

First Nations Laws by First Nations Governments: A Reference Guide to the New Tools

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- Recap
 - Information for communities and First Nations to support decisions, ensure the tools and opportunities permit First Nations to exercise full authority in this area
 - To support fundamental change in child and family services to STOP
 - Provincial/territorial system having control over CFS
 - Stranger foster care placements
 - Adoptions out of family and community
 - Loss of connection to families and children
 - Publication "*Indigenous governing bodies*" and advancing the work of *Re-Building Indigenous Nations and Governments* is a useful background document that is housed within UBC's Indian Residential Schools History and Dialogue Centre. It can be found here: <https://irshdc.ubc.ca/about/publications-and-reports/undrip-papers/>



Tools: Recognition Legislation and First Nations Government and Laws

- Affirms inherent right to self-determination, including inherent right to self-government in section 35 for First Nations self-government over children and families
 - Federal legislation will prevail over provincial law for First Nations peoples, First Nations law can prevail over federal and provincial laws
- Nations can develop, create and pass own laws, revitalize practices, and these will further replace standards and principles.
- First Nations' laws will be paramount, shared, or vacate/grant authority for children and families matters to another entity.
- New “National” Standards apply while FN laws are developed
 - BIC, Cultural Continuity, Substantive Equality, placement priorities
- Nation-building and needs a fresh context not the *Indian Act* approach



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



Inherent Authority for First Nations Laws passed by FN Governments

s.88 Indian Act is pushed out/non-derogation clause added



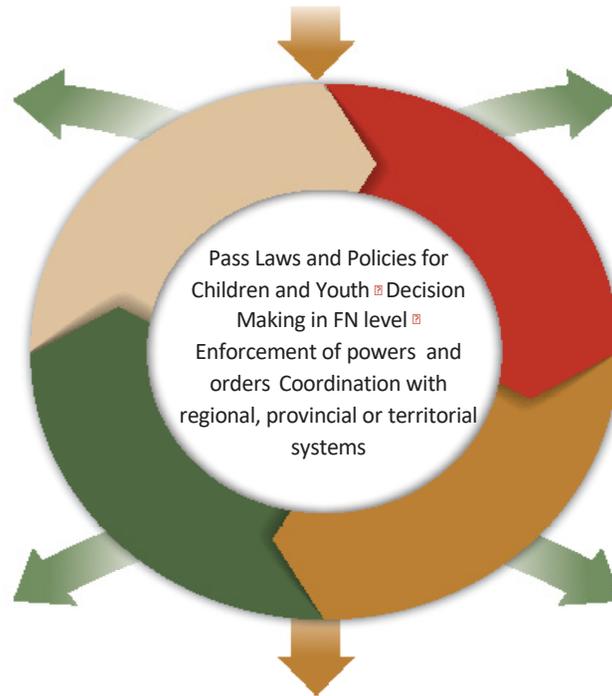
Examples of Law Making

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



Service Organizations

Created or partner with others - effective to keep BIC



Decisions

Resolve Matters Using:

- Customary Processes
- Informal Methods
- Formal Process
- Tribal Courts



Collaborate

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

- Delegate powers and services

First Nations Laws can have **PRECEDENCE** over other laws unless other approach negotiated



IGB Definition and Context

Act has definitions that are meant to “enable” and “support” not to be colonial and define, like the *Indian Act* has been, but key concepts must be understood.

Section 1

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

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

Section 8

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



Purposes of C-92: UN Declaration and First Nations Governance

- Section 8 of C-92 expresses that a purpose of the legislation is to “contribute to the implementation of the UN Declaration”.
- The Act does not seek to (nor could it) alter or change, or define, who the proper title and rights holder are and how they authorize Governments.
- What constitutes an “entity authorized to act on behalf of Indigenous peoples” is a matter of Indigenous self-determination, as articulated in the UN Declaration including in Articles 3, 4, and 5:
- **Article 3:** *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
- **Article 4:** *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*
- **Article 5:** *Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*



What is an Indigenous people, Government and Rights Holder?



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



Who is not an IGB?



- Can an **urban organization** be an IGB?
 - Doubtful—FNOs are not governments but may be created by them.
- Can a **corporation or charity** be an IGB?
 - Corporations are not governments, but may be created by them.
- However, Nation might pass the law and authorize entities to implement it or deliver services under the law—this needs to be clear.
- Band Council may be considered IGB but serious legal issues about real capacity and section 35.



Inherent rights of self-government not *Indian Act* governance

Section 18

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

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



Nation-Building has to start, band council can trigger but work required



Laws passed are posted, to be followed must be public

- If you pass a law you must share or post that law for it to apply outside the community, and even to the members.
- The following First Nations have notified Minister that change is coming (Notices www.sac-isc.gc.ca/eng/1608565826510/1608565862367)
- 23 Nations, Tribal Councils or Organizations have filed notice as of January 2021– 15 for coordinating agreement/law; 8 for law without coordinating agreement.



Non-Derogation and Balancing Individual and Collective Rights: Tribunals

Section 2 This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

The Canadian Charter of Rights and Canadian Human Rights Act will apply, so need to plan accordingly and set up process and detail customs as required.

First Nations Laws should anticipate disputes and challenges as they are administered, IGB should provide for a tribunal or court process and give guidance and resolve matters internally, if possible.

First Nations Governments can shield systems from Charter, but need to take steps to explain how your system works, when a conflict arises:

25. The guarantee in this Charter of certain rights and freedoms shall **not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including**

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
- UNDRIP Article 45 is also a N-D Clause that will assist in the process.



Next Steps

- Make internal decisions about laws and policies building on customs, traditions and practices. IGB reaches out, builds up and can shift over time.
- Advocate for each child/youth and family
- Collaborate with other Nations to build more effective mechanism for change; moving from political organization to technical supports, and evaluation, reporting and outcomes.
- Internal work between IBG, rights holders
- Reset service agreements with FNOs/DAAAs

