Council, while the regional administration will exercise the powers attached to it.<sup>164</sup> The Kativik Council’s role is to regulate and supervise the election of directors of health and social services facilities.<sup>165</sup> In 1994, the Kativik-CSSS Council, created under Section 15.o.3 of the JBNQA, became the Nunavik Regional Board of Health and Social Services.<sup>166</sup>

These agreements establish Aboriginal “self-government” in health services and social services. However, these boards and councils appear to be linked the provincial health system since they are subject to the *Act respecting health services and social services*.

In analyzing the various complementary agreements to the JBNQA, we note that there are no provisions for amending or repealing the administrative regime of the health and social services for the applicable Cree and Inuit communities.

There is also an agreement for purposes of implementing the JBNQA, namely the *Agreement Respecting the Implementation of the James Bay and Northern Quebec Agreement between Her Majesty the Queen in Right of Canada and Makivik Corporation*.<sup>167</sup> The agreement, signed in 1990, contains a single provision on programs for health and social services. That section states that Inuit will have access to federal health programs when there is no equivalent program in the province.<sup>168</sup> The agreement therefore does not repeal or amend the original provisions of the JBNQA concerning health and social services.

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<sup>162</sup> *An Act Respecting Health Services and Social Services for Cree Native Persons*, CQLR, c. S-5.

<sup>163</sup> *James Bay and Northern Quebec Agreement and Complementary Agreements*, Supra, note 109, Sect.. 15.o.3. In Inuktitut, Kativik means “gathering place.”

<sup>164</sup> *Ibid*, Sect. 15.o.4.

<sup>165</sup> *Ibid*, Sect. 15.o.5 and 15.o.9.

<sup>166</sup> GOVERNMENT OF QUEBEC, SECÉTARIAT AUX AFFAIRES AUTOCHTONES, *Backgrounder: History of the Creation of the Nunavik Commission* (consulted on March 22, 2014) [http://www.autochtones.gouv.qc.ca/relations\\_autochtones/ententes/inuits/19991105b.htm](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/ententes/inuits/19991105b.htm)

<sup>167</sup> *Agreement Respecting the Implementation of the James Bay and Northern Quebec Agreement Between Her Majesty the Queen in Right of Canada and Makivik Corporation*, 1990: <https://www.aadnc-aandc.gc.ca/eng/1100100030826/1100100030828> (consulted on March 22, 2014).

<sup>168</sup> *Ibid*, Per Sect. 11 of the agreement: “The Inuit of Quebec have access to federal social health programs and services, applicable in cases where there is no equivalent program offered by Quebec, and this without prejudice to the right of Canada to claim contributions from Quebec for these federal programs.”

## The Northeastern Quebec Agreement (1978)

The *Northeastern Quebec Agreement* (NEQA) modified the JBNQA by integrating the Naskapi. Like the JBNQA, it has no section bearing directly on self-government. Chapter 10 of the NEQA does contain provisions regarding health services and social services. As is the case with the Cree and Inuit governed by the JBNQA, provincial laws of general application apply to the Naskapi.<sup>169</sup> Section 10.3 provides for the establishment of an advisory committee on health and social services. As stipulated in the agreement, the committee's role is to "represent the Naskapi of Quebec with respect to the health and social services delivered by Quebec to the Naskapi of Quebec."<sup>170</sup> It appears then that the Naskapi governed by NEQA do not have the same level of self-government in health and social services compared to the Aboriginal peoples governed by the JBNQA. The role of this committee seems to be solely for consultation purposes, with no decision-making power.<sup>171</sup> The agreement also stipulates that the federal and provincial governments must provide health services to the Naskapi as long as they have not established a permanent residence in the land category stipulated by the agreement.<sup>172</sup> Upon the Naskapi establishing their permanent residence on these lands in 1983, Quebec alone must provide all health and social services<sup>173</sup> to the Aboriginal communities under the NEQA. Under the agreement, the Schefferville hospital is the institution that will provide health services to the Naskapi.<sup>174</sup>

## Conclusion regarding the issue of modern treaties in Quebec

In analyzing the various agreements on comprehensive land claims, we find that most of them have the goal of providing greater autonomy to the signatory Aboriginal peoples. However, the JBNQA and NEQA are not among these agreements containing provisions for rights to self-government. The major difference between these two treaties and the modern treaties signed in their wake in Canada can be explained by, among other things, the fact that the federal government's 1995 *Policy on the inherent right to self-government*<sup>175</sup> was created several years after the signing of the JBNQA and the NEQA.

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<sup>169</sup> *The Northeastern Quebec Agreement*, 1978, Sect. 10.2: [http://www.collectionscanada.gc.ca/webarchives/20071115095342/http://www.ainc-inac.gc.ca/pr/agr/que/nea\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071115095342/http://www.ainc-inac.gc.ca/pr/agr/que/nea_e.html) (consulted on March 22, 2014).

<sup>170</sup> *Ibid.*, Sect. 10.4.

<sup>171</sup> *Ibid.*, Sect. 10.8.

<sup>172</sup> These are IA-N category lands, *Ibid.*, Sect. 10.3. The IA-N category lands are described in the agreement as the "Block Pearce," meaning the "part of the Matimekoshe reserve where the Quebec Naskapi houses and outbuildings are situated [...]". *Ibid.*, Sect. 20.1.2 The IA-N category lands were however modified as provided in the agreement under Section 20.21. Thus, during the relocation of the Naskapi in 1983, the IA-N category lands were modified to correspond to the lands where the Kawawachikamach village now exists.

<sup>173</sup> *Ibid.*, Sect. 10.11.

<sup>174</sup> *Ibid.*, Sect. 10.6.

<sup>175</sup> GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS CANADA, *General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations*, *Supra*, note 63.

We note also that under the provisions of these treaties, the provincial government has more power concerning signatory Aboriginal communities. We recall here that the power to legislate over “Indians and lands reserved for the Indians” belongs to the Parliament of Canada.<sup>176</sup> Thus, although provincial laws of general application apply to “Indians and lands reserved for the Indians,” a provincial legislature cannot make laws relating directly to the core federal exclusive responsibilities. But we note that the JBNQA and NEQA provide for Quebec’s National Assembly to adopt laws directly concerning “Indians and lands reserved for the Indians.” We see this, for example, in the *Act Respecting Health Services and Social Services for Cree Native Persons*,<sup>177</sup> which bears directly on an area under the federal government’s exclusive jurisdiction. These treaties thus indirectly modify the division of powers and delegate part of Canada’s jurisdiction to Quebec, i.e., jurisdiction over the Cree, Inuit and Naskapi, as well as the lands reserved for the Cree, Inuit and Naskapi. This procedure is unconstitutional considering the *Campbell case*<sup>178</sup> in which the B.C. Supreme Court ruled that a modern treaty cannot alter the division of powers nor may it provide for a delegation of jurisdiction.

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<sup>176</sup> S.C. 1867, Sect. 91 (24).

<sup>177</sup> *An Act Respecting Health Services and Social Services for Cree Native Persons*, *Supra*, note 162.

<sup>178</sup> See *Campbell v. British Columbia and Attorney General of Nova Scotia v. Attorney General of Canada*, *Supra*, note 111.

# 7

## ISSUES AND CLAIMS

In this section, we will focus on the state of Aboriginal claims concerning governance over health and social services. Do Canadian or Quebec courts provide Aboriginal people with any recourse with respect to their self-management of health services or social services? Could it be that some Aboriginal communities hold an Aboriginal right to manage health services?

### 7.1 THE NATURE OF ABORIGINAL RIGHTS

A right to autonomy in health services could be claimed by an Aboriginal people if this right takes the form of an Aboriginal right to the management of health services. However, finding the evidence of such a right can be difficult. Indeed, in the context of the claim of an Aboriginal right, the applicant must meet the standard of proof set out in *Van der Peet*.<sup>179</sup> Considering the application of this decision's criteria, the right-activity must, in order to be effective, have formed part of the culture before the time of European contact.<sup>180</sup> As a result, recognition of an Aboriginal right to health services management could be given to a people who established health care as an integral part of their culture (traditional medicine?) prior to European contact.<sup>181</sup>

We note that the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>182</sup> supports the concept of Aboriginal right in health. Indeed, it mentions the right of Indigenous peoples to use their “vital medicinal plants, animals and minerals,” as well as their “traditional medicines.”<sup>183</sup> The text of the Declaration provides that “Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”<sup>184</sup> It also explains that the signatories of the Declaration shall take appropriate measures to “recognize these rights and protect their exercise.”<sup>185</sup>

### 7.2 LEGAL REMEDIES

Upon reviewing the jurisprudence, we note that the Aboriginal right to health management does not appear to have been recognized by any court in Canada.

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<sup>179</sup> *R. v. Van der Peet*, *Supra*, note 25. See also *R. v. Pamajewon*, *Supra*, note 61.

<sup>180</sup> *Ibid.*, par. 46 and 60.

<sup>181</sup> It was recognized in *Van der Peet* that the practice can evolve with time. *Ibid.*, par. 63-64.

<sup>182</sup> UNITED NATIONS ORGANIZATION, GENERAL ASSEMBLY, *Supra*, note 60.

<sup>183</sup> *Ibid.*, Sect. 24.

<sup>184</sup> *Ibid.*, Sect. 31(1).

<sup>185</sup> *Ibid.*, Sect. 31(2). Canada ratified the *United Nations Declaration on the Rights of Indigenous Peoples* in 2010.

## 8 CONCLUSION

Regarding the division of constitutional powers between the federal government and the provinces, we determined that jurisdiction for Aboriginal health normally falls within the purview of the provincial governments under subsections 92 (7) (13) and (16) C.A. 1867. We also found that Canada's Parliament has the power to legislate in the area of Aboriginal health either directly under the introductory paragraph of Section 91 C.A. 1867 and Section 91 (27) C.A. 1867 or indirectly. For example, jurisdiction over "Indians and lands reserved for the Indians" according to Section 91 (24) C.A. 1867 allows the federal government to adopt laws concerning Aboriginal health.

But even if jurisdiction over Aboriginal health is shared, it is primarily the Canadian Parliament that has jurisdiction over this area by virtue of its "spending power." Indeed, it funds several programs for Aboriginal health. This federal intervention is therefore not done directly under the constitutional division of powers, but rather indirectly by way of funding programs that fall within the "federal spending power." In other words, most often, the federal power is present, not only in a strictly legal manner but also through the funding of programs.

# 9

## TABLE OF LAWS AND REGULATIONS

### 9.1 LAWS

#### 9.1.1 Constitutional laws

*The Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.)

*Constitution Act*, Schedule B of the *Canada Act*, 1982, c. 11 (U.K.)

#### 9.1.2 Federal laws

*Canada Health Act*, R.S.C. 1985, c. C-6

*Controlled Drugs and Substances Act*, S.C., 1996, c. 19

*Nisga'a Final Agreement Act*, S.C. 2000, c. 7

*Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27

*Yukon First Nations Self-Government Act*, S.C. 1994, c. 35

*First Nations Fiscal and Statistical Management Act*, S.C. 2005, v. 9

*The Sioux Valley Dakota Nation Governance Act*, S.C. 2014, v. 1

*Department of Health Act*, S.C., 1996, c. 8

*Nunavut Act*, S.C. 1993, c. 28

*Indian Act*, R.S.C. 1985, c. I-5

*Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1

#### 9.1.3 Quebec laws

*Youth Protection Act*, R.S.Q., c. P-34.1, Sect. 37.5

*An Act Respecting Health Services and Social Services for Cree Native Persons*, CQLR c. S-5

### 9.2 ACCORDS, AGREEMENTS AND TREATIES

#### 9.2.1 Yukon

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*Carcross/Tagish First Nation Self-Government Agreement*, 2005

*Champagne and Aishihik First Nations Final Agreement, 1993*  
*Kluane First Nation – Self-Government Agreement, 2003*  
*Kwanlin Dun First Nation Self-Government Agreement, 2005*  
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### **9.2.2**

#### **Manitoba**

*Sioux Valley Dakota Nation Governance Agreement, 2013*

### **9.2.3**

#### **Northwest Territories**

*Tlicho Accord, 2003*  
*Inuvialuit Final Agreement on Western Arctic Claim, 1984*  
*Déline Final Self-Government Agreement, 2014*  
*Déline Self-Government Agreement-in-Principle for the Sahtu Dene/Métis of Déline, 2003*  
*Sahtu Dene and Metis Comprehensive Land Claim Agreement, 1993*  
*Gwich'in Comprehensive Land Claim Agreement, 1992*  
*Gwich'in Self-Government Negotiations Process and Schedule Agreement, 2008*

### **9.2.4**

#### **Nunavut**

*Nunavut Land Claims Agreement, 1993*

### **9.2.5**

#### **British Columbia**

*Lheidli T'enneh Final Agreement, 2006*  
*Nisga'a Final Agreement, 1999*  
*Tsawwassen Final Agreement, 2007*  
*Yale Final Agreement, 2010*  
*Maa-nulth First Nations Final Agreement, 2009*  
*Tla'amin Final Agreement, 2011*

*Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, 2003*  
*British Columbia Tripartite Framework Agreement on First Nations Health Governance, 2011*

### **9.2.6**

#### **Newfoundland and Labrador**

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### **9.2.7**

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# 10

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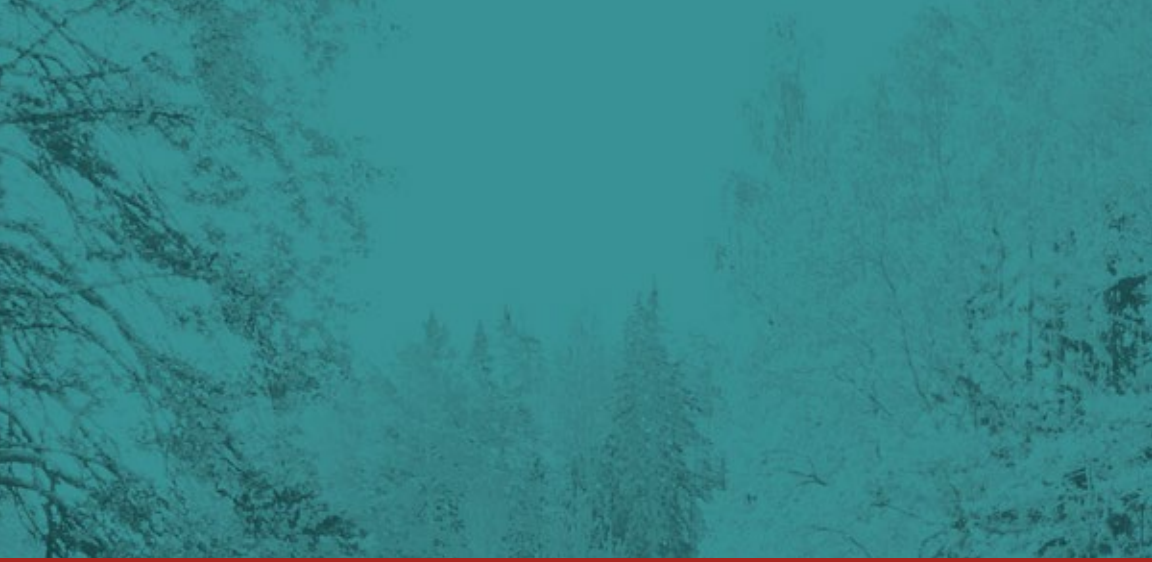
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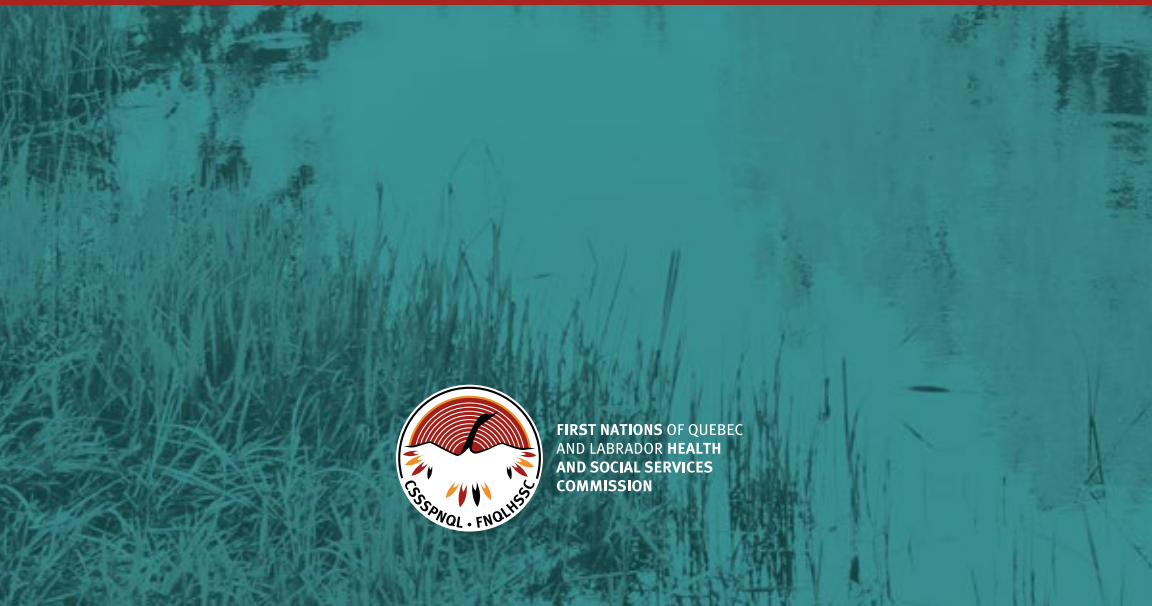








This document provides an overall portrait of the health and social services offered to Aboriginal people in Canada. It identifies the levels of government having jurisdiction over Aboriginal health. It presents the legal concepts in Aboriginal law as well as the provincial and federal laws, policies and agreements concerning health and social services that affect them. It addresses Quebec policies and the funding of health care and social services for the communities in Quebec, in addition to drawing up a portrait of the health care and social services claims that they put forward.



FIRST NATIONS OF QUEBEC  
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