Overview of the Federal Act

MKO Summit

On First Nation Exercising Jurisdiction Over Child Welfare

"Empowering Our Children's Footprints"

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Canad Inns Garden City

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STEPS FOR A FIRST NATION TO ASSERTING JURISDICTION UNDER THE ACT

One of the two significant aspects of the Act is that it sets out the federally recognized framework by which Indigenous groups, communities or people can re-establish their own laws and practices in relation to CFS. This framework is found at section 20 of The Act and includes two optional pathways

STEPS FOR A FIRST NATION TO EXERCISE JURISDICTION UNDER THE ACT

OPTION # 1

The First Nation or Indigenous Governing Body (IGB) would develop a law (example RE: MKO Family Law Template)

The First Nation or Indigenous governing body sends notice to the Minister of Indigenous Services & Provinces advising them that they are exercising their jurisdiction

This option will make a First Nation's law effective, but it will not automatically give the law recognition and support to override provincial child welfare law and may remain in dispute by provincial and federal authorities. If a First Nations law is developed and enacted in full view of section 35 rights, as affirmed by the federal Act, there is a strong case to be made for First Nation's laws to supersede provincial and federal laws on child welfare.
(source: 2021 Assembly of First Nations)

STEPS FOR A FIRST NATION TO EXERCISE JURISDICTION UNDER THE ACT

OPTION #2

Once the First Nation or Indigenous governing body has developed a law, they can send a request to the Minister and the Province to enter into a tripartite coordination agreement.

Coordination Agreement reached within 12 months or Reasonable efforts to reach a Coordination Agreement were made during the period of 12 months.

Indigenous law comes into power and has the same force of federal law. First Nation or Indigenous governing body exercises their jurisdiction over child and family services.

STEPS FOR A FIRST NATION TO EXERCISE JURISDICTION UNDER THE ACT

Step 3

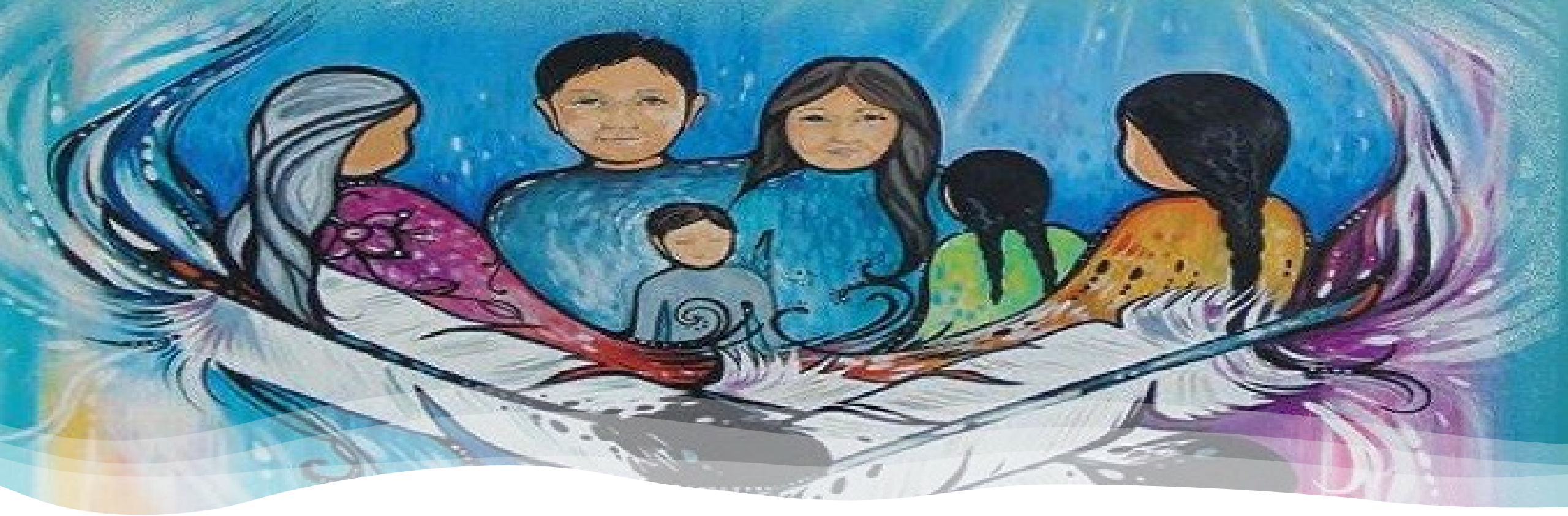
The parties would negotiate a coordination agreement. The parties have 12 months to make reasonable efforts to enter into a coordination agreement.

Step 4

If the coordination agreement is entered into, the law would be passed or if a coordination agreement is not entered, the IGB can either request an extension to the negotiations or pass the law.

Step 5

The law would be passed, Canada would post a notice that the law has been passed as well as post the law in federally-maintained registry in order to comply with the legal requirement for notice to all.



The Act Respecting First Nation, Inuit, Metis children, youth, and families focus on

- Prioritizing *Prevention* and early *Intervention* over apprehension.
- Maintaining and promoting children's relationships with parents, siblings, grandparents, family and community.
- Principle: Best Interests of the child, Cultural Continuity and Substantive equality.
- Reunifying children with their parents, families and community.

Comparison of the Federal Act with Manitoba's Child and Family Services Act

Notice to Parents, Care Providers, and First Nation

WHAT THE FEDERAL ACT SAYS

- A service provider must, prior to taking any significant measure in relation to a child, provide notice to the child's parent, care giver, as well as the Indigenous governing body of the First Nation to which the child belongs. While this requirement is subject to the best interests of the child, it is also subject to section 15.1, which requires that reasonable efforts be taken by a service provider to have a child continue to reside with their prior or another adult member of the child's family before apprehending that child.

WHAT THE MANIOTBA CFS ACT SAYS

- Section 24 of the CFS Act provides that reasonable efforts must be taken to notify the parents or guardian of an apprehended child after that child has been apprehended and brought to a place of safety.

ANALYSIS OF THE DIFFERENCES

While the ways in which "reasonable efforts" in section 15.1 of the Act is interpreted by the courts will have a significant effect on how apprehension decision-making occurs going forward, the changes hold the potential to have a significant impact on Manitoba's CFS provision to First Nations children.

Comparison of Federal Act with CFS Act

Representation of parents, care providers, and First Nation

WHAT THE FEDERAL ACT SAYS

- Section 13 of the Act provides an Indigenous child's parent, care provider, and the Indigenous governing body of the group, community, or people to which the child belongs a right to make representations in a civil proceeding in relation to the provision of CFS to an Indigenous child.

WHAT THE MANITOBA CFS ACT SAYS

- There is no similar provision in Manitoba's CFS ACT.

ANALYSIS OF THE DIFFERENCES

The Act provides significantly more ability for an Indigenous child's family and community to be involved in civil proceedings in relation to CFS being provided in relation to a child.

Comparison of Federal Act with CFS Act

SOCIOECONOMIC CONDITIONS

WHAT THE FEDERAL ACT SAYS

Section 15 of the Act prevents a child from being apprehended solely on the basis of their socio-economic conditions, including poverty, lack of housing or infrastructure, or the state of health of their parent or care provider. This provision is subject to the best interests of the child.

WHAT THE MANITOBA CFS ACT SAYS

Section 17(3) of the CFS Act provides that a child must not be found in need of protection "only by reason" of their parent, guardian, or person having full-time custody lacking the same or similar economic and social advantages as others in Manitoba society.

ANALYSIS OF THE DIFFERENCES

While the CFS Act does not allow socio-economic factors to be determinative, it also does not prevent apprehension in the same way as the Act. This being said, the interpretation of section 15 of the Act depends on how courts define the best interests of a child, which could ultimately produce the same outcome for First Nations children and families.

Comparison of Federal Act with CFS Act

Best Interest Principles Section10 (3) (A-H)

The best interests of the child are to always be given

(1) primary consideration in the making of decisions or taking of actions regarding services provided in relation to an Indigenous child and

(2) Paramount consideration in the case of decisions or actions in relation to child apprehension.

The Act provides a non-exhaustive list of factors that must be assessed when determining the best interests of an Indigenous child. While all the following factors must be considered, an Indigenous child's physical, emotional, and psychological safety, security, and well-being as well as the importance of having an ongoing relationship with their family and the Indigenous group, community, or people to which they belong must be given primary consideration. The listed factors are:

WHAT THE FEDERAL ACT SAYS

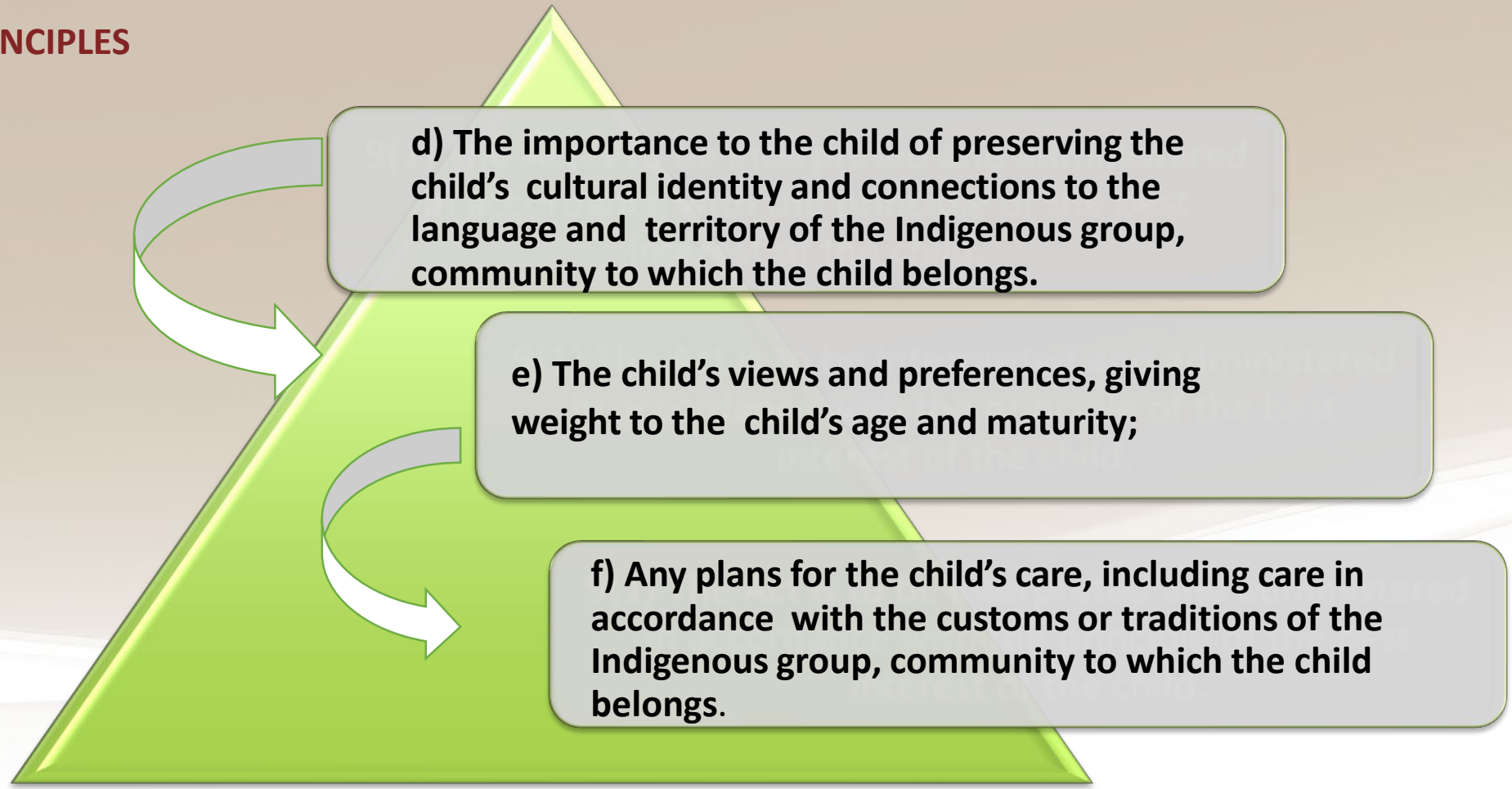
a) The child's cultural, linguistic, religious and spiritual upbringing and heritage;

b)The child's needs, given the child's age and stage of development, such as the child's need for stability;

c) The nature and strength of the child's relationship with his or her parents, caregiver and any member of the child's family who plays an important role in his or her life;

Comparison of Federal Act with CFS Act

BEST INTERESTS PRINCIPLES con't



Comparison of Federal Act with CFS Act

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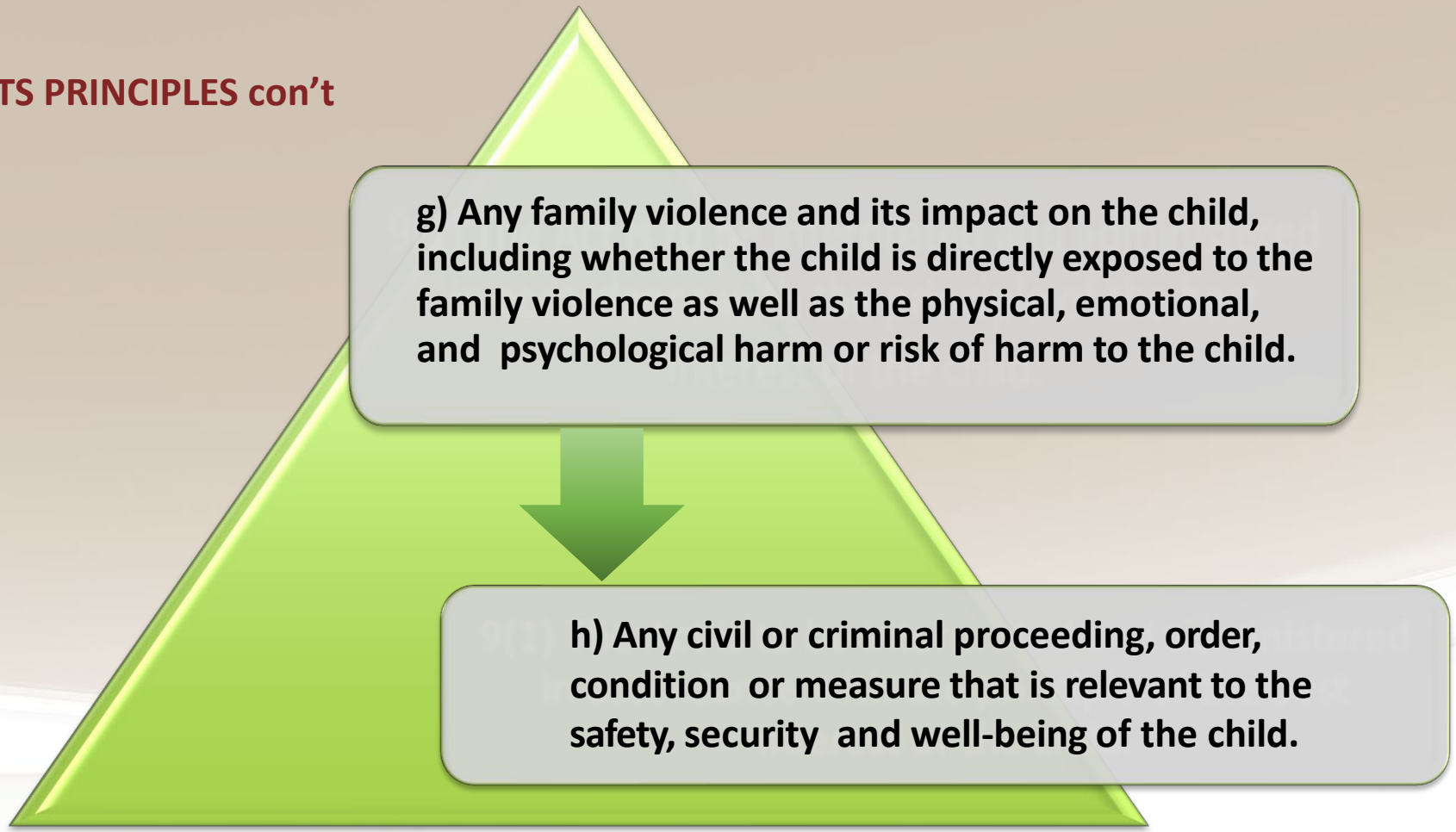
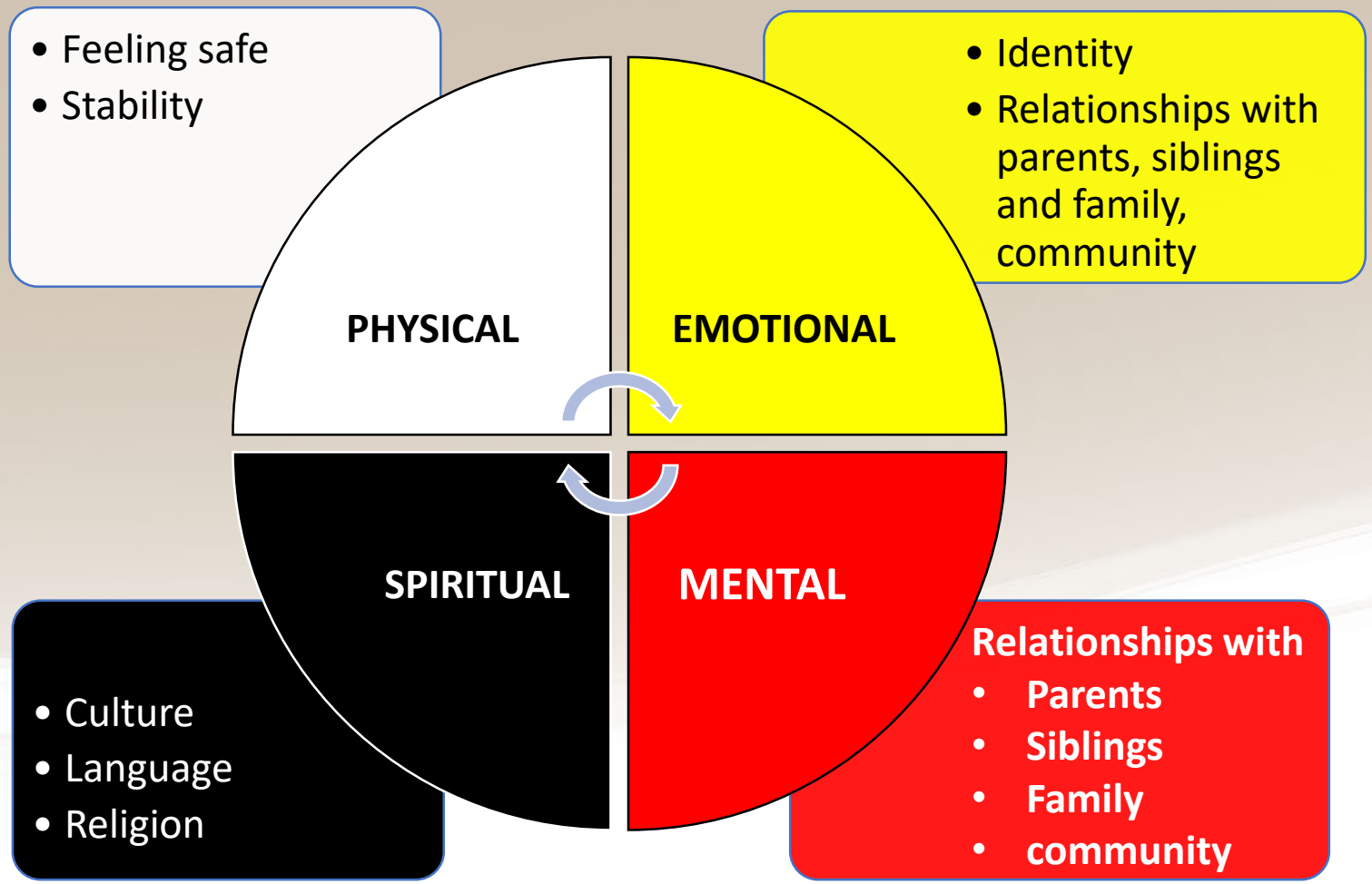


Comparison of Federal Act with CFS Act

BEST INTEREST OF THE CHILD NEEDS



Comparison of Federal Act with CFS Act

WHAT THE MANIOTBA CFS ACT SAYS

The best interests of the child are to always be given **paramount consideration** when a decision, action, or determination in relation to a child is made. In contrast to the Act, only after the best interests of the child are considered will "other relevant factors" be factored in. The non-exhaustive list of "other relevant factors" found in the CFSA are:

(a) **The child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;**

(b) **The mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both to meet such needs;**

(c) **The child's mental, emotional and physical stage of development;**

(d) **The child's sense of continuity and need for permanency with the least possible disruption;**

(e) **The merits and the risks of any plan proposed by the agency that would be caring for the child compared with the merits and the risks of the child returning to or remaining within the family;**

(f) **the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;**

(g) **any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;**

(h) **any family violence as well as the physical, emotional, and psychological harm or risk of harm to the child; and**

(i) **any civil or criminal proceeding, order, conditions, or measure that is relevant to the safety, security, and well-being of the child.**

Comparison of Federal Act with CFS Act

ANALYSIS OF THE DIFFERENCES ON BEST INTERESTS OF THE CHILD

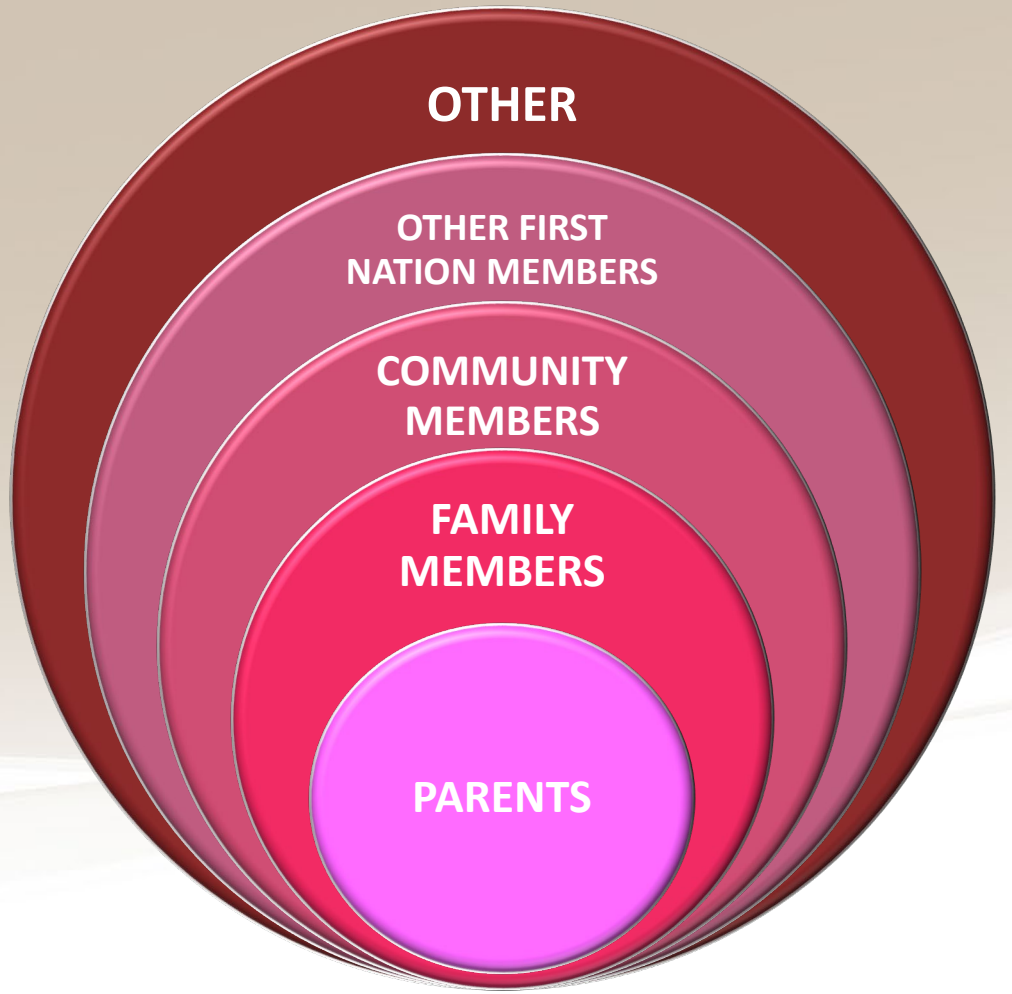
The principle of the best interests of the child is a key concept in CFS law. Notably, as a result of the Act coming into force, decisions taken by Manitoba's CFS providers (i.e., authorities and agencies) must now consider a broader understanding of the best interests of the child that includes factors that have the possibility of mitigating the current child welfare situation in First Nations communities. For instance, whereas a child's ongoing relationship with their family and cultural heritage are secondary to the best interests of a child under the CFS Act, they form an integral part of interpreting the best interests of an Indigenous child under the Act. Nevertheless, as has been flagged by other legal commentators,9 it is still possible that courts will interpret the best interests of the child under the Act in a manner similar to how it has been considered under the CFSA or family law more generally.

Comparison of Federal Act with CFS Act

PLACEMENT PRIORITY FOR THE CHILD under An Act First Nation, Inuit, Metis Children, youth and Families

a) Either parent
b) Another family member
c) Community members
d) Other First nation members, or another FN
e) Other – with any other adult (close family friend)

Must take into consideration placement near siblings, customs and traditions



The Child & Family Service agency must provide documentation on the attempts to place the child in the order that is in the federal act.

Comparison of Federal Act with CFS Act

PLACEMENT OF A CHILD

WHAT THE FEDERAL ACT SAYS

This order of priority is as follows:

(a) with one of the child's parents;

(b) with another adult member of the child's family;

(c) with an adult who belongs to the same Indigenous group, community or people as the child;

(d) with an adult who belongs to an Indigenous group, community, or people other than the one to which the child belongs; or

(e) with any other adult.

WHAT THE MANITOBA CFS ACT SAYS

- There is no similar provision in Manitoba's CFS Act.
- While Bill 18—*The Child and Family Services Amendment Act (Taking Care of Our Children)* – which provided for
- "customary care agreements" to assist First Nations children in staying in their home communities—received Royal Assent on June 4, 2018, it has not yet come into force. Notably, concerns regarding lack of
- consultation and the bill's lack of recognition for inherent jurisdiction over child welfare decision-making accompanied the bill through the legislative process.

ANALYSIS OF THE DIFFERENCES

The inclusion in the Act of an order of priority for placement decision-making will likely impact Manitoba's CFS provision to First Nations children in significant ways. While the provision is contingent upon the best interests of the child, the application of the Act to Manitoba's CFS providers means more First Nations children who are the subject of Manitoba CFS decision-making should stay within their community.

Jurisdiction – The Inherent right

S. (18) 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 ser- vices, 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.

First Nation Asserts Jurisdiction on Child Welfare

FIRST NATION SUBMITS NOTICE AND REQUESTS RELATED TO AN ACT RESPECTING FIRST NATION, INUIT AND METIS, CHILDREN, YOUTH AND FAMILIES

NOTICE OF EXERCISE OF LEGISLATIVE AUTHORITY AND REQUEST FOR COORDINATION AGREEMENT SECTION 20 (1) & (2)

This provision provides that an Indigenous governing body must provide notice to the Minister of ISC and the government of each province in which the Indigenous group, community, or people is located the group, community, or people intend to exercise their legislative jurisdiction. It also sets out the process for requesting a coordination agreement with the federal government and relevant provinces.

INDIGENOUS GOVERNING BODY SECTION 12 NOTICE

Section 12 (1)In the context of providing child and family services in relation to an Indigenous child, to the extent that doing so is consistent with the best interests of the child, before taking any significant measure in relation to the child, the service provider must provide notice of the measure to the child's parent and the care provider, as well as to the Indigenous governing body that acts on be- half of the Indigenous group, community or people to which the child belongs and that has informed the service provider that they are acting on behalf of that Indigenous group, community or people.

S. 12(2) – Personal Information about a child, family members or care provider is not to be included in the notice.

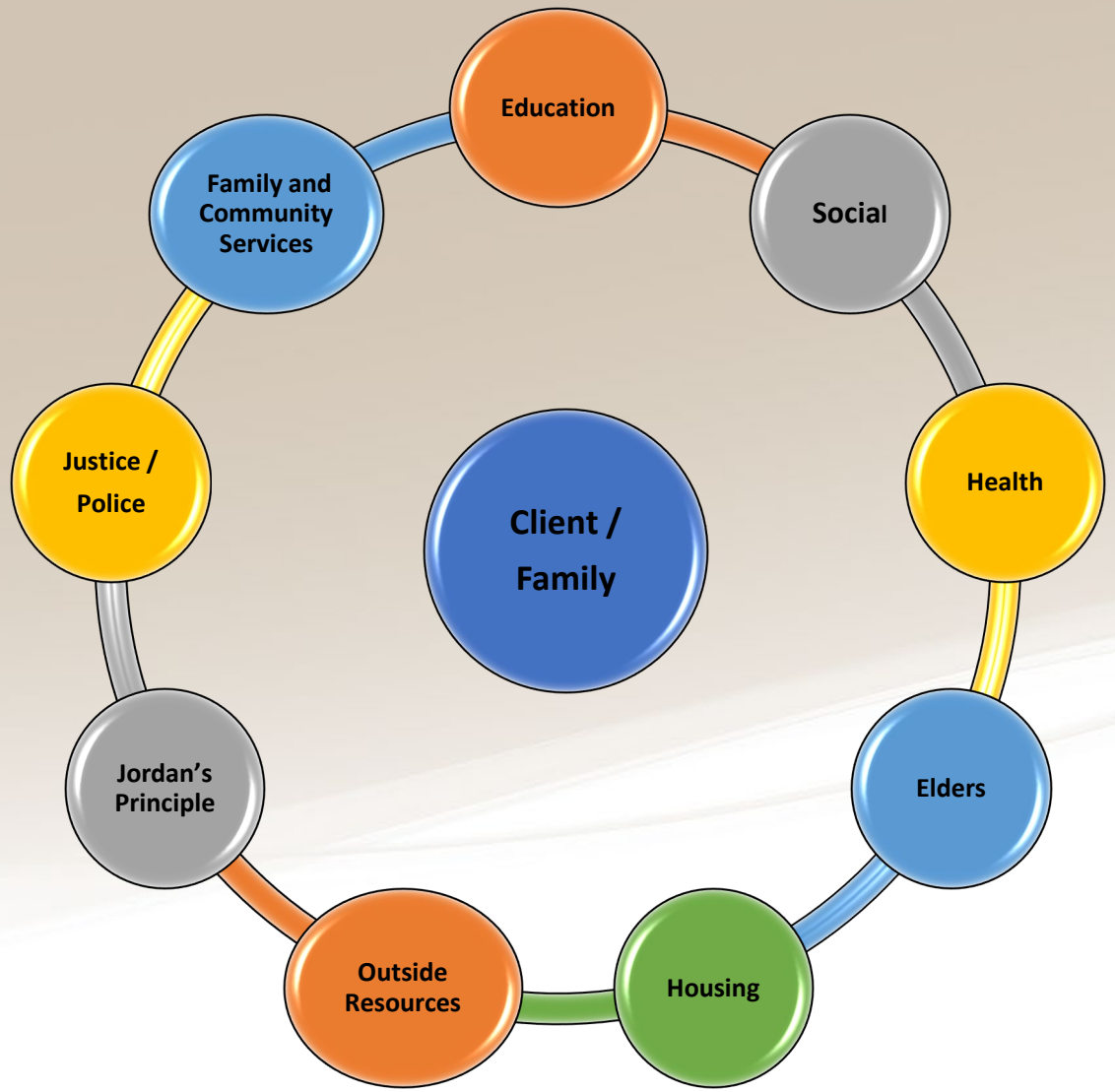
SECTION 12 NOTICE - Significant Measure

What is a Significant Measure?

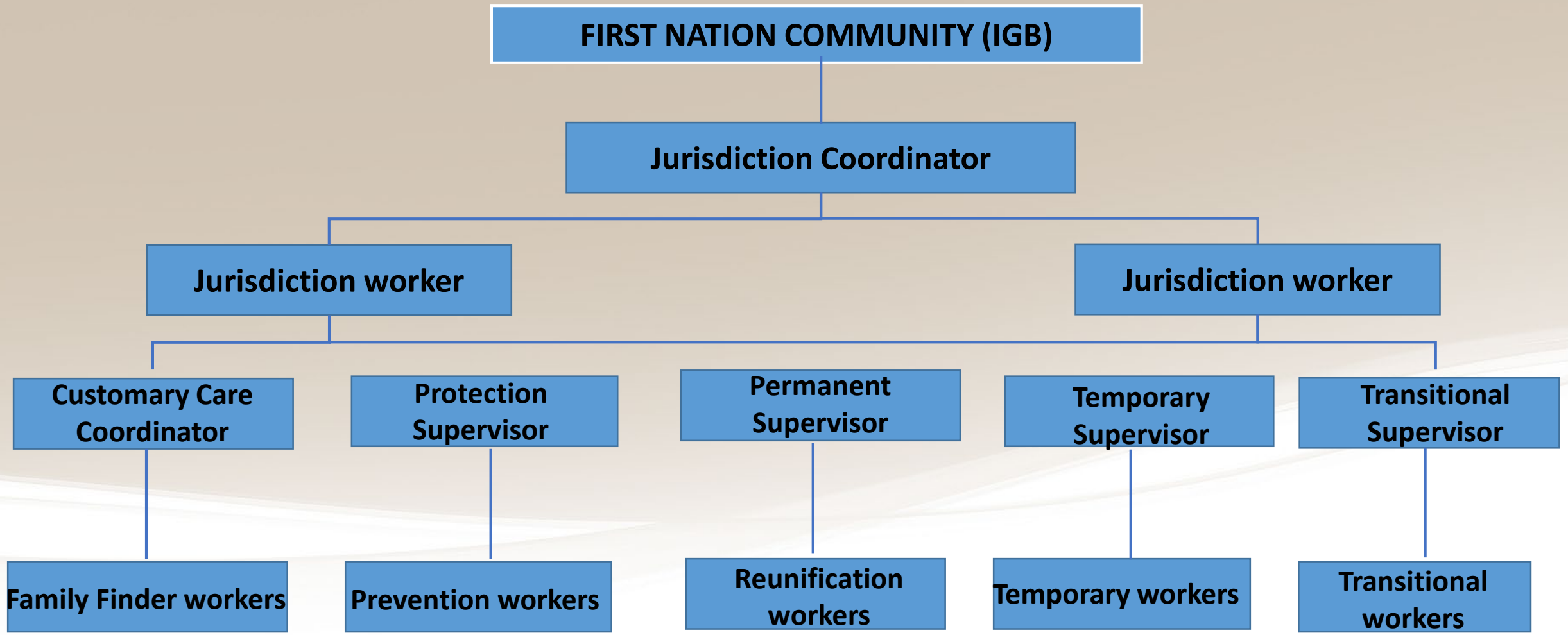
- Apprehension or removal of a child (planned or unplanned apprehension)
- Any court proceedings (apprehensions, temporary, supervisory, permanent orders or legal guardianships).
- Change of placement (culturally appropriate or non-culturally appropriate)
- Discharge of child in care or exiting out of care.

First Nation Assert Jurisdiction on Child Welfare

- First Nation has in communities' resources
- Training to be provided to community members on the Act Respecting First Nation, Inuit, Metis children, youth, and families.
- Community engagements on what community members want to see First Nation taking back Child Welfare jurisdiction.
- Bring back Local childcare committees into communities.
- Elders' council / Knowledge keeper
- Youth council



First Nation Asserts Jurisdiction on Child Welfare



Coordination Agreement – Section 20 (5) Dispute Resolution Mechanism

- If the Indigenous governing body, the Minister and the government of each of those provinces make reasonable efforts to enter into a coordination agreement but do not enter into a coordination agreement, a dispute resolution mechanism provided for by the regulations made under section 32 may be used to promote entering into a coordination agreement.
- MKO Family law template (Part G) – Dispute Resolution **(pg.25)**
  - ❖Review of Decision of the Agency
  - ❖Appeal of Decisions by Family Council

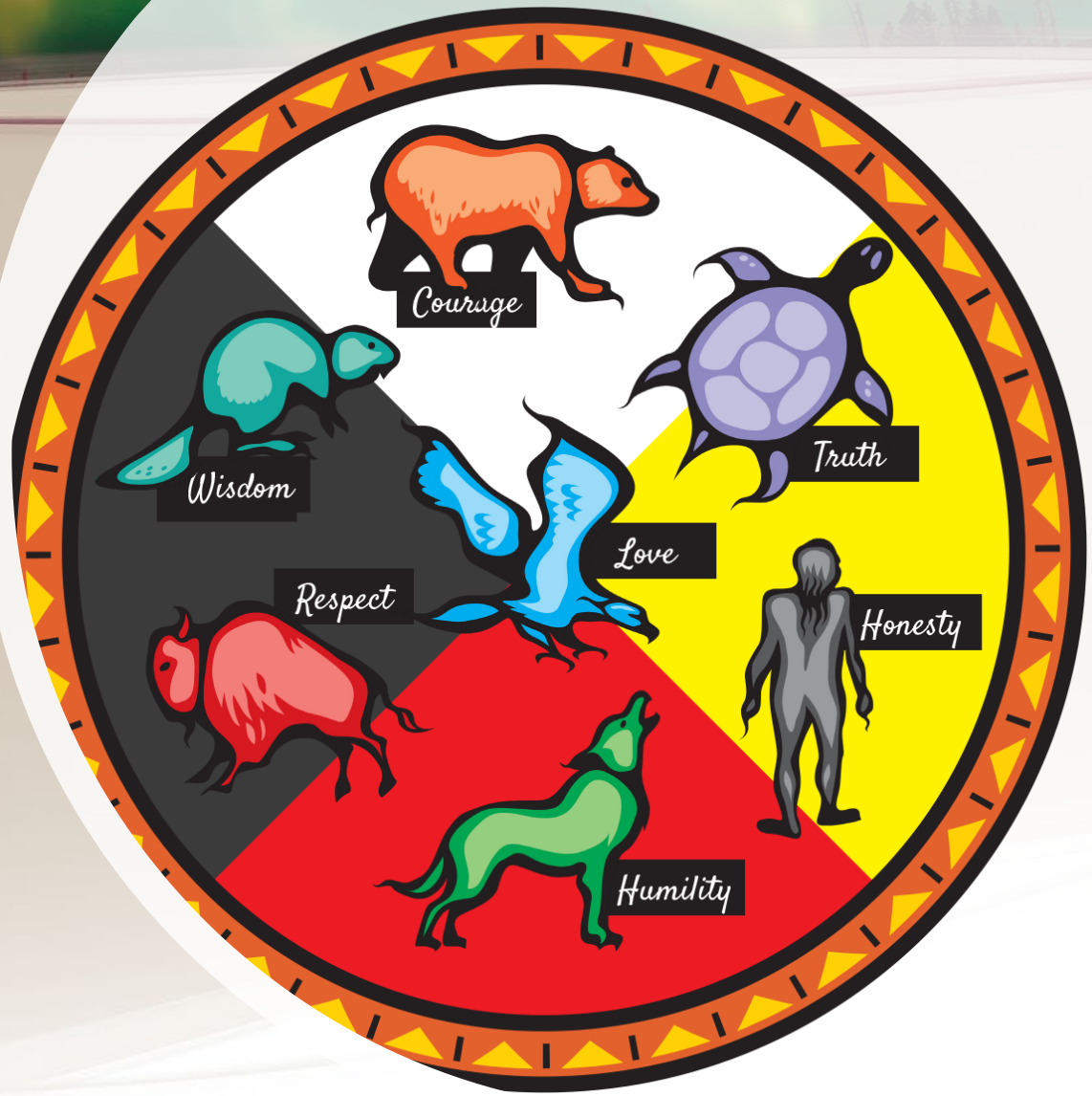
MKO: Advocacy and Support to First Nations

- MKO, through resolutions passed by the MKO Chiefs-in-Assembly, had previously developed a First Nations Family Law template.
- The draft law was developed in consultation with the MKO communities.
- In November 2019, the MKO Chiefs-in-Assembly directed the MKO Child Welfare Secretariat to update the draft MKO Family Law in relation to Bill C-92.
- All MKO communities are welcome to utilize the MKO Family Law template when developing their laws.

MKO Family Law

Purpose:

- Affirm and assert First Nations jurisdiction, power and authority over child and family matters.
- Legally empower MKO First Nations with the capacity to develop and implement First Nations child and family services which are consistent with the languages, traditions, values and beliefs held by First Nations citizens.
- Promote and improve the unity and wellness of First Nations families and communities and to ensure the best care for First Nations children.
- Provide educational needs of the family and community consistent with First Nations culture and languages.



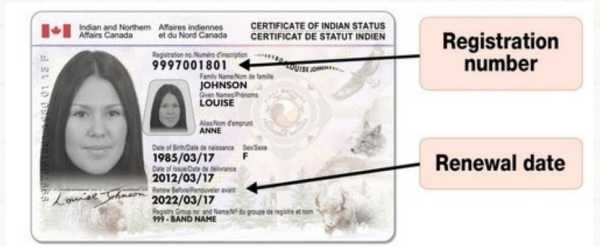
MKO FAMILY LAW

MKO First Nations communities can utilize the MKO Family Law Template to create their own Family Law.

INDIAN STATUS REGISTERATION

- In MKO Chief's Assembly in November 2019, resolution #2019-11-07 *Crisis of Access to Indian Status Registration* was passed.

MKO's Thompson Sub-Office Assisting with Obtaining Secure Status Cards



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MKO STATUS REGISTERATION

- In January 2021, MKO established a Secure Certificate of Indian Status (SCIS) Program. The program is run through a partnership with Indigenous Services Canada (ISC) to meet the needs of Northern Manitobans who need help obtaining a secure status card or Treaty number

EKOSI, MASI CHO, THANK-YOU