



Introduction to the *Act respecting First Nations, Inuit and Métis children, youth and families*



Note: The information provided in this presentation does not, and is not intended to, constitute legal advice.



Indigenous Services
Canada

Services aux
Autochtones Canada

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Canada

Status and Purpose of the Act

- Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, received Royal Assent on June 21, 2019 and came into force on January 1, 2020.
- This legislation is an historic step toward comprehensive reform since it seeks to change the way that child and family services are provided to Indigenous children, with the ultimate goal of reducing the number of children in care.
- The **purpose** of the Act is to (section 8):
 - affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
 - set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
 - contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The Act is not about imposing solutions but is rather about opening the door for Indigenous Peoples to choose their own solutions for their children and families.

Context on the Act

- The Act will help address the first five *Calls to Action* issued by the Truth and Reconciliation Commission in 2015, and will also advance several of the Calls for Justice made by the National Inquiry into Missing and Murdered Indigenous Women and Girls.
- The Act is also consistent with:
 - Canada's ratification of the *United Nations Convention on the Rights of the Child*; and
 - Canada's commitment to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.
- More generally, the Act seeks to advance Canada's commitment to reconciliation with First Nations, Inuit and Métis through renewed nation-to-nation, Inuit-Crown and government-to-government relationships based on recognitions of rights, respect, co-operation and partnership.

Preamble and Definitions

Preamble

- Provides background information on the Act.

Definitions (section 1)

- Includes definitions for numerous key terms, including:

care provider: a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child's parent.

child and family services: services to support children and families, including prevention services, early intervention services and child protection services.

family: defined broadly and includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers to be a close relative of the child.

Indigenous governing body: means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people who hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Interpretation sections of the Act and Principles

Existing agreement (section 3)

- Provides that existing agreements (including treaties and self-government agreements) that address Indigenous child and family services and that are concluded before January 1, 2020, prevail over the provisions of the Act in the case of a conflict or inconsistency.

Minimum standards (section 4)

- Specifies that the standards imposed by the Act should be interpreted as “minimum standards” and provides that, should the provincial or territorial standards go beyond what is provided in the Act, their standards remain valid.

Binding on Her Majesty (section 7)

- Provides that the Act is binding on Canada and the Provinces and Territories.

Principles (section 9)

- Establishes three principles to guide the provision of child and family services provided in relation to Indigenous children: the best interests of the child, cultural continuity and substantive equality.
- The Act must be interpreted and administered in accordance with these principles.

Best Interests of Indigenous Child (section 10)

- The best interests of the child applies to all jurisdictions.
- The Act seeks to ensure that the best interests of the child are always considered when making a decision affecting that child.
- When determining the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered.
- The Act includes a non-exhaustive list of factors to be taken into consideration when making that determination.
- Under the Act, when determining the best interests of an Indigenous child, primary consideration must be given to:
 - the child’s physical, emotional and psychological safety, security and well-being; and
 - the importance, for that child, of an ongoing relationship with his or her family and community and of preserving the child’s connections to his or her culture.
- As per the Act, where possible, the requirements of the Act with regards to the best interests of the child should be interpreted in a manner consistent with the laws of the Indigenous group to which the child belongs.

Provision of Child and Family Services

Effect of services (section 11)

- Section 11 requires that child and family services provided in relation to Indigenous children be provided in a manner that:
 - takes into account the child’s needs and his or her culture;
 - allows the child to know his or her family origins; and
 - promotes substantive equality between the Indigenous child and other children.

Notice (section 12)

- Section 12 requires that advance notice of any significant measure to be taken in relation to an Indigenous child be sent to:
 - the child’s parent and care provider; and
 - the Indigenous governing body acting on behalf of the Indigenous group, community or people to which the child belongs.
- However, the Act limits the personal information that can be shared in the notice provided to the Indigenous governing body.
- Exception: The notice does not have to be sent if sending it would not be in the best interests of the Indigenous child to be affected by the significant measure.

Provision of Child and Family Services

Representation and Party Status (section 13)

- Section 13 provides the right to make representations and the right of party status to the child's parent and care provider in the context of civil proceedings regarding the provision of child and family services in relation to that child.
- Section 13 also provides the right to make representations to the Indigenous governing body acting on behalf of the Indigenous group to which the child belongs.

Priority to preventive care (section 14)

- Section 14 requires that priority be given to child and family services that promote preventive care over any other services.
- Section 14 also requires that priority be given to prenatal services over other services in order to prevent the apprehension of the child at the time of the child's birth.
- Exception: Section 14 is only applicable if it is consistent with the best interests of the child or is likely to be in the best interests of the child after he or she is born.

Provision of Child and Family Services

Socio-economic conditions (section 15)

- Section 15 provides that the child must not be apprehended based solely on his or her socio-economic conditions.
- Exception: This rule only applies to the extent that it is consistent with the best interests of an Indigenous child.

Reasonable efforts before apprehension (section 15.1)

- Section 15.1 provides that Indigenous children can only be placed outside of their families when it has been demonstrated through evidence that efforts were made to keep the family united.
- The Act provides that an apprehension of an Indigenous child who resides with one parent or another adult family member cannot occur before the service provider demonstrates that reasonable efforts were made to have the child continue to reside with that person.
- Exception: Apprehension without the demonstration of reasonable efforts could occur where it is consistent with the best interests of the child.

Order of Placement

Priority for Placement (sub-section 16 (1), (2) and (2.1))

- Sub-section 16 (1) of the Act establishes an order of priority to be followed when considering the placement of an Indigenous child.
- Sub-section 16 (2) encourages placing the child with or near children who have the same parent or who are otherwise members of the child's family.
- Sub-section 16 (2.1) provides that the placement of a child must take into account the customs and traditions of Indigenous peoples, including with regards to customary adoption.

Ongoing Reassessment of Placement (sub-section 16 (3))

- In accordance with sub-section 16 (3), if an Indigenous child does not reside with family, a reassessment must be conducted on an ongoing basis to determine whether it would be appropriate to place the child with parents, or where that is not possible, with another adult family member.
- Also, if the child resides with his family but not with his or her parent(s), a reassessment must be conducted on an ongoing basis to determine whether it would be appropriate to place the Indigenous child with his or her parent.

Emotional Ties and Affirmation of Jurisdiction

Attachment and emotional ties (section 17)

- Section 17 stipulates that the child's attachment and emotional ties to adult members of his or her family, including the child's parents, are to be promoted when the child is placed with someone who is not a member to the child's family.
- Exception: As specified in the Act, this rule would only apply if it can be applied in a manner that is consistent with the best interests of the child.

Jurisdiction (sections 18 and 19)

- Section 18 affirms that 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.
- Section 18 specifies that the jurisdiction over child and family services includes legislative authority and authority to administer and enforce laws. The authority to administer and enforce laws comprises the authority to provide for dispute resolution mechanisms.
- Section 19 states that the *Canadian Charter of Rights and Freedoms* applies to an Indigenous governing body in the exercise of jurisdiction in relation to child and family services on behalf of an Indigenous group, community or people.

Exercising Jurisdiction under the Act (section 20)

- Section 20 outlines the process for exercising jurisdiction under the Act.
- The Act was designed to enable Indigenous groups and communities to transition towards exercising partial or full jurisdiction over child and family services at a pace that they choose.
- A section 35 rights-bearing Indigenous group, community or people with an authorized Indigenous governing body, has two primary options for exercising jurisdiction under the Act:

OPTION 1

- The first option is for an Indigenous group or community to adopt a law on child and family services and to send a notice to the Minister of Indigenous Services and the government of each Province or Territory in which the Indigenous group or community is located informing them that they are exercising their jurisdiction.
- In that case, their Indigenous law would not prevail over conflicting federal, provincial and territorial laws on child and family services.

Exercising Jurisdiction under the Act (section 20)

OPTION 2

- The second option is for an Indigenous group or community to send a request to the Minister of Indigenous Services and the government of each province in which the Indigenous group or community is located to enter into a tripartite coordination agreement related to the exercise of their jurisdiction.
- If an agreement is reached within 12 months following the request, the laws of the Indigenous group or community will prevail over conflicting federal and provincial laws.
- If no agreement is reached within 12 months following the request, provided that the Indigenous governing body has made reasonable efforts to reach an agreement, the Indigenous laws will prevail over conflicting federal, provincial and territorial laws.
- To facilitate the conclusion of a coordination agreement, at any given time, the Act allows the parties to benefit from a dispute resolution mechanism to be established by regulations co-developed with Indigenous peoples.

Indigenous laws prevailing over conflicting laws

- Under Option 2, the Indigenous laws would prevail over conflicting federal, provincial and territorial laws and regulations over child and family services as soon as the Indigenous laws come into force and until they are repealed by the Indigenous governing body.
- According to the Act, there are some exceptions to this conflict of laws rule:
 - Section 10 to 15 of this Act with respect to the “Best Interests of Indigenous Child” and the “Provision of Child and Family Services”; and
 - Provisions of the *Canadian Human Rights Act*.
- The exercise of jurisdiction over child and family services by an Indigenous governing body would also be subject to the *Canadian Charter of Rights and Freedoms* as per section 19.
- The Act imposes certain publication obligations upon the Minister of Indigenous Services Canada to help ensure social workers and other service providers are made aware of the existence of the Indigenous laws. For example:
 - Publication of information related to notices and requests received as well as concluded coordination agreements; and
 - When provided a copy, ensuring that Indigenous laws that have force of federal law under the Act are made accessible to the public.

Application of Indigenous laws (sections 23 and 24)

Application of Indigenous laws – Exception (section 23)

- Specifies that an Indigenous law would apply in relation to an Indigenous child except if it would be contrary to his or her best interests.
- The policy intent behind section 23 was to allow Indigenous children without ties to an Indigenous group or community the possibility to benefit from provincial or territorial child and family services if it is found to be in his or her best interests.

Conflict between Indigenous laws – Test of Stronger Ties (section 24)

- Where more than one Indigenous law applies in relation to an Indigenous child, the law of the Indigenous group with which the child has the strongest ties would prevail to the extent of the conflict.
- The following factors must be taken into consideration when assessing the child's strongest ties to an Indigenous group, community or people:
 - The child's habitual residence;
 - The child's views and preferences, giving due weight to his or her age and maturity, unless they cannot be ascertained; and
 - The views and preferences of the child's parent(s) and care provider.

Information in relation to Indigenous children in care

Agreements – Information (section 27 to 30)

- Sections 27 to 30 address the gathering of information about Indigenous children and the services provided to them, and the disclosure of that information, including to affected families and communities.
- It was envisioned that these details would be determined when discussions take place between provinces, territories and Indigenous governing bodies regarding the collection, retention, use and disclosure of information respecting the child and family services that are provided in relation to Indigenous children.
- Once all parties would agree as to the proper way forward, it was envisioned that they would enter into agreements specifying all relevant details with regards to that information.
- To pursue these goals, the Act:
 - States that the Minister may enter into agreements with Provinces, Territories, and Indigenous governing bodies, respecting the collection, retention, use, and disclosure of information relating to child and family services provided to Indigenous children;
 - Empowers the Minister to disclose information about Indigenous children and the services provided to them.
 - Allows provincial and territorial governments or public bodies established under a provincial or territorial Act to collect and disclose information respecting child and family services provided in relation to Indigenous children and information about individuals in relation to whom those services are provided for the purposes of implementing an agreement referred to in section 28 of the Act.

Five-year review and Regulations

Five-year review (section 31)

- Section 31 requires that the Minister undertake a review of the Act in collaboration with Indigenous peoples, and potentially provincial and territorial governments, every five years after January 1, 2020.

Regulations (section 32 and 34)

- Section 32 authorizes the Governor in Council to make regulations when the affected Indigenous governing bodies were afforded a meaningful opportunity to collaborate in the policy development leading to the making of the regulations.
- Under the Act, the following regulations can be adopted:
 - regulations respecting the application of the Act;
 - regulations relating to the provision of child and family services in relation to Indigenous children; and
 - regulations on transitional matters.
- Provincial and Territorial governments may also collaborate in the policy development leading to the making of regulations.

Transitional Provisions and Coming into Force

Representation and party status – Transitional provision (section 33)

- States that where a civil proceeding respecting the provision of child and family services in relation to an Indigenous child is pending on January 1 2020, the rights described in section 13 (the right with respect to making representations in court and t party status) can only be exercised where that would be consistent with the best interests of the child and appropriate in the circumstances.

Coming Into Force (section 35)

- States that the provisions of the Act will come into force on a day or days to be fixed by order of the Governor in Council.
- An Order in Council fixed the coming into force of the Act in its entirety to January 1, 2020.

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