

# WAHKOHTOWIN



## LAW & GOVERNANCE LODGE

### **Bill C-92 - From Compliance to Connection**

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## **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**

- First statute to recognize inherent Indigenous jurisdiction over CFS as an Aboriginal (S. 35) right in Canada.
- The statute establishes national minimum standards for CFS delivery for all Indigenous children and families.
- Applies to 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.



# Bill C92- Change and Uncertainty

## Much Needed Change:

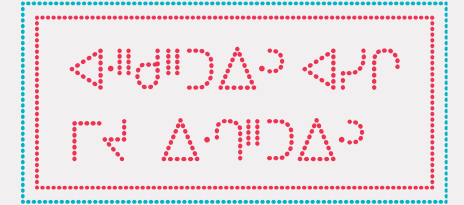
- Response to the TRC Calls to Action & Indigenous advocacy and activism, cases, *Caring Society* case, *Brown v. Canada*
- Human costs of the status quo are unconscionable
- First federal legislation in this area (Indigenous children)
- First official governmental recognition of a S. 35 Aboriginal Right to jurisdiction over child and family services.



# Bill C92- Change and Uncertainty

## Uncertainty:

- No regulations, policies, practice guides yet
- No court interpretations of this legislation yet
- Concurrent jurisdiction model = provincial, federal statutes both apply, as well as potential for multiple Indigenous statutes w/i a year.
- No commitment or clarity regarding funding



# Bill C-92: Main Purposes

## Jurisdiction s. 8(a):

**What:** This law recognizes, for the first time in Canadian history, 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 (CFYEA)

## Now What:

- A lot of work goes into drafting legislation that works for communities.
- Coordination will have to be worked out with province and agencies.
- There may be unique service standards for children from different Indigenous communities that agencies will have to be aware of in order to comply with the applicable laws.



# Bill C-92: Main Purposes

## 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?:** As of January 1, 2020, this law is in force, and the national standards apply in all provinces. Where different, these standards will prevail over provincial legislation.

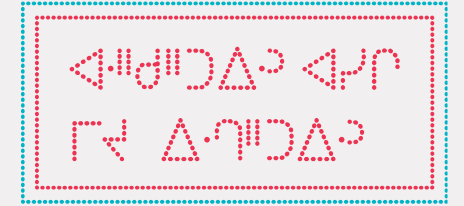
## Now What:

- There are new national standards for all Indigenous children that CFS, DFNAs, agencies, lawyers and courts will have to be aware of in order to comply with the applicable laws.



# National Standards

- **These National Standards came into force January 1, 2020**
- Applies to both federal and provincial governments: s.7
- Sets out a number of standards relating to CFS
- Intended as minimum standards – doesn't displace provincial rules that do not conflict with or are inconsistent with this Act: s.4
- **Where provincial laws do conflict or are inconsistent, the National Standards apply.**
- Indigenous CFS laws do not replace these standards, though they may influence interpretation of BIOC (consistency clause): s. 10(4)



# National Standards

Principles for interpreting and applying this Act include:

## 1. **Best interests of the child:** s.9(1)

- Best interests of the Indigenous child – some unique factors

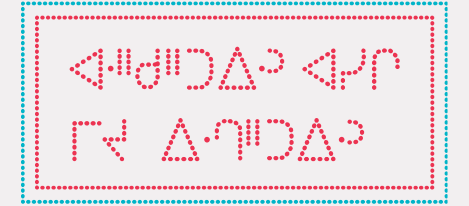
## 2. **Cultural continuity:** s. 9(2)

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

## 3. **Substantive Equality:** s. 9(3)

- The child, child's family and child's governing body must all be able to exercise their rights under this act (a)-(c),
- A **jurisdictional dispute must not result in a gap in services** that are provided in relation to Indigenous children (e).





# National Standards

Best interests of the **Indigenous** child requires a **new** analysis. **Super-weights** importance of child's family relationships & community connections:

- **Primary Consideration Clause:** When considering best Interests factors, **primary consideration** must be given to:
  - the child's physical, emotional and psychological safety, security and well-being,
  - **as well as to** the importance, for that child, of having an **ongoing relationship** with his or her family and with the Indigenous group, community or people to which he or she belongs
  - and of **preserving the child's connections** to his or her culture: s. 10(2)



# National Standards

## Best Interests of an Indigenous child: s.10

There are eight factors:

- a) The child's cultural, linguistic, religious and spiritual upbringing and heritage.
- b) The child's age and stage of development.
- c) The **nature and strength** of the child's **relationship** with his or her parents, care provider and **any member of his or her family**.
- d) The importance of the child's **ongoing relationship** with his or her **Indigenous family, community, language and territory**.



# National Standards

- e) The child's views and preferences, considering the child's age.
- f) **Any plans for the child's care including care in accordance with the customs and traditions** of the Indigenous group.
- g) Any family violence and its impact on the child, whether it is direct, indirect and whether the violence is physical, psychological or emotional
- h) Any civil or criminal proceeding, order, condition, or other measure that is relevant to the safety, security and well-being of the child.



# National Standards: CFS Provision

The EFFECT (not just intent) of providing CFS must:

- Take into account the **child's needs** (physical, emotional, psychological safety, security and wellbeing): s.11(a)
- Take into account a child's **culture**: s.11(b).
- Allow a child to know their **family origins**: s.11(c).
- Promote **substantive equality** between the child and other children: s.11(d).



# National Standards: Preventative Provisions

When consistent with the best interests of the child:

## **Priority of Preventative Care and Prenatal Care: s. 14(1) & (2)**

- Giving priority to preventative care measures over other services,
- Giving priority to prenatal care (when likely to be in best interests of child after birth) in order to prevent apprehension. Consider:
  - Preventative Prenatal Services (essential + specialized)
  - Preventative Services Planning for after birth
  - Placement Planning for after birth



# National Standards: Preventative Provisions

When consistent with the best interests of the child:

## **Socioeconomic Conditions: s. 15**

- 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.

Unless *not* in the best interests of the child:

## **Reasonable Efforts: s. 15.1**

- **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.

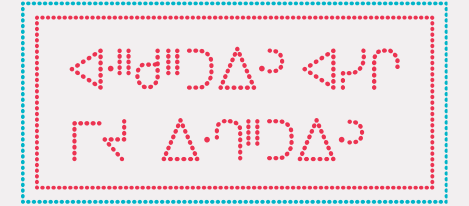


# National Standards: Protection & Out of Home Care Provisions

To the extent in the best interests of the child:

## Notice and Representation Requirements: ss. 12 & 13

- 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.”
- Same parties have right to make **representations** in any civil proceeding; parents and care providers have party status.

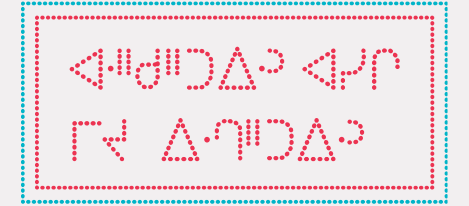


# National Standards: Protection & Out of Home Care Provisions

**The Act** defines “**Indigenous Governing Bodies**” as “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*”: s. 1.

- Includes band councils and other current governing organizations (e.g. Metis Nation, NTI)
- May include tribal organizations or other bodies granted authority over this area by multiple band councils etc.





# National Standards: Protection & Out of Home Care Provisions

**The Act** defines “**care providers**” as “a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child’s parent, including in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs”: s. 1.

- May include family members, grandparents, aunts, uncles or others who care for the child, ‘customary adoption’
- Does NOT include unrelated non-Indigenous foster parents or group care providers



# National Standards: Protection & Out of Home Care Provisions

Wahkohtowin Law and Governance Lodge defines “**Significant measures**” in a broad inclusive way, in keeping with the purposes of the Act – 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.



# National Standards: Placement Provisions

## Placement Priorities: s. 16 (1) & (2)

- Placement is to occur in order of priority:
  - First: parents,
  - Second: family member,
  - Third: community member,
  - Fourth: other Indigenous,
  - Fifth: other
- Must consider possibility of placement “with or near” siblings or relatives
- Must take into account customs and traditions, such as custom adoptions

# National Standards: Protection & Out of Home Care Provisions

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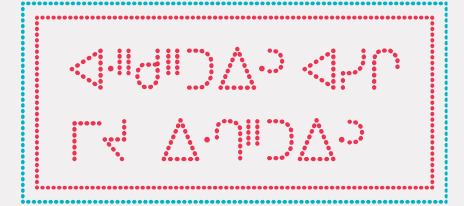
## Ongoing Reassessment for Family Unity: s. 16(3)

- Must be a **reassessment**, conducted on a ongoing basis, of whether it would be appropriate to place the child with parents or family members

To the extent doing so is in the best interests of the child:

## Attachment and Emotional Ties: s. 17

- 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**”



# National Standards: Top 5 Strategies

1. **Educate** social workers, service providers, lawyers, judges about the National Standards – don't assume they know, as many do not.
2. **Advocate** for decision makers to apply the National Standards, additional BIOC factors, cultural continuity, substantive equality, placement, etc.
3. **Identify and Consult** with the child's Indigenous Governing Body [IGB] regarding their views of the child's best interests and for notice and representation purposes. Check if the IGB has given notice to the province. All files should include the Indigenous child's IGB and contact information.
4. **Connect:** 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.
5. **Work internally** on clarifying and developing your practices and look for areas of strengths and improvement to go beyond the minimum required.



# Inherent Jurisdiction: Authority

Recognizes and affirms, as a **S.35 (Aboriginal or Treaty) Right** the **inherent right of self-government** includes:

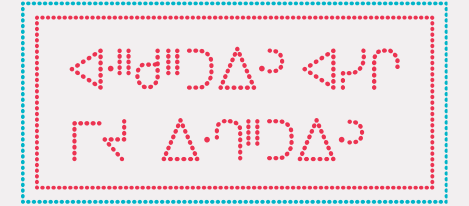
- jurisdiction in relation to child and family services,**  
which includes **authority** for Indigenous Governing Bodies:
- 1. draft their own CFS laws** (legislative authority)
  - 2. administer and enforce** these CFS laws: s. 18(1)
  - 3. and to provide dispute resolution mechanisms:** s. 18(2)



# Inherent Jurisdiction: Powers

Indigenous CFS laws will have **power** to:

- have the **force of law as federal law** (after a year): s. 21 (1)
- prevail over all other *federal* laws (except CHRA): s. 22(1)
- prevail over all *provincial* laws: s. 22(3)



# Inherent Jurisdiction: Limits

BUT...courts have said governments can regulate and “justifiably infringe” s. 35 rights. The Bill regulates inherent jurisdiction by imposing the following limits:

1. Indigenous CFS laws are subject to the application of the ***Charter*** (s. 19) and the ***Canadian Human Rights Act***: s.22(1)
2. Where a child belongs to two Indigenous groups, the CFS laws of the group deemed to have the “**stronger ties**” will apply: 24(1)
3. Indigenous CFS laws will not be applied if they are deemed contrary to the **Best Interests of the Child**: s. 23





# Inherent Jurisdiction: Limits

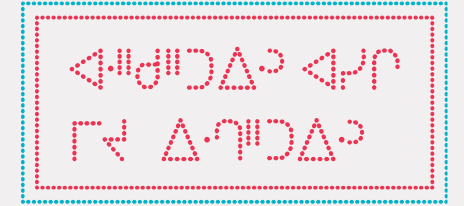
4. In order for Indigenous CFS laws to be recognized as having the force of law and prevailing over provincial CFS laws, they must:
- give **notice** to the provincial and federal governments of their intent to exercise your law-making authority: s. 20(1) AND
  - enter into a “**coordination agreement**” with the province and federal governments that address matters such as provision of emergency services, support measures and fiscal arrangements: s. 20(2), OR
  - have made **reasonable efforts** to do so for a year: s. 20(3)(a) & (b)
  - be prepared for the Minister to **make public and publish** on a website information about the notice, coordination agreement and CFS laws: s. 25 (a) to (c) and s. 26



# Inherent Jurisdiction: Funding

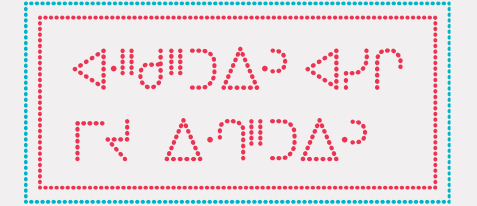
The only clause that addresses funding is s. 20(2)(c), which states governments **MAY** enter into coordination agreements which may include:

(c) **fiscal arrangements**, relating to the provision of child and family services by the Indigenous governing body, that are **sustainable, needs-based and consistent with the principle of substantive equality** in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people to exercise the legislative authority effectively;



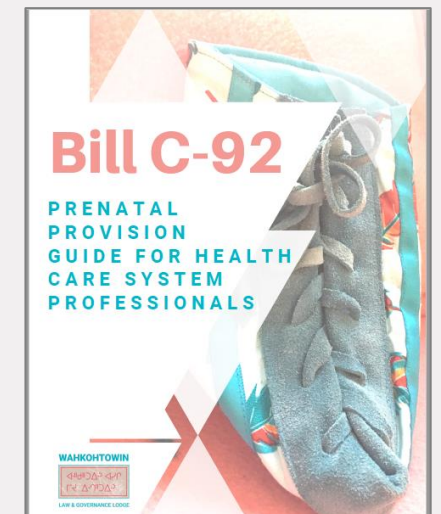
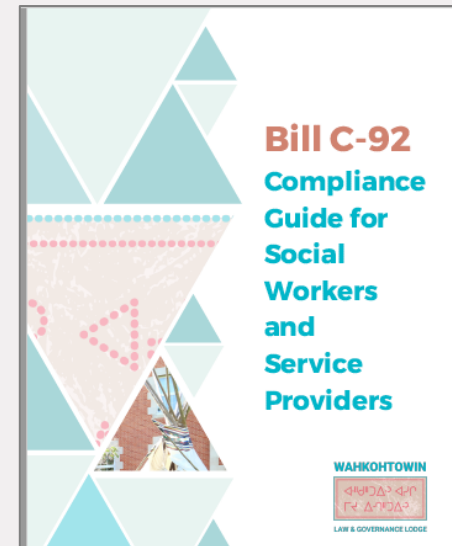
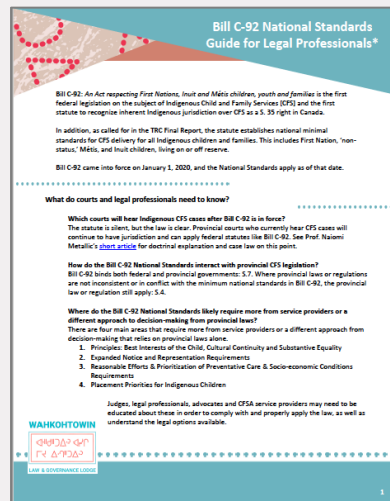
# Jurisdiction – Top 5 Strategies

1. **Consult and listen** to what Indigenous children’s family members and Indigenous Governing Bodies think are wise ways of meeting their needs.
2. **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.
3. **Work together** with Indigenous groups, communities and peoples. Build relationships to create connections for the Indigenous child and for your organization.
4. **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.
5. **Advocate and support advocacy** for substantive equality and equitable funding and service provision for Indigenous children and families.



# Important Steps for your Organization

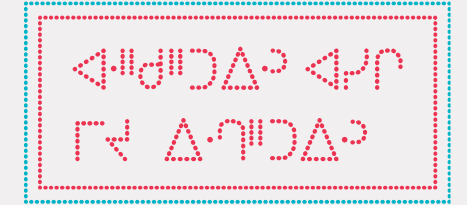
- How can I ensure what I am currently doing is up to the National Standards?
- Can I show my strengths – where we are already doing this?
- Can I create a practice check list?





# Important Steps for your Organization

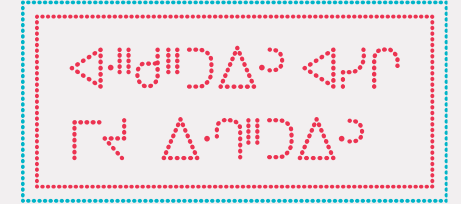
- What do you need to learn more about, or unlearn, in order to understand and work toward the purposes of the Act in your practice?
- What are your first steps? Internally? Externally?
- What are your long term hopes and goals?
- What is a realistic timeline and what resources are required?



## Bill C-92 – Hope and Connections

"Let us put our minds together and see what life we can make for our children."





*Thank you*

Please contact us for further information:

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Educational Resources on Bill C-92 and more can be found on our  
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