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Child and Family Services and Bill C-92 Bench and Bar "Into the Future"

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Wahkohtowin Lodge Purpose:

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Upholding Indigenous laws and governance

- Support Indigenous communities' goals to identify, articulate, and implement their own laws.
- Develop, gather, amplify, and transfer wise practices, promising methods and research tools.
- Produce useful and accessible practical legal resources and public legal education.

The Wahkohtowin Law and Governance Lodge responds to the expressed needs of Indigenous communities and organizations and specifically answers the TRC Call to Action #50, which calls for the creation of Indigenous Law Institutes for the “development, use and understanding of Indigenous laws.”



Grounding Principles

- Indigenous laws need to be treated seriously, as *laws*.
- Indigenous legal research must be conducted with the highest standards of rigor and transparency.
- Indigenous laws are one aspect of Indigenous governance, and part of comprehensive whole societies.
- Revitalizing Indigenous laws and governance processes are essential for re-building healthy communities and for reconciliation in Canada.

Indigenous Law & Aboriginal Law

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Aboriginal Law

- Judge made law
- Aboriginal peoples and the Crown

Indigenous Law

- Rooted in Indigenous societies
- Indigenous legal orders
- Indigenous law doesn't have to look like western law.

Indigenous laws derives from them having been practiced and passed down through “elders, families, clans, and bodies within Indigenous societies.” Indigenous laws continued to be recorded and promulgated in various forms, including in stories, songs, practices and customs. - Borrows

Bill C92-Purposes

Purposes of this Act are:

- To affirm Indigenous inherent CFS jurisdiction,
- set national standards for CFS provision &
- contribute to implementation of UNDRIP: s. 8 (a)-(c)
- Preamble refers to Canada's international human rights commitments, legacy of residential schools, CFS impact on MMIWG, importance of reuniting Indigenous children with families, the TRC Final Report, Indigenous right to self-determination, Canada's commitment to work cooperatively toward reconciliation and reform and recognition of calls for funding consistent with substantive equality.
- Does not displace provincial CFS Acts, but where *different*, **this Act prevails, and Indigenous legislation prevails**: s. 4





The SCC Resets



Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5:

“Even though the Act is expected to accelerate certain aspects of the process of reconciliation, it is still important to realize that **reconciliation is a long term project. It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and the sources of power that exist”:**
para. 90.



FROM JURISDICTIONAL BICKERING TO A “SINGLE STRONG ROPE”

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Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5:

- C92 as a “framework for reconciliation” with 3 types of legal norms interwoven to “ensure the the well-being of Indigenous children.”
 1. Law-making authority of Indigenous Peoples in relation to child and family services [CFS];
 2. National Standards; and
 3. International standards referred to in UNDRIP.
- The “**metaphor of “braiding” together** these 3 types of norms has been helpfully proposed to explain how the [UNDRIP] should be implemented in Canada, so as to “**work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope**” (citing Christie)”: para. 7.



What the SCC Finds: Federalism

- SCC REFRAMES these issue as whether the entire Act, read as a whole, is within the federal power of 91(24).
- Defines s. 91(24) as matters relating to “Indigenous peoples as Indigenous peoples”: para. 2
- Finds the **“essential matter addressed by the Act involves protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in doing so, advancing the process of reconciliation with Indigenous peoples.”**: para. 9
- All part of the Act [national standards, affirmation of self-government over CFS, implementation of the UNDRIP, concrete implementation measures] are “integrated parts of a unified whole”: para. 9



“Of Course”: Division of Powers

Even though the SCC approaches the Act as a unified whole, points out:

1. National Standards fall within the federal powers under s. 91(24), binds provinces through paramountcy.
1. Affirmation of the right to self government falls within s. 91(24) powers (but doesn't define s. 35, or bind the provinces or courts to that definition). Still, has real legal and practical effects.
1. SS. 21 & 22(3) of the Act – Indigenous laws have the force of federal law if process followed, is simply “incorporation by reference”, well within the federal government's power, binds provinces through paramountcy.



What the SCC Finds: S. 35

- Does not decide on s. 35 basis. Says this is not necessary to decide the question before it: para. 111.
- BUT doesn't overturn QCCA analysis on self-government over CFS as a s. 35 right,
- However, this does not mean that C92's affirmation of self-government over CFS as a S. 35 right doesn't do any work. The Court stresses that this affirmation still has practical and legal effects.
- Because the federal government affirmed self-government over CFS as a s. 35 right, they have bound themselves, and provincial governments, **to act as if this right is enshrined** in the Constitution, as long as C92 is in force.
- The Court says the s. 35 affirmation in C92 **binds the federal government** so it "can no longer assert, in any proceedings or discussions, that there is no Indigenous right to self-government in relation to CFS."
- This also engages the "**Honour of the Crown**" – both the federal and provincial governments are the Crown. This means they have duties to act honestly and diligently to respect and implement Indigenous rights.



CHILDREN ARE CORE TO SELF DETERMINATION, CULTURE AND PEOPLEHOOD

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The SCC finds:

- Responsibilities for raising children are core aspects of the right to self government, as recognized in several provisions and the preamble of the UNDRIP: para. 3.
- “Relationships within families and control exercised by Indigenous communities over Indigenous children relates to Indigenous peoples as Indigenous peoples.”: para. 2
- CFS is “fundamental to the culture and identity of Indigenous peoples”: para. 112.
- This is also obvious based on how the Crown attempted to destroy Indigenous families through assimilation policies.



CENTERING INDIGENOUS CHILDREN'S WELLBEING

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What does the SCC say is interwoven in a “framework of reconciliation to ensure the **wellbeing of Indigenous children**”?

- **First**, within C92, (a) Indigenous Legal Authority, (b) National Standards & (c) International Standards: s. 8.
- **Second**, within and beyond C92, Indigenous, federal and provincial laws & powers.
- **Third**, within and beyond C92, Indigenous laws, state laws, and international law.

The braid metaphor reframes the existence of multiple legal orders & jurisdictions (federalism) from a source of conflict or risk, to a source of strength, *if focused on a common goal*.



UNDERSTANDING INHERENT JURISDICTION

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- The SCC stresses that one of the goals of C92 is educational, to promote a cultural change in Canada toward “respect for and reconciliation with” Indigenous peoples: para. 81
- The existence of Indigenous and state laws in Canada is referred to matter-a-factly: e.g. paras. 7; 90.
- However, C92 does not *give* jurisdiction, it recognizes and affirms it.
- Indigenous peoples’ laws and jurisdiction for child and family wellbeing exist now, and always have existed.
- The roots of Indigenous laws today are Indigenous inherent jurisdiction, Indigenous legal traditions, and thousands of years of successful social ordering, as part of whole functioning societies.
- The “wrongly employed” assimilation policies of state law makers have caused harm and damage, that still requires amelioration and rebuilding.

Ways to exercise & respect Laws, Rights and Jurisdiction

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Indigenous Legislation

National Standards

Duty to Consult & Accommodate

Starting Point: Always ask: What does the Child's IGB say? What are the applicable laws?

Does the child's IGB have their own legislation? Check [Canada website](#) If **yes**, start with the requirements from the Indigenous legislation.

Starting Point: Always ask: What does Child's IGB say?
In addition to the s. 12(1) **requirement of notice and representation**, inquiry into the child's IGB's views as to what is in the child's best interests in the particular circumstances of each case may offer the best evidence of compliance with many **National Standards**

Starting Point: Always ask: What does the Child's IGB say?

SCC says Crown must act as *if* constitutional right exists, and act with **Honour of the Crown**.

Judicial Guide to C-92 - WHY & What?



Why?

- Judges in BC and Ontario requested it.
- Cases interpreting the Act in radically different ways.
- Judicial Care & Courage - i.e. The Honourable Justice Dave Hancock: “How do we do our work in a way that we are not complicit?”

What?

- Purposive approach to interpretation and application of the Act
- Focus on National Standards with room for encountering Indigenous legislation.
- Definitions, Jurisdiction and Applicability, Considerations, Encouraging Compliance, Remedies, Additional Resources.
- C-92 Summary Checklist (when ordering an apprehension or placement order).



Judicial Guide to C-92 - Highlights

- **Definitions:**
 - Significant Measures
 - Indigenous Governing Body
- **Indigenous Identity:**
 - Self-identification, status and non-status, on-reserve and off-reserve
- **Jurisdiction and Applicability:**
 - “related to Child and Family Services” - entering, exiting care,
 - PGO & beyond: consider s. 11 (impacts), s. 16(3) (reassessments) & s. 17 (attachment & emotional ties)
 - What IGBs & check for IGB legislation (ss.10-15 still apply)
 - Overlapping jurisdictions, double aspect
- **Notice and Representation (ss.12&13):**
 - IGBs, parents, care providers - inquiry into notice, representation
 - IGB best evidence for adequate information for child’s wellbeing (sections listed).



Judicial Guide to C-92 - Highlights

Guiding Principles:

- **NEW Best Interests Analysis: s. 9(1) & s. 10**
 - BIOC primary consideration BUT requires new analysis (not adding factors to provincial or applying past precedents)
 - “super-weights” child’s relationships & cultural connectedness
 - read with cultural continuity & substantive equality, not contrary to purposes of Act (ss.8(a)-(c)).
 - compare primary consideration & factors with BIOC in DA amendments
- **Cultural Continuity: s. 9(2)**
 - “essential to a child’s wellbeing,” support to understand this
- **Substantive Equality: s. 9(3)**
 - definitions, Jordan’s Principle provision: s. 9(3)(e)



Judicial Guide to C-92 - Highlights

- **Priority to Preventative Care:** s. 14(1)
- **Prenatal Care:** s. 14(2)
- **Socio-economic Conditions:** s. 15
- **Reasonable Efforts:** s. 15.1

For each section, explanation and then:

- Other sections of the Act to connect/apply to interpretation and application of these provisions, resources for better understanding new or unfamiliar concepts
- Questions Judges can ask in court applications to encourage compliance by CFS
- Considerations when making an order



Judicial Guide to C-92 - Highlights

- **Placement Priorities:** s. 15.1 & ss. 16(1), (2), (2.1)
- **Reassessment for Family Unity:** s. 16(3)
- **Promoting Attachment and Emotional Ties:** s. 17

For each section, explanation and then:

- Other sections of the Act to remember/connect to interpretation and application of these provisions
- Questions to encourage compliance by CFS
- Considerations when making an order
- Possibilities to include in orders, or in additional orders (e.g. regular reassessment dates, hyphenate Child's name rather than 'erase & replace', include access or contact order, cultural connection plan compliance).



Judicial Guide to C-92 - Highlights

- **Remedies:**

- Act is silent as to remedies
- BUT based on double aspect, so all provincial substantive, procedural and remedial laws apply.

- **Resources:** links to further resources to learn more about relevant topics, such as:

- The Act (National Standards and Indigenous Jurisdiction)
- Human Rights and Jurisdiction (Caring Society case, Jordan's Principle)
- Attachment Theory and Cultural Connectedness
- Best Practices to address Common Biases (Justice Walkem)



C92 Summary Checklist

Prior to Granting an Apprehension or Placement Order

Jurisdiction and Applicable Law

- Is the child Indigenous (First Nations, Inuit, Métis, status or non-status, on reserve or off-reserve, self-identified or identified through other means)?
- Is the matter related to CFS delivery (apprehension, entering care, leaving care etc.)
- Does the child's IGB have their own CFS legislation?

Notice and Representation

- Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from parents and/or care providers?
- Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from their IGB?

C92 Summary Checklist

Best Interests

Is your analysis of the child's best interests:

- A different analysis from an analysis under provincial legislation, considering the primary considerations, which super-weight the child's relationships with family and cultural connectedness?
- Taking into account the factors in s. 10(3).
- Congruent with principles of **cultural continuity**: 9(2) & **substantive equality**: 9(3)?
- Not contrary to the Act's purposes: s. 8(a)-(c)?

Prioritization of Preventative Care

- Do you have evidence that preventative care has been prioritized prior to granting an apprehension order?
 - Has CFS actively provided support and made reasonable efforts for the child to stay in the home of a parent or family member?
 - Do the grounds for apprehension include socio-economic conditions, including poverty, lack of adequate housing or infrastructure, or parent or care provider's health? If so, can an order to address these be made instead?



C92 Summary Checklist

Placement Priorities

- Do you have evidence that CFS has investigated all priority placements and the child is being placed in the highest priority placement possible?

Promoting Attachment and Emotional Ties

- Has there been adequate time and consultation for promoting attachments and emotional ties, regardless of placement, until the age of majority?

Promoting Attachments and Emotional Ties included in Order.

- A way to promote attachment and emotional ties (e.g. access or contact order; order to incorporate cultural preservation plan)? s. 16(3)

Reassessment for Family Unity taken into account in Order

- Regular ongoing reassessment dates for family unity s. 17 and evaluating the impacts of delivery of services: s. 11 to the age of majority.

CHILDREN AS THE HEART OF LAW AND JUSTICE

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- A common goal of Indigenous children's wellbeing
- Promoting a culture of respect for and reconciliation with Indigenous peoples
- Continuous transformation of relationships
- Braided legal orders= a single strong rope
- Abundance and hope

Thank you

Please contact for further information:

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Check out our wahkohtowin [website](https://www.ualberta.ca/wahkohtowin/index.html)
(<https://www.ualberta.ca/wahkohtowin/index.html>) for more
resources.

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