



# PUBLIC HEALTH CHALLENGES IN THE ABSENCE OF LEGISLATION

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# Outline of Challenges



- Impact of shifting government relationships
- Diversity among First Nations
- Lack of Capacity
- Absence of a defined system
- Water – a modern day example of public health law challenges



# Government Relations



- Public health law, public health policy and public health practices with respect to First Nations are all a reflection of long-standing and shifting relations of power within the Canadian State and its jurisdictional presumptions and arrangements.



# Diversity of First Nations



- 730,000 First Nations people represented by 640 communities.
- Over 50 linguistically distinct groups each with their own culture.
- Each First Nation with their own claim to a traditional land base.
- Canadian legislation and policies do not recognize this diversity – instead FNs are broadly grouped into being either status or non-status First Nations, together with Inuit and Métis.



# Lack of Capacity



- Public health legislation assumes both the capacity to enforce regulations and the capacity to make the necessary changes to maintain the enforced standards.
- Between 1985-1994 nearly 100,000 people applied for and were granted status pursuant to the terms of “Bill C-31” (3/4 of whom were women how had previously been forced to give up their status when marrying non-status men).
- This resulted in an increased demand for on-reserve housing and health services not matched in additional resources by the Federal Government.
- Provinces have received an average of 6% increases in the amounts transferred to them by the Federal Government to fulfill their commitments under the Canada Health Act.
- By contract First Nations communities have been capped at 2% despite increasing population and generally more needs overall.



# FNHIB – a health care system?



- Community health programs and services are delivered to FNs through a complex myriad of mechanisms and jurisdictionally separated agencies, provincial Departments and federal Ministries.
- Although recognized as the responsible deliverer of public health services to FNs, FNHIB is a government branch and not a health care system per se.
- In s. 91 (24) of the *Constitution Act* the federal government is assigned authority over “Indians and lands reserved for Indians” while provinces are considered to have been assigned jurisdiction over health pursuant to other sections of the constitution.
- The interpretation of Indians as a category of people being specifically assigned to a certain level of government regardless of their place of residency is problematic in concept and practice: ***is the health of First Nations a health issue (and thus a provincial jurisdiction) or an Indian issue and thus within federal jurisdiction.***
- The lack of Federal Public Health legislation clarifying roles, responsibilities and extending authority has resulted in a population with no guarantees of health protection and major gaps in services.



## Water – A “Clear” Example Where Public Health Regulations are Needed



- In 1982 the Supreme Court of Canada outlines a guiding principle for s.35(1) of the *Constitution Act* by stating that the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal People.
- The fiduciary relationship may also impose lawfully enforceable obligations upon the Crown whenever it asserts a discretionary power over the right or interest of First Nations.
- There are currently no legally enforceable provincial or federal standards relating to drinking water on FN reserves.



# Water regulations and interpreting Section 88 of the Indian Act



- S.88 states that provincial laws of general application “are applicable to and in respect of Indians in the province.”
- Assessing the term “general application” requires determining if the law affects “Indianess” however s.88 only makes reference to permitting the operation of provincial laws that are applicable to Indians and not to land reserved for Indians.
- This section therefore makes provincial water legislation difficult to operate on reserve.



# Water Panel Update



- Recommendation of the Water Panel have been submitted to the Federal Government for consideration.
- Despite the desperate need for drinking water standards on First Nations, this is also another example of how the issue of capacity for enforcement and monitoring will need to be addressed.



# Conclusion



- The state of health of First Nations is one of Canada's greatest shame.
- The lack of Public Health Legislation for First Nations has permitted those responsible to allow various public health crisis to continue without any liability.
- Lack of protection for First Nations' health presents challenges that can easily be remedied through various opportunities.