

Expanding Surgical Access in Canada Through Self-Governing First Nations

Élargir l'accès à la chirurgie au Canada grâce à l'autonomie des Premières Nations

TRAFFORD CRUMP AND MARIAM HEGAZY

TABLE 1. Key health-related legislative powers described in the modern treaties and self-government agreements included in this review

Agreement	Relevant excerpts/summaries
SIB	<p>Section 14.1 (pp. 7–8): “The Council has, to the extent that it is authorized by the constitution of the shíshálh Nation to do so, the power to make laws in relation to matters coming within any of the following classes of matters: ... (i) health services on shíshálh lands; ... (n) the operation of businesses, professions and trades on shíshálh lands.”</p> <p>Section 37 (p. 18): “All federal laws of general application in force in Canada apply in respect of the shíshálh Nation, its members and shíshálh lands except to the extent that those laws are inconsistent with this Act.”</p> <p>Section 38 (p. 18): “Laws of general application of British Columbia apply in respect of the members of the shíshálh Nation except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Nation or a shíshálh law.”</p>
WFN	<p>Part II.17 (p. 10): “Responsibility for the delivery of federal programs and services to [WFN] and its Members shall remain with Canada until such time as [WFN] assumes responsibility for the delivery of programs and services in accordance with, and subject to, this agreement ... or other agreements entered into between [WFN] and Canada.”</p> <p>Part XVII.193 (p. 45): “Except as otherwise provided ..., in the event of a conflict between Westbank Law [in relation to Part 191] and federal law, Westbank Law shall prevail...”</p> <p>Part XVII.194 (p. 45): [WFN] “may enter into agreements with any level of government ... or any other national, regional or local entity, group or organization, concerning delivery of health services or the application of provincial or other health standards.”</p> <p>Part XXIV.222 (p. 52): declaration of WFN’s intentions to pursue future negotiations “with the province and Canada to set out jurisdictional arrangements with respect to ... health.”</p>

Agreement	Relevant excerpts/summaries
TFN	<p>Chapter 16.23(c), 16.24 (p. 139): “six months written notice must be given to the government of BC and the agreement of both Canada and BC must be granted before TFN government brings into force any law(s) related to health services.”</p> <p>Chapter 16.91 (p. 152): “At the request of any Party, the Parties will negotiate and attempt to reach agreement for the delivery and administration by a Tsawwassen Institution of federal and provincial health services and programs for individuals residing on Tsawwassen Lands.”</p> <p>Chapter 16.89, 92-93 (p. 152): “[TFN] Government may make laws in respect of health services, including public health, provided by a [TFN] Institution on [TFN] Lands” (clause 89); however, federal/provincial laws prevail in case of conflict with a clause 89 Tsawwassen Law (clause 92); however, a Tsawwassen law “in respect of the organization and structure of Tsawwassen Institutions used to deliver health services on Tsawwassen Lands prevails to the extent of a conflict” with federal/provincial law (clause 93).</p>
MnFN	<p>Section 13.22.1-4 (pp. 170-171): each MnFN government “may make laws in respect of health services” provided by that MnFN government or its MnFN public institutions on the MnFN lands of the applicable nation (13.22.1). However, federal/provincial laws prevail in case of conflict with a section 13.22.1 law (13.22.3). However, notwithstanding 13.22.3, MnFN law under 13.22.1 in respect of the organization and structure of its MnFN government or its public institutions used to deliver health services prevails to the extent of a conflict with federal/provincial law (13.22.4).</p>
WDN	<p>Sections 5.17-5.18, 5.24-5.26 (pp. 19-21): Federal law continues to apply to WDN, its government, institutions, and members, except where otherwise provided in the treaty; in cases of conflict, this agreement and its implementing legislation prevail. Saskatchewan law also continues to apply of its own force, but where conflict arises, the treaty, implementing legislation, or WDN law takes precedence. Provincial law also applies by incorporation, except where it conflicts with or duplicates this agreement or WDN provisions.</p> <p>Section 6.01 (p. 25): “WDN has Jurisdiction and Authority with respect to the structure, management, operations, and procedures of Whitecap Dakota Government, including: ... b) establishing WDN Institutions; ...”</p> <p>Sections 23.01-02 (p. 67): WDN holds jurisdiction and authority over the practice and practitioners of traditional Dakota medicine on its reserve lands. This authority does not extend to regulating medical or health practices, practitioners, or substances that fall under federal or provincial licensing or certification regimes.</p> <p>Section 23.04 (p. 67): “WDN may enter into agreements with any level of government in Canada, including any government agency or entity or any other national, regional, or local entity, group, or organization concerning delivery of health services or the application of federal or provincial or other health standards.”</p> <p>Section 32.02 (p. 96): “The Parties may seek to negotiate Jurisdiction and Authority in relation to the following subject matters under Saskatchewan jurisdiction, subject to the participation of Saskatchewan: ... e) health services ...”.</p>

MnFN = Maa-nulth First Nations; SIB = Sechelt Indian Band; TFN = Tsawwassen First Nation; WDN = Whitecap Dakota Nation/ Wapaha Ska Dakota Oyate; WFN = Westbank First Nation.

DISCUSSION AND DEBATE

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TABLE 2. Thematic analysis of the included modern treaties and self-government agreements

Name of the agreement	Theme #1 Conferred status as legal entity	Theme #2 Relationship to the <i>Indian Act</i>	Theme #3 General level of authority	Theme #4 Capacity for granting sovereignty with regards to healthcare
Sechelt Indian Band (SIB) <i>Self-Government Act</i> , aka, shishálh Nation Self-Government Act	<p>Section 3 (p. 3): reaffirms SIB's inherent right to self-government as a First Nation (section 35 of the <i>Constitution Act</i> 1982).</p> <p>Section 6 (p. 5): "The shishálh Nation is a legal entity and has, subject to this Act, the capacity, rights, powers and privileges of a natural person and, without restricting the generality of the foregoing, may (a) enter into contracts or agreements; ... (f) do such other things as are conducive to the exercise of its rights, powers and privileges."</p>	<p>Section 35 (p. 17): "Subject to section 36, the <i>Indian Act</i> applies, with any necessary modifications, in respect of the shishálh Nation ... except to the extent that the <i>Indian Act</i> is inconsistent with this Act, the constitution of the Nation or a shishálh law."</p> <p>Section 36 (p. 18): "The Governor in Council may, on the advice of the Minister, by order, (a) declare that the <i>Indian Act</i> or any provision of that Act does not apply to the shishálh Nation, its members or any portion of shishálh lands; and (b) revoke any such order."</p>	<p>Section 4 (p. 4): "The purposes of this Act are to ... (b) support the Nation in its control over and administration of the ... services available to its members."</p> <p>Section 37 (p. 18): "All federal laws of general application in force in Canada apply in respect of the shishálh Nation, its members and shishálh lands except to the extent that those laws are inconsistent with this Act."</p> <p>Section 38 (p. 18): "Laws of general application of British Columbia apply in respect of the members of the shishálh Nation except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Nation or a shishálh law."</p>	<p>Section 14.1 (pp. 7-8): "The Council has, to the extent that it is authorized by the constitution of the shishálh Nation to do so, the power to make laws in relation to matters coming within any of the following classes of matters: ... (i) health services on shishálh lands; ... (n) the operation of businesses, professions and trades on shishálh lands." Provision 15.1 clarifies that the shishálh Nation constitution prevails over shishálh law to the extent of any inconsistencies (p. 10).</p>
Westbank First Nation (WFN) <i>Self-Government Agreement</i>	<p>Preamble (p. v): reaffirms inherent right of self-government by WFN on Westbank Lands (based on existing section 35 of the <i>Constitution Act</i> 1982) "...without taking any definitive positions with respect to how an inherent right of self-government may ultimately be defined at law."</p> <p>Part III.19 (p. 11): WFN "is a legal entity with the rights, powers and privileges of a natural person, which includes the capacity to: (a) enter into agreements and contracts with any person, government or organization."</p>	<p>Part VI.56 (p. 17): The <i>Indian Act</i> does not apply to this agreement except where indicated.</p> <p>Part XXXI (p. 61): Paragraph 81(1)(a) of the <i>Indian Act</i> shall continue to apply: "The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister ... to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases."</p>	<p>Part II.2(a) (p. 8): agreement does not restrict WFN from participating in other processes to implement the inherent right of self-government by First Nations.</p> <p>Part XVII.193 (p. 45): "Except as otherwise provided ..., in the event of a conflict between Westbank Law [in relation to Part 191] and federal law, Westbank Law shall prevail..."</p>	<p>Part II.17 (p. 10): "Responsibility for the delivery of federal programs and services to [WFN] and its Members shall remain with Canada until such time as [WFN] assumes responsibility for the delivery of programs and services in accordance with, and subject to, this Agreement ... or other agreements entered into between [WFN] and Canada."</p> <p>Part XVII.191-192 (p. 44): WFN has jurisdiction in relation to the regulation of practitioners and practices of traditional Okanagan medicine on Westbank lands; this jurisdiction excludes regulation of substances/products and licensed practitioners.</p> <p>Part XVII.194 (p. 45): WFN "may enter into agreements with any level of government ... or any other national, regional or local entity, group or organization, concerning delivery of health services or the application of provincial or other health standards."</p> <p>Part XXIV.222 (p. 52): declaration of WFN's intentions to pursue future negotiations "with the province and Canada to set out jurisdictional arrangements with respect to ... health."</p>

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Tsawwassen First Nation (TFN) Final Agreement	<p>Preamble (p. 1): reaffirms First Nations' inherent right to self-government (section 35 of the <i>Constitution Act</i>, 1982).</p> <p>Chapter 16.7 (p. 135): recognition of legal status of a natural person, allowing TFN to enter contracts, hold or dispose of property, manage finances, litigate, and undertake ancillary activities.</p>	<p>Chapter 2.10 and 2.39 (p. 22): TFN lands are not "reserve" lands as defined in the <i>Indian Act</i> or the <i>Constitution Act</i>. Moreover, the <i>Indian Act</i> does not apply to this agreement.</p>	<p>Chapter 16.1-6 (p. 135): outlines self-government and law-making power; allows authority over defined subject matters and incidental actions necessary for governance.</p> <p>See next column for relevant clauses regarding health services authority.</p>	<p>Chapter 16.23(c), 16.24 (p. 139): six months written notice must be given to the government of BC, and the agreement of both Canada and BC must be granted before TFN government brings into force any law(s) related to health services. Sections 25-28 clarify the negotiation procedure.</p> <p>Chapter 16.85-88 (p. 151): grants authorization for creation of laws re: aboriginal healers but no authority to regulate substances or practices/practitioners who require licensing; federal and provincial law prevails in case of conflict with section 85 TFN laws.</p> <p>Chapter 16.91 (p. 152): "At the request of any Party, the Parties will negotiate and attempt to reach agreement for the delivery and administration by a Tsawwassen Institution of federal and provincial health services and programs for individuals residing on Tsawwassen Lands."</p> <p>Chapter 16.89, 92-93 (p. 152): "[TFN] Government may make laws in respect of health services, including public health, provided by a [TFN] Institution on [TFN] Lands" (clause 89); however, federal/provincial laws prevail in case of conflict with a clause 89 Tsawwassen Law (clause 92); however, a Tsawwassen law "in respect of the organization and structure of Tsawwassen Institutions used to deliver health services on Tsawwassen Lands prevails to the extent of a conflict" with federal/provincial law (clause 93).</p>
Maa-nulth First Nations (MnFN) Final Agreement	<p>Preamble (p. 1): reaffirms Maa-nulth First Nations' inherent rights to self-government (section 35 of the <i>Constitution Act</i> 1982).</p> <p>Section 13.2.1 (p. 153): "Each Maa-nulth First Nation is a separate and distinct legal entity with the capacity, rights, powers and privileges of a natural person including the ability to: a. enter into contracts and agreements ... e. do other things ancillary to the exercise of its rights, powers and privileges."</p>	<p>Section 1 (p. 4): MnFN lands are not "reserve" lands as defined in the <i>Indian Act</i> or the <i>Constitution Act</i>. Moreover, the <i>Indian Act</i> does not apply to this agreement.</p>	<p>Section 13.28.1-3 (p. 173): each MnFN government "may make laws in respect of the regulation, licensing and prohibition of businesses on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation, including the imposition of licence fees or other fees." However, this does not include "the authority to make laws in respect of accreditation, certification or professional conduct of professions and trades." Federal/provincial prevails to the extent of a conflict.</p>	<p>Section 13.22.1-4 (pp. 170-171): each MnFN government "may make laws in respect of health services" provided by that MnFN government or its MnFN public institutions on the MnFN lands of the applicable nation (13.22.1). However, federal/provincial laws prevail in case of conflict with a section 13.22.1 law (13.22.3). However, notwithstanding 13.22.3, MnFN law under 13.22.1 in respect of the organization and structure of its MnFN government or its public institutions used to deliver health services prevails to the extent of a conflict with federal/provincial law (13.22.4).</p> <p>Language used in section 13.22, though very similar to that regarding the same issue in chapter 16.89-93 of the TFN Final Agreement, appears slightly more restrictive herein. Instead of describing MnFN institutions (which may be inclusive of even private institutions), this agreement limits MnFN health services law, which prevails over federal/provincial law in case of conflict to those laws which concern MnFN government or public institutions. "Maa-nulth First Nation Public Institution" means a body, board, commission or any other similar entity established under Maa-nulth First Nation Law, made under 13.11.1a., including a "school board or health board" (p. 291).</p>

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Name of the agreement	Theme #1 Conferred status as legal entity	Theme #2 Relationship to the Indian Act	Theme #3 General level of authority	Theme #4 Capacity for granting sovereignty with regards to healthcare
<p>A Self-Government Treaty Recognizing the Whitecap Dakota Nation / Wapaha Ska Dakota Oyate (“WDN”)</p>	<p>Section 2.01 (p. 9): “Canada recognizes that WDN: ... b) has the inherent right of self-government as recognized and affirmed by section 35 of the Constitution Act, 1982.”</p> <p>Section 3.02 (p. 13): “WDN is a legal entity with the rights, powers, and privileges of a natural person at law, which include the capacity to: a) enter into agreements and contracts with any person, government, or legal entity; ... h) do other things ancillary to the exercise of their rights, powers, and privileges ...”</p>	<p>Section 5.28 (p. 21): “WDN Laws are not Federal Laws or by-laws within the meaning of the Indian Act (Canada).”</p> <p>Section 5.35 (p. 22): “Except as otherwise provided in this Governance Treaty, the Indian Act does not apply to WDN, the Whitecap Dakota Government, WDN Members, or WDN Reserve Lands.”</p> <p>Sections 5.36–5.39 (p. 22): Certain provisions of the Indian Act continue to apply to the Whitecap Dakota Nation (WDN), including those governing administration, the Indian Register, and the treatment of property on reserve (ss. 2(1), 3, 5–7, 90). Tax exemption (s. 87) and restrictions on property seizure or mortgage (s. 89) also remain in force unless replaced by WDN law. Where the <i>Indian Act</i> continues to apply, statutory references to “band,” “council,” “reserve,” and “member” are to be read as referring to WDN institutions and lands. WDN is deemed a “band” under the <i>Indian Act</i>.</p>	<p>Section 4.03 (p. 15): “WDN will exercise Jurisdiction and Authority in accordance with this Governance Treaty and the WDN Constitution.”</p> <p>Section 5.07 (p. 17): “The Statutory Instruments Act does not apply to WDN Law.”</p> <p>Sections 5.17–18 (p. 19): Federal law continues to apply to WDN, its government and institutions, its members, and all persons on WDN reserve lands, unless otherwise provided in the treaty. In the event of a conflict between federal law and the Governance Treaty or its implementing legislation, the treaty and implementing legislation prevail to the extent of the conflict.</p> <p>Sections 5.24–26 (p. 20–21): Saskatchewan law that applies of its own force continues to apply to WDN and its members in the same manner as before the treaty's effective date. In cases of conflict, the Governance Treaty, its implementing legislation, or a WDN law prevails. Saskatchewan law also applies by incorporation to WDN members except where it conflicts with or duplicates provisions of the treaty, implementing legislation, or WDN law.</p> <p>Section 5.29 (p. 21): “Canada has no authority to approve or disallow WDN Law.”</p>	<p>Section 5.05 (p. 17): “Nothing in this Governance Treaty or other agreements required by this Governance Treaty affect any existing arrangements or prevent WDN from entering into agreements to provide services to WDN Members residing off WDN Reserve Lands.”</p> <p>Section 6.01 (p. 25): “WDN has Jurisdiction and Authority with respect to the structure, management, operations, and procedures of Whitecap Dakota Government, including: ... b) establishing WDN Institutions; ...”</p> <p>Section 1.01 (p. 6): “WDN Institution” includes: ... b) ... corporations ... established under 6.01 in accordance with Federal Law or Saskatchewan Law; ...”</p> <p>Section 17.01 (p. 56): “WDN has Jurisdiction and Authority with respect to the regulation, licensing, and prohibition of businesses on WDN Reserve Lands ...”</p> <p>Sections 23.01–02 (p. 67): WDN holds jurisdiction and authority over the practice and practitioners of traditional Dakota medicine on its reserve lands. This authority does not extend to regulating medical or health practices, practitioners, or substances that fall under federal or provincial licensing or certification regimes.</p> <p>Section 23.04 (p. 67): “WDN may enter into agreements with any level of government in Canada, including any government agency or entity or any other national, regional, or local entity, group, or organization concerning delivery of health services or the application of federal or provincial or other health standards.”</p> <p>Section 32.02 (p. 96): “The Parties may seek to negotiate Jurisdiction and Authority in relation to the following subject matters under Saskatchewan jurisdiction, subject to the participation of Saskatchewan: ... e) health services ...”.</p>

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