

First Nations' Treaty Based Self-determined Choices on Child & Family Services: An Overview

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Self-Determination, Section 35 & UNDRIP

- Information for communities and First Nations to support decisions, ensure the tools and opportunities permit First Nations to exercise full authority in this area
- To support fundamental change in child and family services to STOP
 - Provincial/territorial system having control over CFS
 - Stranger foster care placements
 - Adoptions out of family and community
 - Loss of connection to families and children
 - Unilateral application of child welfare laws of province to First Nations peoples and territories without the free, prior and informed consent

Tools: C-92, Recognition Legislation and Enables/Affirms First Nations Government

- Affirms inherent right to self-determination, including inherent right to self-government in section 35 for First Nations self-government over children and families
 - Federal legislation will prevail over provincial law for First Nations peoples, First Nations law can prevail over federal and provincial laws
 - Appeal to Supreme Court of Quebec Court of Appeal decision
- Nations can develop, create and pass own laws, revitalize practices, and these will further replace standards and principles.
- First Nations' laws will be paramount, shared, or vacate/grant authority for children and families matters to another entity.
- New “National” Standards apply while FN laws are developed
 - BIC, Cultural Continuity, Substantive Equality, placement priorities

Tools: continued...

- Spectrum of choices – not one or two (two tracks, multiple tracks, many options)
- Further government mandates not required, inherent rights affirmed in C-92
- No need for perfect “laws” and meeting standards of drafting and execution that are beyond expectation
- Indigenous legal order work accompanied by policy and operations changes
- Indigenous Governing Body can be Band Council, Nation, regional governments
Flexible but must be authorized by rights holders—need clarity on this front
- Can work with existing agencies during transition—in fact might be preferred approach with capacity, expertise and service experience to build with them



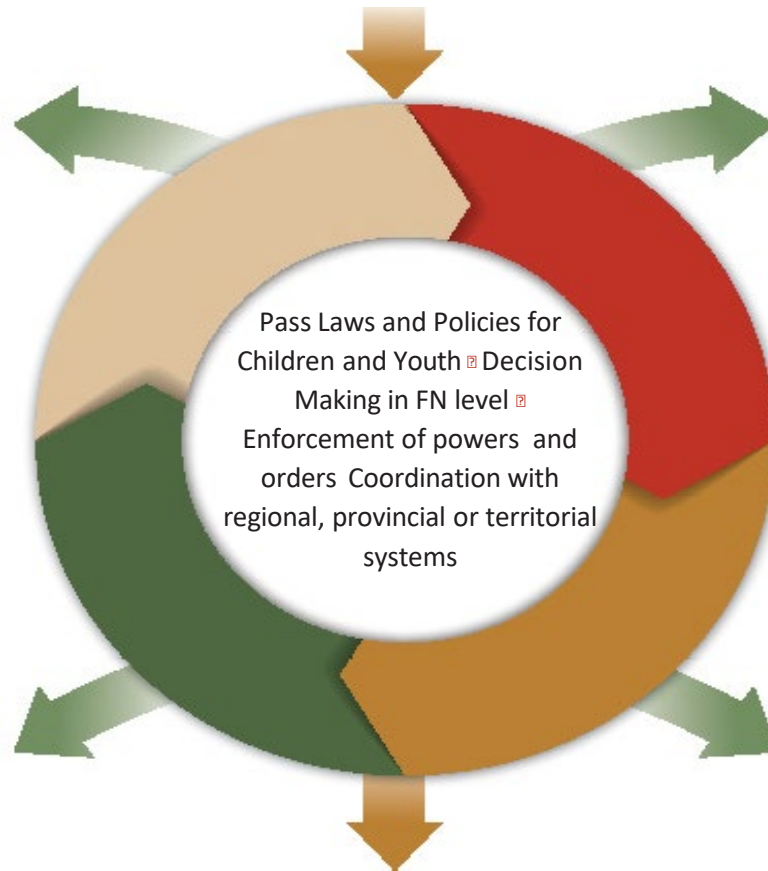
Examples of Law Making

- Prevention
- Family Support
- Child Protection/Guardianship
- Youth Support
- Special Needs
- Residential Services
- Customary Adoption
- Reunification
- Post-majority & transition to adulthood
- Emergency Services
- Child and Youth participation



Service Organizations

Created or partner with others - effective to keep BIC



Decisions

Resolve Matters Using:

- Customary Processes
- Informal Methods
- Formal Process
- Tribal Courts/dispute resolution



Collaborate

Capacity to enter agreements with provinces, territorial governments, agencies based on own priorities

- Delegate powers and services

First Nations Laws should have **PRECEDENCE** over prov. laws but reference case before SCC will address this based on prov. opposition

Key Definitions in Act

Act has definitions that are meant to “enable” and “support” not to be colonial and define, like the Indian Act has been, and this drives other work.


Section 1

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982.

Indigenous, when used in respect of a person, also describes a First Nations person...

Section 8

Purposes to affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services; implement UNDRIP.



Paths to First Nations' Jurisdiction/Recognition and Reform

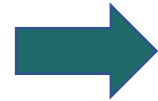
- Who constitutes an Indigenous people that “holds rights recognized and affirmed by section 35 of the Constitution Act, 1982” is a matter that has been answered through the evolution of the law under section 35 and will be impacted by UNDRIP.
- The caselaw suggests that the proper title and rights holder is rooted in the laws, histories, cultures, and traditions of Indigenous peoples. For example, in the trial decision in Tsilhqot’in Nation, the test for proper Title and Rights holder was articulated by the Court as being the “historic community of people sharing language, customs, traditions, historical experience, territory and resources” (paragraph 470).

Act, Section 18

- (1) The inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.
- (2) For greater certainty and for the purposes of subsection (1), the authority to administer and enforce laws includes the authority to provide for dispute resolution mechanisms.

S. 20(1): IGB Notify
Canada/Prov of
intent to pass law
(can be BCR)

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graph LR; A[S. 20(1): IGB Notify Canada/Prov of intent to pass law (can be BCR)] --> B[IGB representative at Coordination Table with Canada and Province (Can be C&C)]; B --> C[Law comes into force, begin operating own system in stages/funding agreements];
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IGB representative
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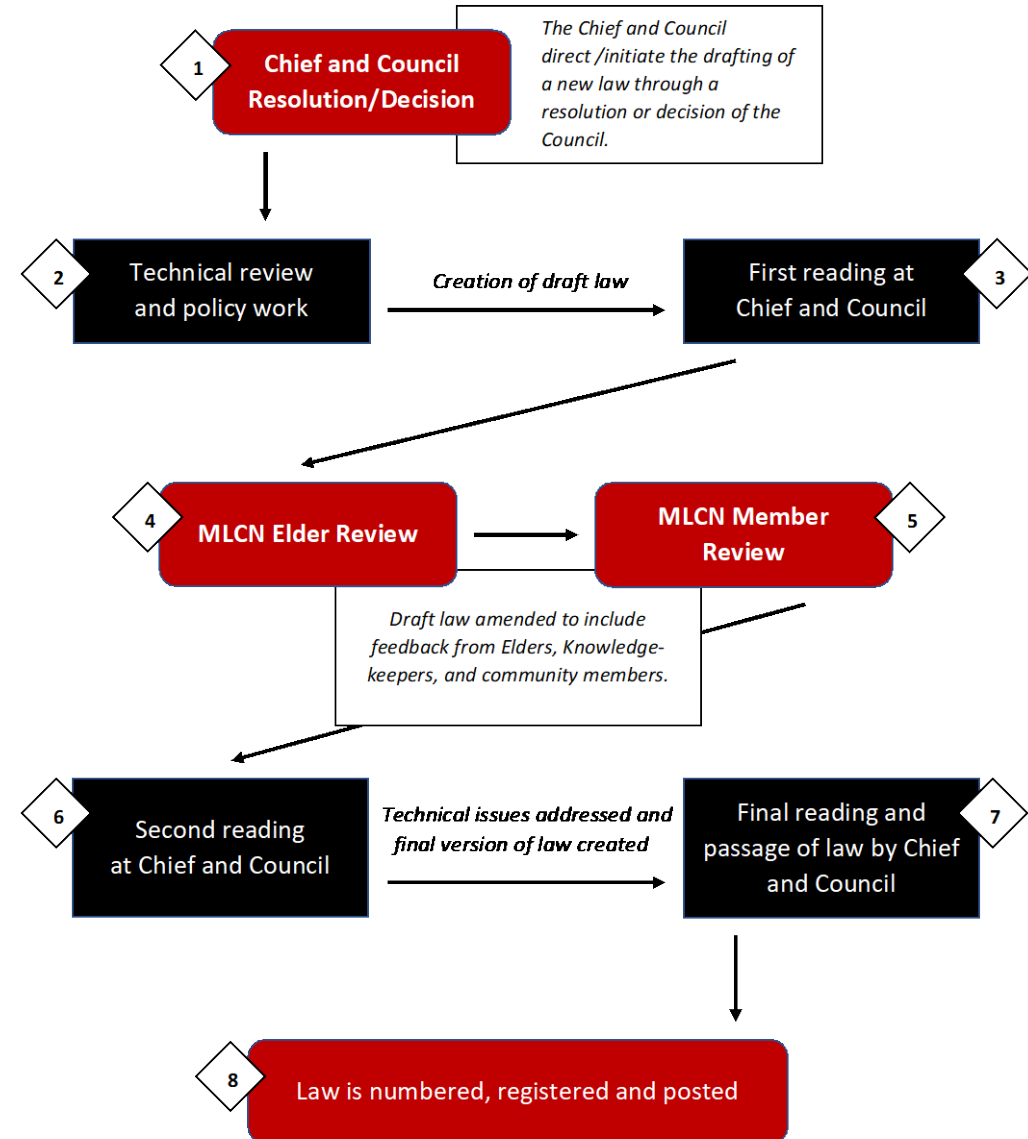


Law comes into
force, begin
operating own
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stages/funding
agreements

- If you pass a law you must share or post that law for it to apply outside the community, and even to the members.
 - Need a registry of laws
- The following First Nations have notified Minister that change is coming
 - Notices www.sac-isc.gc.ca/eng/1608565826510/1608565862367
- Matters are moving slowly except in some places where provinces are engaged and more supportive (i.e., BC), may have a package of amendments to permit shared decision-making using DRIPA
- Consider the process for passing laws OUTSIDE the *Indian Act*, in particular on Treaty and inherent authority

Law-making process for FNs (Sk example)

Muskeg Lake Cree Nation law-making process



Some Decision Points

- Make internal decisions about laws and policies building on customs, traditions and practices. IGB reaches out, builds up
- Advocate for each child/youth and family
- Work together to build more effective mechanism for change; moving from political organization to technical supports, and evaluation, reporting and outcomes
- Internal work between IGB, rights holders
- Reset service level agreements with FNOs/DAAs for transition
- May want to see one or two FN take steps, and share experience across the Tribal Council level

