

INFORMATION BULLETIN March 2018

COMMUNITY SAFETY PLANNING IN INDIGENOUS COMMUNITIES

INTRODUCTION

Many risk identification, safety planning, and information sharing frameworks assume homogeneity amongst women¹ who have experienced violence in their relationships, describing how risk and safety may be addressed for *all* abused women. These frameworks rarely specify in a systematic way how risk and safety considerations might differ depending on the social location of the woman who is at risk.

This Information Bulletin has been created to provide a more nuanced approach, addressing risk factors and safety considerations specific to Indigenous² women. The goal is not to categorize a woman's experience based on her Indigeneity; rather, it is to broaden the approach to safety planning by including more specific considerations relevant to each Indigenous woman's individual context. This document is intended to provide a more specific range of risk factors and approaches to safety planning to help service providers better meet the needs of Indigenous women, while also appreciating that no woman's experience is universal and that there is significant diversity that exists within and between Indigenous communities.³

This document also seeks to acknowledge Indigenous women's agency, authority, capacity, and right to self-determination when it comes to making decisions about herself and her family.

¹ The vast majority of serious violence within intimate relationships is perpetrated against women by their male partners: Sinha, Maire. 2010. Family Violence in Canada: A statistical profile, 2010. Statistics Canada <https://www.statcan.gc.ca/pub/85-002-x/2012001/article/11643-eng.htm>. In 2010 in Canada, the rate of violence against women in intimate relationships was nearly four times higher than that for men, for both spousal and dating partner relationships (Sinha, 2010). For this reason, in this document we refer to the victims of this crime as women and use the female pronoun throughout. Referring to victims/survivors of violence in relationships as female and perpetrators as male is not intended to imply that men are not also sometimes victims of VAWIR, either in heterosexual or same-sex relationships, or that women are not sometimes the perpetrators.

² "Indigenous" is used to include First Nations, Métis and Inuit peoples.

³ Much of the information relating to identifying risk factors and safety planning actions in this Information Bulletin originally appeared in the 2013 Ending Violence Association of BC *Safety Planning Across Culture and Community* document section titled Risk Identification and Safety Planning with Aboriginal Women, by Beverly Jacobs. That document also contains a great deal of information on risk identification and safety planning for women, generally. This document is intended to be read in conjunction with that document, and to supplement the information contained in the Community Coordination for Women's Safety (CCWS) document titled *Increasing Safety for Aboriginal Women: Key Themes and Resources*, May 2011. These documents can be accessed at <http://endingviolence.org/research-publications/>

BACKGROUND AND SOCIAL CONTEXT

Indigenous women are at a significantly higher risk of experiencing VAWIR⁴ as compared to non-Indigenous women. While general approaches to the safety planning process will be useful, there are also culturally-specific considerations that will be important to acknowledge and address when working with Indigenous women. The Royal Commission on Aboriginal Peoples (“RCAP”) noted that:

While family violence experienced by Aboriginal people shares many features with violence in mainstream society, it also has a distinctive face that is important to recognize as we search for understanding of causes and identify solutions.⁵

More recently, the Legal Strategy Coalition on Violence Against Indigenous Women, a coalition of groups and individuals with interdisciplinary expertise on issues impacting Indigenous women, in its review of 58 reports by international human rights bodies, Indigenous women’s organizations, and governments dealing with aspects of violence and discrimination against Indigenous women and girls spanning the course of twenty years, found that:

There is considerable agreement...about the root causes of violence against Indigenous women. Many reports stress that the economic and social marginalization of Indigenous women makes them more susceptible to violence and less able to escape violent circumstances.

...the poverty and discrimination experienced by Indigenous women is the product of continuing racism and sexism in Canada that excludes and devalues Indigenous women. The historical context of this violence, and in particular the legacies of colonialism, the residential school system, and discriminatory Canadian laws such as the *Indian Act*, continue to adversely impact the wellbeing of Indigenous women and girls.⁶

Risk factors and safety planning needs will depend on a woman’s personal history of violence, both within her family and within society. When considering the issue of VAWIR in the context of Indigenous peoples, it is critical to keep in mind that:

- perceived failures in family functioning can be traced, in many cases, to Canada’s colonial history and to a history of deliberate state intervention into Indigenous families; and

⁴ Many terms are used to describe a pattern of physical and sexual violence and other forms of abuse against a current or former intimate partner in heterosexual and same-sex relationships. For the purposes of this Information Bulletin, “VAWIR” or “Violence Against Women in Relationships” is used to be consistent with the current cross sector policy in BC. Other commonly used terms that may be included from other research and policies include “domestic violence” “spousal violence”, “spousal abuse”, “spouse assault”, “intimate partner violence” and “relationship violence”. Additionally, many Indigenous people are discussing terms that more accurately describe the root cause of this and other forms of violence in Indigenous communities such as “colonial violence”.

⁵ Royal Commission on Aboriginal Peoples. 1996. The Royal Commission Report on Aboriginal Peoples. <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

⁶ Pippa Feinstein and Megan Pearce. 2015. Violence against Indigenous women and girls in Canada: review of reports and recommendations – Executive Summary. February 26, 2015. <http://www.leaf.ca/wp-content/uploads/2015/02/Executive-Summary.pdf>.

- violence within Indigenous communities is fostered and sustained by a racist and sexist social environment that promulgates demeaning stereotypes of Indigenous women and seeks to diminish their value as human beings and their right to be treated with dignity.

It is crucial to understand and seek to address the impacts of colonization on an Indigenous woman’s sense of identity, belonging, and self-worth. When safety planning, solutions should be made with the woman’s Indigenous community and efforts should be made to involve Elders and other traditional knowledge holders who are knowledgeable about the dynamics of violence and committed to gender equality.⁷ Safety planning solutions should holistically strive to address the mental, emotional, spiritual, and physical needs of the individual, family, and community. Such a holistic approach requires advocates to move beyond short-term crisis intervention with Indigenous women and their children. Where possible, opportunities should be provided for ceremony and traditional practices.⁸ Indigenous male perpetrators must be involved in family violence prevention processes.⁹ In many First Nations communities, a return to wellness requires the use of traditional healing methods combined with the use of mainstream approaches.¹⁰

RISK FACTOR IDENTIFICATION AND SAFETY PLANNING ACTIONS

In many ways, safety planning with Indigenous women is no different than safety planning with non-Indigenous women. However, the following questions and actions will help you identify particular risk factors and culturally-specific actions you may aid her in taking to engage in effective safety planning with Indigenous women.

QUESTIONS	ACTIONS YOU CAN SUGGEST OR HELP HER TO TAKE
Development of Personal and Cultural Safety	
<p>Importance of relationship between service provider and Indigenous client.</p> <p>Does she understand the impacts of intergenerational trauma?</p> <p>What is her own cultural competency (<i>i.e.</i> knowledge of</p>	<p>Consider how you can develop trust with her and allow necessary time to do so. Work to create a comfortable, non-judgmental atmosphere, ensuring a safe environment. This includes ensuring a culturally safe environment.</p> <p>This could be an opportunity to talk to her about the impacts of colonialism. Useful questions could include:</p> <ul style="list-style-type: none"> • Is she or he (the perpetrator) a survivor of the residential school system?

⁷ Native Women’s Association of Canada: Culturally Relevant Gender Based Models of Reconciliation. March 2010. <https://www.nwac.ca/wp-content/uploads/2015/05/2010-NWAC-Culturally-Relevant-Gender-Based-Models-of-Reconciliation.pdf>.

⁸ Ibid.

⁹ Aboriginal Justice Implementation Commission Final Report, June 27, 2001. http://www.ajic.mb.ca/reports/final_toc.html.

¹⁰ Manon Lamontagne, Violence Against Aboriginal Women: Scan and Report. Canadian Women’s Foundation. January 31, 2011. https://www.canadianwomen.org/wp-content/uploads/2017/09/PDF-VP-Resources-Lamontagne_CWF_Aboriginal-Women_Final_2011.pdf.

QUESTIONS	ACTIONS YOU CAN SUGGEST OR HELP HER TO TAKE
<p>her culture, traditional knowledge, etc.)?</p> <p>Does she have a strong connection to her First Nation/Metis/Inuit community?</p> <p>Is her First Nations/Metis/Inuit language her first language?</p> <p>Is this her first time accessing social services?</p>	<ul style="list-style-type: none"> • Was she (or he) fostered or adopted out? • Did her (or his) parents/grandparents/great grandparents attend residential school? Were they fostered or adopted out?
Victim/Survivor Safety Factors	
<p>Does she live on reserve? Does she live in a geographically isolated area?</p> <p>Does she have a vehicle? Does she have another means of transportation?</p> <p>Does she have children in the home? Are these the perpetrator's biological or step-children?</p> <p>Is she pregnant? Has she just given birth?</p> <p>Is the Ministry of Children and Family Development (MCFD) or a Delegated Aboriginal Agency (DAA) involved?</p>	<p>If she lives on reserve, you should explore with her any options that she may not already have considered, such as housing support and support from band services, as well as additional risks associated with living on reserve, such as possible divided loyalties because of living in such a close-knit community, living in his community, or everyone being aware of the location of a safe shelter.</p> <p>If she lives in a geographically isolated area, talk with her about how she has accessed services in the past and how she might be able to access assistance in an emergency and in the longer-term.</p> <p>Discuss with her the reality that if she is pregnant or has just given birth, this is an especially high risk time for her. Pregnant Indigenous women are at a greater risk of violence than non-Indigenous women. If it does not already, her safety plan should address these specific risk factors.</p> <p>Discuss with her the fact that domestic violence and child abuse often occur in the same family. Let her know that threatening, stalking, or criminally harassing the children may be part of a pattern of abuse or controlling behaviour towards her or towards the children. Threats of harming or kidnapping the children should be taken seriously. Discuss the fact that the risks may be even greater if her children are not the biological children of the abuser. Talk with her about the possible adverse effects on children of child abuse or of children's exposure to domestic violence. If there is a Prevention, Education, Counselling, Advocacy, and Empowerment (PEACE) program in your community,</p>

QUESTIONS	ACTIONS YOU CAN SUGGEST OR HELP HER TO TAKE
<p>What are the potential financial consequences of leaving for your client? Is she dependent on the perpetrator for financial support? Is she financially literate? Does she have budgeting skills?</p> <p>What is her employment situation? Does she have employment skills training? Does she have job search skills training?</p>	<p>you should tell her about the role and benefits of these programs and offer to refer her.</p> <p>If she has not done so already, she should develop a separate safety plan for the children and review that plan with them on a regular basis. If you are not an expert in safety planning for children, you may want to connect with a child-specific service to help her with this plan, such as a CWWA program or child protection services.</p> <p>Many Indigenous mothers are fearful of losing custody of their children to social service agencies. Ensure that she understands your (and her) duty to report to the Ministry of Child and Family Development (MCFD) or Delegated Aboriginal Agency if you (or she) believes that her children may be in need of protection. If she acknowledges that her children are in need of protection or if you believe that the children are in need of protection, but she does not want to report to MCFD/DAA, discuss with her why this is important, explore ways in which you can support her in making this report, and tell her about your own legal obligations to report. If you have to make a report against her wishes, you will have to use all your support and diplomacy skills to assure her of your continued respect and support and to remain in a position to help her. If necessary, refer her to another worker for continuing support.</p> <p>The potential financial consequences of leaving may play a part in many Indigenous women's responses to male violence. Will she lose her home or income as a result of leaving? Who controls the finances? Does she have access to options, information, and resources?¹¹</p>
Her Perceptions of Present Violence	
Does she understand his behavior as abuse/violence?	If she minimizes the violence or the level of risk or does not see his behavior as abuse or violence, discuss

¹¹ Note that income assistance on reserve is managed through the Band Office. If a woman has been receiving income assistance on reserve and then moves off reserve, she will have to re-apply for benefits at a Ministry of Social Development and Poverty Reduction (MSDPR) office. For more information see <http://aboriginal.legalaid.bc.ca/resources/pdfs/pubs/Income-Assistance-on-Reserve-in-British-Columbia-eng.pdf>

QUESTIONS	ACTIONS YOU CAN SUGGEST OR HELP HER TO TAKE
<p>Is she aware of the different types of abuse (<i>ie</i> spiritual, emotional, physical, mental, sexual)</p> <p>Can an Elder/Traditional Knowledge Holder assist her with learning traditional knowledge of balanced healthy relationships?</p> <p>Does she believe violence in relationships is normal?</p> <p>What is her level of fear? Is she afraid for her children or for others? Is she afraid for her entire family?</p> <p>Have extended family or community members intervened? Have men the community confronted the perpetrator? Do men in the community plan to do so?</p> <p>What consequences do abusers face in the community? Is there fear or stigma within the community around speaking out against violence?</p>	<p>with her the nature and dynamics of violence against women in relationships. If it is safe to do so, leave with her other materials, books, or videos about the nature and dynamics of violence against women in relationships. If it is not safe to leave such material with her, discuss ways in which she could look at such materials. Share with her the experiences of other women who have been in similar situations.</p> <p>If she understands her risks, work with her to address each aspect of her circumstances in your safety planning. If she fears for the safety of her children or others, be sure to include children or others for whom she fears in her safety planning. Many Indigenous mothers are fearful of losing custody of their children to social service agencies.</p> <p>If extended family or her community are not supportive or are actively putting pressure on her to stay with or return to the abuser or not involve the authorities, discuss with her what steps she has already taken, further options, and how you can help. For example, there are Indigenous-specific programs that may also be able to provide her with understanding and support. You can help her access these services by making proactive referrals. In these situations, be aware that if information is inadvertently disclosed with unsupportive or potentially hostile community members, this may put the woman and her children at greater risk.</p>
Current Status of the Relationship	
<p>Does she live with the perpetrator? Does she live on reserve? Is she married (common law or legally) to the perpetrator?</p> <p>Is she considering separation? Has she considered leaving the community?</p> <p>Where is her family? Does she have a support network?</p> <p>Has he threatened to kill her?</p>	<p>Many Indigenous women who live on reserve move to their husband's reserve. She may be reluctant to leave because doing so may mean losing her home.</p> <p>In some highest risk cases, women have chosen to change their identities and relocate. This will likely not be an option for many Indigenous women who are strongly connected to their families and communities. The connection to family and community must be taken into consideration when safety planning. Given that separation and the six months following are the most dangerous period, she will need a plan and supports in place.</p>

QUESTIONS	ACTIONS YOU CAN SUGGEST OR HELP HER TO TAKE
<p>Has she reported to police?</p> <p>Are there protection orders¹² or no contact bail conditions in place?</p>	<p>There is a history of distrust of policing and other authorities within most Indigenous communities. This issue must be taken into consideration and respected when addressing questions around an Indigenous woman's decisions to report or interact with police or other authorities.</p> <p>On reserve, some Indigenous women feel that police may be reluctant to remove the man from the scene or to charge the male perpetrator. Many Indigenous women do not report violence because of consistent patterns of discrimination towards Indigenous women within the justice system.</p> <p>In smaller reserves and isolated northern settlements, distance makes the enforcement of protection orders or bail conditions difficult. Indigenous women may feel that she will have to be the one to leave in order to maintain her safety.</p>

¹² Note that women living on reserve may obtain an Emergency Protection Order pursuant to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA). Such an order may contain provisions granting the applicant exclusive occupation of the family home (regardless of whether the applicant is a member of the First Nation); requiring the applicant's spouse and other specified occupants to vacate the family home immediately or within a specified time period and prohibiting them from re-entering; and providing instructions to a Peace Officer to remove a person and keep the person away from the home. The FHRMIRA does not apply to anyone living on a First Nation that has its own matrimonial real property laws, has a self-government agreement, or has a land code in place under the *First Nations Land Management Act*. Indigenous and Northern Affairs Canada (INAC) maintains lists of First Nations that have enacted their own matrimonial real property laws, have self-government agreements, and have land codes in place. These lists are available on the INAC website.

PRIVACY AND INFORMATION SHARING¹³

In response to situations of VAWIR and sexual assault it can be helpful and sometimes necessary to share information across various sectors to keep victims/survivors, their children, and the public safe. The following section is intended to assist first responders from the justice, health, child protection, and other social service sectors within and outside of Indigenous communities in British Columbia in navigating complex questions related to privacy, information sharing, and risk management to enhance coordinated responses to VAWIR and sexual assault in Indigenous communities on- and off-reserve.

Included here is information on privacy laws, information sharing practices, and some guiding principles relating to the collection, use, and disclosure of personal information across sectors. These are meant to ensure that local information sharing practices:

- (a) help maximize safety for women and children; and
- (b) are consistent with federal, provincial, and, where relevant, Indigenous laws relating to privacy and information sharing.

Benefits of Information Sharing

By sharing relevant risk and safety-related information across criminal justice, child welfare, health, and anti-violence sectors, service providers are capable of building a much stronger, more coordinated safety net for victims/survivors and their children who may be in danger.

Victim/survivor advocates will likely already know the risk factors associated with an increased chance of further violence in situations of VAWIR. All responders, whether they are based in systems or in the community, must make themselves aware of the safety implications of certain risk factors and use validated approaches to analyze the risk. The presence of certain risk factors or combinations of risk factors will result in the need for a more proactive approach to information sharing and risk management in a particular case.

In many communities, the table at which highest risk VAWIR information is shared across sectors will be that of the Interagency Case Assessment Team (ICAT). Depending on the community, most ICATs will include members from police, Community Corrections, and community and/or police-based victim services. Where available, standing members of the ICAT may also include representatives from Transition Houses, Stopping the Violence Counselling and/or Outreach Programs, Mental Health, Substance misuse programs, Income Assistance (MSDPR), hospitals, clinics or physicians' offices, settlement programs, parole, PEACE programs, schools, and employee assistance programs. Within Indigenous communities (or within communities with significant Indigenous populations) efforts should be made to include representatives or service providers from Indigenous community organizations.¹⁴

¹³ The Privacy and Information Sharing segments of this document have been adapted from "Guiding Principles: Privacy & Information Sharing in Cases of Sexual Abuse & Assault" by Gisela Ruebsaat, May 2017. See also: *Disclosing Information in Woman Abuse Cases: Guiding Principles*, December 1, 2016: <http://endingviolence.org/publications/disclosing-information-in-woman-abuse-cases-guiding-principles/> and the ICAT Best Practices Manual 2.0, June 2017 (please email ccws@endingviolence.org to request this document).

¹⁴ See *Increasing Safety for Aboriginal Women: Key Themes and Resources*, May 2011 at page 5 for a non-exhaustive list of the types of services and workers that may be appropriate for inclusion on ICATs.

Sharing Personal Information for a Coordinated Response to VAWIR and Sexual Violence: Steps to Follow

1. Seek Consent to Disclose Personal Information (Where Practical)

If it is possible and safe to do so, anyone in possession of personal information should attempt to obtain written or verbal consent to share that information from the individual whose information you are seeking to share. All federal and provincial privacy legislation authorizes disclosure of personal information where the individual has provided consent.

2. Overarching Principle: Life Trumps Privacy

In VAWIR cases flagged as potentially high risk, it may be necessary to pro-actively share key details of a case to keep the survivor/victim, their children, and/or any other individual or group of individuals safe. Sometimes, it may not be practical or safe to obtain consent before sharing information and sometimes it may be necessary to share personal information about an individual without that individual's consent.

Legal commentary regarding privacy legislation has stated that the threat to life trumps privacy. Although federal and provincial privacy laws generally prohibit the use or disclosure of anyone's personal information other than

- (a) for the purposes identified when the information was collected, or
- (b) with the individual's consent to use or disclose the information

each privacy law contains express exceptions which allow for the disclosure of personal information without consent where compelling circumstances exist that affect anyone's health or safety¹⁵ or the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure or disclosure would clearly benefit the individual to whom the information relates.¹⁶

When considering whether sharing information without consent is appropriate in any given situation, the overarching principle to keep in mind is that "life trumps privacy".

3. Identify Legal Authority to Share Information Without Consent

Where it is impractical, unsafe, or you are unable to obtain consent before sharing information, it is necessary for each individual to know their legal authority for sharing information without consent. The privacy legislation that applies to the collection, use, or disclosure of anyone's personal information will depend on which type of agency you work for or are funded by.

Individuals should be aware that others with whom you may be sharing information may be subject to different privacy laws than the laws governing your agency or program. Each individual who collects, uses, or discloses any person's personal information should be aware of whether they are governed by federal or provincial privacy legislation.

¹⁵ FOIPPA: s. 33.1(1)(m)(i) and (ii); PIPA s. 18(1)(k)

¹⁶ *Privacy Act*: s. 8(2)(m)(i) and (ii).

If you are part of a federal agency such as RCMP or Federal Corrections

The federal *Privacy Act* governs RCMP and other federal bodies, including Indigenous and Northern Affairs Canada and the Correctional Service of Canada.

The *Privacy Act* allows personal information to be disclosed without consent in certain situations including, but not limited to, the following:

- (a) For the purpose for which the personal information was obtained or compiled or for a use consistent with that purpose: s. 8(2)(a).
- (b) Under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province... or any institution of such government, for the purpose of administering or enforcing any law or carrying out a lawful investigation. Section 8(2)(f) works in conjunction with the 1983 Canada-British Columbia Agreement on Disclosure of Personal Information: s. 8(2)(f).
- (c) Where in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that would result from disclosure or disclosure would clearly benefit the individual to whom the information relates: s. 8(2)(m)(i) and (ii).¹⁷

If you are part of a provincial public body such as Municipal Police, Community Corrections, a Provincial Health Authority, or MCFD or a Delegated Aboriginal Agency (DAA).

The BC *Freedom of Information and Protection of Privacy Act* (FOIPPA) governs provincial public bodies (*ie* system-based responders such as municipal police, community corrections, employees of government ministries and other provincial Health Authorities).

The FOIPPA authorizes provincial workers/service providers to disclose personal information without consent within Canada:

- (a) If the head of the public body determines that compelling circumstances exist that affect anyone's health or safety, and notice of disclosure is mailed to the last known address of the individual the information is about, unless the head of the public body considers that giving this notice could harm someone's health or safety: s. 33.1(1)(m)(i) and (ii).¹⁸
- (b) For the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur: s. 33.1(1)(m.1).
- (c) For the purpose for which it was obtained or for a use consistent with that purpose: s. 33.2(a).

¹⁷ Section 8(5) of the *Privacy Act* requires that if personal information is disclosed under section 8(2)(m), the head of the government institution must notify the federal Privacy Commissioner prior to any disclosure where reasonably practicable or in any other case forthwith on the disclosure. In urgent cases where this subsection is being used, the federal institution can release the information and notify the federal Privacy Commissioner as soon as possible after the release.

¹⁸ Compelling circumstances exist where there is a necessity to act to avert imminent danger to someone's health or safety or to protect someone's health or safety.

- (d) To an officer or employee of a public body or to a minister if the information is necessary for the performance of their duties: s. 33.2(c).
- (e) To an officer or employee of a public body or agency ... if the information is necessary for the delivery of a common integrated program or activity: s. 33.2(d).
- (f) To a public body or a law enforcement agency in Canada to assist in an investigation with a view towards a law enforcement proceeding or from which a law enforcement proceeding is likely to result: s. 33.2(i).

Provincial public bodies should also be aware that the FOIPPA *requires* public disclosure of information about a risk of significant harm to the health or safety of the public or a group of people: s. 25.

If you are part of a non-government organization, including a non-profit organization, First Nations Health Authority, or a First Nations organization or service provider:

The BC *Personal Information Protection Act* (PIPA) governs most non-government/private sector organizations, including most community-based anti-violence (or other support service) workers.¹⁹

PIPA authorizes disclosure of personal information in the following circumstances:

- (a) The disclosure is in the interests of the individual and consent cannot be obtained in a timely way: s. 18(1)(a).
- (b) The disclosure with consent would compromise an investigation or proceeding and disclosure is reasonable: s. 18(1)(c).
- (c) The disclosure is to a public body or law enforcement agency in Canada to assist in an investigation or in the making of a decision to undertake an investigation: s. 18(1)(j)
- (d) There are reasonable grounds to believe that compelling circumstances exist that affect the health or safety of any individual and notice is sent to the last known address of the individual to whom the personal information relates: s. 18(1)(k).

Also, PIPA allows an organization to disclose personal information to another organization without consent if the individual consented to the original collection and the personal information is disclosed to the other organization solely for the purposes for which the information was originally collected; and to assist the other organization to carry out work on behalf of the first organization: s. 18(2).

¹⁹ Individuals should look to the wording of their funding contracts for additional guidance in determining which privacy law will apply. Some community-based programs may be governed by the FOIPPA if contract wording suggests that program records are under the custody and control of a provincial government ministry.

Privacy Law on Reserve: Jurisdictional Questions and Unique Context

We would like to note the unique legal landscape that exists for First Nation organizations operating on reserve. Some activities of Bands, as “federal works, undertakings, or businesses” created by the *Indian Act*, will be subject to the federal private-sector privacy legislation, called the *Personal Information Protection and Electronic Documents Act* (PIPEDA). In some cases, the collection, use, and disclosure of personal information by organizations that are created by a Band/Band Council may also be governed by the PIPEDA. The determination of whether PIPEDA versus PIPA applies to an activity undertaken by a Band/other First Nation organization must be done on a case-by-case basis, using a multi-staged legal test.

If you are a member of a Band Council, employed by a Band, or employed by an organization created by a Band, and the activity you are undertaking is:

- (a) a core activity of the Band (essentially, pertaining to governance and the administration of that governance), and
- (b) an activity could be said to be a commercial activity

then the PIPEDA may apply to you.²⁰ Where an activity is not a “core” activity (*ie* pertaining to governance and administration of governance), then it will likely be subject to PIPA.²¹

Another unique situation exists where a First Nation has enacted its own privacy legislation under a treaty or the exercise of First Nations’ inherent jurisdiction. Where such legislation exists, it may supersede federal and provincial privacy laws.²²

²⁰ The PIPEDA allows a disclosure without an individual’s knowledge or consent “to a person who needs the information because of an emergency that threatens the life, health or security of an individual” (PIPEDA: s. 7(3)(e)).

²¹ If you are unclear about which legislation applies to you, you may call the Privacy and Access Helpline of the Office of the Information and Privacy Commissioner for BC at 250.356.1851 or the Information Centre of the Office of the Privacy Commissioner of Canada at 1.800.282.1376, or speak to your Band’s legal counsel or another experienced legal advisor.

²² To determine whether a First Nation has passed its own privacy legislation, you should contact the Band office or in-house legal counsel for the particular First Nation in question.

If you are a child protection worker with MCFD or a DAA:

The BC *Child, Family, and Community Service Act* (CFCSA) requires anyone who has a reason to believe that a child is in need of protection to report their concerns to a child protection worker.²³ Child protection workers with the Ministry of Children and Family Development (MCFD) and Delegated Aboriginal Agencies (DAAs) are governed by both the CFCSA and the FOIPPA.²⁴ It should be noted that s. 74 of the CFCSA contains a provision that expressly overrides the FOIPPA in relation to sections 74 to 79 of the CFCSA.

The CFCSA provides the following:

- (a) The director²⁵ may, without consent, disclose any information if the disclosure is necessary to ensure the safety or wellbeing of a child or the safety of a person other than a child: s. 79(a) and (a.1).
- (b) The director may disclose personal information for the purpose of reducing risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur: s. 74(2)(e)(iv).

Sections 74 to 79 of the CFCSA apply despite the FOIPPA. Where an MCFD or DAA social worker is not a designated director, then they will be guided by the FOIPPA authority to disclose (see above).²⁶

Collection of Personal Information

When personal information is shared between service providers across sectors for the purposes of risk identification and safety planning, the information received from an information sharing partner is considered to be a “collection” from a third party, or “indirect collection” under applicable privacy laws. Federal and provincial privacy legislation permits the collection of personal information for the purposes of protecting individuals or the public.²⁷

²³ CFCSA s. 13 and 14.

²⁴ Indigenous groups may have treaties, Band bylaws, or intergovernmental agreements that influence the interpretation or implementation of the CFCSA respecting their child members. Two such examples are found in the Tsawwassen First Nation’s child welfare legislation and the Splat-sin Child Welfare Bylaw:

- Tsawwassen First Nation has passed the *Tsawwassen First Nation 2009 Children and Families Act*, pursuant to its treaty, which occupies the child welfare jurisdiction on Tsawwassen Lands. The Tsawwassen First Nation 2009 Children and Families Act (TFNCFA) adopts the CFCSA in respect of child protection services on Tsawwassen Lands and delegates its child protection powers, duties, and functions for child protection services on Tsawwassen Lands to MCFD. Section 13 of the TFNCFA requires anyone who has reason to believe that a child on Tsawwassen Lands needs protection in accordance with the CFCSA to the Tsawwassen First Nation Children and Family Services Manager (or delegate) or an MCFD director.
- Splat-sin First Nation has taken control of child protection jurisdiction over their child members on and off reserve through a s. 81 *Indian Act* bylaw titled Spallumcheen (Splat-sin) “A By-law for the care of Our Indian Children” (Bylaw #3-1980). According to this bylaw, the CFCSA has no jurisdiction over Splat-sin child welfare.

²⁵ The “director” is designated by the Minister of Children and Family Development for the purposes of administering the CFCSA.

²⁶ The CFCSA s. 24 also permits a person to disclose information obtained in a family conference, mediation, or other alternative mechanism if the disclosure is necessary for a child’s safety or for the safety of a person other than a child.

²⁷ See the ICAT Best Practices Manual 2.0, June 2017: pages 20 and 21.

What about community leaders such as Elders, hereditary chiefs, or matriarchs?

Some Indigenous communities are currently in the process of exploring ways of incorporating traditional systems and leadership in the ICAT process and within coordination initiatives generally. This goal is significant for Indigenous communities given that historically, before contact, leaders such as the matriarchs would have guided key processes within their community and would have directed traditional responses from others in the community to provide support and accountability.

While privacy legislation does not preclude the involvement of individuals who are not employed as system responders to domestic violence and sexual assault, the question of whether traditional community leaders may be included as standing members or otherwise involved in the ICAT process raises a number of issues that may need to be worked out on a community-by-community or even case-by-case basis. Some of these issues may include:

- Does the community leader have personal relationships with the victim/survivor, perpetrator, either of their families, other members of the community, or other affiliations that may affect their decision-making at the ICAT table?

This concern may be more or less relevant depending on the size of the community and the community's approach towards addressing violence in relationships.

- Does the community leader otherwise understand and agree to keep confidential any personal information that may be disclosed during ICAT meetings?

This concern could be addressed by having the community leader sign the standard Affirmation of Confidentiality form.²⁸

- Do the other standing members of the ICAT agree that disclosing information to the community leader is authorized by their organization's guiding privacy legislation and policy?

Some system/institutional actors have cultures of information sharing that may be more or less open to the inclusion of non-system responders such as community leaders at the ICAT table. Discussions may need to take place between all members of the ICAT to ensure that all members are in agreement regarding the appropriateness of including community leaders at the ICAT table?²⁹

Other procedural safeguards that could be explored in order to facilitate traditional community leader participation in ICATs or other coordination initiatives could involve:

²⁸ See standard ICAT Affirmation of Confidentiality form, ICAT Best Practices Manual 2.0, June 2017, at page 59.

²⁹ See pages 9 to 12 of this document for specific provisions that provide legislative authority for sharing information. It should be noted, however, that some system responders may be guided by policies or other directives that may be interpreted more narrowly than the privacy legislation referenced in this document.

- a) identifying criteria for cases where the participation of a traditional community leader in a case conference would be appropriate and applying this criteria on a case by case basis; and/or
- b) making a determination that a community leader may only be involved in a case conference where the victim/survivor has given her informed, written consent in advance.

4. Procedural Best Practices When Sharing Personal Information

- Decisions to disclose personal information should be made on a case-by-case basis.
- If possible and if safe to do so, make every effort to obtain the survivor/victim's consent before disclosing personal information about her. A decision to disclose survivor/victim's information without consent should only be made in situations where the survivor/victim or anyone else is at imminent risk of serious harm.
- Only release information relevant to the health and safety concern in question.
- Designate someone in your agency who makes the decision.
- If time permits, have this person consult with a supervisor.
- Have the person authorizing the disclosure keep a confidential file containing a brief record of the disclosure decision.
- Work with information sharing partners to develop an agreement that outlines the process by which information will be shared, the use that will be made of information, how information will be stored and safely disposed. Incorporate this agreement into internal agency policy.
- When transmitting the information, make reference to the conditions of disclosure in the interagency information sharing agreement.
- Find a safe way to keep the survivor/victim informed.
- Where it is safe and appropriate provide notice of the disclosure to the survivor/victim by mailing a notice to her last known address.

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