CHIEFS OF ONTARIO

Child and Family Well-Being Law Making Resource Bundle

CHIEFS OF ONTARIO | 2022

Prepared by The Firelight Group

Acknowledgements

As First Nations, we know and have lived the pain of centuries of colonial policies enacted on our most vulnerable and cherished: our children. However, we are entering a new era. An era of First Nations enacting our inherent jurisdiction, rights, and responsibilities over our children. This is the work of generations of First Nations. Thousands of leaders, policy makers, advocates, lawyers, Elders, Knowledge Keepers, children, and parents from across Turtle Island have fought for the survival of our families, our cultures, our connections, and our rights and responsibilities to our little ones. We acknowledge and honour these people as heroes to our Nations.

Disclaimer

The information provided in this resource bundle does not, and is not intended to, constitute legal advice. Instead, all information, content, and materials available in this bundle are for general informational purpose only. This resource bundle is intended to provide information and tips for First Nations who want to create their own First Nation Child and Family Well-Being laws. This Child and Family Well-Being Law-Making Resource Bundle has been developed with the intent to support and enhance First Nations capacity in exercising their inherent jurisdiction over child welfare. Readers of this website should contact a lawyer to obtain advice with respect to any particular legal matter.

Acronyms

2SLGBTQQIA	Two-Spirited, Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Asexual
AFN	Assembly of First Nations
AMO	Asikiw Mostos O'pikinawasiwin
ANCWBL	Anishinabek Child Well-Being Law
BIOC	Best Interest of the Child
CHRT	Canadian Human Rights Tribunal
CFSA	Child and Family Services Authorities
COO	Chiefs of Ontario
FNCFS	First Nations Child and Family Services
IGB	Indigenous Governing Body
ILRU	Indigenous Law Research Unit
IRC	Inuvialuit Regional Corporation
ISC	Indigenous Services Canada
MOU	Memoranda of Understanding
MMWIG	Missing and Murdered Indigenous Women and Girls
PTO	Political Territorial Organization
TRC	Truth and Reconciliation Commission
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Glossary

Abuse: Physical or psychological maltreatment or risk of physical or psychological maltreatment by an adult (biological or adoptive parents, step-parents, guardians, other adults). This includes physical abuse, sexual abuse, emotional maltreatment, and exposure to domestic violence.

Adoption: The legal process by which another family permanently takes on the responsibility for caring and raising a child in their own family.

Age of protection: Refers to the age range set by law under which a child may be protected under child welfare services.

Authority or outside or external authority: Governing body or overseeing agency that has the authority to conduct child protection investigations.

Best interests of the child: The interests that preserve and enhance the child's physical, emotional, and psychological safety, security, and well-being. This is determined by considering all factors related to the unique circumstances of the child and placing special importance on ensuring that the Indigenous child remains connected to their culture by preserving family and community connections.

Care or customary care: Customary care is a model of Indigenous child welfare service that is created with each First Nation community to incorporate their unique traditional practices, beliefs, and values into the care of the Indigenous child.

Child: The protective services of child welfare apply until a specific age while that person may still be still considered a child or teenager (youth). The maximum age for service varies according to the laws of each province and territory, but ranges between 16 to 19 as the top age to receive service. Child advocacy centres: A place, authority, or organization where children and youth who suffer abuse can be provided with a safe and comfortable environment to address their needs and receive support.

Culture/Indigenous heritage: Includes the ideas, experiences, worldviews, objects, forms of expressions, customs and practices, knowledge, spirituality, kinship ties and connections to the land held by Indigenous Peoples.

Cultural identity: Identification with, or sense of belonging to, one's heritage and culture. Citizen and/or member: Member of collective/group/country who has rights and protections associated with their belonging.

Delegated Agency: A delegated agency (DA) is an organization established to support the delivery of Indigenous child and family services utilizing provincial legislation and policies. They are not considered an Indigenous Governing Body (IGB) and their participation within a new child welfare regime arising from an Indigenous law must be determined by the community or Nation.

Duty to report: Under Canadian child welfare laws, everyone has the duty to report child abuse and neglect. Professionals who work with children and youth have an added responsibility to report child abuse and neglect. If you know or suspect child maltreatment is occurring, you are obliged to

report this to local child welfare services, social services, or the local police.

False reporting: Statements provided without truth or validation indicating that a child is in need of protective services. Definitions and the associated consequences vary by jurisdiction.

Family: Refers to persons who have a significant and/or meaningful relationship with a child or adult but are not related by blood or marriage and are typically from the same community. For many Indigenous communities, "family" is more than just the parents; it also includes relations and community members involved in raising a child and the people with whom the child was raised. It is a connection to the Elders and Ancestors.

Family violence: Experiences related to the occurrence of violence between family members in the home. Even when the child is not directly injured, exposure to family violence (i.e., hearing, observing, or intervening in the violence or its aftermath) can contribute negatively to the child's development.

Grounds for intervention: If an authoritative child welfare body finds that the legal definition for abuse or neglect is met when investigating for child maltreatment, they may intervene with the appropriate measures to support the child and family.

Independent child advocates: Support and/or care provided by those not affiliated with an organization, agency or other governing body of power.

Inherent jurisdiction: The inherent right of First Nations to self-government, including in relation to child welfare. This includes the legislative authority to make and enforce laws.

Interpretive framework: Approach or method employed in the assessment of the meaning and significance of information, data, results, facts, and so on.

Jurisprudence: The body of written decisions made by judges in court cases and tribunals (case law) on a particular subject. The decisions made by judges in higher courts form a precedent that must be followed by other judges going forward.

Neglect/(Physical) neglect: The child has suffered harm or the child's safety or development has been endangered due to the caregiver's failure to protect and provide for the child adequately. This includes failure to supervise resulting in physical harm or sexual abuse, permitting criminal behaviours, physical neglect such as inadequate nutrition/clothing and unhygienic, dangerous living conditions, failure to provide psychological treatment, abandonment, and educational neglect. There must be evidence or suspicion that the caregiver is at least partially responsible for the situation.

Parent and/or guardian: A person who is responsible for their child's care and upbringing to ensure their well-being.

Risk of Harm: Placing a child at risk of harm implies that a specific action (or inaction) occurred that seriously endangered the safety of the child. Placing a child at risk of harm is considered maltreatment.

Reasonable efforts: Actions made by child welfare agencies to prevent the removal of a child from

their home, and if deemed necessary, towards meeting standards of care required for reunification of the child with their family as soon as possible.

Verification standard: When it is reported that a child has been maltreated, an investigation begins to determine whether to intervene/whether maltreatment has occurred. The verification standard is the method used during the investigation with specific standards varying by jurisdiction.

Youth: A child between the ages of 16 and 19, however, definitions vary by jurisdiction.

Table of Contents

1 Who We Are

1.1 Chiefs of Ontario

The Chiefs of Ontario (COO) is a political collective which supports all First Nations in Ontario as they assert their sovereignty, jurisdiction, and chosen expression of nationhood. COO affirms that First Nations possess the inherent right of self-determination. This is the defining measure of nationhood. It is the responsibility of individual First Nation governments to exercise this jurisdiction through the passage of laws, development of program and other initiatives. COO supports First Nations in the exercise of their inherent rights.

Guided by the Chiefs-in-Assembly, COO upholds self-determination efforts of the Anishinaabek, Mushkegowuk, Onkwehonwe, and Lenape Peoples in protecting and exercising their inherent and Treaty rights. Keeping in mind the wisdom of our Elders, and the future for our youth, we continue to create the path forward in building our Nations' as strong, healthy Peoples respectful of ourselves, each other, and all creation.

The activities of the Chiefs of Ontario is mandated through and guided by:

- Resolutions passed by the Chiefs-in-Assembly of the 133 First Nations in Ontario.
- The Leadership Council made up of the Grand Chiefs of Political Territorial Organizations (PTOs) and Independent First Nations.
- The elected Regional Chief for the Chiefs of Ontario.

COO's vision is a future where our inherent laws, lands, and traditions are recognized and respected by governments, industry, and the general public.

1.2 Justice & Child Welfare Sector

COO has a long history of working to support First Nations children and families and advocating for legislative change to reflect First Nations jurisdiction over child welfare.

This work is currently being led by the COO Justice Sector. The Justice Sector is dedicated to supporting and advocating for First Nations justice systems and self-governance in Ontario. The sector coordinates the political and technical positions of First Nations on justice issues impacting First Nations in Ontario, and develops resources to support First Nations as they exercise their inherent jurisdiction and engage in legislative building processes.

A non-exhaustive list of mandates currently guiding Justice Sector initiatives, include:

- **Resolution 22/15:** Revitalization of Indigenous Legal Principles, Traditions and Systems
- **Resolution 21/26:** Self-Governance and Justice Transformation for First Nations
- **Resolution 21/39:** Consent-Based Consultation and Accommodation Standards

These resolutions highlight the COO's support for all First Nations in exercising their inherent right to self-determination, including the revitalization of First Nations legal principles, traditions and systems, as well as the implementation and direction of culturally-relevant justice systems, such as child welfare.

The imposed application of Canada's justice systems to First Nations is an extension of colonization, which deeply impacts the well-being of individuals, families, communities, and Nations. The Justice Sector is committed to supporting First Nations seeking to create their own child and family well-being laws to address the impacts of historical and ongoing colonization, and improve the overall health and wellness of their people and Nations.

2 What Is This Bundle?

The COO has created the Child and Family Well-Being Law Making Resource Bundle to support First Nations who want to create their own First Nation Child and Family Well-Being laws. This initiative is in response to An Act respecting First Nations, Inuit and Métis children, youth and families, also known as Bill C-92, which came into effect on January 1, 2020.

This Child and Family Well-Being Law-Making Resource Bundle has been developed with the intent to support and enhance First Nations' capacity in exercising their jurisdiction over child welfare. This will be accomplished by:

- Providing foundational and user-friendly information about the current context of First Nations child welfare;
- Demystifying complex legal jargon and concepts;
- Providing tips and tools to support Nations in exercising jurisdiction on child welfare;
- Providing useful real-world examples of First Nations jurisdiction of child welfare in action; and,
- Collecting and presenting links to other tools and relevant information.

2.1 Bundle Organization

The Child and Family Well-Being Law-Making Resource Bundle is organized into a series of chapters. Our hope is that these sections are accessible, and that you can read and return to this document as a reference text as you move through your child and family jurisdiction journey. The chapters are:

1. **Background** provides important foundational level-setting information. This includes historical background, as well as more recent political and legal developments that impact this work.
2. **Outlining the Canadian Legal System** provides a high-level overview of the Canadian legal system as it relates to Indigenous Peoples, including a deeper dive into the new federal child welfare legislation, An Act respecting First Nations, Inuit, and Métis children, youth and families
3. **Setting the Foundation for First Nations Law Making Authority** describes key concepts about Indigenous law and jurisdiction over children and families.
4. **Key Steps on the Journey** outlines important steps you may want to take before beginning to design your child welfare system and develop your laws. This includes valuable resources on mapping your community strengths, undertaking community engagements, developing political strategies, and negotiating funding.
5. **Drafting the Law** provides a detailed guide of important aspects that are either required or recommended to be included in your child and family well-being law, with examples and links to laws already developed by First Nations communities.
6. **Considerations for Child Welfare Agency Structures and Processes** provides insights, drawn from examples across the country, of how you may want to organize your child and family systems.
7. **Making our Circle Stronger** highlights projects undertaken by Indigenous Peoples from across Canada on reinvigorating and implementing Indigenous laws. Our hope is that these

examples will provide inspiration as you move along your own path in realizing jurisdiction over child and family well-being.

8. **Useful Tools** helps bring all this information down to a very practical level. Tools provided include a set of checklists to help guide you through the pathways to jurisdiction, a child welfare law template, and additional details to support framing your jurisdiction.

3 Background

3.1 Historical Context

First Nations' worldviews are grounded in principles of interconnectedness, where values of generosity and social responsibility ensure the wellness of individuals, families, and communities. The care and upbringing of children is an important and community-supported responsibility, with community members and relatives often caring for all children and producing strong familial, cultural, and social ties.[1] Early European contact with First Nations peoples in Canada did not largely interfere with practices of childcare and child welfare; however, as colonial powers sought to forcefully remove First Nations from their traditional territories in order to secure sovereignty and facilitate resource extraction, explicit policies and efforts were enacted to control and assimilate First Nations peoples.[2]

For example, the Indian Act (1876) enabled the Canadian government to impose governing structures (i.e., band councils, to control the practice of culture and traditions, to define who is legally recognized as having Indian status, among other things. Other colonial policies that greatly impacted First Nations include the Indian Residential School system, which was established to remove and isolate children from their families, communities, and cultures, in order to assimilate them into the colonial culture.[3] Between 1883 and 1996, over 150,000 Indigenous children, often through force or coercion, attended residential schools where many experienced abuse, poverty, and neglectful living conditions.[4]

Children returned from residential schools with trauma that at times led to substance use, suicide, and a repetition of the violence many had experienced in the schools. Other impacts of residential schools include domestic violence and dysfunctional relationships, disruption in the passing down of knowledge, and changes in family structure, which severed the ties through which culture is transmitted, contributing to a general loss of language and culture which is still felt today.[5]

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[1] Johanna Caldwell and Vandna Sinha. "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada," *Child Indicators Research*, 13, no. 2 (2020): 481-512. https://doi.org/10.1007/s12187-019-09676-w

[2] Truth and Reconciliation Commission of Canada. "Canada's Residential Schools: The History, Part 2, 1939 to 2000: The Final Report of the Truth and Reconciliation Commission of Canada," *McGill Queens Indigenous and Northern Studies* 1, (2015), https://doi.org/10.2307/j.ctt19rm9wn.

[3] Bennett, Marlyn, Cindy Blackstock, and Richard De La Ronde. *A literature review and annotated bibliography on aspects of Aboriginal child welfare in Canada, Vol 13.* (First Nations Child & Family Caring Society of Canada, 2005), https://www.fncaringsociety.com/sites/default/files/docs/AboriginalCWLitReview_2ndEd.pdf

[4] Truth and Reconciliation Commission of Canada. "Canada's Residential Schools: The History, Part 2, 1939 to 2000: The Final Report of the Truth and Reconciliation Commission of Canada," *McGill Queens Indigenous and Northern Studies 1*, (2015), https://doi.org/10.2307/j.ctt19rm9wn.

[5] Ibid.

The rupture and fragmentation of family caused by colonial policies, forced relocation, and residential schools was worsened through the disconnection faced due to child welfare apprehension. A 1951 amendment to the Indian Act allowed for provincial law, including child welfare laws, to apply to Indigenous peoples on-reserve.[6] This led to the 'Sixties Scoop' – which involved the mass removal of Indigenous children from their families into the child welfare system, where they were largely placed with non-Indigenous families – and disconnected First Nations children from their cultures and communities.[7]

The 'Sixties Scoop' has evolved into the 'Millennium Scoop', coined to describe the alarming rate at which Indigenous children continue to be brought into the child welfare system from the 1980s to today. The long-lasting impacts of removal from community and mistreatment through the child welfare system, which continues to fail to provide adequate funding or culturally relevant services to Indigenous children and families, has contributed to intergenerational trauma and the downstream effects of colonial oppression which are still felt today.[8]

3.2 Important Recent Developments

Over the last decade there have been several important developments that have set the stage for First Nations taking up the call to reinvigorate authority and jurisdiction in many areas, including in child welfare. These developments include the undertaking and completion of the Truth and Reconciliation Commission of Canada on Indian Residential Schools, the National Inquiry into Missing and Murdered Indigenous Women and Girls, and years-long legal struggles at Canadian Human Rights Tribunal. These developments are both an advocacy lever and foundation for advancing the kind of work represented in this Bundle.

3.2.1 Truth and Reconciliation Commission of Canada

Following seven years of gathering testimony from survivors and intergenerational survivors of Indian Residential Schools, the Truth and Reconciliation Commission of Canada (TRC) released its final report in 2015. The report culminated in 94 Calls to Action; a comprehensive set of recommendations that, when implemented, create the foundation for reconciliation across Canada. There are five Calls to Action specific to child welfare. They are as follows:

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[6] Johanna Caldwell and Vandna Sinha. "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada," *Child Indicators Research*, 13, no. 2 (2020): 481-512. https://doi.org/10.1007/s12187-019-09676-w

[7] Fallon, Barbara, Rachael Lefebvre, Nico Trocmé, Kenn Richard, Sonia Hélie, M. Montgomery, Marlyn Bennett et al. *Denouncing the continued overrepresentation of first nations children in Canadian child welfare: Findings from the first nations/Canadian Incidence Study of Reported Child Abuse and Neglect-2019*, (Assembly of First Nations, 2021), 5.

[8] Ibid.

1. *We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:*
   a. *Monitoring and assessing neglect investigations.*
   b. *Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.*
   c. *Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.*
   d. *Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.*
   e. *Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.*
2. *We call upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.*
3. *We call upon all levels of government to fully implement Jordan's Principle.*
4. *We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:*
   a. *Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.*
   b. *Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.*
   c. *Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.*
5. *We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.*[9]

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[9] Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action," *Exhibits*, accessed October 2, 2022, https://exhibits.library.utoronto.ca/items/show/2420.

The TRC also affirmed what Indigenous peoples have been saying for decades: the child welfare system is a continuation of the residential school system.

3.2.2 National Inquiry into Missing and Murdered Indigenous Women and Girls

Between 2016 and 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) heard from 2,380 family members, survivors of violence, experts and Knowledge Keepers related to the shocking and disproportionate rates of violence against Indigenous women, girls, and 2SLGBTQQIA people. The National Inquiry's final report included 231 Calls for Justice directed towards provincial/territorial and federal governments, service providers, civil society and industry, and all Canadians, in the areas of culture, health, security, and justice.

The Final Report rightly notes the very close connection between the involvement of children and youth in care and the horrific phenomena of missing and murdered Indigenous women, girls, and Two-Spirit peoples. As such, the National Inquiry's Calls for Justice include numerous recommendations related to child welfare. The Calls for Justice most relevant to this Bundle include calling on:

1. *All federal, provincial, and territorial governments to recognize Indigenous self-determination and inherent jurisdiction over child welfare. Indigenous governments and leaders have a positive obligation to assert jurisdiction in this area. We further assert that it is the responsibility of Indigenous governments to take a role in intervening, advocating, and supporting their members impacted by the child welfare system, even when not exercising jurisdiction to provide services through Indigenous agencies.*

2. *All governments, including Indigenous governments, to transform current child welfare systems fundamentally so that Indigenous communities have control over the design and delivery of services for their families and children. These services must be adequately funded and resourced to ensure better support for families and communities to keep children in their family homes.*

3. *All governments and Indigenous organizations to develop and apply a definition of "best interests of the child" based on distinct Indigenous perspectives, world views, needs, and priorities, including the perspective of Indigenous children and youth. The primary focus and objective of all child and family services agencies must be upholding and protecting the rights of the child through ensuring the health and well-being of children, their families, and communities, and family unification and reunification.*[10]

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[10] Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. Canada, 2019. Web Archive. https://www.loc.gov/item/lcwaN0028038/.

3.2.3 Canadian Human Rights Tribunal

In 2007, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (AFN) launched a complaint at the Canadian Human Rights Tribunal (CHRT) against the federal government alleging discrimination against on-reserve First Nations children within child welfare services. The Chiefs of Ontario also intervened in the case.

After years of legal wrangling and hearings, in 2016 the CHRT ruled in favour of First Nations children, finding that Canada

> *[…] denied services to many First Nations children and families living on-reserve and resulted in adverse impacts for them because it was based on flawed assumptions about First Nations communities that did not reflect the actual needs of those communities. The Tribunal also found that the [Government of Canada's First Nations Child & Family Services] Program's two main funding mechanisms incentivized removing First Nations' children from their families.*[11]

The CHRT issued a series of orders meant to end the federal government's discriminatory practices and launch child welfare program reform. Since the initial rulings in 2016, the Tribunal has issued numerous compliance orders providing clarity and direction on the initial orders and compelling federal action. A detailed list of compliance orders can be found here.

Compensation

In September 2019, the CHRT issued a Compensation Decision ordering the Government of Canada to pay eligible First Nations children and their parents and/or caregivers $40,000 in compensation. Eligible claimants include children and parents/caregivers of those removed and placed in care outside of their communities since January 1, 2006. The Government of Canada sought judicial review of this decision, but it was upheld.

Two compensation-related class action lawsuits were also filed at this time, including one by the AFN, and another by Moushoom/Trout seeking compensation for First Nations children and caregivers who were discriminated against through underfunding of the FNCFS Program and the narrow application of Jordan's Principle. In the fall of 2021, the Government of Canada agreed to enter negotiations to settle the class action lawsuits.

The AFN, the Government of Canada, and Moushoom/Trout signed an Agreement-in-Principle on December 31, 2021, that outlined $20 billion in compensation for impacted First Nations children and families. Eligible claimants include children and their parents/caregivers removed from their families dating back to 1991. "Removal" in this case does not require removal from the community, as in the CHRT Compensation Order; rather, simple removal from the family home entitles the child/family to compensation. The Parties also signed an Agreement-in-Principle to reform the FNCFS program and for the proper implementation of Jordan's Principle, outlining an additional $19.807 billion.

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[11] First Nations Child and Family Caring Society. Information Sheet: Victory for First Nations Children: Canadian Human Rights Tribunal Finds Discrimination Against First Nations Children Living On-Reserve, (2016).

After months of negotiations, the Final Settlement Agreement (FSA) was announced in June of 2022. The FSA represents the largest settlement agreement in Canada's history

In October of 2022, the CHRT declined to endorse the FSA as it leaves out some victims/survivors that would be eligible for compensation under the CHRT's September 2019 Compensation Order. Those left out of the FSA include the estates of deceased caregivers and voluntary placements, which Indigenous Services Canada does not fund.

The following month, both the AFN and the Government of Canada filed an application for a judicial review of the CHRT decision. As of January of 2023, this process is ongoing.

3.2.4 Jordan's Principle

Jordan's Principle is "a child-first principle intended to ensure that First Nations children do not experience service denials, delays, or disruptions because of jurisdictional disputes over the provision of or payment for services."[12]

Jordan's Principle was developed in honour of Jordan River Anderson, a First Nations child from the Norway House Cree Nation, Manitoba who was born with complex medical needs. Since Jordan was a First Nations child whose family lived on-reserve but was receiving medical care off-reserve, there was a dispute between the federal and provincial government about who would pay for services after Jordan's doctors cleared him to return home. If Jordan was a non-Indigenous child living off-reserve, he would have been able to go home and have his in-home services covered by the province. Instead, Jordan spent an additional two years in hospital and died in 2005 without ever going home.

While Jordan's Principle passed unanimously in the House of Commons in December 2007, the CHRT found in the First Nations child welfare case that the Government of Canada applied a limited and discriminatory definition of the principle and in 2016, "ordered the federal government to take immediate measures to implement the full and proper scope of Jordan's legacy".[13] Since the CHRT ruling, the federal government has dedicated significant funding to Jordan's Principle intended to cover, "all public services such as mental health, special education, dental, physical therapy, medical equipment, physiotherapy" among others.[14] Services are generally coordinated through regional service coordinators who often operate within First Nations governments and organizations.

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[12] The Jordan's Principle Working Group. Without Denial, Delay, or Disruption: Ensuring First Nations Children's Access to Equitable Services through Jordan's Principle, (Assembly of First Nations. 2015), http://cwrp.ca/sites/default/files/publications/en/jpreport_final_en.pdf.

[13] First Nations Child and Family Caring Society. "Jordan's Principle", accessed September 23, 2022, https://fncaringsociety.com/what-you-can-do/ways-make-difference/jordans-principle.

[14] Assembly of First Nations. Accessing Jordan's Principle: A Resource for First Nations Parents, Caregivers, Families and Communities, (2018), https://www.afn.ca/uploads/Social_Development/Jordan%27s%20Principle%20Handbook%202019_en.pdf.

3.2.5 An Act Respecting First Nations, Inuit and Métis Children, Youth, and Families

Developed in part as a response to the ruling of the Canadian Human Rights Tribunal, a federal bill called *An Act respecting First Nations, Inuit, and Métis children, youth, and families* (formerly Bill C-92) became law in June of 2019. This act provides the legislative framework for First Nations to exercise their inherent jurisdiction over the care of their children and families. Extensive information on this legislation can be found in **Section 4.4: The Federal Act.**

4 Outlining The Canadian Legal System

The following section provides an overview of key features of the Canadian legal system with a focus on how these features interact with First Nations jurisdiction over child well-being.

4.1 The Canadian Constitution

At its most basic, the Canadian Constitution sets out the fundamental rules and principles which govern Canada including defining the powers of each of the three branches of government (executive, legislative, and judiciary), and creates and defines the division of powers between federal, provincial, and territorial governments.

'Aboriginal rights' are inherent to Indigenous Peoples on account of their historic presence prior to contact. **'Treaty rights'** arise via sacred agreements between the Crown and Indigenous Peoples. Both these Aboriginal and Treaty rights are recognized and affirmed via Section 35 of the Constitution. Section 35 rights cannot be extinguished through legislation. The language of 'recognized and affirmed' is deliberate and important here. Indigenous rights have existed since time immemorial, that is, pre-colonization and pre-contact. Colonial legal systems did not and do not create or undermine the existence of Indigenous inherent rights, including over children and families, were not created by, nor rely on, colonial laws.

Despite this, Canada's history is rife with examples of governments pushing back against these rights, including policies such as placing Indigenous children in residential schools and removing them from their homes under the auspices of child protection concerns.

The Supreme Court established a test to determine the existence of a Section 35 right in Canada in the *R. v. Van der Peet* decision.[15] According to this test:

- the activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Nation prior to contact; and,
- there must be continuity between the pre-contact practice, custom or tradition and the practice, custom or tradition as it exists today.

Arguably, there is nothing more integral to a culture than the rearing and education of its children. As such, Section 35 provides a pathway for recognition of the laws, methods, and approaches First Nations' own ways of raising and protecting their children.

4.1.1 Jurisdictional Chasms and Child Welfare

Sections 91 and 92 of the Constitution set out the division of powers between the federal government and the provinces. Section 91(24) establishes federal powers over "Indians, and lands

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[15] R. v. Van der Peet, [1996] 2 S.C.R. 507 at paras. 46, 60, 64 ("Van der Peet") https://canlii.ca/t/1fr8r.

reserved for Indians", a power which enabled federal legislation such as the Indian Act. Section 88 of the Indian Act establishes that provincial child welfare legislation applies on reserves. This has resulted in a system where, apart from a few exceptions, the federal government funds child welfare agencies for First Nations children, and they must operate according to provincial rules. Historically, this has created a situation for many First Nations-delegated agencies in which they are tasked with providing services, comparable to provincial agencies, with inadequate funding provided by the federal government.

The ongoing tension between provincial, federal, and First Nations jurisdiction remains a key area to pay attention to when considering developing your own child and family well-being laws. Section 4.4.1 below discusses this challenge related to Bill C-92.

4.2 The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (the Charter) is part of the Canadian Constitution, and sets out "basic rights and freedoms of all Canadians that are considered essential to preserving Canada as a free and democratic country"[16] and applies to federal, provincial, and territorial governments. The Charter includes protections for fundamental freedoms (i.e., freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; freedom of association, democratic rights, mobility rights, legal rights, equality rights, and official languages rights, among others).

4.3 United Nations Declaration on the Rights and Freedoms of Indigenous Peoples

After decades of advocacy from Indigenous Peoples around the globe, the United Nations General Assembly passed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or 'the Declaration'), an international instrument that sets out "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".[17] The rights specific to child well-being articulated within the Declaration include the right:

- to self-determination, including in the area of child and family well-being (Articles 3, 4 and 34);
- for children to remain in their communities (Article 7.2, Article 8); and
- of communities to educate their children (Article 12).

It is important to note that UNDRIP is a Declaration and does not bind signatory states in the same way a Convention does. This means that individual States must also recognize UNDRIP within their domestic practice or decisions, in order to give UNDRIP the force of law. Relatedly, in 2021,

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[16] Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[17] United Nations. United Nations Declaration on the Rights of Indigenous Peoples: Article 43, (2007). https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Canada passed The United Nations Declaration on the Rights of Indigenous Peoples Act (Bill C-15) which sets out Canada's obligations to upholding UNDRIP. Found in the Act's preamble is Canada's obligations to addressing child welfare, which states:

> *Whereas the implementation of the Declaration [UNDRIP] must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence, racism, and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons.*[18]

The Act also rejects the notion that Indigenous Peoples' right to be self-determining comes as a 'gift' from the Crown. Rather, it acknowledges that these rights arise out of the fact of Indigenous Peoples existence prior to colonization. The legislation notes:

> *…the urgent need to respect and promote the inherent rights of Indigenous peoples of the world which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, philosophies and legal systems, especially their rights to their lands, territories and resources.*[19]

4.4 The Federal Act: An act respecting First Nations, Inuit, and Métis children, youth, and families

As noted previously, the Federal Act known as An Act respecting First Nations, Inuit, and Métis children, youth, and families (The Act) was introduced by the government in 2019 as Bill C-92 and came into force on January 1, 2020. The Federal Act does two things:

1. Recognizes and affirms Indigenous communities' inherent jurisdiction; and
2. Establishes national standards for any agency/province working with Indigenous children, articulating:
    a. the need for cultural continuity;
    b. the hierarchy of placement, including keeping siblings together; and,
    c. the exclusion of socioeconomic factors from grounding apprehensions.

The concept of the best interests of the child is not new; in fact, it is well established within provincial child welfare legislation, including in Ontario. However, the Act essentially indigenizes the concept by requiring several new factors be considered in determining the best interests of the child. These factors are primarily related to the rights of children to cultural continuity, connections, and belonging. Addition information on the best interests of the child provisions in the Act can be found in Section 7.1.6.

In affirming an existing Section 35 right, the Federal Act confers no new rights to Indigenous

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[18] Bill C-15, An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, 2d sess., 43rd Parliament, 2020-2021. https://parl.ca/DocumentViewer/en/43-2/bill/C-15/third-reading

[19] Ibid.

Peoples, but rather recognizes what already belongs to Indigenous Nations: the inherent jurisdiction over child well-being matters. The provinces and Canada cannot interfere where an Indigenous law exists in this area.

However, an Indigenous child-welfare law may be challenged. That would happen in federal court, rather than provincial court. The court can be asked whether the law violates the Charter or the federal human rights framework, however, the court cannot read in or superimpose provincial or federal laws. The federal and provincial governments may also bring to the court questions about an Indigenous law's inconsistency with national standards articulated in the Federal Act.

While the passing of the Federal Act into Canadian law was seen by many as a triumph, it does have limitations. For the purposes of re-asserting inherent jurisdiction, it is important to recognize both the benefits and limitations of the Act so that First Nations can prepare accordingly.

4.4.1 Benefits and Limitations of the Federal Act

As stated above, one of the most obvious benefits of the Federal Act is its recognition in Canadian law the inherent right and jurisdiction of Indigenous Peoples over their children. While these rights have existed since time immemorial, colonial governments have ignored these rights and used their power to attempt to assert their own policies and laws. The recognition in Canadian law tells Canadians, including lawyers, politicians, judges, and social workers, that decisions regarding the well-being of Indigenous children shall be made by the child's community or communities.

Critics have thus far identified four main limitations of the Federal Act:

1. The Federal Act does not provide for a stable and predictable funding stream to First Nations exercising their jurisdiction over child and family well-being;
2. First Nations are required to attempt to enter into coordinating agreements, not only with the federal government and the government of the province with which their territory overlaps, but with any province in which they wish their jurisdiction to be recognized;
3. Provincial and federal law can intrude in any aspect of child and family well-being for which the Indigenous law does not cover the field; and
4. The federal government currently takes the position that the Charter as well as national standards set out in the Federal Act, apply to Indigenous child and family well-being laws.

These criticisms are further outlined below.

Funding

The main concern about the Federal Act is that there is no explicit funding mechanism attached to it. While the federal government has stated that it will fund the Indigenous institutions established by Indigenous laws, stable, predictable, and sufficient funding of these functions remain an outstanding question.

Coordination Agreements

The Federal Act requires First Nations to enter into a Coordination Agreement with the federal government and relevant provincial governments. The current position of the federal government is that each First Nation will need to **attempt to** enter into coordinating agreements with

each province with which its law is intended to apply, which is to say, each province that the community's children may be living in.

At this time, First Nations that appear in court in child protection matters are not limited by the location of the First Nation – an Ontario First Nation can appear in a Saskatchewan child protection matter so long as one of its children is the subject of protection proceedings in that jurisdiction.

The Charter and National Standards

The substantive rules of the Federal Act, those outlining national standards for cultural continuity, substantive equality, and priority of placement for Indigenous children may, in some cases, supersede Indigenous law, at least to the extent that there is a conflict between them.

There are areas where this assessment of supersession will likely cause challenges, such as in the area of the primacy of preventative care as set out in Section 14 of the Federal Act. In some First Nations, children are removed by their grandparents on a short- and medium-term basis, and if a law allows this as a least disruptive act, without providing for preventative care to precede it, a party may bring a legal challenge within the Canadian court system on this basis.

4.4.2 Interaction of Federal, Provincial, and Indigenous Laws

First Nations have been navigating a challenging and complex relationship with both provincial and federal governments in the areas of child welfare for decades. As mentioned previously, both provincial and federal governments play a role in First Nations child welfare, both on and off reserve. The lack of jurisdictional clarity combined with colonial attitudes has resulted in confusion and buck-passing which has significantly contributed to inadequate services and overall poorer outcomes for First Nations children and families.

Within the Federal Act, the Federal Government currently asserts that an Indigenous law enacted by a First Nation will displace provincial and, often, federal law pertaining to child and family well-being, to the extent that it occupies the field and meets certain criteria.

This means that if an Indigenous law remains silent on topic, such as adoption, the provincial scheme resumes its primacy in that area. However, if the Indigenous law is a complete and comprehensive statute in the area of adoption, it will displace the provincial scheme in that area entirely.

An area that remains unsettled is employment law. In general terms, Indigenous agencies providing child protection services are regulated by the provincial employment scheme.[20] However, this analysis is based on the fact that the agencies providing those services currently do so under the provincial child protection legislation. It remains to be seen whether employment disputes arising under Indigenous laws will come under the realm of provincial or federal jurisdiction.

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[20] NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union [2010] 2 SCR 696, at para 8, https://canlii.ca/t/2d60s

4.4.3 Quebec's Challenge to the Federal Act

Quebec is the only province to have challenged the Federal Act. The Quebec Court of Appeal recently answered the following questions posed by Quebec: does the Federal Act intrude on a provincial area of jurisdiction, and thereby modify the scope of Section 35?

Quebec asserted that the Federal Act was unconstitutional because:

- child protection is a provincial concern and national standards are invalid because they appear to dictate the manner of service delivery to the provinces in an area of provincial jurisdiction;
- the Section 35 right to self-government does not include inherent jurisdiction in child welfare; and,
- the Federal Act cannot confer Indigenous laws enacted under it with the force of federal law because to do so would require a constitutional amendment.

The Quebec Court of Appeal ruled that the federal government cannot grant Indigenous law the force of federal law without a constitutional amendment.

This challenge is on appeal to the Supreme Court.

4.4.4 Treaties or Existing Agreements

As First Nations work to codify their existing laws and negotiating with federal and provincial governments, existing agreements and protocols will also require revision.

What is Codification?

Codification is the process of collecting and restating the law of a jurisdiction, forming a legal code. Codification is a long-held practice in First Nations.

The Wampum belt is an example of the ways in which First Nations laws are codified. Wampum belts hold collective responsibility and instruction of 'who we are, and what we do, and what we need to do'.

1965 Welfare Agreement

This agreement between Canada and Ontario, which did not include any First Nation signatories, mandated that the federal government provide 93% of the costs of child welfare services delivered on reserve, while Ontario provide the remaining 7%. The funding provided through this agreement fell significantly short of similar funding in non-Indigenous communities.

As noted in the above section discussing the child welfare case at the Canadian Human Rights Tribunal (CHRT), in January 2016, the CHRT found the First Nations Child and Family Services (FNCFS) program to be flawed, inequitable, and discriminatory under the Canadian Human Rights Act. The CHRT ordered the federal department responsible to cease its discriminatory practices and to reform both the program and the 1965 Welfare Agreement in Ontario to reflect the findings in their decision.

While the federal government has put some measures in place, including Community Well-Being and Jurisdiction Initiatives and amendments to Jordan's Principle funding, negotiations for stable, predictable operational funding will be required as part of the coordination tables with the federal government.

Existing Local Agreements

Many First Nations currently have protocols or Memoranda of Understanding (MOU) with local agencies, including hospitals, school boards, and child protection agencies. These set out parameters for service provision and co-operation, including when outside agencies may come onto a reserve.

As First Nations work to codify and enact their Indigenous laws, these protocols and MOUs will need to be revisited and replaced, both on an interim basis to account for the Nations' transitional measures as they re-assert their jurisdiction and on an ongoing basis once exercising that jurisdiction.

Anishinabek Nation Law

Some First Nations had previously signed on to the Anishinabek Nation Law, which asserts its inherent jurisdiction by centralizing the jurisdictions of its signatory members. Since the passage of the Federal Act, some First Nations are reviewing their options, as they are now able to assert their jurisdiction independently.

5 Setting the Foundation for First Nation Law Making Authority

5.1 What is Indigenous Law?

Indigenous law refers to the ways in which Indigenous people govern themselves, including decision-making processes, regulation, customs, and dispute resolution. As described by Indigenous legal scholar Val Napoleon, Indigenous law is:

> *integrally connected with how we imagine and manage ourselves both collectively and individually," and is about "building citizenship, responsibility and governance, challenging internal and external oppressions, safety, and protection, lands and resources, and external political relations with other Indigenous peoples and the state.*[21]

Indigenous law is derived from the evolution of customary practices in Indigenous communities, and is shaped by practices, stories, songs, language, traditions, and ceremony.[22] Indigenous law is also derived from peoples' social relationships with one another, where customary roles and reciprocal obligations found within Indigenous communities and kinship networks represent a unique source of Indigenous law founded on customary relationality. Indigenous law is further shaped by the method through which it is recorded – mainly, oral tradition through songs, stories, and ceremony, and its interpretation by Indigenous Elders and law-keepers.[23] The oral tradition of Indigenous law has allowed for its evolution as a living practice and process, rather than a static fact.

Indigenous law is also specific to Indigenous Peoples as distinct and self-governing groups.[24] This means that different Indigenous Peoples have their own laws and practices that govern their internal relationships and their relationships with other groups and levels of government.

It is important to distinguish Indigenous law from Aboriginal law. Aboriginal law is an arm of the Western legal framework, created by Canadian courts and legislature to shape the legal relationship between Indigenous Peoples in Canada and the country's legal system.[25] Aboriginal law thus refers

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[21] Val Napoleon. "Thinking about Indigenous Legal Orders," In Dialogues on human rights and legal pluralism, Springer, Dordrecht, (2013): 2

[22] See Val Napoleon. "Thinking about Indigenous Legal Orders," In Dialogues on human rights and legal pluralism, Springer, Dordrecht, (2013): 229-245 and Frankie Young. "Positioning Indigenous Law in the Legally Pluralistic State of Canada." Cambridge L. Rev, 6 (2021): 30.

[23] Ibid.

[24] West Coast Environmental Law. "Transforming the Legal Landscape", accessed September 23, 2022. https://www.wcel.org/.

[25] Kate Gunn and Cody O'Neil. "First Peoples Law: Indigenous Law and Canadian Courts", accessed September 23, 2022. https://www.firstpeopleslaw.com/public-education/blog/indigenous-law-canadian-courts

to the interpretation of Indigenous rights within Canada's federal jurisdiction, such as the *Indian Act*, self-government agreements, and Aboriginal and Treaty Rights under the *Constitution Act, 1982*.[26] Alternatively, as emphasized above, Indigenous law exists outside of the Canadian legal system, and is an inherent right of Indigenous Peoples to govern themselves and their relationships, manage resources, and importantly, "resolve conflicts within and across legal systems".[27]

Priorities for Indigenous law are honoured in the **Truth and Reconciliation Calls to Action**, including calls to both recognize and integrate Indigenous law into legal processes and negotiations, and to support training, education, cultural competency, and further development of Indigenous law and legal processes.[28]

5.2 What is Inherent Jurisdiction?

Inherent jurisdiction refers to the inherent right to live in accordance with your First Nation's own laws: the laws that live in the land, in the language, and passed down through generations. These laws pre-date colonial laws and have survived despite years of colonial governments' attempts to destroy them.

The manner in which First Nations care for their children, both within families and as a collective, is determined by Nations' cultural ways of knowing, being, and doing. In many ways, the collective care of children is the basis of First Nations' culture. The laws around the care and protection of children, and how Nations govern themselves with those laws, define each First Nation.

As generations of Ancestors learned through the trauma of the residential school system, there is nothing more intrusive and harmful than taking children away from their families, communities, land, language, and culture, for both the child and their families, communities, and Nations. Such an intrusion should only be permitted where there is no safer alternatives, under clear legal authority of that child's First Nation, and in alignment with the laws of that child's Ancestors, kin, language, and culture.

No First Nation has ever given up the right to live in accordance with its own laws – these laws have never been extinguished or surrendered. Instead, the provincial and federal governments have been ignoring and eliding these laws and the inherent jurisdiction of Nations. At the same time, as a result of colonial policies, Nations have lacked, and continue to lack, the resources and capacity to deliver prevention and protection services themselves.

An Act respecting First Nations, Inuit and Métis children, youth and families provides the first mechanism under Canadian law to recognize Indigenous jurisdiction in the area of child and family well-being.

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[26] Ibid.

[27] Kate Gunn and Cody O'Neil. "First Peoples Law: Indigenous Law and Canadian Courts", accessed September 23, 2022. https://www.firstpeopleslaw.com/public-education/blog/indigenous-law-canadian-courts

[28] Truth and Reconciliation Commission of Canada. Truth and Reconciliation Commission of Canada: Calls to Action, (2015), https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf

In discussing and generating laws on child welfare, each First Nation will have to consider various aspects of the concept of jurisdiction, including most centrally, who falls within the jurisdiction. Some considerations to assist with thinking through this concept are detailed below.

5.3 Pathways to Jurisdiction Under the Federal Act

Within the Federal Act, there are two potential pathways to jurisdiction available to Indigenous Peoples in Canada:

1. to give notice of intention to exercise jurisdiction; or,
2. to make a request to enter into a coordination agreement.

Regardless of the chosen pathway, a First Nation must develop their child and family service laws and a detailed implementation plan before moving to next steps. Once a Nation is ready to submit their notice or request, they will also be required to send the following information, as described in ISC's Technical Information Package:

- the name of the Indigenous Governing Body (IGB), as well as the name of the communities who have authorized this body to act on their behalf and an explanation of the process through which this body was authorized;
- the name of the current child and family services provider;
- a brief summary of the child and family services model as well as a copy of the Nation's legislation, and a description of where and to whom these would apply;
- a copy of any previous notices sent of the Nation's intent to exercise jurisdiction; and,
- a list of all treaties or self-government agreements.

As outlined by the Indigenous Child and Family Services Directors, **if no path to jurisdiction is chosen**, service providers will be required to follow the minimum standards identified in the Federal Act (see Section 7.3: Minimum Standards).

For a checklist that outlines the steps and sequencing of pursuing both options, please see Section 10: Useful Tools.

5.3.1 Give notice of intention to exercise jurisdiction

The first pathway requires that notice be given to the Minister of Indigenous Services of Canada (ISC), as well as the provincial or territorial government where the First Nation is located. Notice must state that the First Nation plans to exercise their own laws in regard to child and family services.

Through this pathway to jurisdiction, a First Nation can immediately begin to administer their own laws, however, Indigenous law will not prevail in the case of conflict between laws. For Indigenous law to prevail over conflicting federal or provincial/territorial laws, a request must be made to enter a coordination agreement, as described below.

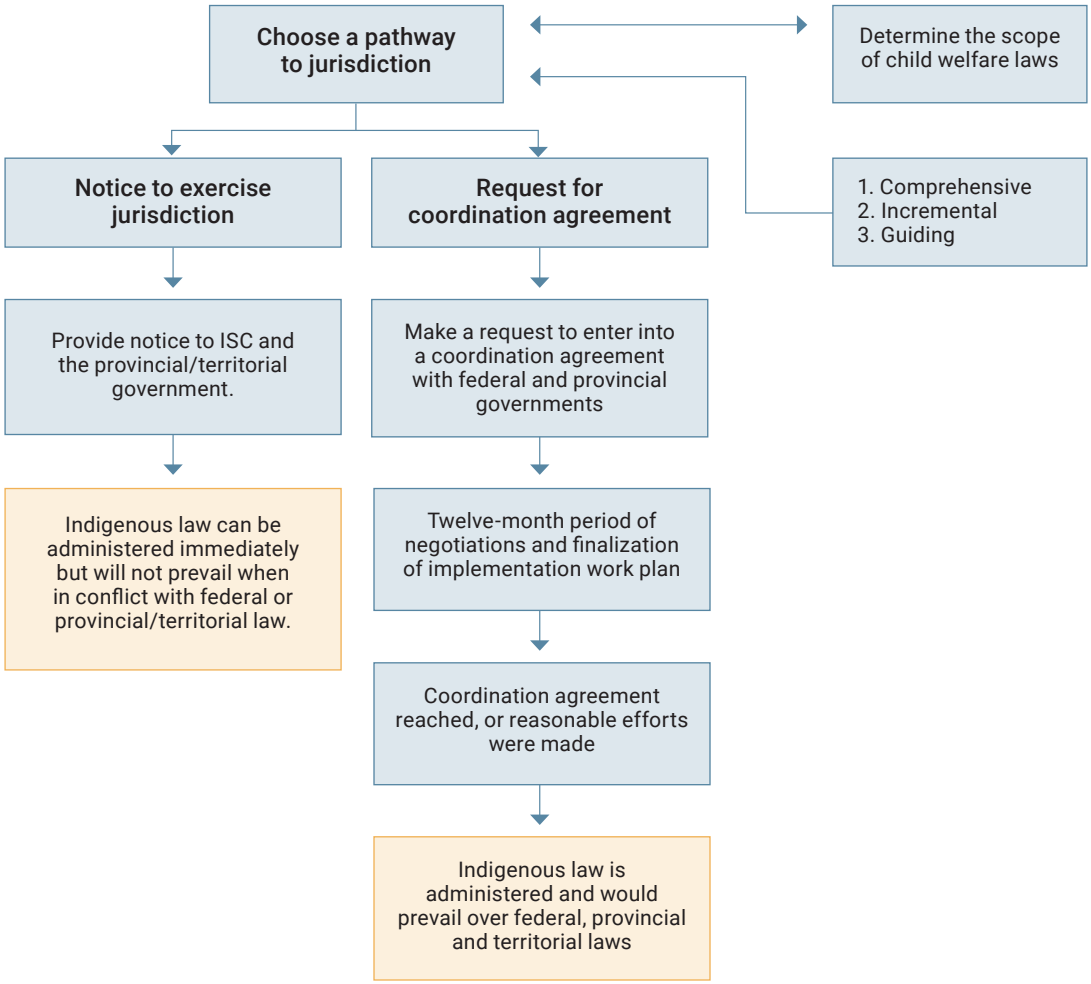
5.3.2 Make a request to enter into a coordination agreement

The second pathway requires that a First Nation submit a request to both ISC and the province to enter into a coordination agreement. ISC will confirm the request within 30 days, and advise on

next steps, which will include the submission of a funding proposal and proposed work plan to support the Nation in this coordination agreement process.

The twelve-month period following the request involves tripartite negotiations to finalize the coordination work plan, and may include the co-creation of a dispute resolution tool should disagreements arise.

The Government of Canada states that in the case of a successful coordination agreement, or "[if] no agreement is reached but reasonable efforts were made to reach an agreement", the Indigenous law "would prevail over federal, provincial and territorial laws".[29]



Click here for a look at which communities have provided ISC with formal notice of intention to undertake action under the Federal Act (for both pathways).

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[29] Indigenous Services Canada. *An Act Respecting First Nations, Inuit and Metis Children: Technical Package*, (2020), https://www.metisnation.ca/uploads/documents/tech-info-pkg-Act-respecting-FN-Inuit-Metis-Children-1579795374325-eng.pdf

5.4 Extent of Child Welfare Laws

There are three principal options regarding the extent of child welfare laws passed under the Federal Act, including: comprehensive, incremental, and guiding laws, as described in Wrapping Our Ways Around Them: Indigenous Communities And Child Welfare Guidebook.[30]

5.4.1 Comprehensive

Comprehensive child welfare laws are implemented with the intention of replacing provincial/territorial laws altogether. These laws include various supporting components, including the creation of Indigenous Governing Bodies, which are responsible for carrying out the established legal processes and standards, and dispute resolution and appeals processes.

5.4.2 Incremental

Incremental child welfare laws address certain areas of child welfare, but this is a piecemeal approach as it is not comprehensive in scope. An incremental approach allows First Nations to increase the scope of their laws as their capacity to do so increases.

5.4.3 Guiding

Guiding child welfare laws provide direction on how the Federal Act could manifest in a First Nation – including how the Act is interpreted and applied according to Indigenous law. Examples of this include direction on how to define preventative care or providing definitions of the "best interest of the child". Guiding child welfare laws can be put in place as the Nation builds capacity towards a more comprehensive approach.

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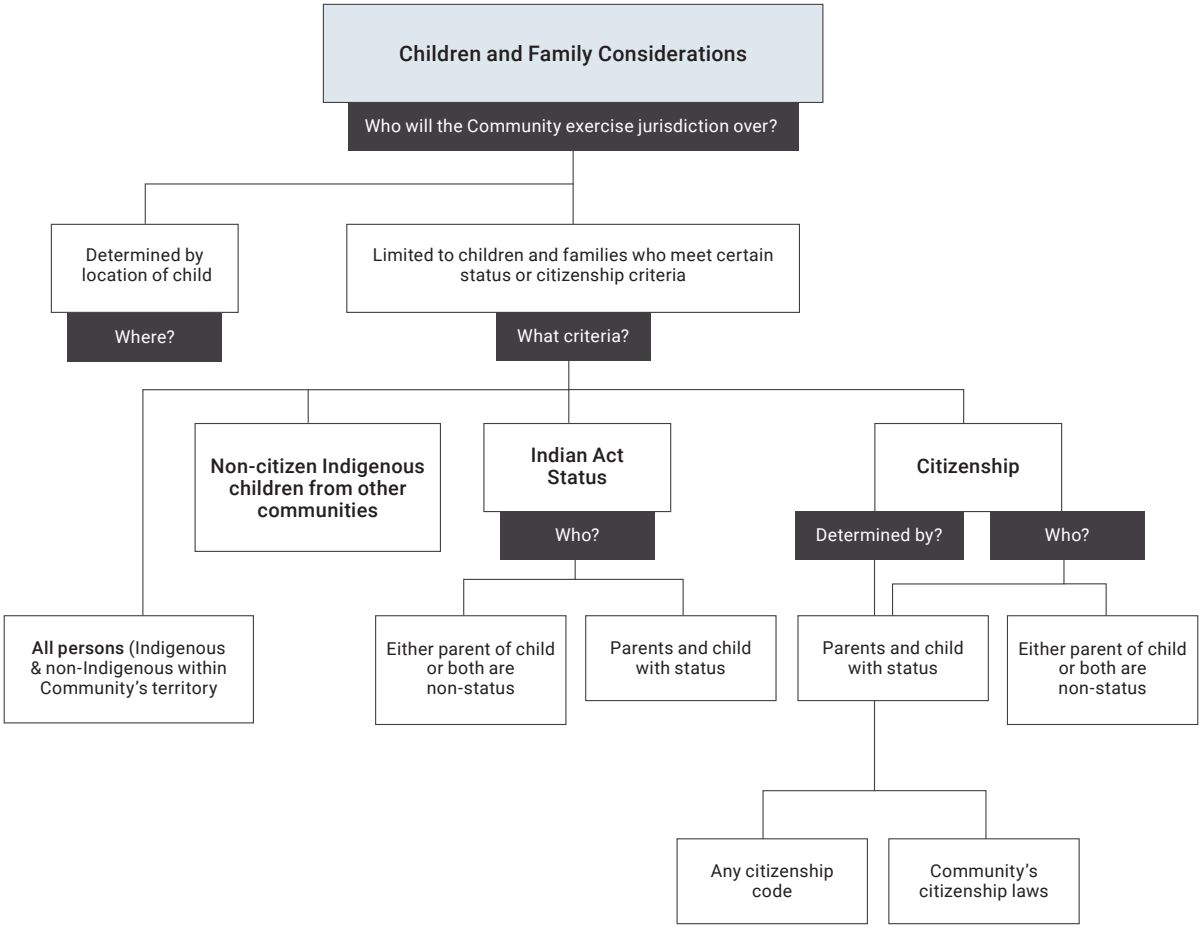
[30] Ardith Walkem. Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook. ShchEma-mee.tkt Project, (2020), https://www.nntc.ca/documents/WOW_Guidebook_2021_210214.pdf

5.5 Framing the Jurisdiction Question

When considering an Indigenous law, First Nations will have to make decisions about who falls within their jurisdiction. Inherent jurisdiction is tied to community territoriality, meaning it extends throughout traditional territory and beyond the boundaries of reserve lands. Therefore, there are varying extents in which First Nations can choose to exercise their inherent jurisdiction.



In contemplating jurisdiction, First Nations are encouraged to consider answering the following questions:

1. Whether and to what extent a First Nation wants to exercise jurisdiction over child and family services off reserve, within the Nation's territory?

    a. Which portions of the Nation's territory?

2. Whether and to what extent a First Nation wants to exercise jurisdiction over child and family services with respect to citizenship, membership, and status of the Nation's children and families?

    a. Parents and children with Indian Act status?
    b. Either parents or children or both are non-status?

c. Living off-reserve but within the Nation's territory? If so, which parts of the territory?
d. Living outside of the Nation's territory?

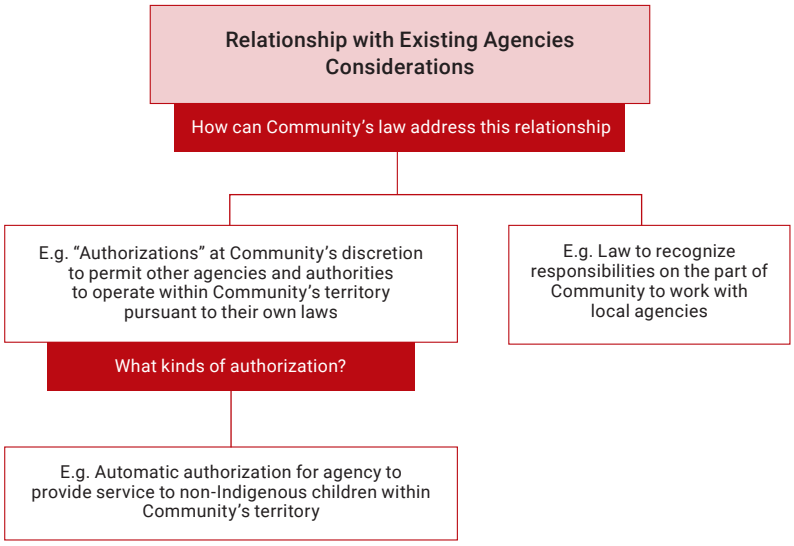
Thinking about jurisdiction through these questions allows First Nations to determine and specify *who* and *where* jurisdiction is exercised over child and family well-being services.

5.5.1 Territorial Jurisdiction

First Nations can assert territorial jurisdiction, for all persons – citizen or non-citizen, Indigenous or non-Indigenous – residing within a Nation's territory.

Once a law asserting territorial jurisdiction for all persons is drafted, it could allow "authorizations" to be determined at the Nation's discretion. In other words, First Nations could choose to permit other agencies and authorities, such as provincial child and family service agencies, to operate within the Nation's territory, including pursuant to their own provincial laws.

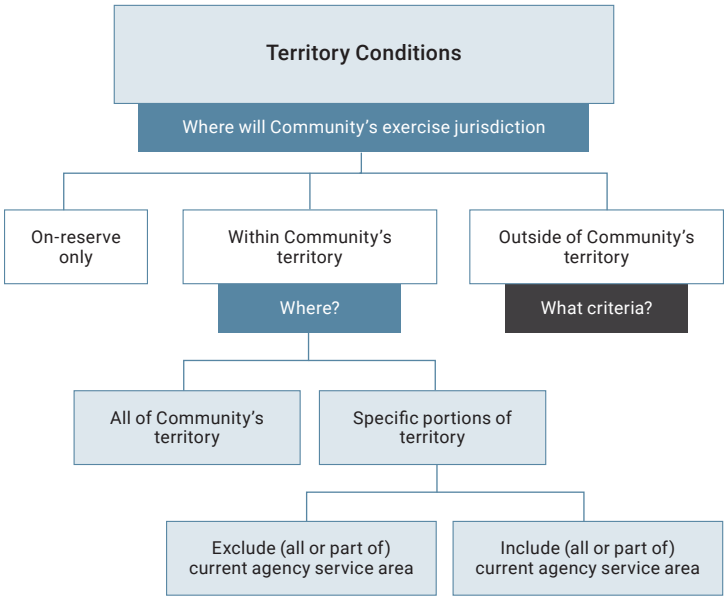
For example, a First Nation child and family welfare law could provide for an automatic authorization for the local Children's Aid Society to provide services to non-Indigenous children and families residing within the First Nation's territory, pursuant to the relevant provincial Child, Youth, and Family Services Act.



Conversely, in the case of a First Nation's citizen residing outside of the territory, a First Nation law could recognize responsibilities on the part of the Nation to work with local non-First Nation agencies.

5.5.2 Expansion of Jurisdiction

It is well documented and acknowledged that due to the devastating impacts of decades of colonial policies, not all First Nations have the capacity to develop and deliver their own programs and services. However, there is potential for the gradual or staged expansion of jurisdiction throughout a Nation's territory.

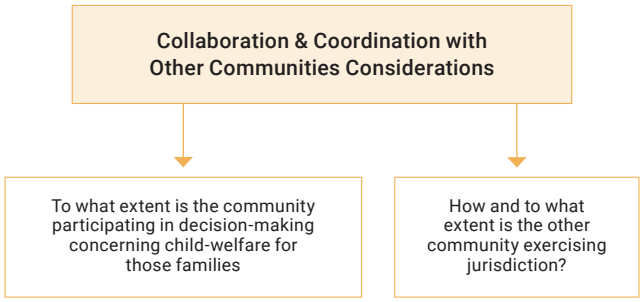


Local Jurisdiction

In an approach of staged expansion, jurisdiction first begins on-reserve and/or within what is currently the local agency's geographic mandate. This first stage is accompanied by an assessment of the number of families receiving child welfare services or interventions within the Nation's territory but outside of the agency's geographic mandate.

Jurisdiction over Indigenous children who are not members or citizens

Further staged expansion of jurisdiction could include the exercise of jurisdiction over all Indigenous children and families within the Nation's territory and currently served by a local agency. This expansion would be done in coordination with the child's Nation of origin and would depend on whether and how those Nations themselves are exercising jurisdiction or participating in decision-making on child welfare services for those families.

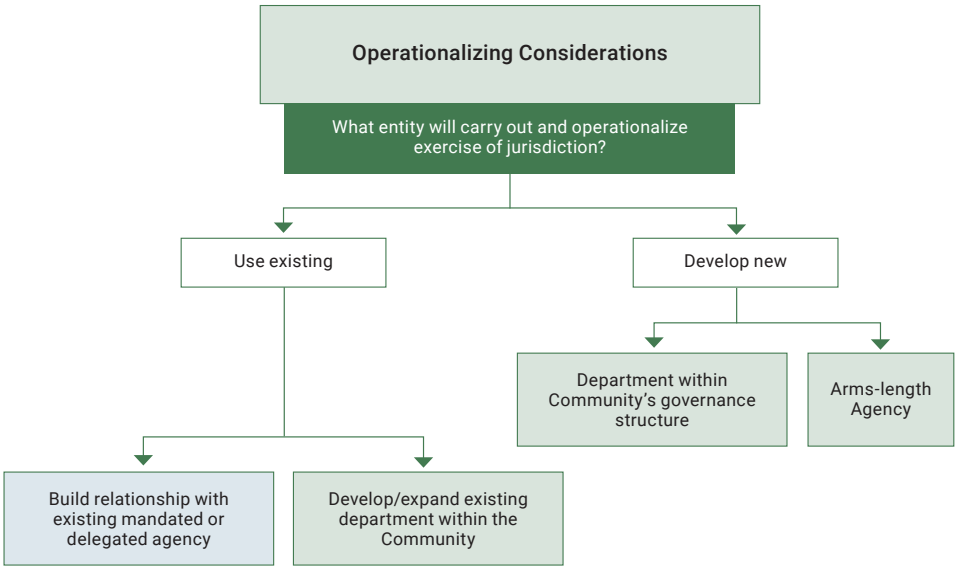


Jurisdiction over member children outside the community's territory

First Nations may wish to consider expanding the services it provides to member children who live outside of the Nation's territory and/or outside the geographic mandate of the local agency's service provision. In this case, the Nation would need to implement more robust protocols and procedures with respect to interactions with the mandated Indigenous agencies in the territory where the children reside. Examples of this form of jurisdiction are detailed below.

Operational implications

Expanding jurisdiction to provide child welfare prevention services through these three options will likely increase the number of children and families who require services from a First Nation. As illustrated in the chart below, such decisions will likely require Nations to consider, coordinate, and plan with existing organizations, agencies, and capacities, as well as potentially developing new structures to successfully implement inherent jurisdiction over child and family services.



6 Key Steps on the Journey

Deciding on the pathway is the first step in a complex journey towards enlivening a Nation's jurisdiction over child well-being. What comes next is a strategic and clear planning process that includes understanding and articulating the current context, identifying strengths and gaps, and understanding existing and potential partnerships and relationships. Perhaps most importantly, this planning journey includes generating a collective vision and underlying values on child well-being.

6.1 Assessing Where You Are At

It is important to begin with a full picture of a First Nation's current circumstance, including what tools and capacities already exist and to understand which areas may require strengthening. A common way of undertaking this assessment is through asset mapping.

Asset mapping is a process of recognizing the tangible and intangible assets, and strengths that exist in a Nation so that these can be preserved, supported, learned from, and enhanced. These assets may belong to an entire Nation, or may be particular to individuals, groups, or organizations, and can include skills, experience, and abilities; individuals, organizations, institutions, and networks; built infrastructure, physical and/or natural environments, and local economies; and heritage, knowledge, beliefs, and culture.

Some important questions include:

- What experience and qualifications exist within the Nation related to child well-being?
- What are the existing policies and/or laws on child well-being?
- What is the current landscape of relationships and partnerships related to the delivery of child well-being programs and services?
- What is the current relationship with government related to child well-being?

The knowledge generated by asset mapping provides a strong foundation on which to engage with Nation's citizens and relevant partners in advancing a community child well-being approach. The following documents are resources, though not all specific to child welfare, that provide good information on asset mapping activities:

- Sustainable Communities: A Guide to Community Asset Mapping (Falls Brook Centre)
- Community Mapping Guide (Access Open Minds)
- Community Asset Mapping Tool- Poplar Hill First Nation, Ontario (First Mile)
- Comprehensive Community Planning Toolkit (Nishnawbe Aski Development Fund)

6.2 Undertaking Community Dialogue

In order to receive Nation input and guidance to the proposed child well-being approach, undertaking community engagement is often best practice. There are many approaches to engagement and the selected approach will depend on the desired extent of engagement (e.g., community-wide or specific to a certain group), as well as the goals and desired outcomes of the activity. It is also important to consider time, financial, and resource limitations, as well as logistical considerations.

Methods may include focus groups, open houses/forums, surveys, one-on-one interviews, and cultural events/activities. An engagement approach may include more than one of these methods. Below are a few questions to consider when planning an engagement process:

- Is there a point-person to coordinate engagements?
- Which voices are being included? Which voices are not?
    - Does your approach include opportunities for input from Elders, women, parents, families with experience in child welfare systems, Youth, 2SLGBTQQIA+ community members, etc.?
    - Are there any partners outside of the Nation that should be engaged? This could include nearby agencies, Indigenous organizations, Tribal Councils, provincial/federal government officials, subject-matter experts, etc.
- Does the Nation have the necessary resources to complete engagements? If not, how could those resources be acquired?
- How will the Nation communicate with its citizens about the engagement approach and process?

6.2.1 Key Areas of Inquiry

Once the engagement approach has been determined, the First Nation should determine the types of discussions it would like to facilitate and the types of questions to ask. It will be important to understand the community's perspectives on a number of key areas to inform the development of the Nation's child well-being approach. Outlined below are several examples of general areas of inquiry:

1. Identifying an ideal Indigenous Governing Body (IGB). The Federal Act notes that inherent jurisdiction lies with the Section 35 rights-holding group. This could be the First Nation government (i.e., band council) itself, a Tribal Council, or an organization mandated by the rights-holders, such as a child welfare agency.
2. What is the long-term vision for child and family well-being? Developing the child well-being law will include detailing the objectives of the law. This can be supported through determining the Nation's long-term vision(s) for child and family well-being. What is driving the Nation's efforts on child welfare? What do the Nation's teachings say about caring for children?
3. What are the values that underlie how the work will be undertaken? It is worthwhile to establish a set of values that can be relied upon throughout the process of establishing a new child and family well-being regime. In addition, these values can set the standard for how the Nation's law will be enacted. It may be useful to draw these values from cultural ways of knowing, doing, and being.
4. Establish key-shared understandings. The new child well-being law will require a set of definitions that are community specific. Section 7: Drafting a Law includes a full list of important terms to consider when outlining definitions within the law. Several of these concepts could benefit from community input, including discussions around:
    a. What is a family? What are the roles of family members in the raising and protection of children?
    b. How to determine who are members of families, and who are members of community?
    c. What do children need to live full, safe, and fulfilling lives?
    d. What lessons does the Nation's culture teach about family and caring for each other?
    e. In the past, how did the Nation respond to children who needed protection and support?
    f. What were/are traditional dispute resolution practices within communities? Who was/is involved?
    g. What were/are our dispute resolution practices between Nations?

The following documents may be helpful in planning and facilitating engagement activities:

- A Guide to Community Engagement and Planning (BC Aboriginal Child Care Society)
- A Guide to Community Engagement Frameworks for Action on the Social Determinants of Health and Health Equity (The National Collaborating Centre for Determinants of Health)
- Community Engagement Toolkit (SPARC BC)

6.3 Generating Political Strategies

Advancing Nation-based child and family well-being legislation will require significant political leadership. Chief and Council, among other Nation leaders, have an important role to play in identifying and responding to the needs of their citizens by planning and setting long-term goals and objectives based on the community's vision. Potential key tasks in this work include:

- Securing capacity to undertake this work. This includes human resource capacity and funding to both develop the model, and ultimately implement it (more details on budget negotiations can be found in **Section 6.4: Negotiating Funding)**;
- Supporting opportunities for relationship building at the local, regional, and national level with other First Nations and service provider organizations aimed at information sharing, capacity development, and mutual support;
- Leveraging political influence to generate provincial and federal government support for the Nation's jurisdictional efforts; and
- Utilizing political capital to advocate for and generate buy-in for the child and family well-being development approach and law, both within and outside of the Nation.

6.4 Negotiating Funding

When negotiating, whether for initial funding or additional funding through a coordination agreement, it is important to remember that these are the inherent rights of First Nations and their children. It is because of the federal and provincial governments that First Nations' children have been mistreated and removed from their homes and communities. It is because of colonial policies that families have been torn apart.

The funding provided to First Nations by the federal government to repair broken systems, broken families, and lack of resources are a direct consequence of violent, colonial policies. It may be important for your First Nation to remind Indigenous Services Canada representatives of this fact during negotiations with the federal government.

When putting together estimates, for both initial and further funding, it is important to consider that money will need to go into research, consultation, and drafting, but also the operationalization of the law.

For example, if a First Nation decides to create its own agency (or similar entity), it will likely require budgeting for a range of items and capacity, including:

- case management software to keep track of families and programs;
- salaries of staff, and training for staff and service workers' skills;
- infrastructure and equipment, such as buildings to provide prevention services or housing for youth, agency operated homes, or group homes;
- program costs, such as approaches for prevention care;

- research, development of policies and tools, and engagement processes with the external governments; and,
- cultural support, such as through Elders and healing services.

These needs will differ from Nation to Nation, but all the elements required to put the law into action and provide the best care possible to children will need to be accounted.

Budgets for services may also vary based on the vision and capacity of the Nation. One Nation may decide to develop a child welfare agency within their own administration. This budget would be very different from an agency mandated to serve multiple Nations.

Funding for services is available through service agreements with ISC. However, other funds can be accessed for different programs, research, or processes. Agencies that may be able to support funding include:

- Calls for proposals from different provincial and federal agencies
- Foundations, including:
    - The Laidlaw Foundation Youth Action Fund
    - Canada Roots Exchange Grant Programs
    - Telus Indigenous Communities Fund
    - Dreamcatcher Charitable Fund

Jordan's Principle and Funding

As noted in **Section 3.2.4: Jordan's Principle**, Jordan's Principle sets a standard for how provincial and federal service providers are to treat Indigenous children. The federal government has dedicated significant funding to Jordan's Principle intended to cover, "all public services such as mental health, special education, dental, physical therapy, medical equipment, physiotherapy" among others.[31] Services are generally coordinated through regional service coordinators who often operate within First Nations governments and organizations.

If a Nation has been spending money that ought to have been paid by the federal government, or if services have been inadequately provided to children within a Nation, that First Nation is encouraged to bring this to the attention of Indigenous Services Canada when negotiating funding as it relates to child care. This is encouraged to ensure a seamless continuum of necessary services are available to children and family within child and family services settings.

More information on Jordan's Principle and how to connect with regional Jordan's Principle Focal Point can be found here.

[31] Assembly of First Nations. Accessing Jordan's Principle: A Resource for First Nations Parents, Caregivers, Families and Communities, (2018), https://www.afn.ca/uploads/Social_Development/Jordan%27s%20Principle%20Handbook%202019_en.pdf

7 Drafting a Law

This section provides important information to developing First Nations' child well-being laws. While the content of each Nation's law may differ based on its unique context, some common elements can include:

- A set of definitions and principles that will support the interpretation of the legislation;
- Clearly identified objectives of the law;
- An outline of the jurisdiction within which the law operates;
- An overview of the agenc(ies) responsible for administration of the law, it's roles and responsibilities, funding, and governance structure;
- Minimum standards/requirements for the child welfare program;
- Direction on the placement of children and apprehension (who, where, why);
- A description of prevention services; and
- A dispute resolution mechanism, including information on how to resolve disputes between First Nations that may arise when a child has ties to more than one community.

The following section provides more information on these common elements, with links to examples from existing models and best practices from across Canada. In addition, a Child Well-being Law Template can be found in **Section 10.2.**

7.1 Minimum Definitions to Consider

It is good practice for the law to begin with an outline of key definitions and a framework for interpretation. The section below describes the importance of developing key definitions and an interpretative framework specific to the First Nation drafting the law. This is to ensure the law reflects the Nation's intentions and that it is a robust mechanism to occupy the field, keeping provincial and federal law out to the greatest extent possible. Further, the drafting of this written law is an opportunity to convey the key elements of the Nation's law as it has been/should be carried out and how it ought to continue operating.

Below are a series of key concepts and definitions (listed alphabetically) that may be important to consider when developing a child-well being law.

7.1.1 Abuse

Defining this term can assist in protecting children against the most serious of harms committed. It may provide clarity by identifying a minimum set of acts or behaviors that define child abuse. The Peguis Act has defined this term, as described below.

Example: "Abuse" means where an act or omission by any person where that act or omission results in physical injury to a Child, emotional disability of a permanent nature in the Child or is likely to result in such a disability, or results in sexual exploitation of the Child with or without the Child's consent.

7.1.2 Adoption

In some First Nations, adoption is intrinsically open, meaning that the adoptive family has authority to raise the adopted child as it sees fit, but there is no barrier to maintaining a relationship between the adopted child and their biological family. Definitions surrounding adoption, such as adoption, customary adoption, adoptee or adoptive parent, should account for these considerations.

Example: "Adoptive Parent" is defined as the person who has established a permanent parent-child relationship with a child who is not their biological child.

7.1.3 Authority of Outside of External Authority

A First Nation may designate its own agency or department (see Section 5.5). In this case, the agency may be referred to or defined in this section.

A First Nation will likely also need to maintain protocols and relationships with external agencies. Three scenarios that may be common are agencies which:

- have historically had a geographic mandate over parts of a Nation's territory;
- represent children from other communities or First Nations; and
- provide services in the community a child from another Nation is currently located within.

Example: "Outside Authority" is a person, government, or other entity responsible for providing child protection services pursuant to

- provincial legislation, or
- Indigenous legislation,

but does not include the community's agency or other agencies of [community or First Nation].

To the extent that the law explicitly takes a position with respect to these types of agencies, a definition of an external agency or agencies should be included in the law.

7.1.4 Authorized Person

Within a First Nations context, a director or an individual that assumes a role within executive leadership may grant a family member, community worker or an individual of importance to the well-being of a child, the right to access specific information pertaining to a child (in accordance with provincial and federal laws) and/or participate in the development, management, and support of a child.

Example: "Authorized Person" means a person authorized by executive leadership under a specific law to access specific information or attend to matters pertaining to a child's welfare as outlined by provincial and federal law as well as the executive leadership of a First Nation.

7.1.5 Band Representative

A Band Representative is employed by the First Nation and play a complex role in supporting members within child welfare contexts. While duties differ between Nations, in general, band representatives provide support to children and families and advocate for members within child and family services settings. Moose Cree First Nation provides a good overview of the role of their Band Representatives.

Within your law, it is likely that you will want to describe the components of your child welfare system including the child welfare agency, the agency's board, any relevant committees, and key roles such as the Band Representative.

7.1.6 Best Interests of the Child

While this concept may be defined within the body of the law and its definition adopted here, as outlined in **Section 7.3.1: Best Interests of the Child** below, the national standard set out in the Federal Act for the best interests of the child is a requirement for all child protection legislation, whether Indigenous or provincial.

Both the Peguis First Nation Honouring of Children Families and Nation Act (Peguis Act) and the Cowessess First Nation's Miyo Pimatisowin Act (Cowessess Act) include language on the primacy of family connection and connection to the First Nation(s) to which the child belongs. The Wabaseemoong Customary Care Code (Wabaseemoong Code) also considers the desirability of a continued connection, and additionally defines the best interests of the First Nation.

Example: "Best Interests of the Child" is defined as the primary consideration in the provision of prevention and protection services to a child and is determined by a variety of factors, including but not limited to ensuring the child's:

- cultural continuity within the community;
- health and well-being;
- preferences where the child is of an age to express them;
- bond with the parties;
- desirability of maintaining continuity with the parties.

7.1.7 Care or Customary Care

A First Nation may wish to define the mechanism or person who provides day-to-day care of a child and who is not that child's biological parent, and also distinguish between such a person and a foster parent.

Example: "Customary Care" means placing a child into a parent-child relationship with someone other than the child's birth parent(s) according to the traditional practice and rules recognized by the [community or First Nation].

7.1.8 Child

As this term will define a primary recipient of care under a First Nation's law, considerations for this definition may include:

- Age parameters: does a child in the First Nation receive care until they are 18 or older? The Cowessess Act, for example, considers a member under the age of 21, a child.
- Membership parameters: will this term be used to define who receives care, support, and services from the First Nation? If so, this can be articulated in the definition.

Example: Within the Peguis Act, "Child" means any Member, or is entitled, or eligible to be a Member, under the age of 18.

7.1.9 Citizen and/or Member

Jurisdiction, discussed in **Section 5.5: Framing the Jurisdiction Question**, is connected to a specific place, but rights may travel with the child. A definition of citizen and/or member will allow for a distinction between care, support, and services provided for children within the jurisdiction determined by the First Nation. In the event that a First Nation has a Citizenship Code, it may want to ensure that the term in this law coincides with or adopts it.

Example: "Citizen" means any person whose name appears or is entitled to appear on the Band Membership List as maintained by the First Nation or the Band List maintained by the Indian Registry Administrator for the First Nation and the registrar of ISC pursuant to the provisions of the *Indian Act*, R.S.C 1985 c. I-5

7.1.10 Culture

Culture is the essence of who a person is, where they belong to, where they come from, and how they relate to one another. Culture is the accumulated teachings of ancestors. It forms the basis of traditions, customs, protocols, values, spirituality, language, ways of knowing and being, and connections to the land. Within your child and family well-being law it may be useful to provide a definition of culture within the legislation, including any Nation-specific nuances that may be deemed important as part of child rearing and well-being.

7.1.11 Disability

The principle of substantive equality requires considering the unique needs of each child to enable full and meaningful participation in their families, communities, and cultures. This includes specific needs of children with disabilities. As such, you may want to consider including a definition of disability within your legislation. Disability generally refers to any form of impairment, including a physical, mental, intellectual, cognitive, learning, communication, or sensory limitation — or a functional limitation — whether permanent, temporary, or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society.[32]

7.1.12 Emergency Services

Many families and communities can attest that colonial child and family services, specifically via child apprehension in the name of "emergencies", can often cause more harm than good. Developing an Indigenous child and family law is an opportunity to define and build systems for emergency services that are vastly different from those First Nations have experienced in the past under colonial imposition. Section 7.4.2: Child in Need of Protection provides additional insights and considerations for how a First Nation may consider defining and addressing emergency services within its law.

Example: One notable aspect of the Peguis Act, when outlining **"Emergency Services"**, is that a person appointed to provide emergency care for a child may care for the Child in the Child's home residence and for that purpose may;

- Enter the residence;
- Live in the residence;
- Carry on normal housekeeping activities in the residence that are necessary for the care of the Child; and
- Exercise reasonable control over the Child residing in the residence.

This is a stark contrast to the historical impulse of provincial child welfare services to remove the child from the home.

7.1.13 Family

In some First Nations, there is a clear delineation of what constitutes a family with responsibilities for care and intervention, for example, along matrilineal lines. Family or a term that encompasses some form of familial or clan ties will also be required in the context of decisions made about a child.

It is important to note that the Federal Act includes new participation rights for "care providers", defined as "having primary responsibility for providing the day-to-day care". However, it is currently unclear whether this extends to non-Indigenous care providers, such as foster families.

Another way of addressing the various roles that different types of family members may play is exemplified by the Spallumcheen Children By-Law, which defines both the term family and extended family member.

Example: "Family member" is a person who is considered the Child's sibling, parent, step-parent, grandparent, aunt or uncle by custom, cultural adoption, marriage, or blood, and may also mean a person considered a close relative by the family of the Child.

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[32] Department of Justice Canada. Accessible Canada Act, 2019, https://laws-lois.justice.gc.ca/eng/acts/a-0.6/page-1.html?wbdisable=true

7.1.14 Human Rights

Human rights are the fundamental rights all humans are entitled to as human beings. They define what we are all entitled to – a life of equality, dignity, and respect, to live free from discrimination and harassment.[33] While UNDRIP is often reference as a lever supporting Indigenous struggles in Canada, broader human rights mechanisms, such as the UN Declaration of Human Rights, and the UN Convention on the Rights of the Child, are also valuable tools.

7.1.15 Neglect

Some First Nations may wish to define neglect, as it can be less obvious than signs of physical or sexual abuse. Structural factors outside of the caregiver's control, like poverty and poor housing, have been used to justify the removal of First Nations children from their caregiver(s)/communities. Importantly, however, Section 15 of the Federal Act states that a child cannot be apprehended based solely on poverty, lack of adequate housing, or a parent's health status.

Example: "Neglect" means a type of maltreatment that refers to a caregiver's failure to provide, or inability to provide, a minimal standard of age-appropriate care that has resulted in harm to the safety or development of the child. This may include:

- Failure to supervise resulting in physical or sexual harm to a child;
- Permitting criminal behaviour;
- Physical neglect, including inadequate nutrition or living conditions;
- Medical neglect;
- Failure to provide psychological treatment;
- Abandonment;
- Educational neglect.

7.1.16 Non-Citizen

First Nations have always had their own framework and approach to membership and citizenship. Over time, First Nations have asserted their authority to define membership based on their own customary laws, traditions, and/or constitution. Considering this context, non-citizens may be understood as individuals who are not members of a specific Nation and who do not meet the criteria of what it means to be a member of that Nation based on the Nation's customary laws, traditional laws, and/or constitution.

Example: "Non-Citizen" is defined as an individual that is not a member of a particular Nation as governed by that Nation's customary laws, traditional laws, and/or constitution.

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[33] United Nations. The Universal Declaration of Human Rights, (1948), https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

7.1.17 Parent and/or Guardian

This term may provide clarity on a First Nation's framing of adults who have duties towards children and rights before a dispute resolution authority. The term can be broadly defined, as in the The Cowessess Act, which includes care providers, or can exclude certain persons, such as foster parents.

Example: "Parent" means
- the mother or step-mother of a Child;
- the father or step-father of a Child;
- a person who, by agreement or order of the [dispute resolution institution] has custody of the child;
- a Care Provider but does not include Foster Parents or the Director.

7.1.18 Personal Information

When a Nation is developing laws regarding child welfare, it is important to understand the legal context of personal information and the processes that are required in accessing personal information that is relevant to the protection and well-being of a child. For example, section 12(2) of the Federal Act states, "the service provider must ensure that the notice provided to an Indigenous governing body… does not contain personal information about the child, a member of the child's family or the care provider, other than information that is necessary to explain the proposed significant measure or that is required by the Indigenous governing body's coordination agreement."

A First Nation's law can provide examples of what constitutes personal information. In general, personal information is understood to include any factual or subjective information, recorded or not, about an identifiable individual. This may include:
- Age, name, gender;
- Phone number, address, band member information, status number;
- Medical information and healthcare history;
- Fingerprints, blood type, etc.

7.1.19 Post-Majority Age

Post majority age refers to the age when an individual becomes a legal adult. In Canada, this age differs across provinces but is typically between 16 to 19 years of age. The age of majority in Ontario is 18.

7.1.20 Post-Majority Care

At its most basic, post-majority care are supports and services provided to young people aging out of the child welfare system. In 2022, the CHRT issued an order requiring Canada to:

Fund, at actual cost, post-majority services as part of the First Nations Child and Family Services (FNCFS) program to First Nations aging out of care in FNCFS agencies, and young adults who were

formally in care up to age 26 across all provinces and territories starting April 1, 2022.[34]

Supports could include help with housing, food, employment, mental health and wellness, access to cultural supports, connection with community, land and more.[35]

The First Nations Child and Family Caring Society of Canada have developed a useful resource outlining post-majority care.

In developing your law, it may be useful to consider how your child and family caring regime will address youth aging out of care.

7.1.21 Prevention

Prevention refers to services that are designed to keep a child in their family home, with removals being a last resort. This may include activities and services such as in-home supports and parent mentoring, supervision, housing, and financial supports. It may be useful here to consider potential prevention activities across the social determinants of health. The First Nations of Quebec and Labrador Health and Social Services Commission have developed a First Line Prevention Services Framework, which might be useful to review.

Your law should likely include some information on prevention services including the definition, and when and how prevention services are provided to children and families.

Example: The Cowessess Act defines prevention services as "services offered to children in need of intervention and their families in order to keep the children and families together, and may include financial assistance and supervision by the director."

7.1.22 Pre-natal Supports

Pre-natal supports refer to the relevant care and access to programs, services, and resources available for an individual that is pregnant. This includes culturally safe healthcare checkups from a doctor, nurse, or midwife as well as holistic care and support provided via doulas. Access to pre-natal supports is a vital aspect of a healthy pregnancy and sets the foundation for healthy families.[36] Your law may want to define how pre-natal supports fit within, and can be supported by, prevention programming.

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[34] First Nations Child & Family Caring Society. First Nations Young People Aging Out, 2022, https://fncaringsociety.com/sites/default/files/38420_post-majority_services_infographic_final.pdf

[35] Ibid.

[36] National Aboriginal Council of Midwives. Restoring Midwifery and Birth Workbook, 2020, https://indigenousmidwifery.ca/restoringmidwifery/

7.1.23 Record

Records are an important aspect of case management and facilitating legal processes. It is good practice for a Nation developing laws around child welfare to consider the different kinds of records that will be important to access to ensure the effective management, planning, and overall care of a child. Records provide important background information about a child and identifies key factors that may assist in ensuring the holistic care and safety of a child.

There are two types of records that are important for a Nation to have the right to access: legal records and social records. **Legal record**s include any petition, note, motion, finding, order, judgment, pleading, paper or other document, other than social records, filed with the court. **Social records** include family social histories, medical or treatment reports, psychological evaluations or assessments, educational records, or home studies, even if attached to court reports prepared by an agency.

Example: "Record" is defined as something set down in writing or some other permanent form for later reference, especially officially.

7.1.24 Remote

There is not one singular universally accepted definition of remoteness. However, according to Statistics Canada, remoteness is defined as any community or locale with fewer than 10,000 people and where fewer than 50% of the population commutes to an urban area.[37]

ISC uses a categorization system that places First Nations into one of four zones. These are:

- **Zone 1:** Located within 50 km of the nearest service centre with year-round road access.
- **Zone 2:** Located between 50 and 350 km from the nearest service centre with year-round road access.
- **Zone 3:** Located over 350 km from the nearest service centre with year-round road access.
- **Zone 4:** The First Nation has no year-round road access to a service centre and, as a result, experiences a higher cost of transportation.

Rural and remote communities may have unique challenges and considerations when it comes to the delivery of child and family well-being services. These challenges may include limited availability of prevention, health, and social services, recruitment and retention barriers, and challenging contexts related to the protection of confidentiality and privacy, among others. These are important factors to consider, both in developing your legal framework, but also in negotiating adequate funding to meet the needs of the community.

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[37] Statistics Canada. Definitions of Rural, 2002, https://www150.statcan.gc.ca/n1/en/pub/21-601-m/2002061/4224867-eng.pdf?st=Yn4t9nmn

7.1.25 Youth

First Nations may wish to provide transitional services to people who are no longer children but continue to require supports as they take their rightful place in their community. Some may describe this cohort of people as those "aging out of care." Nations may include language in their law to establish ongoing supports for this group.

Example: "Youth" means a Citizen who is 21 to 29 years of age, inclusive, who is currently receiving or is transitioning from receipt of child and family services, in his or her capacity as a child or youth.

7.2 Determining the Objective of the Law

The objectives of a child well-being law may vary from one First Nation to the other. For some Nations, getting non-community operated children's aid societies out of the Nation is the most important goal, while reunification of children with their families may be the primary focus for another.

Wise Practice: Peguis Act, Preamble

Through this law the Peguis First Nation Child has the ascribed and inherent right:

To their Spirit Name	Anishinaabe anoozoowin
To their Clan	Dodem
To be with the Parents	Gitziimak
To be with Family (your relations)	Nawendaagnak
To cultural & ceremonial practices	Anishinaabe Miiniggisiwin
To their identity & lifestyle	Anishinaabe Aadzewin
To their language	Anishinaabemowin
To a purposeful & good life	Mino Bimatiziwin
To their traditional land	Anishinaabe Akiing
To a good education	Kinamaatiwin
To protection within that Child	Wiikawaabmind
To membership (where the roots are)	Dabendaagziwin

The preamble of the law is an opportunity to outline the law's objectives, as well as express the interpretive framework within which it operates. For example, the Peguis Act and the Wabaseemoong Code both assert the Anishinaabe Inakonegewin (Anishinaabe law), in addition to outlining their Treaty relationship with Canada. Further, the preamble can clearly articulate who is covered by the law (i.e. the extent of territorial jurisdiction exercised), and the purpose of the law, as with the Cowessess Act.

The preamble can also ground the law in the history of the First Nation, both historically, and, to the extent that the Nation feels the need or desire to address this, the trauma suffered and the way in which the law is intended to mitigate and allow the Nation to heal.

A Note on Language

Beyond the framing of the law, there may be concepts in a Nation's law which are most accurately expressed in their traditional language. For many communities, language is medicine, and one cannot truly understand law without knowing the language, because law is rooted in language.

A practitioner or Nation may wish to consider in which language or languages to draft the law and/or define specific terms.

Whereas the Wabaseemoong Code is drafted entirely in English, the Peguis Act incorporates Anishinaabemowin into its preamble.

7.3 Minimum Standards

Although the Federal Act recognizes the inherent jurisdiction of Indigenous Peoples in relation to child and family services, it also identifies a number of requirements for how the Act is to be administered and implemented via an Indigenous law, regardless of the party providing the services. While a First Nation may contest this external standard-setting exercise, it may require a lengthy legal battle to assert this definitively.

Meanwhile, there is very strong rationale for the requirements included in the Federal Act as they reflect the messages First Nations leaders and experts have been advocating for decades. In drafting the law, a First Nation may be satisfied with the standards detailed in the Federal Act. A First Nation may also want to add additional considerations to strengthen these minimum standards or make them more relevant to its Nation's context.

Each of the minimum standards are detailed below.

7.3.1 Best Interests of the Child (BIOC)

The Federal Act states:

> *The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.*

Section 10 (2) notes that in determining the BIOC:

> *Primary consideration must be given to the child's physical, emotional, and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture.*

Factors to be considered – noted in Section 10 (3) – include:

- the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- the child's needs, given the child's age and stage of development, such as the child's need for stability;
- the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;
- the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;
- the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- 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;
- any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and
- any civil or criminal proceeding, order, condition, or measure that is relevant to the safety,

security and well-being of the child.

7.3.2 Cultural Continuity

The centrality of culture in the well-being of Indigenous children is reflected in the Federal Act. Section 9 (2) states:

- cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
- the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
- a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;
- child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and
- the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.

7.3.3 Substantive Equality

Another principle through which the Federal Act is to be interpreted and implemented is the concept of substantive equality. The Act states:

- the rights and distinct needs of a child with a disability are to be considered in order to promote the child's participation, to the same extent as other children, in the activities of his or her family or the Indigenous group, community or people to which he or she belongs;
- a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;
- a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;
- the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and
- in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

In addition, Section 10 (4) of the Federal Act states that subsections noted above "are to be construed in relation to an Indigenous child, to the extent that it is possible to do so, *in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.*" Accordingly, it is important to articulate the definition of BIOC in a First Nation's child well-being law.

Some First Nations have adopted language within their child well-being laws that is similar to the language within the Federal Act. Examples include the Cowessess Act and the Pegius Act. However, a Nation may be interested in setting out even more substantial standards for what constitutes the best interest of a child than those set out in the Federal Act. This is why those set out in the Federal Act should be thought of as "the floor not the ceiling." However, it is important that a Nation's law either sets out the set of factors which includes or is similar to those of the Federal Act or incorporates the standards of the Federal Act by reference.

7.3.4 Provision of Services

Section 11 of the Federal Act describes minimum standards related to the provision of child and family services. This section lays out that the provision of child and family services must be consistent with the principles identified above (BIOC, cultural continuity, and substantive equality).

7.3.5 Notice to Families and Personal Information

The Federal Act requires agencies providing child and family services to provide notice to the child's parents and care provider, as well as to the Indigenous governing body *before* taking any "significant measure in relation to the child". Providing notice is intended to ensure actions taken are consistent with the best interest of the child.

While the notice provisions are broad and the Federal Act does not define notice, either in terms of timelines or the mechanism by which notice is to be provided, they are mandatory within the Federal Act and in practice an agency must be able to demonstrate both *how* and *when* they provided notice to the family, caregiver, and Indigenous governing body.

Wise Practice: Parents Bill of Rights

Certainly, child apprehension is never ideal. Interestingly, Peguis First Nation included a Parents Bill of Rights in their child wellbeing law. It states:

Upon apprehension of a Child, the Parent(s) or Care Provider must be notified of the following, if the Parent(s) or Care Provider can be located, that they

- can identify a safe person to care for their Child(ren);
- can bring their own supports when meeting with Agency representatives;
- can receive services in a culturally appropriate way;
- can receive help and resources to support family preservation, as long as it is in the Best Interests of the Child;
- can attend court proceedings and provide input to the judge regarding their Child; and
- can provide input on their case plan and receive notification pursuant to Notice provisions of the Act.

It is therefore important in drafting a Nation's law, to interpret both "significant measures" and "notice" in a broad inclusive way to apply not just to legal changes but changes in placements, service provider awareness or responses to issues such as suicidal ideation or behaviour, sexual identity, etc. – anything, in other words, that could significantly change the day-to-day life of the child, parent, and/or care provider, or can impact the likelihood or timeline of apprehension, permanency, or reunification.

Wise Practice: Providing Notice of Apprehension

The Cowessess Act outlined their process for providing notice of apprehension as follows:

> *If a Child has been apprehended, the Director shall notify the Parents of the Child forthwith that the Child has been apprehended, the reasons for the apprehension, and provide contact information of the Director. Notice… may be by any method and may be oral or in writing… The validity of proceedings under this Act is not affected if the Director is unable, after reasonable effort, to give notice in accordance with this section.*

Notice to a Governing Body

Section 12 (2) of the Federal Act requires that notice provided to an Indigenous governing body does not include any identifying information about the child or family. This may present some challenges, in particular when working with other First Nations, and as protocols with mandated agencies are developed.

Section 12 (2) allows for this aspect to be addressed through the coordination agreement. While it is important that confidentiality is maintained in child protection proceedings, and that information about such proceedings is not shared within the Indigenous community at large or in the governing body generally, a First Nation may wish to ensure that an agency created or mandated is entitled to such information in order to provide services to the family.

7.3.6 Representation and Party Status

A "party" in this context refers to an individual or a group that comprises a single entity with some interest in the outcome of the child welfare proceedings. Within Section 13 of the Federal Act, the child's parent or care provider, as well as the Nation's governing body, have the right to make representations and have party standing.

First Nations having a right to party status is fundamentally important to Nations exercising self-determination over their children as it allows Nations to be proactive in seeking solutions to support the child and the family. It also reflects the worldview common to most First Nations of collective responsibility over and care for all community members and citizens.

An area in which Section 13 of the Federal Act may have created a new uncertainty is in the creation of a new participation right for "care providers", defined as "having primary responsibility for providing the day-to-day care" for an Indigenous child. While this is, on its face, a welcomed development in that it allows for traditional care situations should Indigenous laws give standing to customary care providers, it may also open the door to include foster parents, who are excluded under the Provincial Act.

It remains unclear whether this would apply only to Indigenous caregivers. The Provincial Act grants participation rights to some people standing in place of parents prior to intervention, along with parents, but does not grant such rights to those assigned after an intervention.

In drafting a First Nation's law, it will be helpful to be clear about definitions regarding representation and party status to ensure the Nations' desired approach, whether to include or

exclude foster parents explicitly, and address different parties who have standing according to the developed law.

7.3.7 Prevention Activities

While the Provincial Act contains a test that an agency must be satisfied that "no course of action less disruptive to the child" is available, Sections 14 and 15.1 of the Federal Act requires agencies to prioritize preventative care, including prenatal preventative care. In this, the provisions for prevention appear significantly stronger in the Federal Act.

Prior to apprehending a child residing with a parent or family member, the service provider must demonstrate that they have made reasonable efforts to have the child remain with that person. Further, as previously stated, Section 15 also prohibits apprehension based on the family's socioeconomic conditions, including poverty, lack of adequate housing or infrastructure, or the state of health of the child's parents or the care provider.

In particular, in drafting a First Nation's, consideration should be given to the following questions:

- What preventative care mechanisms are being put in place?
- What is to be done in respect of prenatal care and what considerations for prevention or placement can be made in setting out this approach?
- How is 'reasonable efforts' defined and should this be set out in the law?
- How are the needs of children with disabilities or other considerations counteracting potential discrimination being considered?

In addition to provisions addressing preventative care within the law, it is recommended that policies are developed that flesh out how preventative care is prioritized, what supports and services are offered to parents and caregivers, how 'reasonable efforts' will be documented, as well as to address any identified individual and systemic barriers to prevention.

Wise Practice: Defining Prevention

The Peguis Act defines prevention services as "programs and services provided to a Child, Youth, or Family in need of intervention in order to keep families together, and may include financial support and supervision by the Agency."

This area of the law is an opportunity to consider incorporating an explicit reference to Jordan's Principle to ensure that children can access all public services when they need them. This could include language around working in collaboration with local or regional Jordan's Principle staff.

7.3.8 Placement Priorities

The Federal Act's minimum standards include direction on the placement of children. Section 16 (1) prioritizes placement of an Indigenous child in the following order, provided that the determination is in keeping with the BIOC:

1. With one of the child's parents;
2. With another adult member of the child's family;
3. With an adult who belongs to the same Indigenous group;

4. With an adult who belongs to a different Indigenous group; or,
5. With any other adult.

Broadly speaking, these priorities are consistent with the Provincial Act. Where the Federal Act differs is through two additional considerations on placement. In the Federal Act agencies are required to:

- Consider placement near siblings (Section 16 (2));
- Consider the customs and traditions of Indigenous peoples in a child's placement (Section 16 (2.1).

While the Provincial Act does require the agency to consider a customary care placement and agreement, one must be put forward by the First Nation and it is not a mandatory consideration within the placement priorities for Indigenous children. In addition, agencies favour their own foster families as a first resort in placing a new child, even where other siblings are already in customary care or in family placements. In contrast, the Federal Act now requires that agencies must at least consider placing children near their siblings.

Within a First Nation's law, it is possible to strengthen these placement priorities. For example, the Yellowhead Institute recommends incorporating language such as:

- *Active efforts, not just reasonable efforts, to keep a child in family care;*
- *Maximum contact with siblings, extended family, community and territory, as a principle for all children out of family care; and,*
- *Impermissible reasoning, where time out of parental care alone cannot be grounds for permanently ending the child's legal relationships*[38]

7.4. Other Considerations for Wise Practice

7.4.1 Reassessment of Placements

Section 16 (3) of the Federal Act states that reassessment of a placement should take place on an ongoing basis to determine whether it would be appropriate to place the child with their parent, or with another adult member of the family.

This is an entirely new provision for which there is no parallel in the Provincial Act. As Section 16 does not prevail over Indigenous law, there is no requirement that it be incorporated into a First Nation's law. However, regular reassessment of placements is good practice.

One of the issues First Nations families encounter in relation to provincial agencies is that assessment and reassessment can be met with defensiveness on the part of the agencies, rather than seen as an opportunity to validate, strengthen, and occasionally reset the relationship between the agency and the caretakers. In contrast, Indigenous laws can establish reassessment as a part of a regular visiting and care scheme that is based on reinforcing internal bonds within the community.

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[38] Yellowhead Institute. The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children,Youth and Families, (2019), https://yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf

First Nations with small populations that delegate their protection authority to an agency shared in common with other Nations, may wish to ensure that assessments continue on a schedule similar to the current 30 or 90 day provincial scheme. Other Nations that take on their own child protection work with their own institutions, or those which undertake placements as part of prevention as well as protection, may wish to build in reviews that are more closely centered on catching changes in circumstance while allowing for fewer interruptions in the lives of children and care providers.

Where returning a child to a family member is not possible, Section 17 of the Federal Act requires that the child's attachment to family members be promoted so long as it is consistent with the child's best interest. The Provincial Act contains a parallel provision and the Federal Act's provision does not prevail over Indigenous law.

Wise Practice: Empowering Youth

The Louis Bull Tribe in Treaty 6 territory have included specific language within their child well-being law, the Asikiw Mostos O'pikinawasiwin Law (AMO Law), that empowers youth to be active agents in their care and play a key role in decision-making. The law states:

When a decision involving an Awasisahk (child and youth under 18) is made, the Awasisahk:

- Should be given information and explanation in a way that the Awasisahk can understand; section above on the best interests of an Awasisahk does not limit the matters that may impact their life;
- Should be given the opportunity to participate in the decision-making and to respond to the decision;
- Should be given the opportunity to express their wishes and views freely;
- Should be given adequate assistance in expressing clearly and accurately those wishes and views; and,
- Should take those wishes and views into account, having regard to the Awasisahk's maturity and understanding

7.4.2 Child in Need of Protection

While the Provincial Act pays significant attention to defining considerations around a child's need of protection and the threshold for apprehension, there is no comparable provision in the Federal Act, which refers only to the "provision of child and family services" throughout.

When considering whether a child is in need of protection, there may be a tendency to refer to the definitions contained in provincial policy. However, circumstances such as poverty, poor housing, no clean drinking water, etc. are barriers that many parents do not have control over. These circumstances do not make them "bad parents", but such circumstances may not make for an ideal environment for the child. While removing children from their homes does not resolve these larger, systemic issues, consideration may be given to whether the child would be in a better environment if the family had more supports. Considerations may also be given to whether issues experienced by parents can be resolved outside of the home in favour of keeping the child within the home to ensure their safety and security.

Emergencies

Protocols should be developed as it relates to emergencies. If the situation in the home is so dangerous that direct and immediate action must be taken, an emergency policy and process should be put in place to ensure the safety of the child. Consider the following questions:

- Is there a difference between various forms of injury, such as physical, emotional, sexual in terms of when a child needs the care of the community?
- Is there a difference between the loss of one parent and the loss of both parents?
- Who will be the first people on site if a violent issue arises?
- Will anyone be removed from the home, if so, who?
- What if there is a weapon involved?
- What if there is mental illness involved?

The worst-case scenario should be considered and a plan should be made for how that situation will be dealt with by the First Nation in a way that is least intrusive and harmful for the child. It could be helpful to be able to point to a provision or set of provisions that address the circumstances under which the Nation will step into a child or family's life.

Wise Practice: Emergency List

The Yellowhead Institute recommends *"internally, develop[ing] a list of people in or related to the community who are able and willing to act as safe houses in emergencies or take in children temporarily or permanently. Also develop a list of people who might not be able to provide full time care, but may be able to provide respite, regular or special visits, and facilitate familial and cultural connections for children out of family care."*

7.4.3 Role of Family

Though it is not a requirement under the Federal Act, it is important to consider and give weight to the role each family member plays in the caring of a child as those roles have been enshrined in First Nations' customs since time immemorial. Of course, the role of the family will look different for every Nation. For example, for the Haudenosaunee, discussion of the role of the family may extend to longhouse families. For others, the role of the family may also extend to clan or *dodem*.

Since colonial policies, such as the residential school system and the child welfare system, have been deeply distributive to families, it is important for Nations to reclaim their definitions of family and kin.

If Nations wish to include this section in their law, they may consider referring to their teachings and Elders to restore the traditional values held within family. As Indigenous Peoples, the 'nuclear' family has never been an appropriate structure to define the wide circle that captures aunties, uncles, and cousins. It will be important for Nations to reflect on what families mean to their people and the roles those family members play in raising a child.

7.4.4 Mixed Marriages

Many Nations already provide services to families in which at least one parent or child is not a member of the community. While some communities have explicit prohibitions on residence by non-members, others may wish to clearly outline the extent to which their laws apply to children and families that are mixed.

It is important to consider the importance of the placement priorities (**see Section 7.3.8: Placement Priorities)**, including the mandate to keep siblings together. For most First Nations, this

will mean – at a minimum – putting protocols in place for prioritizing which community provides services to the family.

7.4.5 Minor Parents

While it is not uncommon for young people to have children, there are various teachings on the life cycle that speak to the learning, exploring, and support youth experience and require. For young parents, the community should consider its teachings on youth and how young parents were traditionally supported. Based on these foundational teachings, formal and informal supports should be put in place for both the child and parents as they navigate that stage of life. These supports should also consider the present context of the family and the possible need or intention of the parents to go to school and/or earn income for their family.

Consideration may be given to language related to providing supports for young parents within the text of the law. This could fit within the stated objectives section, for example. An example of an innovative program providing support for young parents can be found in the program by Maskwacis, Treaty 6 territory, that brings together Elders and young parents for mentorship and to pass along parenting teachings.

In addition, the law may include how to treat minor parents within the Nation's child welfare regime. For example, the Peguis Act states that:

> *A Customary Care Agreement [the agreement that outlines a care plan for a particular child] is valid notwithstanding that a Parent entering into the agreement is a minor 16 years of age or older. If the minor Parent is under the age of 16 years, the Parent(s) or guardian of the minor Parent will be required to consent to the Customary Care Agreement along with the minor Parent.*

7.4.6 Dispute Resolution

Section 18(2) of the Federal Act affirms that the authority to administer and enforce laws includes the ability to provide for dispute resolution mechanisms. Generally speaking, dispute resolution mechanisms are established methods used to resolve disagreements. Common mechanisms include:

- **Negotiation:** A discussion aimed at reaching an agreement.
- **Mediation:** A discussion mediated by an impartial person who assists in negotiating through differences.
- **Arbitration:** Where a disagreement is submitted to one or more mutually agreed upon arbiters, who then decide on a solution or outcome.

First Nations cultures and traditional legal orders also include insights into dispute resolution that could be built into the law. These methods may include bringing disputes to a Council of Elders or Women, consensus building through deep dialogue, mediation circles, and going into ceremony, among others. Each First Nation will determine which method(s) is right for them.

By way of example, the Cowessess Act brings together aspects of both First Nations and western dispute resolution methods. Some notable features include:

- The establishment of an oversight tribunal, called the Eagle Woman Tribunal;
- Those, among the people who can refer a decision to the oversight tribunal for review, are the children impacted by the decision;

- The tribunal can receive both oral and written evidence; and,
- Upon review of the case, the tribunal can either confirm the decision presented for review, ask the agency director to review and reconsider their decision, or – with the agreement of the parties – refer the case to a mediator appointed by the tribunal.

8 Considerations for Child Welfare Agency Structures and Processes

As noted in the description of Authority or Outside or External Authority in **Section 7.1.3** above, there are various potential models for how a First Nation chooses to organize child well-being services for its citizens. Several Nations are using this opportunity to develop their own child welfare agencies and supportive structures for those agencies.

For example, the Asikiw Mostos O'pikinawasiwin Law (AMO Law) from the Louis Bull Tribe, in Treaty 6 territory describes a comprehensive system to support child well-being including:

- The child & family services agency (Asikiw Mostos O'pikinawasiwin Society/ ᐊᓯᑭᐤ ᒧᐢᑐᐢ ᐅᐦᐱᑭᓇᐊᐧᓯᐃᐧᐣ) responsible for the day-to-day operations of programs and services;
- The AWO Society Board of Governors that is mandated by the Louis Bull Tribe to administer funding, support the implementation of the AMO Law, and act as the central liaison for the community on child and family well-being; and,
- An AWO Society Children's Commissioner, appointed by tribal resolution and accountable to the AWO Board of Governors to oversee the functioning of the law.

Other Nations may choose to work with a delegated agency within the new legal framework. For example, the recognized Indigenous Governing Body (IGB) may determine that an already-existing delegated agency may:

- *[Provide] technical support and expertise to the IGB in developing their own laws and policies;*
- *Be a service provider (most likely under an amended set of directions or parameters that reflect Indigenous laws) to implement and enforce the IGB's child welfare law; or,*
- *[Deliver] specific outreach and support services, as outlined in the IGB's own law, within their own communities and for members living in urban communities.*[39]

What is a delegated agency?

A delegated agency is an organization established to support the delivery of Indigenous child and family services utilizing provincial legislation and policies. They are not considered an IGB and their participation within a new child welfare regime arising from an Indigenous law must be determined by the community or nation.

For more information on delegated agencies in Ontario see the Association of Native Child and Family Service Agencies of Ontario.

These roles and responsibilities should be described in a child well-being law.

In addition, this section may be used to identify the relationship of the agency and other groups and

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[39] Ardith Walkem. Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook. ShchEmamee.tkt Project, (2020), https://www.nntc.ca/documents/WOW_Guidebook_2021_210214.pdf

organizations that the agency may interact with. This includes organizations within urban centres where First Nation citizens may reside, as well as other Indigenous groups.

8.1 Relationships with Urban Centres

Urban environments vary and major urban centres may be equipped to provide services, particularly if those services have been developed by and for Indigenous Peoples. It is important to consider the delivery of services to citizens living outside of the Nation that require the same type of child and family supports, rooted in culture and community connections, as those provided on reserve. To this end, a First Nation may wish to consider implementing specific protocols with the service providers in that urban centre(s) and possibly regulations that apply to those service providers.

8.2 Outside Child and Family Services Authorities

It is important to note that Child and Family Services Authorities (CFSAs) operating outside of First Nations also have an obligation to adhere to the Federal Act when they are serving an Indigenous child and/or family. CFSAs must work with an Indigenous child's family and the child's IGB. They must consult with the IGB to determine the best interest of the child and:

- Demonstrate compliance with notice requirements within the Federal Act;
- Uphold the IGB's right to have their views and perspectives considered in decisions impacting their people;
- Determine alignment with the IGB's laws (s.10(4));
- Have adequate information to consider a child's "language, cultures, practices, customs, traditions, ceremonies, and knowledge" (s. 9(2)(b)); the characteristics and challenges of the region" (s. 9(2)(e)), and how services can be provided in a manner that does not "contribute to the assimilation of the Indigenous group, community, or people" (s. 9(2)(d)).[40]

8.3 Interprovincial Matters

As previously discussed in **Section 4.4.1: Benefits and Limitations of the Federal Act**, the federal government currently takes the position that a First Nation must negotiate with any province in which its law is intended to apply in any way.

As a result, provisions with respect to jurisdiction will need to be particularly clear for Nations who either have large populations of citizens in other provinces, or whose territory straddles multiple provinces or states.

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[40] Hadley Friedland. Bill C-92 National Standards Guide for Legal Professionals, (n.d.), https://www.ualberta.ca/wahkohtowin/media-library/data-lists-pdfs/bill-c-92-national-standards-brief-for-legal.pdf

9 Making Our Circle Stronger: Wise Practices

The process of reinvigorating and renewing First Nations jurisdiction over child well-being can be an overwhelming and intimidating task. However, there are many powerful and innovative examples of Nations and organizations that have already begun this valuable work that can be referred to insight and inspiration. This section includes a brief overview of some of these examples.

While the projects below represent positive examples of First Nations implementing true self-governance and law-making authority over child and family well-being services, it is important to remember that the creation of laws is just the beginning of asserting jurisdiction over child and family well-being, which requires funding, capacity building, and retention of human resources. A major criticism of the Federal Act is that it does not include any guarantee of the provision of funding nor human resources. This is especially concerning considering the disproportionally high amounts of Indigenous children in foster care, the remoteness/geographic considerations of various Nations, staff shortages, and the history of underfunding experienced by First Nations.

Therefore, for many Nations, coordination, communication, and planning with federal, provincial, and territorial governments will be necessary to successfully implementing laws pursuant to the inherent jurisdiction of governing the well-being of its children and families.

9.1 GroundWork Project in Treaty 8

In terms of its relationship to child welfare jurisdiction, the GroundWork project represents an important method of working within Nations on the revitalization of Indigenous legal orders.

In 2019, the Treaty 8 Tribal Association and four Treaty 8 Tribal Association Member Nations (Fort Nelson First Nation, Halfway River First Nation, West Moberly First Nation, and Saulteau First Nation) began a collaborative research project called GroundWork. The project is part of a larger effort to revitalize Indigenous laws in Treaty 8. This work is focused on understanding how land-use decisions are made within Dane-zaa, Dene, Cree, and Saulteau legal traditions. This ongoing research is conducted in partnership with the Indigenous Law Research Unit (ILRU) at the University of Victoria's Faculty of Law.

The purpose of this project is to understand, adapt, and apply First Nations laws of land governance towards resolving ongoing conflicts and issues around land-uses in Treaty 8 territories. The Living Law Gathering, hosted by the Fort Nelson First Nation Lands Department in March 2020, brought together twenty-participants consisting of Elders, youth, and knowledge-holders to share their stories, life histories, laws, and traditions relevant to land governance. This is an example of the type of research engagements that are conducted by the ILRU through the GroundWork research project.

9.2 Anishinabek Nation Child and Well-Being Law

In 2008, the Anishinabek Chiefs-in-Assembly passed a Grand Council Resolution that affirmed the need for Anishinabek to assert jurisdiction over child well-being and to initiate the process of developing a law for the Anishinabek that is Anishinabek-led.

From 2009 to 2010, the Anishinabek Nation held a total of 97 meetings discussing and gathering input from Member Nations on possible changes to the child welfare system and rearing and caring of their children. After these meetings, a draft law was developed.

Later in 2010, the Child Well-Being Working Group was established with the mandate to review and refine the draft law. The Working Group consisted of First Nation Chiefs and Councillors, social workers, Social Department Directors, Anishinabek citizens, child and family welfare agency directors and representatives, and band representatives. The Working Group revised and updated the draft law with input gathered during meetings held throughout Anishinabek territory and from online input from Anishinabek citizens.

Eventually, the draft law was presented to and approved by the Anishinabek Nation Grand Council Assembly in 2016 for each Anishinabek First Nation to review and decide whether to approve the law for implementation. As of present, twenty-two (out of thirty-nine) Anishinabek Nation First Nations have agreed to move forward with the Anishinabek Nation Child Well-Being Law in their communities.

Recently in 2021, the Anishinabek Nation and Canada signed the Agreement-in-Principle on Anishinabek Child, Youth, and Family Well-Being. The Agreement-in-Principle supports the signatory First Nations in creating their own framework and delivering the programs and services required to keep Anishinabek children within Anishinabek families and communities.

The Anishinabek Child Well-Being Law (ANCWBL) was developed in response to the current ramifications of child welfare laws that often result in the removal of First Nations children from their families and communities. Therefore, in addition to affirming Anishinabek inherent jurisdiction over child and family welfare, the law ensures the safety and well-being of Anishinabek children through various mechanisms that serve to prevent the removal of Anishinabek children from their families and communities.

The ANCWBL also establishes the legislative framework for the structure of the Anishinabek Nation Child Well-Being system, community agreements, and community standards. The ANCWBL is an important step in realizing the Anishinabek Nation's vision of self-determination and will ultimately advance First Nations' work in the area of child, youth, and family well-being.

Key Strengths

- Ensures the safety and well-being of Anishinabek children and youth.
- Provides First Nations the right to exercise their inherent jurisdiction over the well-being of their children regardless of residency.
- Acknowledges, respects, and supports the role of parents/guardians, families, and communities in safeguarding and upholding the wellness of Anishinaabe children and youth.
- Provides guidelines for the protection of children and youth in circumstances where their parents or guardians are unlikely or unable to care for and protect their child.
- Focuses on prevention activities that would lessen the need for the protection from child welfare

authorities.
- Includes and maintains traditional Anishinaabe teachings, culture, values, and language.
- Ensures that adoptions only occur on the approval of the parent or guardian and the First Nation of the child/youth and their parents or guardians.

9.3 Cowessess First Nation Miyo Pimatisowin Act (Striving for a Better life)

In July 2020, under the leadership of Chief Cadmus Delorme, the Cowessess First Nation became the first Nation to finalize and ratify an agreement under the Federal Act by signing a coordination agreement with the Government of Canada and the Government of Saskatchewan to initiate a transition plan towards reclaiming the Nation's jurisdiction and responsibility over its children, youth, and families. As a result, the Cowessess First Nation's Miyo Pimatisowin Act formally took precedence over provincial child welfare law.

The Miyo Pimatisowin Act was led and developed by the Cowessess First Nation with minimal involvement from the federal government, apart from a $38 million investment towards development and implementation. The Nation has used this funding to launch the Child and Family Services program and the Chief Red Bear Children's Lodge, a Cowessess-led agency committed to providing child and family welfare services to all Cowessess citizens in a holistic, traditional, and culturally-based manner.

The Cowessess assertion and implementation of their inherent rights to govern child welfare has already produced significant positive outcomes for the Nation. As of April 1st, 2021, the Cowessess First Nation had welcomed back nineteen children who were in government care and placed them in the care of Cowessess First Nation families receiving supports. Additionally, nine children in care in Saskatchewan with roots in Cowessess were introduced back to family and community. Finally, zero Cowessess children were in care on Cowessess First Nation as of April 1st, 2021, due to the successful implementation of family plans and the provision of necessary supports.

Key Strengths
- Ensures the care and protection of Cowessess First Nation children and families.
- Gives Cowessess full coast-to-coast jurisdiction over its children in care anywhere in Canada.
- Provides families with the culturally relevant resources required to heal from intergenerational trauma.
- Focuses on prevention initiatives that would lessen the need for protection from child welfare authorities.
- Develops comprehensive and culturally relevant Cowessess First Nation Child and Family Services.
- The Act and the Child and Family Services program shall apply to all Cowessess First Nation Citizens and their children, whether they are residing on or off the reserve.
- Establishes of the Chief Red Bear Children's Lodge, a Cowessess First Nation agency that provides comprehensive programming, services, and residence for Cowessess First Nation children and families.
- Employs a holistic, traditional, and culturally-based healing model to care for and assist Cowessess First Nation children and families.

9.4 Inuvialuit Qitunrariit Inuuniarnikkun Makigaksat

In November 2021, after a year of consulting with communities to discuss how Inuvialuit wants to care for their children, families, and culture, the Inuvialuit Regional Corporation (IRC) signed the Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat (Inuvialuit Family Way of Living Law). The law was created in response to the Federal Act and is designed to support a steady transition over the next several years towards full Inuvialuit control of the care of Inuvialuit children and youth. This transition includes the creation of facilities, community staffing, and a new dedicated organization called Maligaksat, which will advocate for Inuvialuit children and youth while addressing existing gaps in services.

With this law, Inuvialuit is now the first Inuit region to enact its own child well-being legislation. This law requires all federal, territorial, and provincial governments to meet certain standards of care when providing child and family services to Inuvialuit children, youth, and their families. Specifically, it ensures that Inuvialuit children in contact with child and family services in Canada remain connected with their Inuvialuit culture.

In response to concerns regarding funding and capacity challenges, the IRC requested coordination agreements, funding, and support from the federal, Yukon, NWT, and Alberta governments. If an agreement is not reached within the one-year deadline, the Inuvialuit law will come into force and will supersede any territorial and federal laws, except human rights laws.

Key Strengths

- Ensures cultural continuity for each Inuvialuit child and youth, which is essential to well-being.
- Provides services for Inuvialuit children and youth in their home community.
- Youth who are currently in child and family services anywhere in Canada will be able to return to the Inuvialuit Settlement Region (Inuvik, Aklavik, Paulatuk, Sachs Harbour, Tuktoyaktuk, and Ulukhaktok).
- Provides financial, cultural, and educational support for Inuvialuit children, youth, and their families.
- Enhances the existing supports and services available to enable Inuvialuit families to thrive and to reduce the need for intervention.
- Improves and strengthens information sharing for fully informed service provision, advocacy, and decision-making.
- Develops the process of Inuvialuit jurisdiction in child and family services in a gradual and supportive manner.

10 Useful Tools

10.1 Checklist

The process of developing a child and family well-being law and system is complex and different for each First Nation. However, there are a number of steps required and should be completed in a particular order to align with the Federal Act.

These steps are outlined in two checklists, adapted from ISC's Technical Information Package, detailed below. These are slightly different depending on which pathway to jurisdiction you choose.

Pathway #1: Notice to Exercise Legislative Authority (as per s. 20(1) of the Federal Act)		✓
Before developing the law		
1.	Seek/identify funding to support the law-making project	
2.	Undertake community asset mapping and engagement	
Developing the law		
3.	Determine scope of the child and family services law	
4.	Confirm mandate of the Indigenous governing body	
5.	Define how services will be delivered and by whom	
6.	Authorize an Indigenous Governing Body to act on behalf of the Indigenous group, community, or people	
7.	Develop a child and family services law	
Submitting the Request		
8.	Send request to the Minister of Indigenous Services Canada, and any province/ territory in which the Indigenous Governing Body is located	
9.	The request must include: • the name of your Indigenous Governing Body as well as the name of each group or community who has authorized this body to act on their behalf • an explanation of the process through which this Indigenous Governing Body was authorized by each group or community • the name of the province or territory in which each group or community being represented by the Indigenous Governing Body is located • the name of your current child and family services provider • a brief summary of your child and family services model as well as a copy of your legislation • a description of where your child and family services model and legislation would apply and to whom it would apply	

	• a copy of any previous requests sent to the Government of Canada or to the provinces or territories of your intent to exercise your jurisdiction • a list of all agreements, including treaties and self-government agreements that you have signed that address child and family services	
After Submitting the Request		
10.	Receive an acknowledgement from ISC within 10 days of submitting notice Receive a fulsome response and next steps within 30 days	
11.	Once all documents are determined by ISC to be complete, a 12-month period begins	
12.	Your ISC Regional Office will organize a kick-off meeting with the Indigenous Governing Body as well as with the relevant province and territory within 60 days	
13.	Regional Office will set up a table for the coordination agreement discussions to take place within 60 days if a CIRNAC table does not already exist or if a community chooses not to use the existing table	
14.	Indigenous Governing Body will submit a funding proposal to support the coordination agreement process accompanied by a proposed work-plan within 60 days	
15.	ISC will assess the funding proposal and funding arrangements will be made to support participation of the Indigenous Governing Body and/or the Indigenous groups in the initial coordination agreement discussions	
16.	ISC Regional Office will provide the funds to the Indigenous Governing Body and/or the Indigenous groups in accordance with the funding arrangements and will facilitate the first coordination agreement meeting during which the participants to the table would agree on a final work-plan	
17.	Within 12 months of the request being made, if an agreement is reached, or if no agreement is reached but reasonable efforts were made to reach one, Indigenous laws would have the force of federal law and would prevail over federal, provincial, and territorial laws in the event of a conflict or inconsistency • If needed, a dispute resolution mechanism can be used to promote the conclusion of a coordination agreement before or after the 12 months following the request. This dispute resolution mechanism will be created by regulations co-developed with partners. • Before this dispute resolution mechanism is created, nothing precludes the parties from identifying an independent body to help resolve any issues arising during the discussions surrounding coordination agreements	
18.	Indigenous laws could prevail after a 12-month period even if a coordination agreement is not concluded • An Indigenous Governing Body can make a new request to enter into a coordination agreement at any time, and can enter into a coordination agreement even after the 12-month period • The discussions at the coordination agreement table can be extended beyond the 12 months at the request of the Indigenous Governing Body	

10.2 Child Well-being Law Template

This template provides a general idea of important elements that may be included within a child well-being law. Below are some considerations to remember when developing the law:

- The areas determined to be minimum standards in the Federal Act are just that – minimums. First Nations have the opportunity to strengthen these standards and align them with their contextual and cultural understandings and values.
- Not all existing First Nations child welfare laws include each of the sections outlined below. Additionally, they are not all organized in the same way. However, elements from various innovative models have been highlighted as inspiration and teachings.
- A Nation's law can be guiding, incremental, or comprehensive. It will take some work to determine the right fit. It is also important to remember that it might not be perfect the first attempt and it is possible to make amendments.
- More than just setting out rules, roles, and responsibilities, the law should establish the vision and tone for the Nation's child well-being framework. This is where cultural understandings and values can be laid out and infused within the law and in doing so, become the foundation of child and family well-being within the Nation.

Template	
Preamble	*This section will set the stage for the Law, frame the purpose of the Law, and explains the general scope of the Law. This section essentially acts as an introduction.*
Declarations and Jurisdiction	*This section will note customary declarations that set the stage for the Law. It outlines the jurisdiction, the scope, and the limitations of the Law*
Interpretations and Definitions	*This section will list pertinent definitions pertaining to the Law, as well as the interpretations and applications of these definitions relevant to the scope of the Law.*
Purpose of the Law	*This section will specify the purpose of the Law and the overall objectives intended in the implementation of the Law.*
Principles Governing the Law	*This section will outline the overarching principles and values guiding the enactment and implementation of the Law.*
Minimum Standards	*This section outlines the minimum standard of practice according to the Federal Act. These legal standards must be adhered to as they are the minimum requirements and procedures that ensure Indigenous child protection and child welfare in Canada.* *Minimum standards exist in the areas of:*

	• *Best interest of the child* • *Provision of child and family services* • *Notice requirements and representation/ party status* • *Priority to prevention including prenatal care* • *Socioeconomic conditions* • *Placement priorities* *It is important to note that the minimum standards can be either presented as a separate section, like it has been laid out in this template, or embedded within the text of other areas of the law.*
Structure, Programs and Services	*This section outlines the structure of the Law, and the programs and services the Law shall regulate. These programs and services are an extension of this Law and will have the authority to administer various requirements and aspects of the Law.*
Placement of a Child	*This section outlines the structure and protocols in prioritizing, facilitating, and deciding the appropriate placement of a child.*
Custom Adoption	*This section lists specific procedural steps and considerations that inform the process of adoption according to customary and traditional law. In addition, this section also discusses the legal process of adoption and requirements according to the provincial court of law.*
Role of Family	*This section outlines the role and responsibilities of family in relation to the care of a child. In addition, this section outlines procedural steps to be taken in various circumstances involving the safety, protection, and well-being of a child in relation to their family.*
Duty to Report	*This section lists requirements, protocols, and steps to be taken to ensure that reporting duties regarding the protection, safety, and well-being of a child is prioritized. The section outlines reporting responsibilities and scenario-based situations where emergency reporting must be adhered to as per the minimum standards and standards of this Law.*
Rights, Parties and Hearings	*This section outlines the rights of children and outlines specifics regarding parental rights (or the loss of parental rights) and related hearing procedures.*

Enforcement, Appeals, Records, and Conflicts of Law	*This section provides a statement regarding the enforcement of the Law. In addition, this section outlines appeal mechanisms that are listed in the Law, requirements for appeals under this Law, rights for access to records under this Law, and will note any irregularities or conflicts between this Law in context of other jurisdictions and laws.*
Review and Amendments	*This section outlines the process of amendment and review of the Law.*
Confidentiality	*This section details requirements and protocols surrounding confidentiality, access to personal information, and the laws governing this area.*
Delegation and Liability	*This section notes delegation of the Law in the event of certain circumstances and outlines a clause on protection from liability.*
Coming into Force	*This section notes how the Law is coming into force, from when it will take effect, and the specifics pertaining to its enactment.*

Endnotes

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