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] and the first statute to recognize inherent Indigenous jurisdiction over CFS as a S. 35 right in Canada.

In addition, as called for in the TRC Final Report, the statute establishes national minimal 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.

Bill C-92 came into force on January 1, 2020, and the National Standards apply as of that date.

**What do courts and legal professionals need to know?**

**Which courts will hear Indigenous CFS cases after Bill C-92 is in force?**
The statute is silent, but the law is clear. Provincial courts who currently hear CFS cases will continue to have jurisdiction and can apply federal statutes like Bill C-92. See Prof. Naiomi Metallic’s [short article](#) for doctrinal explanation and case law on this point.

**How do the Bill C-92 National Standards interact with provincial CFS legislation?**
Bill C-92 binds both federal and provincial governments: S.7. Where provincial laws or regulations are not inconsistent or in conflict with the minimum national standards in Bill C-92, the provincial law or regulation still apply: S.4.

**Where do the Bill C-92 National Standards likely require more from service providers or a different approach to decision-making from provincial laws?**
There are four main areas that require more from service providers or a different approach from decision-making that relies on provincial laws alone.

1. **Principles:** Best Interests of the Child, Cultural Continuity and Substantive Equality
2. **Expanded Notice and Representation Requirements**
3. **Reasonable Efforts & Prioritization of Preventative Care & Socio-economic Conditions Requirements**
4. **Placement Priorities for Indigenous Children**

Judges, legal professionals, advocates and CFSA service providers may need to be educated about these in order to comply with and properly apply the law, as well as understand the legal options available.
1. Principles: Best Interests of the Child, Cultural Continuity and Substantive Equality

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

Best Interests of the Child [BIOC] remains the paramount consideration: s. 10(1)
BIOC is paramount but should be read with principles of cultural continuity: 9(2) + substantive equality: 9(3) & not in a way contrary to the Act’s purposes: s. 8(a)-(c).

- Determining BIOC under Bill C-92 requires a different approach, so can’t rely on past precedents alone. Must consider: Best Interests of INDIGENOUS child, primary considerations: s. 10(2), BIOC factors: s. 10(3) as well as BIOC Consistency: s. 10(4) & Inherent Jurisdiction: s. 8 (a) & s. 18(1).
- Starting point is that Indigenous children’s need for continuing relationships with their family members, community, culture and territory are equally important as other indicators of emotional and psychological safety, security and wellbeing. Full clause reads:

  **Primary Consideration:** When the factors referred to in subsection (3) are being considered, 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)

See the NICWA Brief on current research illustrating the importance of ongoing relationships and cultural connections for Indigenous children’s wellbeing.

A Bill C-92 Analysis requires Consultation with the Child’s Indigenous Governing Body: s. 12(1)
Inquiry into and evidence as to Indigenous children’s Indigenous governing body’s views as to what is in the BIOC in the particular circumstances of each case is necessary to:

- Demonstrate compliance with Bill C-92 notice requirements: s. 12(1).
- Uphold Indigenous governing body’s right to have “the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people”: s. 9(3) (d).
- Determine congruency with the Indigenous governing body’s laws: s. 10(4)
- Have adequate information to consider a child’s “languages, cultures, practices, customs, traditions, ceremonies and knowledge”: s. 9(2)(b); the “characteristics and challenges of the region”: s. 9(2)(d) and how services can be provided in a manner that does not “contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people”: s. 9(2)(e).
- Fulfil Bill C-92’s purpose of recognizing inherent CFS jurisdiction: s. 8 (a) & s. 18(1).
2. Expanded Notice and Representation Requirement

Notice: “Before taking any significant measure in relation to an Indigenous child,” CFSA must provide notice of that measure to the (1) child’s parent; (2) child’s care provider; and (3) child’s Indigenous governing body, as consistent with BIOC: s. 12(1).

- This expands notice beyond court proceedings to any significant measure (such as investigation, custody agreements, supervision orders, temporary placements, etc.).
- This expands notice beyond just Indian Act Bands to include Métis, non-status, Inuit or hereditary Indigenous governments who give notice of their representative role: s. 12 (1).
- CFSA must ensure notice does not contain more personal information about the child, parent or care provider than necessary to explain the proposed significant measure: s. 12(2).

Representations and Party Status: In court proceedings relating to CFS provision to an Indigenous child,
- the child’s parents and care providers have the right to make representations and have party status: s. 13(a);
- the child’s Indigenous governing body has the right to make representations: s. 13(b).

3. Reasonable Efforts & Prioritization of Preventative Care Requirements

CFSA or service providers must demonstrate that they made reasonable efforts to have the child continue to reside with a parent or family member prior to any apprehension being granted: s. 15.1.

Prior to an apprehension order, CFSA service providers have an obligation to demonstrate, through evidence:
- Preventative Care: How they have prioritized services that promote preventative care to support the child’s family over apprehension: s. 14(1).
- Prenatal Care: Where applicable, how they have prioritized prenatal care likely to be in the BIOC over other services to prevent apprehension at birth: s. 14(2).
- Socio-economic Conditions: That the child is not being apprehended solely on the basis of their socio-economic conditions, “including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider”: s. 15.

As consistent with BIOC (as defined and approached in Bill C-92).
4. Placement Priorities for Indigenous Children

Placement Priority: CFSA service providers have an obligation to demonstrate, through evidence:

- Placement occurs in order of the following priority: (a) parents, (b) extended family members, (c) a member of the same Indigenous group, community or people, (d) a member of another Indigenous group, community or people, (e) another adult, as consistent with BIOC: s. 16(1).

- Placement with Siblings: When the above order of placement is being applied, the possibility of placement with or near siblings (including children who don’t have the same parents but are viewed as siblings) should be considered when determining BIOC: s. 16(2).

- Customs and Traditions: Placement must take into account customs and traditions of Indigenous peoples, such as custom adoption: s. 16(2.1).

When Indigenous Children are placed in out-of-home care, and particularly outside of their family or community, all orders should include:

Regular Review Dates:
- It is mandatory to reassess, on an ongoing basis, whether it would be appropriate for an Indigenous child placed outside of their extended family to be placed back with parents or extended family: s. 16(3).
- The focus on effects of services, not just the initial purpose or justification, require ongoing evaluation to ensure they are provided in a way that: takes into account the child’s needs, including culture; allows the child to know their family origins; and promotes substantive equality: s. 11(a)-(d).

An Access Order and/or Cultural Connection Order:
- A child’s attachments and emotional ties to members of their extended family are to be promoted: s.17, to the extent it is consistent with the BIOC, as interpreted through the different approach required by Bill C-92, and particularly s. 9(2), s. 10(2), s. 10 3 (c) & (d).
- Access orders are possible under some provincial statutes, but Bill C-92 has stronger wording about the importance of an Indigenous child’s ongoing relationships with family, community and territory for their wellbeing. A Cultural Connection Plan under provincial statutes is typically mandatory only at the point of adoption or private guardianship and is unenforceable. Making it an order creates an enforceable obligation to promote attachment and emotional ties: s. 17.

* This Guide as prepared by: Dr. Hadley Friedland, Wahkohtowin Lodge Co-Lead, Assistant Professor, University of Alberta Faculty of Law. It is not legal advice or a legal opinion.