



Chiefs of Ontario

**Creating a Healthy &
Loving Society for our
Children: A Forum on C-92
Implementation**

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Overview of Presentation

Part 1: Indigenous Jurisdiction: children, youth and families

Part 2: Coordination Agreements

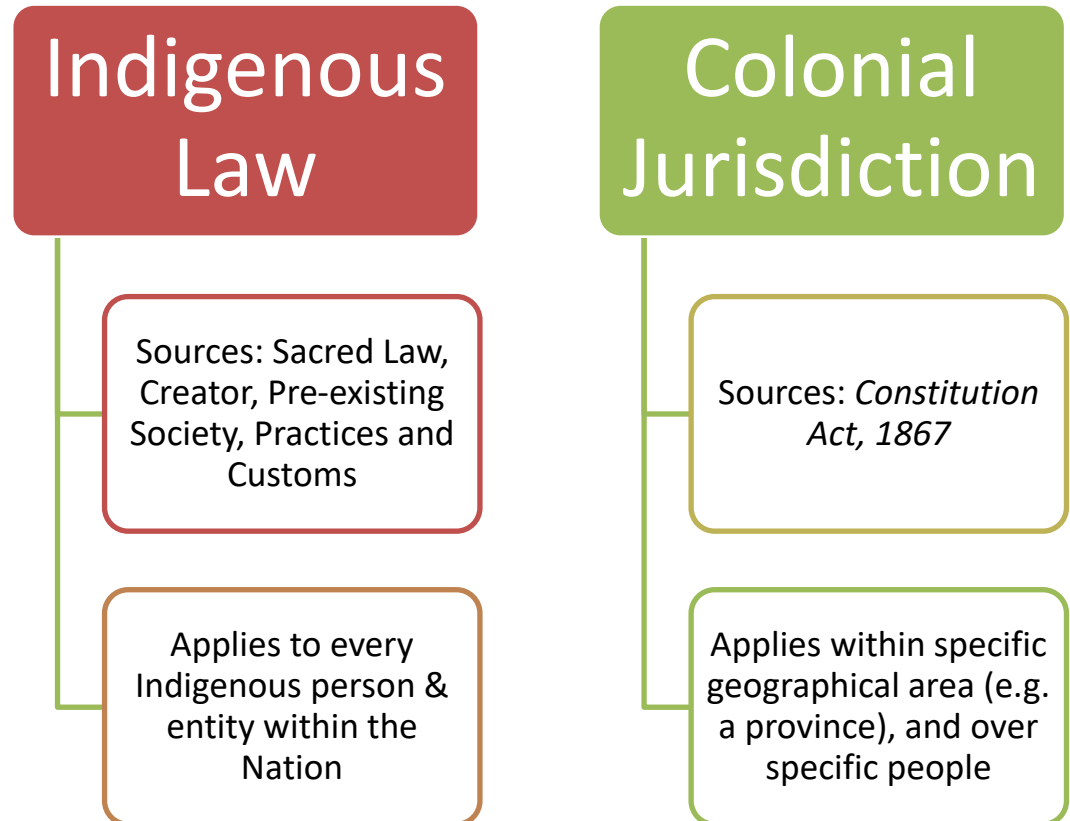
Part 3: Additional info on jurisdiction & the Federal Act

PART 1: INDIGENOUS JURISDICTION OVERVIEW

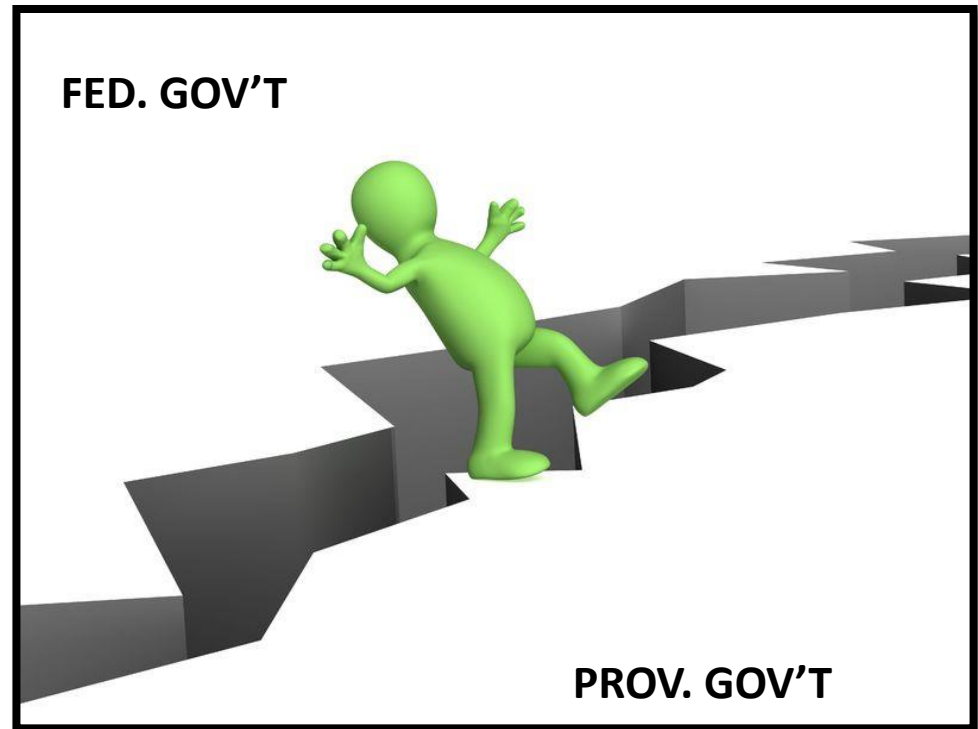
“Jurisdiction” & Child Welfare



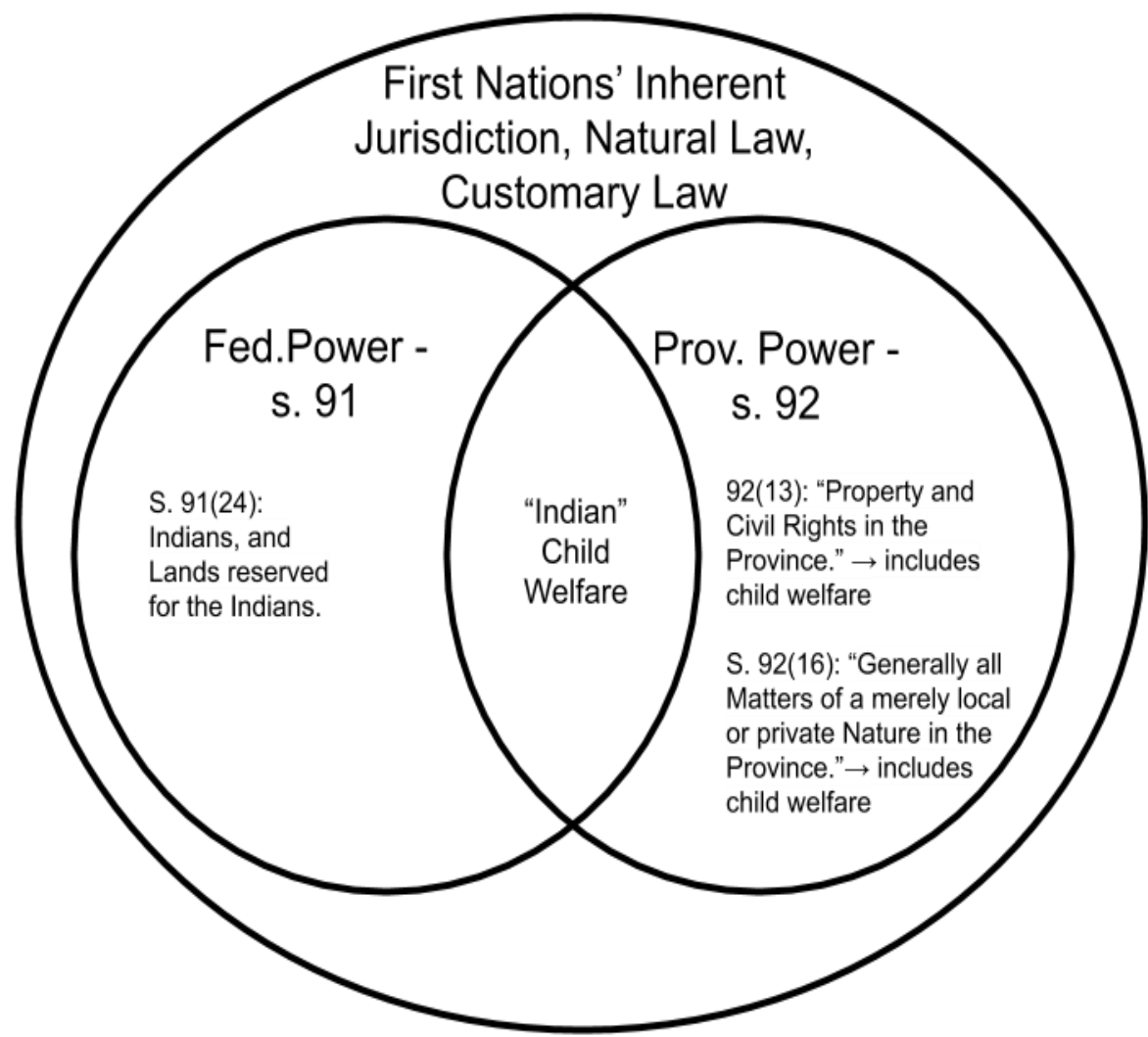
- “Jurisdiction” in child welfare can be colonial (Crown – subject) or it can be collective/solidarity (Miinigoowiwin, Inaadziwin, Bimaadziwin, as an example)
- Collective authority in Indigenous law – who is the decision-maker, what is their responsibility, existing principles – this has existed and will exist as long as the sun shines, rivers flow and the grasses grow



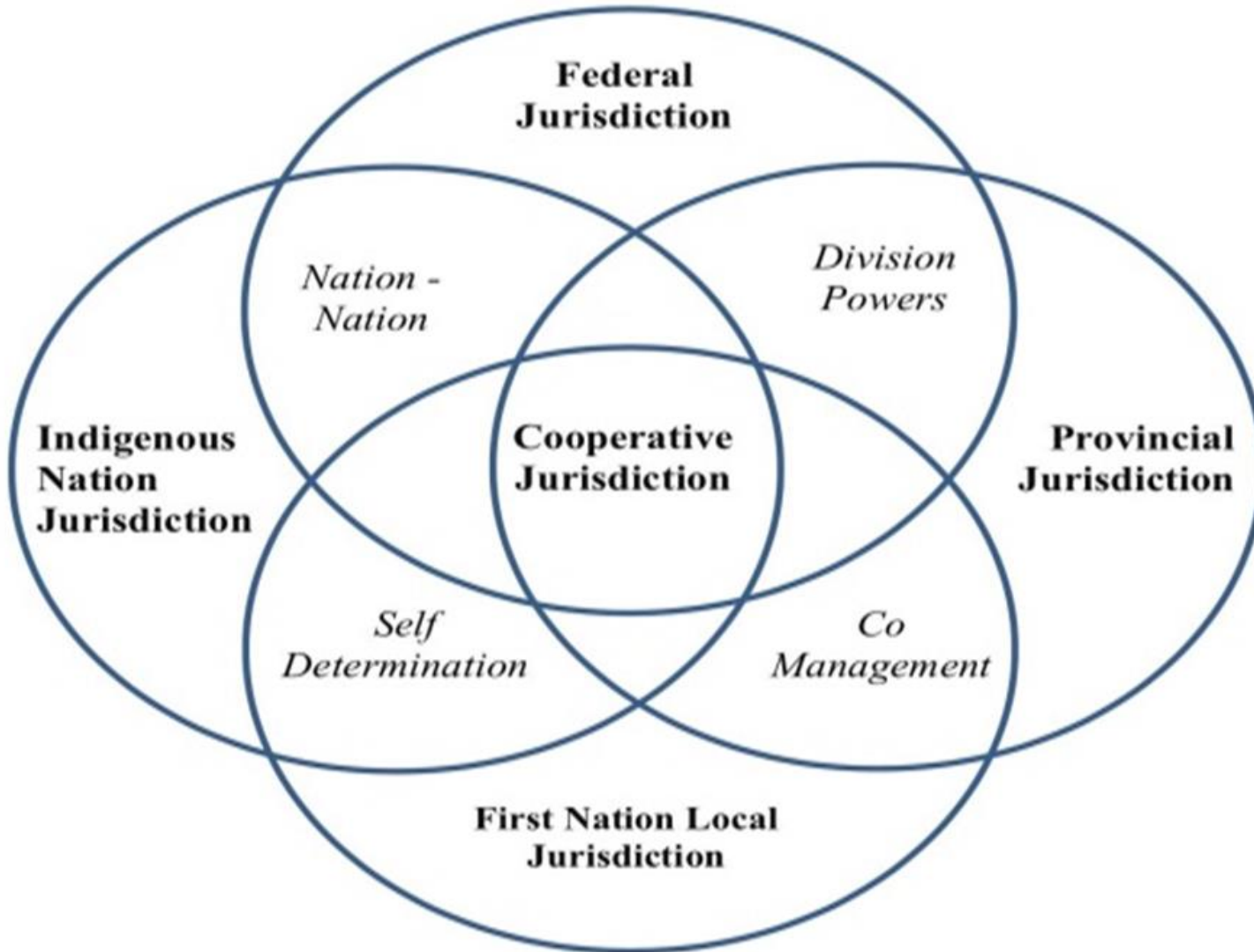
- Jurisdiction isn’t just an abstract idea; it has practical importance for FN children (e.g. Jordan River Anderson)
- Overwhelmingly, basic social services and human rights for FNs have been a “hot potato” between federal & provincial gov’ts resulting in “jurisdictional neglect”
- “Jurisdictional neglect” = falling through the cracks



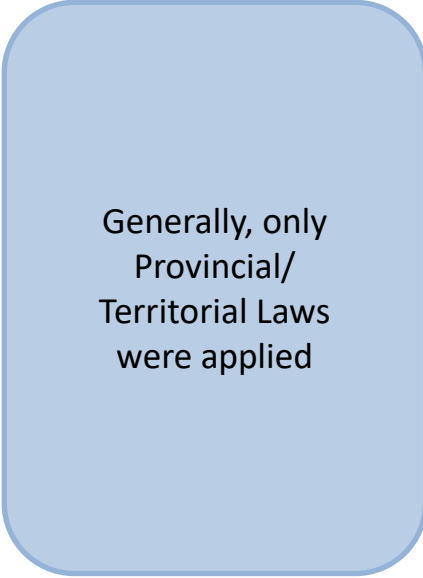
“Division of Powers” and Child Welfare



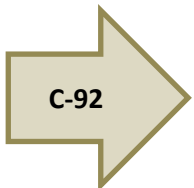
Example: Treaty Federalism



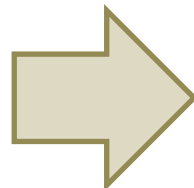
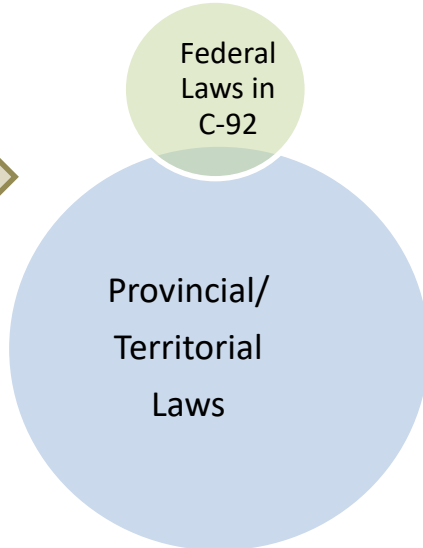
PREVIOUSLY



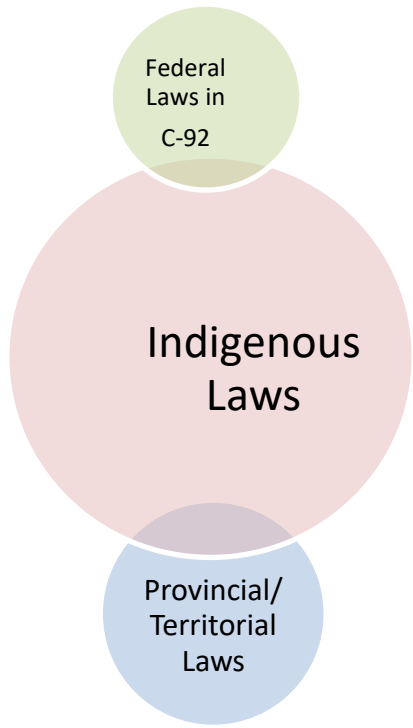
Indigenous laws sometimes partially applied, e.g. in communities, or by own agencies, but not fully respected by courts, other governments, other service providers, etc.



STARTING JANUARY 1, 2020



OVER TIME



This is actually many phases of change, according to various Indigenous laws, which may change over time.

Affirmation

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. (Federal Act)

First Nations, Inuit and Métis peoples are constitutionally recognized peoples in Canada, with their own laws, and distinct cultural, political and historical ties to the Province of Ontario. (Preamble of *CYFSA*)



“Indigenous Law” / Indigenous Legal Orders

- Indigenous Legal Orders have their customs and traditions around “legality” , “legitimacy” and the “rule of law” – these constitutional principles are the primary rules to make your law, “law.”
- Which aspects of an Indigenous law are codified alongside C92 will vary. E.g., some aspects will be written and shared with outsiders; some may not be. These harmonization and coordination principles are generated through government-to-government arrangements.
- Some Indigenous laws will be a “full code” others may address only discrete areas – such as “prevention”.

PART 2: COORDINATION AGREEMENTS

1. What the Federal Act and “Technical Guide” tell us about Coordination Agreements (“CA”)
2. What CA are, what CA are not
3. Scope & content of CA
4. Considerations for CA prep and negotiations
5. Preliminary comments on funding for CAs

*What the Federal Act and Technical
Guide tell us About Coordination
Agreements*

- s. 20(1) – If a First Nation intends to exercise its “legislative authority” it may give notice to Canada & each province in which the Nation is located.
- s. 20(2) – When a FN gives notice per s. 20(1), they *may* also request to enter into a CA.
- s.20(2) – also says that the following areas must be covered in a CA:
 - Emergency services
 - Children’s rights
 - Fiscal arrangements



- s. 20(3)(a) – refers to s. 21-22, if you enter a CA, your law has the force of a federal law.
- S.20(3)(b) – refers to s. 21-22, if you *do not enter a CA*, but you make “reasonable efforts” to do so for one year, your law has the force of a federal law.
- s. 20(5) – opens possibility to create a reg. for dispute resolution in situations where a CA cannot be concluded (no regs. yet).
- s. 20(6) – if you give notice but don’t conclude a CA or your law doesn’t have the force of a federal law, you can send a new request to negotiate a CA.
- s.20(7) – you can enter a CA even after 1 year of negotiations have passed.



- Canada has created a [“Technical Guide”](#) on the Federal Act.
- This Guide introduces requirements for First Nations when the Nation gives notice of its intention to exercise its jurisdiction per s. 20 of the Federal Act.
- *The Guide says that **BEFORE** you give notice you must:*
 - Develop a child and family services law
 - Determine scope of the law
 - Define how services will be delivered and by whom
 - Authorize an Indigenous Governing Body (“IGB”) to act on behalf of your FN
 - Confirm the mandate of the IGB



*The Guide says that **WHEN** you give notice you must include:*

- Name of IGB and FN
- An explanation of the process through which the IGB was authorized by the FN
- Name of prov/terr in which the FN is located
- Name of your current child and family services provider
- Summary of your service model
- A copy of your law
- A description of where (area) and to whom your law would apply
- Copy of any previous notices sent re your intention to exercise jurisdiction
- A list of all treaties or self-government agreements you have signed that could be impacted by your exercise of jurisdiction

*What Coordination Agreements Are,
What Coordination Agreements Are Not*

Coordination Agreements ARE...

- A written framework for the relationship between three governments
- A contract (but not limited to this description/characterization)
- Interpreted by the laws of Canada
- A bit similar to a sectoral self-government agreement
- Intended to sustain cooperation for the Nation's law for generations
- An opportunity to express principles from within your legal tradition
- Evolving

Coordination Agreements ARE NOT...

- A law
- The place to try and amend your Indigenous law or federal law
- A contribution agreement
- Perfect

Scope & Content of a Coordination Agreement



- Each Indigenous Law will define its own scope. There are two main aspects of scope to consider:
 - **To whom** the law applies – will it be *Indian Act* status only? Descendants? How will you determine whether the law applies to an individual?
 - **Where** the law applies – on reserve only? Wherever your people are located?
- The Federal Act does not clearly explain how a First Nation is supposed to deal with Coordination Agreements where their law will apply in more than one province/terr.
- Consider whether you should give notice to more than one province, especially if many of your citizens are located in another province and you intend to offer extensive services there.



- As noted, s. 20(2) sets out a few areas that **must** be covered in a CA
 - Emergency services
 - Children’s rights
 - Fiscal arrangements
- It’s probably going to contain some basic stuff like:
 - Interpretation
 - Definitions
 - Purpose
 - Liability
 - Indemnity
 - Severability
 - Length of CA (duration)



- Other areas you may want to consider including in a CA:
 - Accountability
 - Access to information
 - Scope of the applicability of your law
 - Recognition of the source of your jurisdiction
 - “Enforcement” of your law
 - How interjurisdictional issues will be handled (b/w the 3 parties, and b/w other prov/terr or other IGB)
 - Amendment
 - Dispute resolution
 - What you expect other gov’ts to do to bring actors within their system in line (e.g. CAS)

*Considerations for Coordination
Agreement Negotiations*

Consider community needs before you start negotiating for your CA...

Understanding your community needs is very important. Some areas to consider:

1. What are the **drivers** that bring children into the child welfare system.
2. What **capital needs** might you have:
 - Related to service delivery
 - Related to reunification and repatriation
 - Related to keeping children safe within their family homes
 - In your community, outside of your community
3. How will you determine what a needs-based budget is for your community?
What financial and corporate structures/policies will you need in place?

Aspects of the negotiation process to consider...

1. There is funding available to negotiate a CA.
2. Who will be on your negotiation team? Some ideas...
 - Expert on your legal tradition and the processes within it
 - Finance geeks
 - Legal expertise: drafting, your legal options during negotiations, etc.
 - Practitioners within your Indigenous legal tradition, within devolution or other types of arrangements
3. Develop a strong internal decision-making process.

Be prepared...

1. A strong service delivery model will “translate” your law into action.
2. Identify key external partners and develop protocols. Jurisdiction is a muscle, exercise it.

Be inclusive...

1. Reach out to CFS agencies across the country.
2. This may be a chance to reconnect with people who have been lost.

Funding & Coordination Agreements



- Fiscal arrangements under a Coordination Agreement must be “sustainable, needs-based and consistent with the principle of substantive equality” (Federal Act s. 20(2)(c)).
- **Exercising jurisdiction is not devolution.** Your funding should reflect a whole system approach.

Funding under a CA isn't only for service delivery, it's for the exercise of "legislative authority". What's included in this? Some ideas...

- Capital
- Start-up
- Capacity building & training
- Governance
- Decision-making bodies (who will make decisions under your Law?)
- Corporate bodies
- Internal services – IT, statistics, data management, HR, finance
- Supports to children and families (as defined under your law): residential care, prevention, protection, reunification, adoption, etc.
- Etc...!!!!



- Canada has an interim funding approach for “early adopters”
- In this interim funding approach, Canada will flow funds through a “block” or “grant” mechanism. Meaning the FN/IGB will distro the funds as needed, not stuck to budget lines.
- Canada will work with Indigenous partners to co-develop a long-term funding approach.
- **It should never be a “bad time” to exercise your jurisdiction!!!!** FNs who are “early adopters” can include a provision in their CA that any future changes in funding will be accessible to them, if they want it.

- Canada is providing funding for FNs who wish to:
 1. Explore readiness to exercise jurisdiction
 2. Develop Indigenous child and family service legislation, systems, and programs prior to entering into coordination agreement discussions
- The deadline to submit proposals is **May 28, 2021 at 11:59 pm Eastern time. This won't be your only chance to access funding for capacity development in this area.**
- Full details can be found here: [Capacity-building funding for An Act respecting First Nations, Inuit and Métis children, youth and families for fiscal year 2021 to 2022 \(sac-isc.gc.ca\)](https://sac-isc.gc.ca)

CONCLUSION/NEXT STEPS



Possible Next Steps

1. Are you ready to put forward a proposal for funding for capacity-building in this area?

2. Exercising your jurisdiction...
 - Look at where your children & families succeed and where they need more help

 - Envision a “healthy & loving society” for your people. How will you get there – through your own law? Collaborating with other FNs to make a law? Using existing system but with adjustments?

3. Note: Whether you seek capacity funding or not, C92 can still help...You can use C92 now (minimum standards) to repatriate & reconnect your children to their Nation.



Accessing Indigenous Laws

- Indigenous Governing Bodies wishing to exercise legislative authority alongside the Federal Act can give notice of this intention (s. 20(1))
- Aspects of an Indigenous law have to be made public (s. 25)
- Canada posts notices here: [Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families \(sac-isc.gc.ca\)](https://www.sac-isc.gc.ca)
- One Indigenous Law currently has the force of a federal law – the [Wabaseemoong Independent Nations Customary Care Code](#)



Resources

- Wahkohtowin Lodge: [Research and Public Resources | Wahkohtowin Law and Governance Lodge \(ualberta.ca\)](#)
- Indigenous Law Research Unit (Uvic): [Indigenous Law Research Unit - University of Victoria \(uvic.ca\)](#)
- OKT: [A Roadmap to C-92, the Federal Child Welfare Law - OKT | Olthuis Kleer Townshend LLP \(oktlaw.com\)](#)
- John Borrows' Lectures:
 - [Lecture 21: Child Welfare and Self-Governance – YouTube](#)
 - [Lecture 20: Child Welfare - Courts - YouTube](#)
- ISC:
 - “Technical Guide on C92: <https://www.sac-isc.gc.ca/eng/1579468554846/1579468577638>
 - A phone line and email service to answer questions about C-92 and other CFS matters:
Phone (toll free): 1-800-567-9604
Email: isc.indigenousfamilies.together@canada.ca

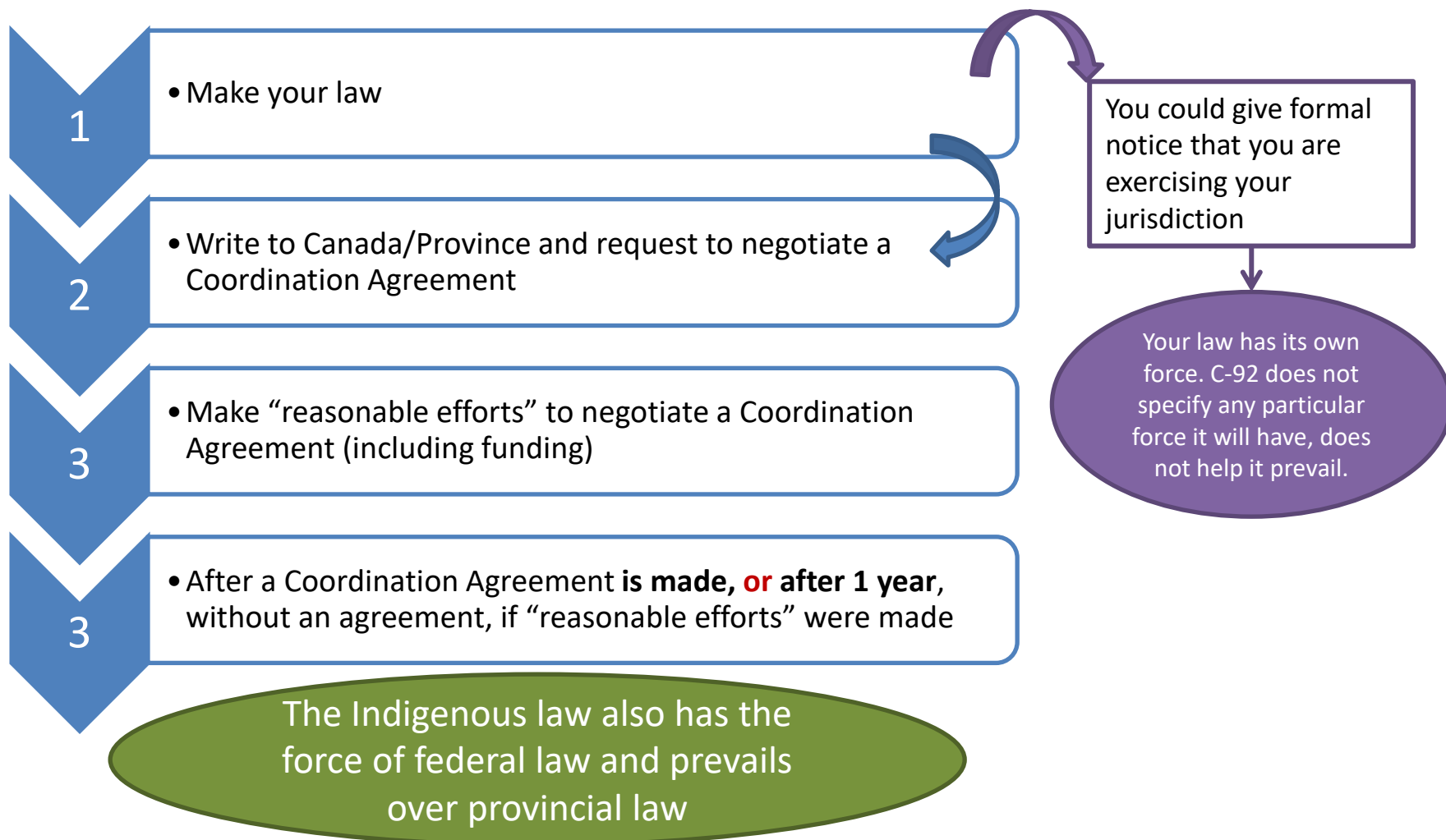
PART 3: ADDITIONAL SLIDES ON JURISDICTION

*Some Ideas on How to Move Forward
with Exercising Your Jurisdiction*

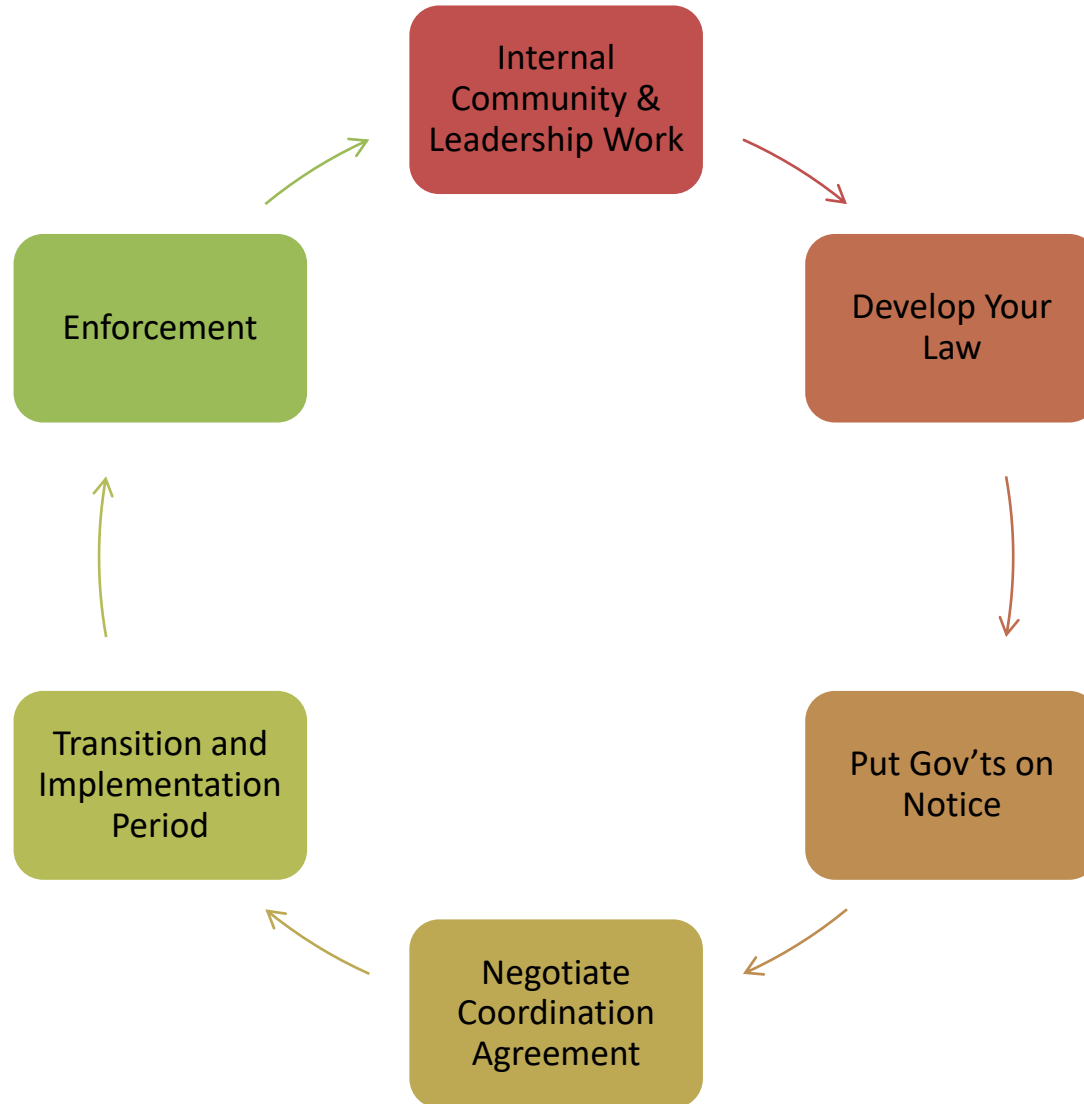


- The way you exercise your jurisdiction – how, when, what path you follow – *is entirely up to the rights-holders (you)*.
- There’s no “right” way of doing this. It’s new. It’s different for every First Nation.
 - Some First Nations are starting now and drafting child welfare laws that are limited in scope.
 - Others have laws already in place that are broad in scope.
 - Some First Nations are banding together to make a shared law & shared system.

Jurisdiction – Pathways



Possible Process for Implementing an Indigenous Law Under C-92



*Interjurisdictional Framework – How
the Laws Work Together (or Don't)*



Once an Indigenous Law is in force using the C-92 process:

- The Indigenous law “also has the force of federal law”
- The Indigenous law takes precedence over Provincial law
 - could displace all or some of prov law
 - both can apply, but in a conflict or inconsistency, the Indigenous Law prevails
- The Indigenous law takes precedence over *most* federal law too with exceptions (these prevail over the Indigenous law):
 - ss. 10-15 of C-92: six of the federal rules
 - s. 23 of C-92: a general best interests override clause (problematic)
 - Human rights (Charter & Canadian Human Rights Act)



What law prevails if there's a "conflict or inconsistency" between laws?		
Federal Rules in C-92: ss. 10-15	Canadian Human Rights Act	Charter of Rights and Freedoms
Indigenous Law using C-92 (with Coordination Agreement or 1-year option)		
Federal Rules in C-92: ss. 16-17 and generally	Other federal laws (if any are relevant)	
Provincial or Territorial Law		

MEEGWETCH NIA'WEN THANK YOU



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Your prosperity.
Our mission.

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