Bill C-92

Compliance Guide for Social Workers and Service Providers

WAHKOHTOWIN

LAW & GOVERNANCE LODGE

Background

Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families is the first federal legislation on the subject of Indigenous Child and Family Services [CFS].

The Act is the first statute to recognize inherent Indigenous jurisdiction over CFS as an Aboriginal (S. 35) right in Canada. As called for in the TRC Final Report, the statute establishes national minimum standards for CFS delivery for all Indigenous children and families. This includes First Nation, 'non-status,' Métis, and Inuit children, living on or off reserve.

The Act is in force on January 1, 2020, and the National Standards apply in all provinces as of that date. Note that Quebec's reference question about its constitutionality does not change this. Unless a court finds it is invalid, the law applies. Where there is conflict or inconsistency with provincial CFS Acts, the National Standards prevail.

Key Purposes of Bill C-92

Jurisdiction s. 8(a):
What: This law recognizes that Indigenous peoples have the inherent right to jurisdiction (authority) over their own child and family services.
So What?: Within one year, January 1, 2021, some Indigenous groups may have their own legislation, that, where different, will prevail over provincial CFS legislation.

National Standards: s. 8(b):
What: This law puts into place national standards for providing child and family services relating to Indigenous children and families.
So What?: On January 1, 2020, this law came into force, and the national standards apply in all provinces. Where different, these standards will prevail over provincial legislation. The new national standards are minimum standards – you can do more.

Assess your current practice standards and ensure they meet the National Standards

The National Standards map on to Indigenous led and evidence-based best practices already in the child protection field. *The best interests of the child* is still the primary consideration for decision-making but requires a different approach. It includes the importance of ongoing relationships for Indigenous children and should be considered in light of the *cultural continuity* and *substantive equality* principles.

The **National Standards** focus on:

- Prioritizing prevention and early intervention over apprehension;
- Maintaining and promoting Indigenous children's relationships with family, community and territory;
- Valuing and promoting culture, including community, language and territory; and
- Reunifying Indigenous children, families and communities.

Bill C-92 Compliance Checklist for Social Workers and Service Providers

☐ Is the child Indigenous?

First Nations, Inuit or Métis.
First Nations can include Status or Non Status.
The parents or child can live on or off reserve, inside or outside their community.

If so where are they from?
Do they have ties to more than two Nations?

Helpful Hints

- **Identify the child's Indigenous Governing Body or Bodies [IGB]:** All files should include an Indigenous child's Indigenous governing body or bodies and their preferred contact information. In addition, check for social media and other ways the IGB may reach out to members or advertise community events.

- **Family-mapping/Genogram:** In addition to identifying an Indigenous child's IGB(s), a family map or genogram should be completed as soon as possible to identify family members and community members.

☐ Have you notified everyone that the National Standards require?

You *must* give notice to child's parents and the care provider as well as the Indigenous governing body *before* any "significant measure in relation to the child": ss 12 & 13.

a. Have you notified the child's Indigenous Governing Body? How? Results?

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.

b. Have you notified the child's parents? How? Results?

c. Have you notified the child's care providers? How? Results?

Helpful Hints

These are **mandatory** provisions. To be compliant, you MUST demonstrate HOW and WHEN you provided notice to the child's IGB, parent(s) and/or care providers as applicable or document with evidence WHY it was not safe or possible to do so. In addition, to make the most of this process for the child:

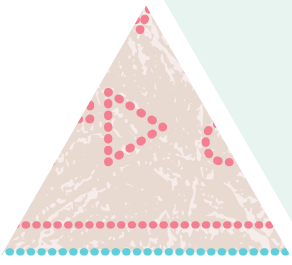
- **Take a Team Approach:** Approach decisions from a collaborative perspective and communicate with the IGB, parents and/or care providers the way you would with colleagues.
- **Conference:** Plan a conference call, case conference or family group conference with the Indigenous Governing Body representative and the child's parents and/or caregivers to give notice of and discuss any significant measure beforehand.
- **Err on the side of Communication:** "Significant measures" should be interpreted in a broad inclusive way – not just legal changes but changes in placements, service provider awareness or responses to issues such as suicidal ideation or behaviour, sexual identity, etc. – anything 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.

☐ Is the Child a member of an Indigenous Nation that has its own Child Welfare legislation enacted under Bill C-92?

- Check on the Government of Canada website, the Indigenous Governing Body's website and/or with the Indigenous community representative.
- If so, abide by the Indigenous Nation's Law where and to the extent it applies.
- If there is not, or the Indigenous Nation's Law does not fully address the situation, continue using the National Standards.

Helpful Hints

- **Seek out Experts:** Indigenous Governing Bodies are the experts on their own laws. Relationship-building and asking clarifying questions to Indigenous experts can help you understand and apply Indigenous child and family laws properly.
- **Appreciative Inquiry:** Change is part of life and all systems. Approaching Indigenous legislation with curiosity and approaching required changes from a strengths based and problem-solving approach can benefit everyone involved.
- **Cultural Humility:** Self-reflexive practice is wise practice. Humbly acknowledging yourself as a learner, working to understand personal and systemic biases and building and maintaining respectful processes and relationships based on mutual trust can help overcome fear-based reactions to Indigenous laws you may not understand or be familiar with at first.



☐ Have you prioritized and made reasonable efforts for prevention?

The Act mandates priority be given to Preventative Care generally and Prenatal Care promoting preventative care (when likely to be in best interests of child after birth) in order to prevent apprehension after birth: *s. 14(1) & (2): Before apprehending* a child who resides with a parent or family member, the service provider *must demonstrate* that he or she made reasonable efforts to have the child continue to reside with that person: s. 15.1. Finally, A child *must not* be apprehended based on his or her socioeconomic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of the child's parents or the care provider: s. 15.

a. Preventative Care: What preventative care have you offered or provided the family?

b. Pre-natal Care: Is there a pregnancy? What prenatal care have you offered or provided the parents? What planning for prevention or placement has taken place where there are safety concerns?

c. Reasonable Efforts: What reasonable efforts can you take to keep the child living with parent(s)?

d. Socio-economic Circumstances: Have you ensured the sole reason for apprehension is not poverty or health related? How have you addressed poverty-related risks?

e. Substantive Equality: S. 9(3) of the Act states Indigenous children, families and governing bodies must be able to exercise their rights under this Act without discrimination: ss. 9(3)(b)-(d). Indigenous children with disabilities' distinct needs must be considered: s. 9(3)(a). Finally, s. 9(3)(e) of the Act states a jurisdictional dispute must not result in a gap in CFS services for Indigenous children and families.

In providing preventative services and assessing if reasonable efforts have been made, have you assessed for any substantive equality issues? This requires paying attention to the effect, not just the intent of services being provided.

Helpful Hints

- **Define "Reasonable Efforts":** Create a policy on what reasonable efforts mean to your organization or agency and ensure it is adhered to by all.
- **Get Creative:** An ounce of prevention is worth a pound of cure – What kind of family supports make sense for this particular parent, family, or in this community? What risks or stressors can be relieved through support, resources and referrals? How can preventative services build on family's strengths and reduce safety risks (i.e. Signs of Safety planning)?
- **Jordan's Principle:** Familiarize yourself with Jordan's Principle and processes for accessing resources where applicable. *Jordan's Principle is a child-first principle*, ensuring First Nations children get the services they need when they need them. Jordan's Principle ensures that the First Nations children can access all public services when they need them. Services need to be cultural based and take into full account the historical disadvantage that many First Nations children live with. The government of first contact pays for the service and resolves jurisdiction/payment disputes later. For more information, see: www.jordansprinciple.ca
- **Show your Work:** It is important to document *how* you prioritized preventative care, what you offered and supplied to the child's parent(s) or care givers, and if there are individual or systemic barriers to prevention (e.g. Is a treatment program or family support workers available in the area/region the family lives in?) to determine if Indigenous children's, family's and governing body's right to substantive equality are being upheld. This can be done with affidavits. Your agency should create a template for each file. It is important to provide documentation.

☐ If an out-of-home, out-of-family placement is unavoidable, how have you followed the placement priority provisions?

Placement Priorities: Placement is to occur in order of priority:

(a) parents,
(b) family member,
(c) community member,
(d) other Indigenous,
(e) other

+ Must consider possibility of placement "with or near" siblings or relatives
+ Must take into account customs and traditions, such as custom adoptions: s. 16 (1) & (2)

Helpful Hints

These are mandatory provisions. To be compliant, you MUST demonstrate HOW you have followed the placement priorities. Ways to show this include:

- **Adequate Knowledge of Child's Family:** Knowledge of a child's family tree and identification of as many family members or relatives as possible (i.e. genograms, family finding processes);
- **Consultation with Child's Community:** Consultation has occurred with Indigenous governing body or relevant community organizations or agencies for possible community placements;
- **Placement Priorities applied in EVERY placement move:** If a break down or planned move in out of home placements, how have you reassessed for the possibility for family unity (see below, s. 16(3)) and followed these placement priorities for the new placement.

☐ When a child is not placed with parents or family members, what is the plan and resources provided for promoting:

a. Attachment and Emotional Ties to the child's Indigenous parents and family members?

- When a child is not placed with parent or family members, "attachment and emotional ties to each such member of his or her family are to be promoted": s. 17

b. Respect for and continuity with the child's culture?

Cultural continuity: s. 9(2)

- Cultural continuity is essential to wellbeing of children, families & communities s. 9(2) (a),
- CFS must not contribute to assimilation or cultural destruction: s. 9(2)(d).

Helpful Hints

These are **mandatory** provisions. To be compliant, you MUST demonstrate HOW you have promoted the child's attachments and emotional ties to family members and maintained the child's cultural continuity. Ways to show this include:

- **Plan of Care:** The child's plan of care includes support for promoting safe and sustainable attachment and emotional ties to their parents and family members.
- **Access Agreement or Orders:** Whenever possible, an access order should be included with or made in addition to any CFS order, along with appropriate resources allocated to facilitating regular and meaningful access when necessary.
- **Community/Cultural Connection Plan:** A community/cultural connection plan, developed collaboratively with all available and interested family members, supports and the child's IGB, must be completed for every Indigenous child placed outside their own family or community.

☐ Where a child is not placed with parents or family members, what is the plan for ongoing reassessment for family unity?

The Act requires ongoing reassessment for family unity. This means there MUST be a reassessment, conducted on an ongoing basis, of whether it would be appropriate to place the child with parents or family members: s. 16(3)

- Bill C-92 allows for reassessment of current files. This can include temporary, private or permanent guardianship, or adoption orders.
- Youth, parents, care providers or family members/relatives may ask for reassessment.

Helpful Hints

This is a **mandatory** provision. To be compliant, you MUST demonstrate HOW you are planning or actually re-assessing the possibility of family unity on an ongoing basis. Ways to show this include:

- **Plan for Regular Reassessments:** You must include provisions for ongoing reassessment for family unity provisions in new and current cases.
- **Reassessments may lead to new plans to promoting relationships:** If placement with parents or family members is still not possible upon reassessment, you should also reassess plan for re-building or promoting attachments and emotional ties to parents and family members: s. 17.

☐ For all of the above, are you aware of and applying the Act's new "Best Interests of an Indigenous Child" analysis when making decisions or taking action?

Bill C-92 is to be interpreted and implemented according to the principles of Best Interests of an Indigenous Child: ss. 9 (1) & ss. 10 (1)-(3), which requires decision-makers to go beyond principles in most provincial statutes. This requires a different approach:

- **Best Interests of the Child** [*Best Interests*] remains the paramount consideration: s. 10(1). However, while most provincial statutes simply give a list of factors, there are now primary considerations for determining these best interests.

Primary Consideration Clause: s. 10(2)

When considering best interests factors to make decisions or take action in relation to providing services in relation to, or apprehensions of Indigenous children, the primary considerations must be the child's *physical, emotional and psychological safety, security and well-being,* the importance of the child *having an ongoing relationship with their family and with Indigenous group, community and people, and preserving the child's connection to his or her culture.*

Put simply, the new starting point for deciding best interests is that Indigenous children's *need for continuing relationships* with their parents, family members, community and culture is at least equally important as other indicators of emotional and psychological safety, security and wellbeing.

- ***Best Interests*** should be determined by considering all factors related to the circumstances of the child, including those listed in s.10(3)) (a)-(h). These include many factors similar to those found in provincial CFS and family law statutes but also include *the importance of relationships*, such as:
    - the nature and strength of the child's relationships with parents, care providers and any family members (c),
    - ongoing relationships with family, community, language and territory (d).

  As well as *the importance of finding out*:
    - the child's views, considering the child's age (e); and
    - the Indigenous community's plans for the child's care, including care in accordance with their customs and traditions (f).

- Where an Indigenous Governing Body has their own legislation, ***Best Interests*** should be read in a manner as consistent as possible with the Indigenous law: s. 10(4)

Helpful Hints

- **Ask:** Find out what the child, the child's parents, family members and IGB think are wise ways of meeting the child's needs for safety, security and well-being.
- **Learn:** Seek out resources to deepen your understanding of Indigenous children's experiences in out-of-home care, Indigenous family structures, and the role of relationships and cultural continuity as protective factors for positive adult outcomes.
- **Follow:** The National Standards set out a framework for addressing the primary considerations for best interests in a range of circumstances.

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It is not legal advice or a legal opinion.

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