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Information Sheet #8

Legislation, Regulation and Soft Law

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This information sheet offers a brief introduction to the different kinds of documents (or *instruments*) that First Nations may use to create, enforce and administer child and family service laws. There are three kinds of documents: legislation, regulation and soft law. Each serves a different purpose.

What is Legislation?

Legislation is one form of written law created by various state officials. Like other sources of law, legislation creates rules, rights and privileges that are enforced by the state's courts.

How does Legislation Relate to Other Kinds of Law?

Legislation interacts with other sources of law, including the common law, the civil law (in Quebec) and Indigenous legal traditions. Sometimes legislation operates with these other sources of law. For example, the *Criminal Code* is a statute that relies on the common law's definitions of property and ownership to penalize theft.[2] Courts must therefore look to the common law when enforcing the laws on theft. At other times, legislation departs from other sources of law. When this happens, legislation is considered more authoritative.[3]

In 2016, the Canadian Human Rights Tribunal ordered Canada to cease its discriminatory practices and to reform the First Nations Child and Family Services (FNCFS) program. Indigenous Services Canada will fund "prevention/least disruptive measures" at the rate of $2,500 (adjusted for inflation) per person living on reserve and in the Yukon until the FNCFS program reform is completed. Concerns have been raised about the adequacy and implementation of this per capita funding approach.

This information sheet is **one in a series**[1] developed in collaboration with the McGill University's Faculty of Law to provide basic legal information relevant to self-government and the provision of child welfare services. This is not legal advice. Legal counsel should be consulted for guidance on your situation.

Legislation is always subordinate to Canada's Constitution, including the *Constitution Act, 1867* and the *Constitution Act, 1982,* one part of which is the *Canadian Charter of Rights and Freedoms*. This

means that legislation is invalid to the extent of any inconsistency with those instruments.[4]

Who Can Legislate?

To make valid laws recognized and enforced by the state's courts, a person or body must have authority to make law.[5] There are two main kinds of lawmaking authority.

Primary Legislative Bodies

The most significant kind of legislative authority is conferred by the Constitution on the Parliament of Canada and provincial legislatures. The *Constitution Act, 1867* (sections 91 to 95) authorizes the Parliament of Canada and the provincial legislatures to create laws on various subjects.[6] A law passed by one of these bodies for which the authority to legislate cannot be traced to the *Constitution Act, 1867* will exceed that body's authority or jurisdiction and will be invalid.

Parliament and the legislatures are called *primary legislative bodies* and the legislation they make is called *primary legislation*. Primary legislation is made through a multi-step process. In a provincial legislature, a bill becomes law only by being "read" and passed three times by the legislative assembly and signed into law by the lieutenant-governor. In the Parliament of Canada, a bill becomes law only by being read and passed three times by the House of Commons and three times by the Senate of Canada, then signed into law by the Governor General. While territorial legislatures derive their authority from federal legislation and not the Constitution, their legislative authority is comparable to the legislatures.[7]

Delegated Authority

Primary legislation sometimes delegates authority to legislate. A variety of persons or bodies exercise delegated authority, such as ministers, the Governor General or lieutenant governors acting *in Council* (i.e., the federal or provincial cabinet), regulatory agencies, professional bodies, municipal authorities and band councils.

There are limits on the power to delegate and on the powers that can be delegated. Typically, delegates are authorized only to make specific laws for specific purposes. Crucially, a primary legislative body may delegate only those powers that it may exercise.[8]

Sub-Delegation

A primary legislative body may authorize a delegate to sub-delegate authority to another subordinate. The intention to authorize such sub-delegation must be clearly indicated.[9]

Provincial vs. Federal Legislation

Sometimes a valid federal law and a valid provincial law (primary or secondary) are in conflict. In such cases, the valid federal law will prevail. As a result of what is called federal paramountcy, the provincial law will become inoperative to the extent of the conflict or inconsistency between federal and provincial law. If the federal law is amended or repealed so that the conflict disappears, the provincial law will then become operative, producing its effects.

Lawmaking Under Bill C-92

Bill C-92 (*An Act respecting First Nations, Inuit and Métis children, youth and families*) contemplates that First Nations may exercise authority to make laws over child and family services. Crucially, Bill C-92 says that Indigenous laws made under its authority will have the status of federal law. This holds for legislation and for delegated legislation, such as regulations, duly authorized and passed by Indigenous bodies. Given the paramountcy of federal law noted above, Bill C-92 ensures that Indigenous laws will prevail over an inconsistent provincial law. This point is significant since it is foreseeable that Indigenous laws in relation to child and family services may be inconsistent with

provincial laws on child protection or other matters affected by operations in this area, such as privacy.

Bill C-92 also specifies that First Nations' laws will prevail over nearly all inconsistent federal laws.[10]

What are Regulations?

Regulations are one kind of delegated legislation.[11] They help to flesh out general rules and implement regulatory schemes set out in the primary legislation.[12] Regulations can be made or modified more easily than primary legislation, so are often used for things that might be changed more often than the overarching scheme. All regulations must be made by authority of some primary legislative text.[13] Regulations are normally made and adopted by delegated authorities acting under an enabling statute¾primary legislation that specifies the scope of their authority.[14] Any regulation made under delegated authority must respect the precise purpose of the delegation spelled out in the authorizing legislation.[15] A regulation must also be consistent with the overall purpose of the enabling legislation.

What is Soft Law?

In addition to legislation, delegated authorities produce a wide range of documentation setting out procedures, directives, explanations, interpretations and the like, often referred to as *soft law*. These documents are designed to facilitate the administration and enforcement of legislation by the delegated authority, as well as to help the public understand its legal rights and obligations.[16] While such documents may be relied on in statutory interpretation or in assessing the reasonableness of an action or decision undertaken by a delegate, they do not declare the law and they are not binding.[17]

When to Use Each Instrument

Each of the instruments outlined above serves a different purpose. Here is a high-level summary of when each should be used:

- **Legislation** should be used when there is a need to create, amend or repeal a law. It sets out the general legal framework and the main principles and policies that will govern an area.
- **Regulations** ought to be used to fill in the details of how the law will be applied in practice. They are often more technical and can be more easily updated or modified than legislation, allowing for flexibility and responsiveness to changing circumstances.
- **Soft law** documents should be thought of as guidelines helping administrative and enforcement bodies carry out their jobs. These documents are supplementary to legislation and regulation and should not be used in their stead, as they are not binding.

What is Incorporation by Reference?

Incorporation by reference is a technique of legislative drafting. It allows lawmakers to make the content of an external document part of the legislation being enacted without having to reproduce the document's text.[18] Lawmakers do so by (i) referring to the document or the section of a document they wish to incorporate and (ii) expressing the intention to make its content binding as if it had in fact been reproduced in the legislative text.[19]

The primary motives for using this technique are to take advantage of the expertise and initiatives of others and to enhance harmonization within and across jurisdictions.[20] Incorporation by reference also allows legislators to shorten texts and increase their readability. However, incorporation by reference makes legislation less accessible, especially when the

reader is unfamiliar with the referenced material. This can run counter to the principle of the rule of law, according to which laws must be known to citizens.

The incorporated documents may be legislative, whether enacted by the same jurisdiction, another Canadian jurisdiction or a foreign jurisdiction. Lawmakers, especially delegated lawmakers, often incorporate regulatory standards prepared by organizations that are more or less independent of government, including foreign or international organizations. It is also common for agreements—including international conventions, federal-provincial agreements and modern treaties with Indigenous peoples—to be implemented by incorporating them into legislation. Finally, on occasion lawmakers incorporate documents produced by their own executive branch.

References can also be *static* or *ambulatory*. A reference is static if it incorporates content as it is at the time of incorporation. Static incorporations are non-controversial. A reference is ambulatory if it incorporates the content not only as it exists at the time of incorporation but also as it is amended from time to time.[21] Both the ambulatory incorporation of legislation enacted by other jurisdictions and the ambulatory incorporation of non-legislative documents are controversial, because they effectively allow an entity other than the lawmaker to change the content of legislation without going through the normal process of amendment.[22]

If you would like to share information about a First Nations child and family support initiative in your community, the Loving Our Children project researchers would like to hear from you. **LOCwhatworks@gmail.com**

Endnotes

1 https://cwrp.ca/indigenous-child-welfare

2 *Criminal Code,* RSC 1985, c C-46, s 322(1)(a).

3 *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 at para 67.

4 The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1), providing that "the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

5 John Mark Keyes, *Executive Legislation*, 2nd ed. (LexisNexis Canada, 2010) ["Keyes"] at 21.

6 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

7 Strictly speaking, the territorial governments exercise their lawmaking authority as delegates of the federal Parliament. See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 14–3, 14–4.

8 Keyes, *Executive Legislation*, 2nd ed. (LexisNexis Canada, 2010) ["Keyes"] at 90–91.

9 Ibid at 422–26, 430–34.

10 Section 22(1) of C-92 clearly states that Indigenous child and family services laws are paramount over all federal laws, other than the *Canadian Human Rights Act* and C-92 itself. This means that the Indigenous law will prevail to the extent of any conflict or inconsistency with any federal law other than C-92 or the *Canadian Human Rights Act*. See Bissett, T., (January 2025). Supreme Court of Canada's Reference re An Act respecting First Nations, Inuit and Métis children, youth and families: What Indigenous Peoples and Governments Need to Know [Information sheet #6]. Loving Our Children: Finding What Works for First Nations Families. https://cwrp.ca/indigenous-child-welfare

11 *Association des courtiers et agents immobiliers du Québec v Proprio Direct Inc.,* 2008 SCC, [2008] 2 SCR 195 at para 62

12 Keyes, supra note 5 at chapter 1; see also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189 at para 73.

13 Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) at para. 5.9: "The power to make legally binding subordinate legislation is derived solely from statute. It must be authorized by statute, but it need not specify the statutory authority for its enactment."

14 René Dussault et Louis Borgeat, *Traité de droit administrative*, 2nd ed., vol. 1 (Québec: Les Presses de l'Université Laval, 1987) at 429–31.

15 *Shell Canada Products Ltd v Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 SCR 231.

16 Keyes, *Executive Legislation*, 2nd ed. (LexisNexis Canada, 2010) at 50–56.

17 *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] SCJ No. 61 at para. 32, 2015 SCC 61. (Guidelines are useful in indicating what constitutes a reasonable interpretation of the (CAN) *Immigration and Refugee Protection Act*, SC 2001, c 27, but are not legally binding and are not intended to be exhaustive or restrictive.)

18 Keyes, "Incorporation by Reference in Legislation" (2004) 25:3 Stat L Rev 180 at 181.

19 Reference re: *Manitoba Language Rights*, [1992] SCJ No. 2 at para 33, [1992] 1 SCR 212 (SCC). For a review of language used to express an intention to incorporate external content into legislation, see Keyes, *Executive Legislation*, 2nd ed. (LexisNexis Canada, 2010) at 450–53.

20 Keyes, *Executive Legislation*, 2nd ed. (LexisNexis Canada, 2010) at 448.

21 Ibid at 455–57.

22 Ibid at 476–81; Paul Salembier, *Regulatory Law and Practice*, 2nd ed. (LexisNexis Canada, 2015) at 219ff.