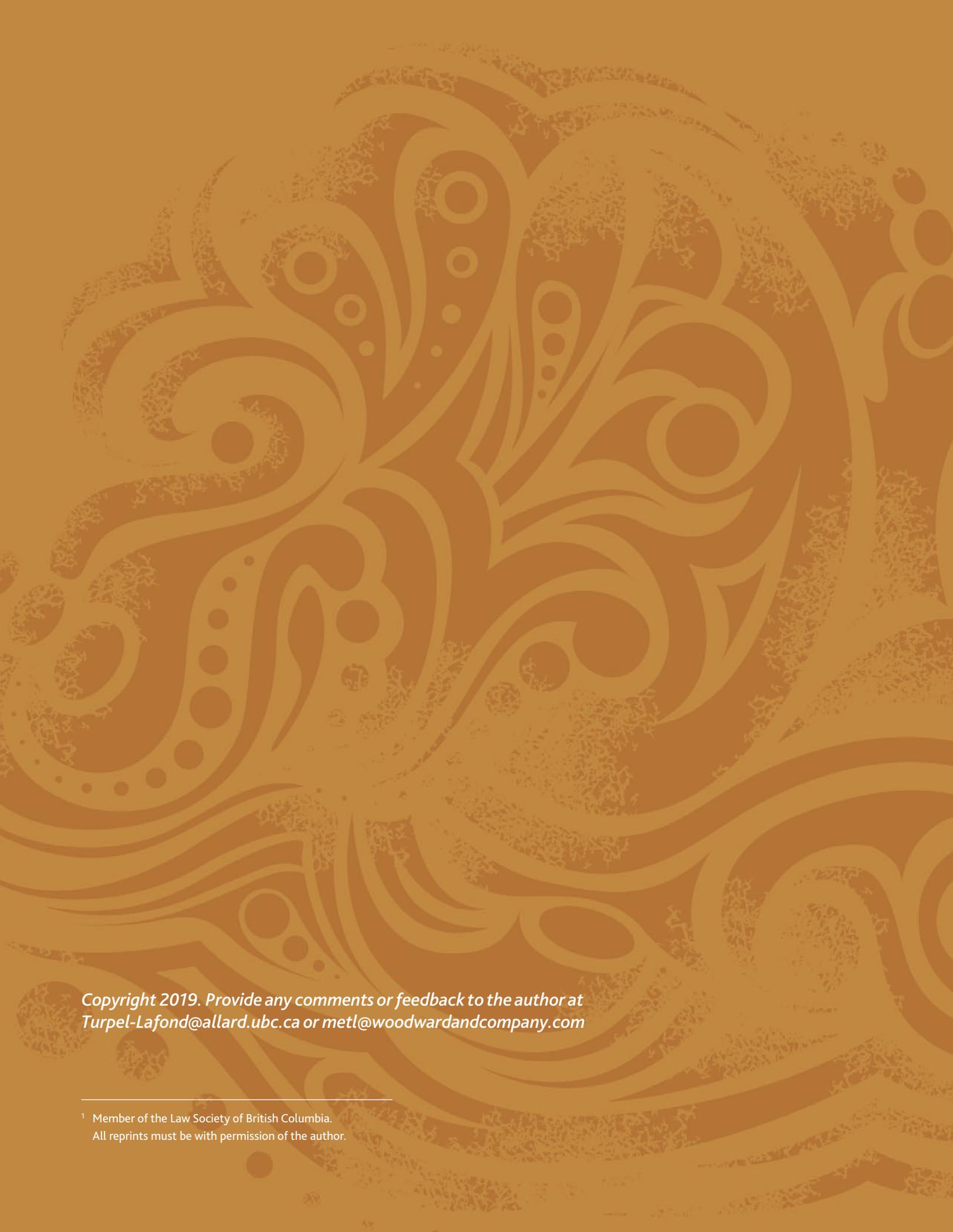




**PRIMER ON PRACTICE SHIFTS
REQUIRED WITH CANADA'S**
*Act respecting First Nations, Inuit and
Métis children, youth and families*

*(R.S.C. c. 24, 2019, also called "Bill C-92"
herein referred to as "the Act"),
coming into force January 1, 2020.*

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1. Background

On January 1, 2020, new federal legislation comes into effect for all provinces and territories in Canada. It is intended to create a “comprehensive reform of child and family services that are provided in relation to Indigenous children.”² This primer on the changes that come into effect on January 1, 2020, has been prepared as a practice overview for those working with First Nations³ children, youth, families, communities and First Nations governments.

Child and family services are defined in s. 1 of the Act as “services to support children and families, including prevention services, early intervention services and child protection services.” This definition creates the context for interpreting and applying the new rules and principles across the complete child and family serving system as it relates to First Nations in all provinces and territories in Canada.

The legislation affirms the pre-existing rights of First Nations. It seeks to “contribute to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*”⁴ by providing support for First Nations authority over child and family services and setting out national legal principles and standards that have been drafted to prevent and remedy family breakdown for First Nations.

2. National principles

The Act sets out new national legal principles that apply to all matters involving First Nations children, youth and families in the child and family serving system as of January 1, 2020. The national principles are derived from several key sources. This includes discussions with Government and First Nations leaders, experts and service delivery officials through a variety of mechanisms, including a national meeting on January 25-26, 2018, convened by Canada to address the humanitarian crisis of over-representation of First Nations children in child welfare systems. The national principles were informed by systemic analysis of the application of the child welfare system to First Nations peoples by commissions and public officers, and by numerous reports and studies, particularly the Report of the Truth and Reconciliation Commission, which included national legislation as a Call to Action in its final report in 2015.

The legislation itself was informed by significant advocacy and input from First Nations Chiefs and technical advisors. Canada held 65 meetings in all provinces and territories with First Nations leaders and service delivery officials. The Assembly of First Nations created a “Legislative Working Group” consisting of Chiefs appointed from each region and territory in Canada, technical experts as well as Dr. Cindy Blackstock from the First Nations Child and Family Caring Society of Canada.

² Paragraph 9 of preamble to the Act.

³ The primer is focussed exclusively on implementation for First Nations peoples. For Metis and Inuit, it might be of assistance, and more specific inquiries must be made regarding these contexts. The author has less expertise and knowledge on these dimensions of implementation and will defer to others regarding these contexts.

⁴ Section 8 (c). The reference to “contribute to the implementation” of the United Nations Declaration on the Rights of Indigenous Peoples is reinforced by the first paragraph of the preamble to the Act which states “Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples.”



The Assembly of First Nations Legislative Working Group prepared policy options, engaged directly with lead federal officials and provided comment on a consultation draft in 2018.

The legislation is intended to change operational policies and practices in the delivery of child and family services to First Nations by provincial and territorial authorities and officials to address the impacts caused by having provincial and territorial values, beliefs and laws imposed on First Nations without their approval or consent.⁵ The national legal principles are legal rules, norms or standards that must be applied after January 1, 2020, when

assessing, serving or engaging with First Nations children, youth, families and First Nations leaders and governments. It is important to note that the national legal principles are not discretionary and are lawful requirements that must be considered in practice.⁶ They apply in every instance where the child, youth or family is First Nations, whether registered as a status Indian or not.

The new national principles will reform the practice of child welfare systemically and, once adopted, override provincial and territorial laws and allow First Nations laws to operate in their place. This means that those who work in child and family services, including child protection, family support, youth services, and parenting programs and supports, need to be sure they understand these new principles and align service delivery with the requirements of federal law. First Nations must do a close reading of the new legislation and a side-by-side comparison with existing provincial or territorial law and policy to flag where changes to existing practices must change.

The principles include direction to: promote family unity; avoid family breakdown; allowing for the reassessment of placements under the new legislation when the child is not with a parent; emphasizing least intrusive measures by putting a

⁵ The provisions of the *Indian Act* were applied to First Nations peoples without the consent or approval of First Nations governments. The *Indian Act* contains a provision, section 88, which has been in force since the 1950s. It was this provision that permitted provincial laws of general application to apply on-reserve and this brought child welfare officials full federal authority to intervene in families and apprehend children. This is the key colonial tool of outsider child welfare law which resulted in the systemic and forcible removal of children. First Nations child welfare has a distinct history with distinct legal tools used to harm First Nations cultural identity and family unity through the imposition of the *Federal Indian Act*. The national legislation is a repudiation of this approach and a recognition that Canada's permission of such measures caused a massive violation of the human rights of First Nations families. However, the distinct nature of First Nations history and experience under the *Indian Act*, requires a unique implementation plan to ensure the new legislation provides a complete remedy to this harmful legacy.

⁶ The practice standards established under provincial or territorial child welfare legislation and policy were adopted without the involvement of First Nations peoples. These laws and policies have been applied to First Nations through a provision of the *Indian Act*, and has been a highly criticized tool of colonial imposition of laws and practices on families (section 88). For example, in British Columbia law and policy, there are several operational policies that contain service standards which have been recently upgraded. These policies and standards were not co-developed with First Nations and they do not reflect the requirements to implement new legislation. Existing service standards and policies need to be applied with caution as they may not be consistent with the requirements of the *federal Act* on January 1, 2020, and will give way to new national standards. For example, several key provincial policies would require review. These would include BC MCFD Chapter 2: Family Support Services and Agreements; Chapter 3: Child Protection Response; Chapter 5: Supporting the Cultural Identity of Indigenous Children and Youth in Care.

duty on social workers to demonstrate explicit steps taken to keep the child with the family and in community; and opening greater space for the direct involvement by family, caregivers and communities in child welfare decision-making. The practice must evolve to accommodate the participation of family members, First Nations government representatives, parents and caregivers in decisions for children and youth. As of January 1, 2020, all front line of service delivery (provinces, territories and Aboriginal agencies) will need to be working more extensively with families both before and after decisions are made, and throughout the entire period that a child or family is known to them.

The national principles include both **positive** factors to evaluate or consider when delivering services to First Nations, and **restrictions** or procedural and substantive limits that will constrain the facts that can be applied on the front lines of the child and family serving system.

Provisions in the new Act include, on the one hand, a positive service principle, and on the other hand, the same concept as a restriction on practice. A good example is a concept of promoting family unity (positive) versus restrictions on the placement of children with a test for what person(s) should be given priority when a child is not safe (constraint), with the first two possible placements including immediate and extended family.

3. Positive Standards

The **positive** principles, standards and norms include:

- Additional specific protections for the human rights of First Nations children, youth, family members, care givers and First Nations governments to respond to the intergenerational trauma caused by colonial policies and practices, including that the purpose of the legislation is to contribute to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* standards. These additions include:
 - o Promotion and protection of “substantive equality”—meaning children and family must be treated in a manner that is substantively equal to other children and families (doesn't mean the same treatment, but rather the substance of outcomes and supports are similar to other children and families with the same situation).
 - o Non-discrimination based on gender and gender diversity.
 - o Rights to participate and have views given weight in child welfare decisions and processes, especially for children and youth.
 - o Right to be placed with or near siblings and members of the family.
 - o Right of a child to be attached to all members of their family, and to keep emotional ties with all members of their family, including when they are not residing with those family members (i.e., living with one birth parent's family and not the other).

- o First Nations law, administration and dispute resolution, once asserted, must also meet human rights standards—although human rights standards must be applied and interpreted in a way that does not take away Section 35 individual and collective rights of First Nations (so a balance between collective and individual rights will be unique to this area).
- A new definition of “family” to reflect an extended family and to explicitly require this to be informed by First Nations’ understanding of family members following the “customs, traditions or customary adoption practices of the First Nations” (s. 1).
- Recognition that the placement decisions for a child must reflect the customs and traditions of the peoples involved in a child and family service matter, including for “custom adoption” practices of their First Nation.
- Requiring that services provided be consistent with the preservation of “cultural continuity” for the child, family, community and Nation.
 - o Cultural continuity is a positive affirmation or standard in the Act. Still, it also includes ensuring that child and family services are delivered in a manner that does not “contribute to the assimilation” of the child’s First Nation, or to the “destruction of the culture” of that First Nation.

- Setting out a range of factors to be included in the assessment of what is in the “best interests of the child.” Some of these variables include ensuring the services are delivered according to service delivery principles required under the Act, and the objective of “preserving the child’s cultural identity and connection to their territory” and the First Nation to which they belong.
- The right of the child to have their views and preferences given due weight and consideration, considering their age and maturity. This would require those making decisions (courts, judges, others) to hear directly from the child and youth before making any decision impacting them.
- Right of notice to family members, First Nation and care provider before taking any “significant measure” concerning a child in the child welfare system to promote their involvement and participation at all stages in planning for the child and to promote the concepts in the legislation that reflect First Nations’ preferences for protecting their children and families. Notice provisions under current child welfare laws are often routine emails or notices of a hearing coming for a child and tend to be minimal requirements.
- A child’s parent or care provider has a right to be a party to all proceedings involving a child.
- A child’s First Nation government has a right to make representations in all proceedings involving a child from their Nation.
- Right to “family unity” which will include an “assessment” or reassessment on an “ongoing basis” of whether the placement of the child is appropriate and consistent with the requirements of the Act, meaning the return of children to a family can be an open option at any time in the delivery of services.



4. Restrictive or Constraining Provisions

The new Act includes several principles which are more accurately described as *restrictions* or *constraints* that require service delivery staff at front line, and in all parts of the system, to change the way decisions are made about First Nations children. These new restrictions include lawful instructions to ensure service delivery addresses some of the following concerns:

- Reduce and/or prevent the apprehension of the child at birth by placing a new priority on prenatal prevention work to keep mothers and infants together (s. 14(2)).
- Considerations in evaluating “best interests” factors “must” be more expansive than in the past as a priority is given to family preservation. This means that factors considered under provincial or territorial child welfare laws which tend to focus on physical, emotional and psychological safety must be balanced with other considerations, including the “importance of having an ongoing relationship” with the family for that child and “preserving the child’s connection to his or her culture.” The list of factors is extensive and cannot be by-passed.
 - o Considerable attention needs to be directed to understanding what tests and tools will be required under the new Act, as these will change front line practice effective January 1, 2020. In particular, read and discuss with First Nations representatives how to interpret and apply Sections 9, 10, 11, 12 & 13.
- Limiting the ability to remove a child when there are poverty-related issues in the family by resolving the underlying factors that cause child and family vulnerability rather than removing

the child. The Act explicitly directs that a child should not be removed due to:

- o Poverty
 - o Lack of adequate housing
 - o Lack of adequate infrastructure
 - o State of health of the child’s parent and/or care provider
- Restrictions on social workers or other persons so they cannot “apprehend” or remove a child from a family unless they can “demonstrate” that they have taken all reasonable efforts to have the child continue to reside with that person. This requires documentation and proof that those steps were taken before such a removal could be justified and places:
 - o A duty on any person removing a child to demonstrate to a court or other reviewing body that this apprehension was the last resort and all other options were explored.
 - o A reverse onus situation as service delivery staff will need to actively demonstrate what reasonable efforts they took and why those steps did not present a reasonable plan to keep the child in the family.
 - Priority to preventative steps and programming over other interventions which might lead to the removal of a child.

- Priority on First Nations placement of the child is explicitly prescribed with five options. This is to prevent the child from going into care of a "stranger." The Act directs that the child must be placed (in order of first/highest priority to last/lowest priority) with:
 - o One of the child's parents
 - o Another adult member of the child's family
 - o With an adult who belongs to the same First Nation as the child
 - o With an adult to belongs to another First Nation other than the one the child belongs to
 - o With any other adult.
- Requiring that the Act be interpreted as upholding the rights of First Nations, and not be interpreted in a way that abrogates or violates constitutional rights of First Nations.

5. First Nations Laws Will Apply

The Act brings greater direction to the following two "tracks" of reform which have been underway in Canada:

1. Existing child and family service delivery system change through national principles and laws that apply to reform key problems identified as problematic in the current service delivery context in Canada from the outset.
2. Establishment and recognition of First Nations laws, operations and dispute resolution in child and family services.

The second track, First Nations law-making and giving full force and credit to First Nations laws and policies within Canada has been a more challenging exercise prior to the Act due to significant political resistance to the recognition of the inherent rights of First Nations in Section 35 of the Constitution Act, 1982, and through implementation of treaties between the Crown and First Nations. The new Act affirms that First Nations can create their own laws, administration and dispute resolution for child and family services, and means that the laws that a front-line service delivery agency will apply may depend on whether the First Nation has "occupied the field" of jurisdiction and put forward their own legal regime for children and families.

This means that service delivery staff, including child protection staff, will now be required to know and comply with First Nations laws where they have been passed by a First Nations governing body. Managers, directors, and other designated officials in provincial and territorial governments must ensure that staff is up to date and thus will be required to monitor and inform their staff of changes at this level as they unfold in the months and years ahead.



All persons in all roles with First Nations children, youth, families, communities and Nations need to understand the mechanics of self-government in relation to the new legislation. They must take the time to understand the difference in roles and authority between an Indigenous governing body (or First Nations government), an "entity" it might delegate service delivery to, and in turn the rights holders who are both individuals and collectives under Section 35 of the *Constitution Act*, 1982. The era of simply dealing with a delegated provincial agency—or arm of the provincial ministry or department—ends on January 1, 2020.

Agencies are not governing bodies unless designated under the new law as "entities" to conduct some of the key work which will fall under this legislation. During the transition, the provincial/territorial delegation agreements are not automatically ended. Going forward, First Nations will decide whether to keep these agencies as service providers and on what basis they will interact with provincial and territorial governments (likely constrained to service provision only—while relationships and law-making will set out other key decision-makers and leads).

They may continue but be delegated under First Nations laws and policies as well. They may operate within a zone of "shared" jurisdiction. They may see First Nations realign services.



6. The Interplay between Elected Indian Act Band Councils and Traditional Governing Roles and Institutions

The federal legislation does not give provincial governments or federal governments the authority to develop and impose policies or conditions on who the Indigenous governing body is for First Nations; that *Indian Act* approach is no longer applicable.

For a period, *Indian Act* structures may co-exist and fade while the First Nations traditional structures (such as decision-makers) are restored, recognized and revitalized through discussion, consent, and a process determined through the First Nations' own processes. This approach was developed in the legislation by First Nations as a matter **NOT** to be regulated and controlled by provinces, territories and the federal government.

Federal and provincial governments should not be unilaterally developing a policy that recognizes who the Indigenous governing body is or directs First Nations on how to govern. First Nations may make decisions for children and families when a family breakdown occurs and operate under customary systems of decision-making.

This "in-between period" of change is exactly what was anticipated as necessary during the development of this new legislation. First Nations can request the involvement of the Federal and provincial government to coordinate the jurisdiction over child and family services during a one year period under the Act. This places a positive onus on governments to come to the table in a responsive and timely way once to coordinate jurisdiction when invited by a First Nations governing body under section 20 (2).

Several provisions of the Act affirm the rights of First Nations to pass and administer their own laws, and set up processes for the resolution of disputes arising from those laws. This may be done with "coordination" between the First Nation, Canada and the province or territory over matters like emergency measures, service delivery roles and responsibilities, etc., or it could be done with the First Nation passing the law and simply notifying Canada. Again, it must be emphasized that a "coordination" agreement is to coordinate recognized jurisdictions and authorities. It is not a self-government agreement where a level of government gives jurisdiction to a First Nation after negotiating it with them. **First Nations jurisdiction over children and family services is an existing inherent right—it does not need to be negotiated.** Coordination agreements permit the jurisdiction to be coordinated so there is greater clarity on the roles and responsibilities of different governments, and what is shared or exclusive jurisdiction for the First Nations government. Consent-based shared decision-making arrangements may also be part of a transition period if that is what the First Nation decides.

For example, there could be an agreement between the First Nation and the Director of Child Welfare in a province for a sharing of decision-making on child safety during the transition period. There may also be a designation by the First Nations governing body that designates the provincial Director of Child Welfare as an official that can apply provincial child welfare law to the members of the Nation during a period of time, for example when a child is apprehended in an emergency and the provincial officials are the only available resource to respond.

It is expected that some First Nations will notify the federal and provincial governments of their intent to have their laws published and accessible in a federal registry as soon as feasible, any time after January 1, 2020.⁷ First Nations have the right to pass laws, and their laws need to be given full force and credit.

For those practising in the area of child and family services, this legal shift will require attention to the following matters:

- Monitor federal Indigenous Services Canada registry site for official notice of deposit of First Nations laws.
- First Nations laws have the force of federal laws and may be paramount over provincial or territorial laws, policies and standards.
- Learn and understand the laws in case you are required to administer the law for a child from the Nation in your service delivery area.
- Identify the designated lead official from the First Nation who will require notice in advance of any significant measure for a child and ensure you share information appropriately if files must be transferred or authority shared regarding specific service requests or decisions (emergencies and exigent circumstances will be considered).

⁷ Section 25 of the legislation sets out a process for the federal Minister to post on a website the name of the First Nation intending to pass a law, the law and a coordination agreement, if an agreement has been reached.

- Understand and respect the protocols and practices of First Nations governments concerning their children through ongoing training and relationship building so your practice can be compliant, informed, and meet legal and professional requirements.
- Expect that customary adoption will be a significant matter during the transition period, and that many of the “informal” placements of children may be given new protection based on First Nations practices, and thus may require post-adoption financial assistance and services or support to families.

For First Nations operating under comprehensive self-government and modern land claims or treaty agreements with Canada and provinces, the provisions of those agreements are assumed to continue to be in force. However, these First Nations will also have the benefit of the rights affirmed in the federal legislation. They will have the opportunity to decide if they wish to enhance their arrangements for child and family services using the tools in the new federal legislation. Their children, youth and families will also enjoy new rights and opportunities to inform child welfare practices based on their customs, traditions, laws and practices.



7. Legislation Bring Immediate Change and Pathway for Fine-Tuning and Improvement

The Act brings new legal principles, tests, objectives and context to child and family services at the national level. These new legal requirements for service delivery will clearly change the practice for those currently working in child and family services. For practitioners at all levels of these systems, whether social workers, family service workers, youth workers, or those who design and manage services, ongoing training and adjustment to standard operating procedures will be required to meet the requirements of the new law.

Without a doubt, there will be disputes over what the Act means, and differences of interpretation will be decided in the courts. Funding issues and other critical elements necessary to make these transitions meaningful will be the subject of dispute, negotiation and engagement with First Nations governments, their organizations, Canada, and provinces and territories.

There will be improvements and changes to the Act over time, as there are provisions requiring periodic review (5 years—so by 2025) and reporting on the effectiveness of the legislation in meeting the objectives over time prior to the first review. There will also be federal regulations that must be the product of collaboration and cooperation with First Nations, or the Governor in Council cannot approve them. The way regulations develop will also change with this legislation, and cooperation at all levels will be built into the system, meaning it will not look exactly as it does today in the years ahead.

The administration of the new legislation will also be influenced by how funding is provided to support First Nations in developing systems, rather than having government continuing to fund a system that is inadequate.

8. Is this new regime legally valid, or can provinces and territories disagree and opt-in or out?

Some provinces and territories raised concerns about the legality of the new legislation during the debate phase in Parliament. Some provinces and territories challenged that these legislative changes are too expansive and suggested they may not adhere to this new law, and possibly contest it in the courts if passed. It is a fact that not all provinces or territories are at the same place as the federal government, as the government tasked with applying constitutional law and legislative authority at the national level according to the Canadian Constitution. This is standard as part of Canadian federalism, and the recognition of First Nations rights requires the federal government to take a leadership position. However, the differences in the positions of governments at the political level should not be taken as meaning the Act only applies where provinces agree with the legislation. **The consent of the provinces and territories is NOT required for the law to come into force.**⁸

9. Concluding Thoughts

For First Nations, the law has been one of the most important tools of colonization, oppression and denial of rights and identity as First Nations. Section 88 of the Indian Act brought the child welfare system into First Nations families and lands in a way that caused harm. It will not be unwound overnight, particularly without a dedicated effort to reform the system in a comprehensive, collaborative way with adequate resources to support these changes.

Addressing the findings of discrimination and orders of the Canadian Human Rights Tribunal involves separate but essential remedies for past or ongoing discrimination experienced by the victims directly. This, too must be fully resolved by Canada as a component of lasting systemic reform of the system.

The new federal Act recognizes historical factors that have caused massive human rights violations for First Nations children, youth, families and communities. First Nations law-making includes powers to administer those laws and resolve disputes that arise from those laws according to their own practices. The First Nations legal orders that are confirmed through this legislation will have full force and effect in Canada.

The new legislation presents a significant opportunity to support recognition of First Nations rights and Nation-rebuilding, and provides avenues to engage directly with First Nations rights holders and their governments in a positive and forward-looking fashion for children, youth and families.

⁸ The analysis of the legal and constitutional issues supporting the validity of federal legislation can be found in Justice Sebastien Grammond, *Federal Legislation on Indigenous Child Welfare in Canada*, (2018) <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1300&context=jisp>.

Creating space for First Nations legal orders is a core purpose of the Act. As noted, the further references to the *United Nations Declaration on the Rights of Indigenous Peoples*⁹ in relation to the purpose of the Act provide interpretive context to all areas of the Act as it is implemented and applied.

The Act's provisions are broadly worded to affirm rights, including First Nations legal orders:

S. 18(1) The inherent right of self-government recognized and affirmed in section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services, and authority to administer and enforce laws made under this legislative authority.

S. 18(2) For greater certainty and for the purposes of subsection (1), the authority to administer and enforce laws includes the authority to provide for dispute resolution mechanisms.

All persons working in the front lines or in service delivery to First Nations children and families (such as intake staff, social work, police, courts, youth workers, family justice workers, health professionals, contracted service providers, residential service providers, etc.) will be required to take notice of and learn about First Nations laws, practices and dispute resolutions processes. Ongoing training, education and learning will be required on the part of all those working in and around these areas of human services.

At this stage, it is strongly advisable to build on training and Indigenous cultural competency skills you may have developed through your current roles and professional requirements. If you have had no such training to date, or inadequate support, working with your employer to make this a priority will be significant. Without question, adjustments in practice will be required to ensure you can be compliant with the new law. Ongoing training can further develop your understanding of the tools applicable on January 1, 2020, and arrangements that may fill this new space for First Nations laws and policies. Grounding your practice with respect for First Nations rights and cultural humility will be a significant asset to you, and many excellent resources are available to support this approach.¹⁰

Finally, all Canadians will see shifts and changes in child and family services for First Nations as the law enters this new era of providing stronger tools to recognize and respect the human rights of First Nations children, youth, families, communities and Indigenous peoples.

⁹ Section 8(c)

¹⁰ See range of resources available at UBC Indian Residential School History and Dialogue Centre, National Centre for Truth and Reconciliation, and other key sources of information. Ask your First Nations partners for resources to read and review to help guide the changes ahead. Excellent materials and programs are available from Reconciliation Canada: <https://reconciliationcanada.ca>.



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