



FACULTY OF LAW

LUND UNIVERSITY

Katla Ýr Sebastiansdóttir Peters

Realising Indigenous Children's  
Rights: Aligning the Principles of  
Self-Determination and the Best  
Interests of the Child  
The Case of Indigenous Peoples in Canada

JAMM07 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: Christine Evans

Term of graduation: Spring 2025

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## Summary

The historical legacy of colonialism worldwide has created challenges for Indigenous peoples, including racial discrimination and marginalization. This is reflected in, *inter alia*, the overrepresentation of Indigenous children in child welfare systems, even in countries performing comparably high in human right advancements otherwise. While there may be a broad spectrum of reasons for this issue, this thesis focuses on the problematic dissonance of two human rights principles in their application, the best interests of the child (BIOc) and Indigenous peoples' right to self-determination.

The BIOc principle includes that "*in all actions concerning children [...] the best interests of the child shall be a primary consideration.*", as stated in article 3 of the United Nations Convention on the Rights of the Child. However, the principle has been criticized for being interpreted from a culturally decontextualized perspective. This is based on an interpretation of the BIOc principle having been used as a justification for removing Indigenous children from their families and communities, which has resulted in, *inter alia*, cultural loss, loss of language, identity and family ties.

Meanwhile, Indigenous peoples' right to self-determination is stated in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. It is an overarching right and essential for Indigenous peoples to exercise all other rights of the Declaration. This includes the right of Indigenous peoples to develop their own social structure in accordance with their culture and traditions, and their right to self-governance.

The thesis argues that the BIOc principle has limited Indigenous peoples right to self-determination, because the application and decontextualized interpretation of the BIOc might not reflect the Indigenous communities' understanding and values. Consequently, the limitations of the right to self-determination have resulted in the BIOc not being applied in a way that truly reflects the Indigenous child's best interests and needs in their socio-cultural context.

Examining and discussing the interconnectedness of the BIOc and the right to self-determination, and how they can be aligned to enhance each other, is important for improving future legal practices. Researching Indigenous children's rights is not only important for understanding their current status, but also for determining how future legal frameworks can better protect Indigenous children's rights. With the purpose to contribute to that discussion, the thesis seeks to answer the research question: *how can the principles of BIOc and self-determination be aligned in law and in practice?* Aligning the principles in this case means highlighting bridges between the two principles that encourage collaboration and understanding. This could further provide a framework that allows them to not only coexist but to further enhance each other.

The thesis answers this question by applying doctrinal legal research, which is complemented by interdisciplinary research. The thesis thereby highlights how the two legal principles are interconnected and how they have limited each other's full potential, by analysing the legal framework of the principles as well as their social foundations. The thesis furthermore argues for aligning the two legal concepts and therefore takes a normative position.

To develop a more concrete understanding of the issue and to illustrate the problem in a relevant context, the thesis looks at the case of Canada. Canada has a long history of separating Indigenous children from their families and communities. This has not only affected the children themselves, but also their future generations. Indigenous children remain highly overrepresented in the Canadian child welfare systems. In response to this problem, and after years of strong Indigenous advocacy, the Canadian State implemented *An Act respecting First Nations, Inuit and Métis children, youth and families* in 2020. The Act provides Indigenous peoples the option of claiming jurisdiction over their child welfare systems. The thesis examines this Act and questions whether it presents a possible solution to aligning the BIoC principle with the right to self-determination.

The thesis concludes that to align the BIoC principle and the right to self-determination Indigenous communities should be able to claim jurisdiction over their own child welfare systems, in accordance with their own Indigenous laws. This would recognize their inherent right to self-determination and self-governance, as well as the BIoC principle being interpreted in a culturally appropriate way that aligns with the Indigenous child's best interests. Furthermore, the thesis concludes that the Act implemented by Canada is a milestone for Indigenous peoples. However, the Act still includes limitations to Indigenous peoples' ability to apply their own laws and allows non-Indigenous authorities to intervene, thereby it limits Indigenous peoples right to self-determination. This has a risk of ultimately perpetuating the status quo.

This thesis hopes to constructively contribute to ongoing discussions about Indigenous children's rights and explore alternative and improved pathways for future practices.

## Preface

This master thesis finds its inspiration from my third semester of this master program, where I had a class called *Human Rights and Remedies*. One of the assignments in the class was to write a written argument on remedies and transitional justice. Because of my interest in Indigenous peoples' rights, I chose to write about the Truth and Reconciliation Commission of Canada. The tragic history of Indigenous children being separated from their families and communities left me wanting to contribute to the discussion on the issue that still affect Indigenous children, families and communities today. Furthermore, my work at the Quality and Supervisory Authority of Welfare in Iceland, which among else, supervises Child protection services within Iceland, inspired me to write about children's rights. Working at the Authority has helped me understand the complexity of the issue.

I would like to express my gratitude to my supervisor, Christine Evans, for her valuable expertise, guidance and feedback. I would further like to thank my friends and family and for their support during my thesis writing and for patiently listening to my rants on the topic. I also want to acknowledge my fellow classmates and friends who were with me both mornings and evenings at the RWI library, you made this time very memorable. Finally, special thanks to my dad who showed great interest in the topic of this thesis and was always happy to discuss it with me.

## Abbreviations

|            |                                                                                        |
|------------|----------------------------------------------------------------------------------------|
| BIoC       | Best Interests of the Child                                                            |
| CERD       | Committee on the Elimination of Racial Discrimination                                  |
| CRC        | Committee on the Rights of the Child                                                   |
| EMRIP      | Expert Mechanisms on the Rights of Indigenous Peoples                                  |
| ICCPR      | International Covenant on Civil and Political Rights                                   |
| ICESCR     | International Covenant on Economic, Social and Cultural Rights                         |
| ILO 169    | International Labour Organization Convention No. 169                                   |
| IRSSA      | Indian Residential School Settlement Agreement                                         |
| The Act    | An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019 |
| UDHR       | Universal Declaration of Human Rights                                                  |
| UN         | United Nations                                                                         |
| UN Charter | Charter of the United Nations                                                          |
| UNCRC      | United Nations Convention on the Rights of the Child                                   |
| UNDRIP     | United Nations Declaration on the Rights of Indigenous Peoples                         |

# 1. Introduction

## 1.1. Issue in Focus

At the core of this thesis lies the assertion that children should be given special consideration as subjects of their own rights. In addition to having the same general human rights as adults they have specific rights, recognizing their special needs. The reason for these special safeguards is that children's views would otherwise often go unheard on many important issues that affect them. Short-sighted policymaking that fails to take children into account could affect them negatively both at present and in the future. Since children are still developing, they are especially vulnerable to poor living conditions and children's early experiences may influence their future development significantly.<sup>1</sup> Therefore, there is a need to pay special attention to children's rights and the realisation of these rights. In line with this argument, the concept of *the best interests of the child* (BIOc) represents a fundamental principle in children's rights, asserting that all decisions and rights concerning the child are to be made in the child's best interests.<sup>2</sup> This principle is enshrined in article 3 of the United Nations Convention on the Rights of the Child (UNCRC).<sup>3</sup>

While the principle of the BIOc applies to all children, this thesis focuses especially on Indigenous children, arguing that the indigenesness of these children exacerbates the vulnerable status they already have as children. Around the world, Indigenous peoples' human rights are regularly violated by state authorities, and they face structural discrimination and severe marginalization.<sup>4</sup> Thereby, Indigenous children face intersectional disadvantages, both due to their age and due to their Indigenous background. While this thesis focuses on Indigenous children's rights, it should be noted that there is no universally agreed definition of Indigenous peoples.<sup>5</sup> However, this study argues that many diverse Indigenous peoples have similar socio-political situations and experiences in common, regardless of possible socio-cultural differences between them. This will be explained in chapter 3 as well as throughout the thesis.

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<sup>1</sup> UNICEF, 'Child Rights and Why They Matter: Every Right, for Every Child' (*UNICEF | for every child*) <<https://www.unicef.org/child-rights-convention/child-rights-why-they-matter>> accessed 13 May 2025.

<sup>2</sup> CRC, 'General Comment No.14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)' (2013) UN Doc CRC/C/GC/14 para 4.

<sup>3</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

<sup>4</sup> EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples' (2021) UN Doc, A/HRC/48/74 para 2.

<sup>5</sup> Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014) 40.

A fundamental right of Indigenous peoples is their collective right to self-determination, stated in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>6</sup> This right entails Indigenous peoples' right to determine their political status and pursue their economic, social and cultural development and provides a fundamental foundation to all other human rights enshrined in the UNDRIP.<sup>7</sup> Furthermore, the UNDRIP specifically recognizes the right of Indigenous peoples to develop their own social structure in accordance with their culture and traditions.<sup>8</sup>

The concept of BIoC has been criticized for being deeply intertwined with European colonial ideology, which underlines formal equality and universality.<sup>9</sup> Indigenous child removal has a history of being justified on the grounds that European and Christian way of life is superior to the "savage" Indigenous cultures.<sup>10</sup> Furthermore, Indigenous peoples' right to self-determination has been ignored or limited, based on the justification that state authorities acted in their best interests. Such practice has endangered Indigenous people's existence.<sup>11</sup> Further, family and child protection services have employed non-Indigenous social workers who were working with families from cultures far different from their own understanding and knowledge about raising children.<sup>12</sup> This often resulted in families being torn apart based on the argument that this would be in line the BIoC principle.<sup>13</sup> It must be recognized that what is culturally acceptable for one society might be problematic in the views of another. Different factors and views are weighted when determining the BIoC, depending on who interprets the principle.

Nevertheless, the principle of the BIoC is integrated throughout the UNCRC which was developed by states and organisations from all around the world, with different perspectives and from different cultures.<sup>14</sup> Further, the Committee of the Rights of the Child (CRC) has recognized the importance of giving the cultural rights of the child weight when determining the BIoC, as well as their right to exercise such rights collectively.<sup>15</sup> This view provides

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<sup>6</sup> United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UNDRIP) art 3.

<sup>7</sup> *ibid.*

<sup>8</sup> UNDRIP preamble and art. 33.

<sup>9</sup> Marlee Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations' (1992) 30 Osgoode Hall Law Journal 390.

<sup>10</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015) 4.

<sup>11</sup> *ibid.* 209.

<sup>12</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy. The Final Report of the Truth and Reconciliation Commission of Canada' (2015) 5 14.

<sup>13</sup> *ibid.* 12.

<sup>14</sup> See OHCHR, 'Legislative History of the Convention on the Rights of the Child. Vol. 2' (United Nations 2007) 335–343.

<sup>15</sup> CRC, 'General Comment No 11: Indigenous Children and Their Rights under the Convention' (2009) UN Doc CRC/C/GC/11 31.

that the cultural background of an Indigenous child should be taken into account in any relevant assessment regarding an Indigenous child. However, another view is that the whole assessment should be done from an Indigenous perspective entirely. In other words, the assessment should be made through an Indigenous lens, rather than the child's indigenusness only being a factor in the assessment. Expanding the scope by highlighting different ways of interpreting and applying law, may contribute to a critical discussion about children's rights and their principles.

The thesis highlights the issue that these two fundamental concepts mentioned above, the BIoC and the right to self-determination, have a history of counteracting each other in their implementation. In other words, the principle of self-determination is recognized, as well as the right of Indigenous peoples to develop their own social structure in accordance with their culture and traditions. However, the right to self-determination could possibly be limited due to the obligation to meet the standards of the BIoC. This limitation stems from the assumption that there is a universal and culturally independent understanding of the BIoC principle.

## 1.2. Objective and Research Question

The purpose of this thesis is to make a contribution to debates about the dilemma between the principles of self-determination and BIoC counteracting each other. To achieve this, the thesis attempts to critically unpack the concept of the BIoC and the concept of self-determination, to understand in a more nuanced way how and why they are conflicting. This will allow an exploration of how the principles can be aligned better and their future application thereby improved. Aligning the principles in this case means, highlighting bridges between the two principles that encourage collaboration and understanding, which could further provide a framework that allows them to not only coexist but to further enhance each other.

The thesis argues that further research is needed for a better understanding of how and whether self-determination can be achieved by allowing Indigenous peoples to interpret their own children's rights. In response to this gap the thesis analyses the case of Canada. Critically discussing these concepts of the BIoC and self-determination through a concrete case can achieve a deeper and more nuanced understanding. The Canadian Constitution recognizes three groups of Indigenous peoples, First Nations, Métis and Inuit. In the Canadian Constitution Act 1982, section 35(2), these three Indigenous groups are defined as *Aboriginal peoples*.<sup>16</sup> However, the term "Indigenous", which is recognised in international law, has increasingly been replacing the term "Aboriginal". Domestically both terms are used.<sup>17</sup> In most Canadian national

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<sup>16</sup> Constitution Act, being Schedule B to the Canada Act (UK), 1982, c 11 s 35(2).

<sup>17</sup> Marie-Céline Charron, 'No Perfect Answer: Is It First Nations, Aboriginal or Indigenous?' (*National*, 6 March 2019) <<https://www.national.ca/en/perspectives/detail/no-perfect-answer-first-nations-aboriginal-indigenous/>> accessed 13 May 2025.

reports the term Aboriginal seems to be used, but recently implemented laws use the term Indigenous. Also, from views of Indigenous peoples, some refer to themselves as Indigenous and others as Aboriginal, others only use the specific name of their community. The thesis will use the term Indigenous when referring to contemporary discussions and legislation that adopt this language. However, the thesis will also use the term Aboriginal and the specific names of communities where they are used by the appropriate community, with respect for and in recognition of their identity.<sup>18</sup>

Canada is part of the history of forcibly removing Indigenous children from their families and communities. Still to this day, this history strongly affects the Indigenous population in Canada and is, for example, reflected in the overrepresentation of Indigenous children in the Canadian child welfare systems. Canada is an interesting case to examine because it also has a history of seeking reconciliation and of adopting measures to change systemic biases by recognising the suffering of Indigenous peoples in the country. Furthermore, in the attempt to tackle the overrepresentation of Indigenous children in the child welfare systems, and following advocacy by Indigenous peoples, in 2020 Canada adopted *An Act respecting First Nations, Inuit and Métis children, youth and families* (the Act). The Act affirms the right to self-determination, including the inherent right of Indigenous peoples to self-governance over child welfare.<sup>19</sup> This makes Canada a particularly relevant case to study and learn from. The Act has been viewed as a grand milestone for Indigenous communities in Canada but is not without critics.

The main research question of the thesis is: *how can the principles of BIoC and self-determination be aligned in law and in practice?* There are several analytical steps that need to be made to be able to answer this question. Firstly, developing an analytical understanding of the BIoC principle in itself, and in relation to self-determination. Secondly, investigating the case of Canada as such to, finally, compare the case against the analytical understanding developed in the first step.

### 1.3. Scope and Limitations

The main focus of the thesis is on investigating the BIoC principle and its relationship with the right of Indigenous peoples to self-determination. Indigenous children worldwide are faced with various challenges. These challenges include marginalization, racism and poor economic, social and cultural rights, due to structural discrimination and colonial legacies.<sup>20</sup>

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<sup>18</sup> The terms "Indigenous" and "Aboriginal" are capitalized throughout this thesis to show respect and recognition for their identity. This aligns with documentation published by or on behalf of Indigenous peoples in Canada, including the final report from the Truth and Reconciliation Commission of Canada (2015).

<sup>19</sup> An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 preamble.

<sup>20</sup> EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples' (n 4) para 14.

Assimilation and discrimination policies that have led to the removal of Indigenous children from their communities and subsequent institutionalisation is a history many countries share. Though examining different countries would offer a valuable comparison of the different ways the issues have been tackled, it would also provide less space for an in-depth analysis. For the purpose of conducting a comprehensive analysis addressing the research question, this research is limited to the case of Canada.

It should be emphasised that the thesis approaches the research question from an international perspective by analysing international legal material. The Canadian legal system is quite complex. It is a federal state and thereby has a federal parliament that writes laws in the national interest for all of Canada, as well as different legislatures in each province and territory. Analysing the application of the Act affirming Indigenous peoples' rights to self-governance over child welfare in Canada could provide valuable insights. However, a narrow investigation of the legal system in Canada might become too complex and specialized, which would lead to a different direction than the study intends. Such an in-depth investigation would exceed the intended scope of the thesis, which rather uses the case of Canada to demonstrate the main research issue. The case of Canada is therefore used to facilitate and strengthen an otherwise highly theoretical investigation.

Furthermore, the Act implemented by Canada has been criticized for many different factors, including lack of Indigenous personnel and Indigenous peoples' involvement in establishing the Act, and lack of funding. Though the thesis does acknowledge these aspects, its focus will be to analyse the Act's connections with the BIoC principle and the right to self-determination.

The thesis intends to analyse legal concepts from the legal obligations and interpretation provided by the United Nations (UN). Therefore, the thesis will not analyse other international obligations Canada might be bound by such as the Charter of the Organisation of American States,<sup>21</sup> which Canada is a member of. Canada is therefore subject to the human rights provisions outlined in the Inter-American Declaration,<sup>22</sup> which allows the Inter-American Commission of Human Rights conduct monitoring provisions in Canada. However, Canada has not ratified the Inter-American Convention on Human Rights<sup>23</sup> and is therefore not subject to the jurisdiction of the Inter-American Court of Human Rights.<sup>24</sup> Though it is acknowledged that Canada

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<sup>21</sup> Charter of the Organisation of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

<sup>22</sup> Inter-American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OAS Res XXX.

<sup>23</sup> Inter-American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 (ACHR).

<sup>24</sup> Margarette May Macaulay, 'Canada and the Inter-American Human Rights System' (2022) 15 *Revue québécoise de droit international* 17–18.

has other international obligations, this thesis will remain focused on the interpretation of UN instruments.

#### 1.4. Methodology and Material

The thesis employs doctrinal legal research, complemented by interdisciplinary research, with a normative aim. Doctrinal legal research includes systematically explaining the rules governing a specific legal category and analysing the relationship between these rules.<sup>25</sup> It aims at improving the understanding of the law and its social foundations.<sup>26</sup> This includes using an inductive method of reasoning by examining facts, values and secondary materials of the legal systems. The doctrinal legal research is complemented by interdisciplinary research, which is a research methodology that includes insights from disciplines other than law, such as anthropology and epistemology.<sup>27</sup> These fields strengthen the scope of the thesis by providing insights to a better understanding of the research problem and help to identify its possible solutions.

The use of doctrinal legal research in this thesis will comprehensively analyse the legal framework surrounding the Indigenous child welfare systems. The research provides exposition of the rules governing Indigenous children's rights and Indigenous peoples' right to self-determination, analysing the relationship between the legal principles as well as highlighting its obstacles and possible ways of resolving them.<sup>28</sup> Thus, this thesis has normative aims as it attempts to not only describe the rules but to make the best sense of them and suggest alternative approaches.<sup>29</sup>

The thesis further uses the case of Canada as a point of reference for a critical investigation of the problem statement. The case of Canada is well suited to give deeper insight into the problem due its advances in legislative development regarding the issue. Specifically, it will examine the Act, affirming Indigenous peoples the right to self-governance over child welfare. The research attempts to analyse the social foundations and controversies of the Act.

The primary literature review of the research is both primary and secondary legal materials. Indigenous children's rights are examined by looking at

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<sup>25</sup> P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2020) 144.

<sup>26</sup> *ibid* 150–151.

<sup>27</sup> Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research, Some Experiences with an Interdisciplinary Research Method' (2011) 7 *Utrecht Law Review* 1.

<sup>28</sup> Bhat (n 25) 145.

<sup>29</sup> Deborah Hellman and others (eds), 'Introduction', *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 1.

international human rights law, particularly the UNCRC and the UNDRIP. To do so, the research will rely on, *inter alia*, UN documentation from the UN treaty bodies, special procedures and expert mechanisms. The research further includes interdisciplinary research by looking into academic literature from the field of social science, with the purpose of providing deeper insights and a more comprehensive perspective. Furthermore, the research relies on various secondary sources. To provide factual statements, the research uses reports and official websites from governmental agencies, non-governmental agencies, commissions, research institutions and international actors. Academic literature is used to strengthen the analysis of the research and provide a comprehensive understanding of the legal principles in question. Additionally, two open discussions with experts and specialised academics were carried out supplementary, to grasp a better understanding of the problem in question.

## 1.5. Outline

The introductory chapter of the thesis has given a brief explanation of the issue in focus and stated the objective of the research, as well as the research question.

The second chapter draws a picture of the Canadian history of Indigenous child welfare systems. To understand the importance of addressing this topic and the current struggles of Indigenous peoples in Canada there is a need to understand where they originated from. Further, it underlines that disregarding Indigenous peoples' views, practices and rights has a history of resulting in great harm to Indigenous communities.

The third chapter provides the analytical framework used to analyse the case of Canada. It unpacks the BIoC principle and the Indigenous peoples' right to self-determination. This is achieved by highlighting the challenges of the BIoC principle. The chapter intends to examine the different ways of potentially interpreting the BIoC principle and how it may be aligned with the right to self-determination.

Chapter four investigates Canada's *Act respecting First Nations, Inuit and Métis children, youth and families* and how the BIoC principle and Indigenous peoples' right to self-determination has been implemented in the legislation. It further exhibits how the legislation has been criticised by Indigenous communities in relation to these two principles.

The fifth chapter presents a synthesis, by applying the analytical framework provided in chapter three to the Act presented in chapter four. It will explore

the connections between the findings from Canada and the analytical framework, highlighting their significance and relevance.

The concluding chapter evaluates the findings of this study in relation to its purpose and overall research question. This also includes a brief critical reflection regarding both the research design, the main takeaways from the study and, finally, suggestions for further research.

## 2. History of Indigenous Child Welfare in Canada

The historical legacy of colonialism and racial discrimination in Canada is reflected in Aboriginal peoples' socioeconomic disadvantages. This is further mirrored in inadequate housing, racial discrimination, lack of funding for Indigenous child services and disrespect for the Nation-to-Nation relationship with Aboriginal peoples.<sup>30</sup> These challenges are interconnected and have all contributed to the removal of Aboriginal children from their communities.<sup>31</sup>

The overrepresentation of Aboriginal children in Canada's child welfare systems is evident. In 2021 Aboriginal children constituted 53.8% of children placed in child welfare services and even up to 90% in some provinces,<sup>32</sup> though Aboriginal children make up only 7.7% of the child population in Canada.<sup>33</sup> This challenge is rooted in the historical practice in Canada of forced removal of Aboriginal children from their families and communities. Removing Aboriginal children from their communities, resulting in intergenerational trauma, cultural loss, loss of language, identity and family ties, continues today.<sup>34</sup> This can all be traced back to the Indian residential schools in Canada.

### 2.1. Indian Residential Schools

The Indian residential schools were government-funded schools for Aboriginal children to become culturally assimilated.<sup>35</sup> The state of Canada was established in 1867. By then, Canadian churches had already established

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<sup>30</sup> UNHRC, 'Visit to Canada Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay' (2023) UN Doc A/HRC/54/31/Add.2 para 32.

<sup>31</sup> *ibid* 22.

<sup>32</sup> *ibid* 31.

<sup>33</sup> Government of Canada; Indigenous Services, 'Reducing the Number of Indigenous Children in Care' (*Government of Canada*, 17 February 2025) <<https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851>> accessed 13 May 2025.

<sup>34</sup> UNHRC, 'Visit to Canada' (n 30) para 31.

<sup>35</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' (n 10) 3 and 5.

a few boarding schools for Aboriginal children. The number of these schools grew rapidly and became a key factor in the federal government's Aboriginal policy.<sup>36</sup> A total of 139 residential schools across Canada, that operated with federal support, have been recognized.<sup>37</sup> It has been estimated that over 150,000 First Nations, Métis and Inuit children were separated from their families and forced to attend these residential schools. The partnership between the government and the church lasted until 1969.<sup>38</sup> Although most of the residential schools were closed in the 1980s, the last federally supported school only closed in the late 1990s.<sup>39</sup> In the establishment of the schools the Canadian government claimed Aboriginal parents to be unfit and their culture viewed to be "savage". The schools were based on the claim that Eurocentric values and Christian religion were superior to Aboriginal culture.<sup>40</sup>

The children in the residential schools experienced a low quality of life. They lived in inadequate housing, which was poorly maintained with poor heating. Malnutrition and insufficient healthcare led to a significant number of students suffering from poor health.<sup>41</sup> Discipline was harsh<sup>42</sup> and students were banned from speaking their Aboriginal languages or practicing their culture.<sup>43</sup> The education provided was limited and reflected the low opinion of the intellectual ability of Aboriginal children.<sup>44</sup> Neglect was institutionalized, which further gave rise to increased vulnerability to sexual and physical abuse.<sup>45</sup> Almost 38,000 claims of physical and sexual abuse in connection to the schools had been reported by the year 2015.<sup>46</sup>

In the mid 1980s survivors of the residential schools started to form class action lawsuits with the objective of seeking compensation for their experiences. Litigation later resulted in the Indian Residential School

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<sup>36</sup> *ibid* 3.

<sup>37</sup> Government of Canada; Indigenous and Northern Affairs Canada, 'Recognized Indian Residential Schools' (*Government of Canada*, 5 March 2015) <<https://www.rcaanc-cirnac.gc.ca/eng/1100100015606/1581724359507>> accessed 13 May 2025.

<sup>38</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' (n 10) 3.

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* 4–5.

<sup>41</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: Missing Children and Unmarked Burials. The Final Report of the Truth and Reconciliation Commission of Canada' (2015) 4 122.

<sup>42</sup> *ibid* 100.

<sup>43</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' (n 10) 3.

<sup>44</sup> *ibid* 3–4.

<sup>45</sup> *ibid* 4.

<sup>46</sup> *ibid* 106.

Settlement Agreement (IRSSA).<sup>47</sup> The implementation of the IRSSA began in 2007 to address the legacy of the Indian residential schools. IRSSA included individual and collective reparations, support for healing projects and commemorative activities, and the establishment of a Truth and Reconciliation Commission.<sup>48</sup> The Truth and Reconciliation Commission provided a platform for those directly and indirectly affected by the schools to share their experiences and stories. The Commission spent six years travelling across Canada and listened to over 6,500 witnesses, creating a historical record of the residential school system.<sup>49</sup> It further hosted seven national events to bring awareness and educate the Canadian public of the history and legacy of the residential school system.<sup>50</sup> A six volume final report of the Commission was issued in 2015, including 94 calls for action aiming for further reconciliation.<sup>51</sup>

Even though Canada has acknowledged the human rights violations and taken reconciliation initiatives regarding the residential schools, the socio-economic situation of Indigenous peoples in Canada remains poor.<sup>52</sup> Racial discrimination continues to affect Indigenous peoples, causing displacements, poverty, poor health outcomes, mental health problems, low education achievements, high unemployment rates, overrepresentations in housing insecurity, child welfare systems and prisons, and dispossession of their lands and resources.<sup>53</sup>

Survivors of the residential schools have shared their experiences of witnessing stories of children disappearing from the schools, newborns being burned in incinerators, and memories of digging graves for their fellow students.<sup>54</sup> The Truth and Reconciliation Commission of Canada started the “Missing Children and Unmarked Burial Project” in efforts to identify and register missing children and unmarked burials, as well as analysing their

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<sup>47</sup> Indian Residential School History and Dialogue Centre, ‘The Indian Residential School Settlement Agreement’ (*Indian Residential School History and Dialogue Centre*) <<https://irshdc.ubc.ca/learn/the-indian-residential-school-settlement-agreement/>> accessed 13 May 2025.

<sup>48</sup> Government of Canada, ‘Indian Residential Schools Settlement Agreement’ (*Government of Canada*, 9 June 2021) <<https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074>> accessed 13 May 2025.

<sup>49</sup> Government of Canada; Crown-Indigenous Relations and Northern Affairs, ‘Truth and Reconciliation Commission of Canada’ (*Government of Canada*, 12 December 2024) <<https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525>> accessed 13 May 2025.

<sup>50</sup> *ibid.*

<sup>51</sup> Truth and Reconciliation Commission of Canada, ‘Canada’s Residential Schools: Reconciliation. The Final Report of the Truth and Reconciliation Commission of Canada’ (2015) 6 223.

<sup>52</sup> UNHRC, ‘Visit to Canada’ (n 30) para 21.

<sup>53</sup> *ibid* 31.

<sup>54</sup> *ibid* 25.

deaths.<sup>55</sup> The National Residential School Student Register comprises 2,040 student names of those who died in the residential schools or shortly after attending, and 1,161 more deaths of unnamed students.<sup>56</sup> The report of the Truth and Reconciliation Commissions concluded that these deaths can be traced back to a combination of various elements. They include, but are not limited to, poor housing, inadequate medicine and malnutrition. All these factors made children vulnerable to diseases.<sup>57</sup> Further students lived under harsh rules and often suffered abusive punishments. The harsh discipline resulted in physical and mental health issues and lead to many runaway children, which contributed to the schools' death rates.<sup>58</sup>

Although the gravity of the residential schools was established in the Commission's report in 2015, it was the discovery in May 2021 at a former residential school in British Columbia of 215 unmarked graves that attracted global attention.<sup>59</sup> In 2022, the Canadian House of Commons unanimously recognized the residential school system as genocide, and the Pope visited Canada and issued an apology to survivors for the Catholic Church's role, in response to the Commission's call to action no. 58. Additionally, he acknowledged the residential school system as genocide.<sup>60</sup>

## 2.2. The Legacy of the Residential Schools

The legacy of the residential schools is reflected in the systemic racism and other forms of discrimination experienced by Aboriginal peoples on a regular basis in everyday life.<sup>61</sup> Inequalities between Aboriginal peoples and other Canadians is evident with respect to education, financial and health standards.<sup>62</sup> The legacy can also be observed within Aboriginal communities. Suppression of their culture and traditions, affecting their self-worth, has resulted in a lot of lost culture and left most Aboriginal languages close to extinction.<sup>63</sup> The languages most spoken are Inuktitut, Cree, and Ojibway, though all are vulnerable to extinction.<sup>64</sup> The children's loss of language resulted in a subsequent loss of ability to communicate with each other, as well as a loss of faith in the value of their culture. Children were forced to

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<sup>55</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: Missing Children and Unmarked Burials' (n 41) 1.

<sup>56</sup> *ibid* 15 and 137.

<sup>57</sup> *ibid* 122.

<sup>58</sup> *ibid* 123.

<sup>59</sup> UNHRC, 'Visit to Canada' (n 30) para 26.

<sup>60</sup> *ibid* 24.

<sup>61</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 3.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid*.

<sup>64</sup> *ibid* 112.

relinquish everything they knew, including but not limited to food, family values, history and beliefs.<sup>65</sup> Many survivors of the schools suffer profound loss, leaving them with feelings of anger and sadness.<sup>66</sup>

Some First Nations Elders believe that in order to have a deeper understanding of the First Nations culture and community, there is a need to learn the native language.<sup>67</sup> The loss of culture and language has furthermore been argued to have a strong impact on health. It has been demonstrated that positive cultural identity is associated with enhanced resilience and improved mental well-being among minority populations.<sup>68</sup> Aboriginal peoples who speak an Aboriginal language are said to have better mental health and lower suicide rates.<sup>69</sup> Data from the First Nations Centre suggests that there are strong links between Aboriginal sense of identity and their origins. Closer connection with their community and their beliefs and practices leads to better health and self-esteem.<sup>70</sup>

Children having been mistreated and abused at the schools carried on to despair and depression, many developing addictions as a coping mechanism.<sup>71</sup> Further, some victims of abuse, having themselves not had a safe family environment with parental role models, continued to become themselves abusive.<sup>72</sup> The schools thereby not only affected the students enrolled but continued to impact on their families and communities, resulting in intergenerational trauma. Though these impacts may not be attributable to the school alone, they are evidently, according to the Truth and Reconciliation Commission's report, the result of Aboriginal policies of the federal government over the course of the last 150 years.<sup>73</sup>

### 2.3. The Child Welfare System After the Residential Schools

The end of the residential schools did not mark an end to Aboriginal children being separated from their families, with child welfare services taking over the role. Despite being executed in a different manner, according to the

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<sup>65</sup> *ibid* 106–107.

<sup>66</sup> *ibid* 110.

<sup>67</sup> *ibid* 111.

<sup>68</sup> First Nations Center, 'First Nations Regional Longitudinal Health Survey (RHS) 200/203- Results for Adults, Youth and Children Living in First Nations Communities' (First Nations Center 2005) 147.

<sup>69</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 111.

<sup>70</sup> First Nations Center (n 68) 147.

<sup>71</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 3.

<sup>72</sup> *ibid*.

<sup>73</sup> *ibid*.

Commission's final report, a greater number of Aboriginal children were being separated from their families at the time of the report than when the residential schools existed.<sup>74</sup> Common reasons for separations were poverty, family violence and substance abuse being high in Aboriginal communities. These conditions are closely connected with the legacy of the residential schools.<sup>75</sup> However, assumptions of inferiority of Aboriginal parenting likely influenced the decision that separation of the Aboriginal child from their family was in the best interests of the child.<sup>76</sup> Such assumptions seemed further to appear in funding for child welfare services. Not only was the funding itself inadequate, but also the structure of the funding. That is, it showed preference for taking Aboriginal children into care rather than providing families with the support they needed for the child to remain with the family safely.<sup>77</sup>

In the 1940s and 1950s, the support for the residential schools had decreased, leading to the federal government closing some of the schools.<sup>78</sup> Disparities within educational, health and welfare services provided to Aboriginal peoples were noted in the 1940s and recommendations made to extend these services to reserves. In the 1950s, amendments were made to the federal laws resulting in provincial laws of general application to apply on reserves. Thereby child welfare services on reserves were the responsibility of the provinces and territories.<sup>79</sup> When the residential schools began to be shut down there was an increase of Aboriginal children taken by provincial child welfare authorities and many of them given up for adoption to non-Aboriginal families.<sup>80</sup>

Provincial social workers who were assigned to reserves had little or no knowledge of Aboriginal cultures or training to recognize intergenerational trauma which resulted from the residential schools.<sup>81</sup> Subsequently, a child's welfare was evaluated according to mainstream cultural standards,<sup>82</sup> such as emphasising the individual role of the parents, while ignoring the role of the child's extended family. Further, the Indigenous peoples' traditional respect for the child's autonomy was viewed as permissive parenting and informal adoption practices as improper. Moreover, living conditions in remote communities, might have been considered inadequate by social workers,

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<sup>74</sup> *ibid* 11.

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid* 12.

<sup>77</sup> *ibid*.

<sup>78</sup> *ibid* 14.

<sup>79</sup> *ibid*.

<sup>80</sup> *ibid*.

<sup>81</sup> *ibid*.

<sup>82</sup> *ibid*.

while it was the norm within the child's community.<sup>83</sup> This resulted in thousands of Aboriginal children being removed from their communities. The period was referred to as "The Sixties Scoop".<sup>84</sup> The Sixties Scoop children, in many cases, suffered the same outcomes as survivors of the residential schools. Many were placed with abusive foster parents and suffered from identity confusion or denial of their Aboriginal identity. They were further vulnerable to addictions and unemployment, had lower level of education and low self-esteem.<sup>85</sup>

The Sixties Scoop is a clear example of how the State deemed that the BIoC would be, what was considered a stable environment, economic security and formal education by adopting children into non-Indigenous families. However, Aboriginal communities might have given more weight to the child's connection with its community and culture and placed the child within the community.

### 3. Analytical Framework: Indigenous Children's Rights and the Right to Self-Determination

There is no universally accepted definition of Indigenous peoples.<sup>86</sup> As noted by Tobin, the United Nations Permanent Forum on Indigenous Issues argued in a report in 2004 that "*no formal definition [of Indigenous peoples] is necessary for the recognition and protection of their rights.*"<sup>87</sup> Formulating a global definition has been argued to be impossible, due to the diversity of Indigenous communities. Strict definitions could thereby coincide with some societies, while not with others.<sup>88</sup> This resonates with Indigenous peoples who have argued for self-identification to be the primary criteria for identifying Indigenous peoples.<sup>89</sup>

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<sup>83</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The History, Part 2 1939 to 2000. The Final Report of the Truth and Reconciliation Commission of Canada' (2015) 1 150.

<sup>84</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 15.

<sup>85</sup> *ibid.*

<sup>86</sup> Tobin (n 5) 40.

<sup>87</sup> Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Indigenous Peoples: Workshop on Data Collection and Disaggregation for Indigenous Peoples (New York, 19–21 January 2004)' (2004) UN Doc PFII/2004/WS.1/3 para 8.

<sup>88</sup> Benedict Kingsbury, "'Indigenous Peoples'" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 The American Journal of International Law 414.

<sup>89</sup> Tobin (n 5) 40; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Discrimination against Indigenous Peoples: Report of the Working Group on

Many attempts have been made to define Indigenous peoples. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, prepared a study on the problem of discrimination against Indigenous populations, published in 1986. The study contains a widely cited definition<sup>90</sup>, stating the following:

*“Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”*<sup>91</sup>

This definition by Cobo provides stipulations for self-identification. Further, the study recognises the communities’ sovereign rights *“to decide who belongs to them, without external interference”*.<sup>92</sup> However, the definition fails to account for those displaced from their lands or prevented from maintaining their cultural practices. Further, it fails to recognize that some Indigenous peoples may have migrated to a country or changed location within a country after its borders were established.<sup>93</sup>

Although the International Covenant on Civil and Political Rights (ICCPR)<sup>94</sup> does not make direct reference to the notion of indigenes, the Human Rights Committee declared in 1994 that Indigenous peoples are guaranteed protection under article 27 of the ICCPR as “minorities”.<sup>95</sup> Article 27 obliges states to ensure the survival of minorities and to guarantee continued development of their cultural, religious, and social identity.<sup>96</sup> Indigenous peoples need special attention due to widespread shortcoming in upholding

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Indigenous Populations on Its Fourteenth Session (Geneva, 29 July-2 August 1996)’ UN Doc E/CN.4/Sub.2/1996/21 para 35.

<sup>90</sup> Tobin (n 5) 41.

<sup>91</sup> José R. Martínez Cobo, ‘Study of the Problem of Discrimination against Indigenous Populations. Volume 5, Conclusions, Proposals and Recommendations’ (1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4 para 379.

<sup>92</sup> *ibid* 382; Cited in Tobin (n 5) 41–42.

<sup>93</sup> Tobin (n 5) 41–42.

<sup>94</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>95</sup> CCPR, ‘General Comment No 23: Article 27 (Rights of Minorities)’ (1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 7.

<sup>96</sup> *ibid* 9.

their human rights, including serious violations of the rights of Indigenous children.<sup>97</sup>

### 3.1. International Framework of Indigenous Children's Rights

Two international legal frameworks directly reference Indigenous children: the UNCRC and the UNDRIP. The UNCRC entered into force on the 2nd of September 1990 and was the first core human rights treaty to make a reference to Indigenous children, recognising their need for special measures to fully enjoy their rights.<sup>98</sup> Currently, the UNCRC has a near-global ratification with 116 parties to the Convention. The United States is the only state that has not ratified the UNCRC.<sup>99</sup>

The UNCRC references Indigenous children in three articles. Article 30 states the right of children with a minority status or Indigenous children “*to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language.*”<sup>100</sup> Furthermore, Indigenous children are emphasised in article 29 which provides that the objectives of education for all children should include the development of the child's cultural identity, language and values.<sup>101</sup> Moreover, article 17 states that states should encourage mass media to provide material accessible to minorities and Indigenous children speaking other languages.

The UNCRC and its protocols serve as the foundational framework within which the rights of children are guaranteed. Four underlying principles are required for the full enjoyment of all other rights in the UNCRC:<sup>102</sup> non-discrimination (art. 2), the BIoC (art. 3), the right to life, survival and development (art. 6), and the right to be heard (art. 12).

The principle of the BIoC has an exceptional standing in the UNCRC. Article 3(1) specifically states that the principle shall, in all actions concerning the child, “*be a primary consideration*”. Thus, the principle cannot be overridden by other principles. The principle is integrated throughout the UNCRC to

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<sup>97</sup> UNGA, ‘The Situation of Human Rights and Fundamental Freedoms of Indigenous People, Note by the Secretary-General’ (2004) UN Doc A/59/258 paras 11–12.

<sup>98</sup> CRC, ‘General Comment No. 11’ (n 15) para 5.

<sup>99</sup> UN Human Rights Office of the High Commissioner, ‘UN Treaty Body Database’ (*UN Human Rights Treaty Bodies*) <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en)> accessed 13 May 2025.

<sup>100</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 30.

<sup>101</sup> CRC, ‘General Comment No. 11’ (n 15) para 56.

<sup>102</sup> EMRIP, ‘Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples’ (n 4) para 5.

ensure the enjoyment of all other rights.<sup>103</sup> It is further seen in other articles within the UNCRC in relation to children separation from parents,<sup>104</sup> parental responsibilities,<sup>105</sup> deprivation of family environment,<sup>106</sup> adoption,<sup>107</sup> restriction of liberty,<sup>108</sup> and court hearings of penal matters involving a juvenile.<sup>109</sup>

The principle of the BioC was first established in the 1959 Declaration of the Rights of the Child.<sup>110</sup> Though the principle is not mentioned in the ICCPR, the Human Rights Committee has referred to the child's interests being "paramount" in cases of custody and family disputes.<sup>111</sup> The principle has further been included in three articles of the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women.<sup>112</sup> The principle therefore predates the UNCRC, however the UNCRC elevated the importance of the principle.<sup>113</sup>

The fundamental objective of the BioC principle is twofold: firstly, to ensure full and effective enjoyment of all the rights of the UNCRC, and secondly, to ensure the holistic development of the child.<sup>114</sup> The intention of the principle is for it to apply throughout the UNCRC in harmony with other rights. Thereby its objective is not to supersede the individual rights set out in other articles of the UNCRC,<sup>115</sup> nor can a negative interpretation of the child's best interests result in the compromising of other rights as set out in the UNCRC.<sup>116</sup> When applying the BioC principle, its interpretation must align with the UNCRC as a whole.<sup>117</sup> The principle is further important in situations

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<sup>103</sup> *ibid* 6.

<sup>104</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 9(1) and (3).

<sup>105</sup> *ibid* 18(1).

<sup>106</sup> *ibid* 20.

<sup>107</sup> *ibid* 21.

<sup>108</sup> *ibid* 37(c).

<sup>109</sup> *ibid* 40(2)(b)(iii).

<sup>110</sup> United Nations Declaration on the Rights of the Child (adopted 29 November 1959) UNGA Res 1386(XIV) (UNDRC) art 2.

<sup>111</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF ed, Fully rev 3rd ed, UNICEF 2007) 36; See CCPR, 'General Comment No 17: Article 24 (Rights of the Child)' (1989) para 6; CCPR, 'General Comment No 19: Article 23 (The Family)' (1990) para 9.

<sup>112</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 5(b) and 16(1)(d) and (f).

<sup>113</sup> Amanda Tesarek, 'Making the "Best" Better: Transferring Best Interest Determination to Tribes as a Solution to the Ongoing Post-Colonial Indigenous Child Welfare Crisis' (2021) 30 *Minnesota Journal of International Law* 405.

<sup>114</sup> CRC, 'General Comment No. 14' (n 2) para 4.

<sup>115</sup> UNICEF (n 111) 35.

<sup>116</sup> CRC, 'General Comment No. 14' (n 2) para 4.

<sup>117</sup> CRC, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (2005) UN Doc CRC/C/GC/8 para 20.

where none of the UNCRC more specific articles apply.<sup>118</sup> However, an all-encompassing definition of the principle has not been developed.<sup>119</sup> This must, according to the CRC, be determined on a case-by-case basis.<sup>120</sup>

The CRC states that the BIoC is a threefold concept. First, it is a *substantive right* of the child to have their best interests assessed and taken into consideration. Second, it is a *fundamental interpretative legal principle* with the intention for the interpretation to apply so it serves the child's best interests most effectively. Third, it is a *rule of procedure* that in any decision-making process affecting a child or children must include the possible impact the decision could have on the child or children.<sup>121</sup>

When assessing the BIoC a comprehensive assessment is needed. The assessment includes a consideration of all factors, ensuring a holistic physical, psychological, moral and spiritual integrity of the child, as well as the promotion of the child's human dignity.<sup>122</sup> When making such an assessment in a decision-making process the CRC notes two steps:

- “(a)First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;*
- (b)Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.”<sup>123</sup>*

The first step requires balancing different factors considering the specific situation for the individual child or group of children. Individual characteristics must be considered. Such characteristics include, *inter alia*, age, sex, level of maturity, experience, minority status, disabilities, social and cultural context, family situations such as parental absence, and family relationships and their living environment in relation to safety.<sup>124</sup> All factors that are relevant to the specific situation should be taken into consideration and given weight.<sup>125</sup> It should be noted that not all factors are relevant for every case, and different factors are to be given different weight depending on

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<sup>118</sup> UNICEF (n 111) 35.

<sup>119</sup> Olga Khazova, ‘Interpreting and Applying the Best Interests of the Child: The Main Challenges’ in Milka Sormunen (ed), *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe 2016) 27.

<sup>120</sup> CRC, ‘General Comment No. 14’ (n 2) para 32.

<sup>121</sup> *ibid* 6.

<sup>122</sup> *ibid* 5.

<sup>123</sup> *ibid* 46.

<sup>124</sup> *ibid* 48.

<sup>125</sup> *ibid* 80.

the case. Though it is important that all of them should be assessed.<sup>126</sup> When giving weight to different factors, which might be conflicting factors, there is a need to keep in mind the purpose of the assessment. The purpose being to ensure the full and effective enjoyment of the rights of the UNCRC and the child's holistic development.<sup>127</sup>

The CRC claims that the flexibility and adaptability of the assessment concept allows for it to respond to the needs of individual child or children.<sup>128</sup> Further, the CRC describes it to be a living instrument, evolving in accordance with advancements in the understanding of child development.<sup>129</sup> The concept is intended to be defined and adjusted on an individual bases and in accordance with the specific circumstances of the child.<sup>130</sup> In collective decisions regarding children, the BIoC must be assessed and determined with regard to the specific circumstances of the group in question and/or children in general.<sup>131</sup>

The CRC notes that the principle of the BIoC needs special attention when considering Indigenous children.<sup>132</sup> It emphasises that the BIoC is to be considered as both an individual right and a collective right. Further, emphasising that when applying this right to Indigenous children as a group, it is essential that their collective cultural rights are given due consideration,<sup>133</sup> such as their right to exercise their cultural rights collectively as members of their community.<sup>134</sup> However, the CRC states that even though it recognises the distinction between the best interests of the individual child and those of children as a group, the primary concern shall be the determination of the best interests of the individual child.<sup>135</sup> The best interests of the individual child cannot be disregarded or violated to prioritise the best interests of the group.<sup>136</sup> However, the collective rights of the child are part of the process of determining the best interests of the individual child.<sup>137</sup>

In 2007 the Expert Mechanisms on the Rights of Indigenous Peoples (EMRIP) was established by the Human Rights Council. Its mandate is to

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<sup>126</sup> *ibid.*

<sup>127</sup> *ibid* 82.

<sup>128</sup> *ibid* 32.

<sup>129</sup> *ibid* 34.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid* 32.

<sup>132</sup> CRC, 'General Comment No. 11' (n 15) para 30.

<sup>133</sup> CRC, 'General Comment No. 14' (n 2) para 23; CRC, 'General Comment No. 11' (n 15) para 30.

<sup>134</sup> CRC, 'General Comment No. 11' (n 15) para 31.

<sup>135</sup> *ibid* 32.

<sup>136</sup> *ibid* 30.

<sup>137</sup> *ibid* 32.

provide clarification on fundamental principles, conduct studies and examine practices, and suggest measures to be implemented by states.<sup>138</sup> In 2021 EMRIP conducted a study on the rights of Indigenous children with the intention to ensure that Indigenous rights are understood and implemented in a way that aligns with human and children's rights.<sup>139</sup> The study states that the UNCRC constitutes the foundational principles of children's rights,<sup>140</sup> emphasising that the principle of the BioC should be a primary consideration.<sup>141</sup> EMRIP agreed with the views of the CRC that the principle regards both collective and individual rights. EMRIP further aligned with the CRC views that the application of the principle differs depending on whether it is to apply to non-Indigenous or Indigenous children, stating that the culture, lifestyle and collective rights must be given weight in Indigenous children cases. Further, EMRIP emphasis in its report, in line with the CRC, that the best interests of the individual child shall not be neglected by prioritizing the best interests of the Indigenous collective.<sup>142</sup>

The CRC has expressed that “*States are under the obligation to clarify the best interests of the child when adopting implementation measure*”<sup>143</sup> Which is in accordance with article 4 of the UNCRC which reads that “*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.*” The CRC has emphasised that the general implementation of the UNCRC should be reflected in domestic law.<sup>144</sup> The CRC has further implied that states should “adequately defined”, in the state's legislation affecting children, that the BioC principle should be given primary consideration.<sup>145</sup> Further the CRC implied that the principle should be analysed and implemented objectively with respect to children in various situations, whether as individuals or groups.<sup>146</sup> To decide in a culturally sensitive way how to assess the BioC, legislative bodies and policymakers must consult with Indigenous communities and allow them to participate in a meaningful way in the process, to the extent possible, when establishing the

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<sup>138</sup> UN Human Rights Office of the High Commissioner, ‘Expert Mechanism on the Rights of Indigenous Peoples’ (OHCHR) <<https://www.ohchr.org/en/hrc-subsiidiaries/expert-mechanism-on-indigenous-peoples>> accessed 13 May 2025.

<sup>139</sup> EMRIP, ‘Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples’ (n 4) para 2.

<sup>140</sup> *ibid* 5.

<sup>141</sup> *ibid* 6.

<sup>142</sup> *ibid*.

<sup>143</sup> CRC, ‘General Comment No. 14’ (n 2) para 33.

<sup>144</sup> CRC, ‘General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child’ (2003) UN Doc CRC/GC/2003/5 para 22.

<sup>145</sup> CRC, ‘Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Canada’ (2003) CRC/C/15/Add.215 para 24.

<sup>146</sup> *ibid* 25.

best interests of Indigenous children.<sup>147</sup> This argument furthermore aligns with article 19 of the UNDRIP, which requires states to consult and cooperate in good faith with Indigenous peoples before adopting any legislative or administrative measures that affect them.<sup>148</sup>

The highest international legal standard on Indigenous peoples' rights is the UNDRIP. The UNDRIP provides protection for Indigenous individuals and communities and recognises both collective and individual rights. The UNDRIP emphasises that special attention shall be paid to certain Indigenous groups in the implementation of the UNDRIP, including children.<sup>149</sup> It guarantees them full protection from all forms of violence and discrimination,<sup>150</sup> recognizing the intersectional discrimination they encounter.<sup>151</sup> Only four countries voted against the UNDRIP when it was adopted in the General Assembly in 2007; Australia, Canada, United States and New Zealand, all of whom have a history of forcibly removing Indigenous children and assimilation policies. Since the UNDRIP was adopted, the four countries that voted against it have removed their objector status and formally stated their support for the UNDRIP.<sup>152</sup>

The UNDRIP puts forth "*the minimum standards for the survival, dignity and well-being of the indigenous peoples*".<sup>153</sup> It further recognizes Indigenous peoples' individual right to all human rights in international law without discrimination, as well as their collective rights. Those collective rights are integral to their existence, well-being and development.<sup>154</sup> Article 7(2) recognizes the collective right of Indigenous peoples to live in freedom, peace and security, which includes them not being subject to genocide or having their children forcibly removed from their communities.<sup>155</sup> Article 8 further prohibits forced assimilation or destruction of Indigenous culture.<sup>156</sup> The UNDRIP recognizes the right of Indigenous families and communities to be responsible for raising their children and their well-being, consistent with the rights of the child.<sup>157</sup>

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<sup>147</sup> CRC, 'General Comment No. 11' (n 15) para 31.

<sup>148</sup> UNDRIP art 19.

<sup>149</sup> *ibid* 22.

<sup>150</sup> *ibid*.

<sup>151</sup> EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples' (n 4) para 12.

<sup>152</sup> Department of Economic and Social Affairs, 'United Nations Declaration on the Rights of Indigenous Peoples' <<https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>> accessed 13 May 2025.

<sup>153</sup> UNDRIP art 43.

<sup>154</sup> *ibid* 1 and preamble.

<sup>155</sup> *ibid* 7.

<sup>156</sup> *ibid* 8.

<sup>157</sup> *ibid* preamble.

### 3.2. Indigenous Peoples' Rights to Self-Determination and Self-Governance

Recognition of Indigenous peoples' right to self-determination can be defined as the reestablishment of rights previously infringed upon by states that assumed control over their governance. According to Indigenous peoples' perspectives, it should be regarded not as an act of gifting new rights, but rather as a means of reestablishing ancestral sovereign rights.<sup>158</sup>

The Charter of the United Nations (UN Charter), adopted in 1945, was the first international legal instrument to enshrine the principle of self-determination.<sup>159</sup> The fundamental premise underlying the establishment of the UN Charter was that the primary beneficiaries of human rights would be individuals. It relies on the principle of state sovereignty and did not call into question the centrality of states within the international legal order.<sup>160</sup> Thereby, it did not strengthen the position of groups within states, for it concerned only relationships between states, rather than on the relationship between states and groups.<sup>161</sup>

The establishment of the UN Charter was followed by the adoption of the Universal Declaration on Human Rights (UDHR) by the UN General Assembly in 1948.<sup>162</sup> However, this also only covered individual rights, rather than those of groups. Nonetheless, the UDHR did move away from the policies of racial supremacy that had previously characterised colonialism and established the fundamental principle that all humans have equal value.<sup>163</sup> Following the UDHR, the General Assembly established two legally binding human rights instruments simultaneously, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were adopted in 1966. Common article 1 is present in both the ICCPR and the ICESCR. This article states that the right of self-determination is an inherent right of all peoples. However, this right was initially intended to apply only in relation to colonial populations and not to Indigenous peoples. The rights of Indigenous peoples took time to be addressed, since international development initiatives appeared to prioritise assimilation over

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<sup>158</sup> Tobin (n 5) 33.

<sup>159</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 1(2).

<sup>160</sup> Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (First edition, Oxford University Press 2016) 28.

<sup>161</sup> *ibid* 28–29.

<sup>162</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>163</sup> Åhrén (n 160) 29.

the protection of Indigenous cultures and the safeguarding of their ancestral sovereignty.<sup>164</sup>

The International Labour Organization 169 Convention (ILO 169),<sup>165</sup> adopted in 1989, represented a milestone in the field of Indigenous peoples' rights, marking a departure from the approach of assimilation of previous forerunners.<sup>166</sup> The ILO 169 focuses on collective rights of Indigenous peoples and emphasises the rights of Indigenous groups to have their own communities and cultures, alongside states. The ILO 169 established the principle of Indigenous peoples' rights to self-governance and acknowledged the value of their collective traditions and customs.<sup>167</sup> However, it fell short of giving formal recognition to their right to self-determination.<sup>168</sup>

It was the Human Rights Committee and the Committee on Economic, Social and Cultural Rights that recognized that Indigenous peoples have rights to more control over their political, economic, social and legal affairs within their countries. In the 1990s, both Committees acknowledged this right to autonomy,<sup>169</sup> referred to as "internal" self-determination.<sup>170</sup> The Committee on the Elimination of Racial Discrimination (CERD) also emphasised that the right to self-determination, enshrined in common article 1, is a fundamental principle of international law<sup>171</sup> and that states have a duty to promote this right.<sup>172</sup> CERD defined internal self-determination as "*the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.*"<sup>173</sup> CERD stated that this right is linked to article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, which affirms that every citizen has the right to take part in the conduct of public affairs.<sup>174</sup> Consequently, the government must

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<sup>164</sup> Tobin (n 5) 34.

<sup>165</sup> International Labour Organization, Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO 169).

<sup>166</sup> Åhrén (n 160) 95–96.

<sup>167</sup> *ibid.*

<sup>168</sup> Tobin (n 5) 34.

<sup>169</sup> CCPR, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee Canada' (1999) CCPR/C/79/Add.105 paras 7 and 8; CESCR, 'Consideration of Reports Submitted by States Parties under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights, Columbia.' (2001) UN Doc E/C.12/1/Add.74 33.

<sup>170</sup> Tobin (n 5) 35.

<sup>171</sup> CERD, 'General Recommendation No 21' (1996) UN Doc A/51/18, annex VIII para 7.

<sup>172</sup> *ibid.* 8.

<sup>173</sup> *ibid.* 9.

<sup>174</sup> *ibid.*; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 5(c).

represent the entire population without any distinction.<sup>175</sup> Additionally, CERD called upon states to recognise, respect and promote the preservation of Indigenous peoples' culture, history, language and way of life.<sup>176</sup> Moreover, the Human Rights Committee emphasized the right of Aboriginal peoples to self-determination in a concluding observation regarding Canada and recommended implementations empowering Aboriginal peoples' self-governance. The Committee further recommended that the State should abandon practices that result in the loss of Aboriginal peoples' rights, as it is incompatible with article 1 of the ICCPR.<sup>177</sup>

The UNDRIP was adopted in 2007 by the General Assembly, recognising Indigenous peoples as "peoples" in article 3<sup>178</sup> and affirming the fundamental importance of the right to self-determination of all peoples.<sup>179</sup> In doing so, it formally established that Indigenous peoples have the rights of self-determination under common article 1 of the 1966 Covenants. The UNDRIP is a widely cited instrument and many of its articles mirror existing human rights treaties. Furthermore, many of the UNDRIP provisions are reflected in customary international law, including the protection against racial discrimination.<sup>180</sup>

Article 3 of the UNDRIP states the right of Indigenous peoples to self-determination and asserts that "*by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*" All rights of the UNDRIP are dependent on the fundamental right to self-determination.<sup>181</sup> For Indigenous peoples to exercise the rights of the UNDRIP the right to self-determination must be fulfilled.<sup>182</sup> Article 4 further refers to the right to self-determination in the context of the rights to autonomy and self-governance.<sup>183</sup> Autonomy in the context of article 4 has been defined as the power of Indigenous peoples to determine their lives "*according to their own values, institutions and mechanisms, within the*

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<sup>175</sup> CERD (n 171) para 9.

<sup>176</sup> CERD, 'General Recommendation No 23: Indigenous Peoples' (1997) UN Doc A/52/18, annex V para 4.

<sup>177</sup> CCPR, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (n 169) para 8.

<sup>178</sup> UNDRIP art 3.

<sup>179</sup> *ibid* preamble.

<sup>180</sup> UNGA, 'Rights of Indigenous Peoples, Note by the Secretary-General' (2017) UN Doc A/72/186 para 9.

<sup>181</sup> EMRIP, 'Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination, Report of the Expert Mechanism on the Rights of Indigenous Peoples' (2021) UN Doc, A/HRC/48/75 para 14.

<sup>182</sup> *ibid* 8.

<sup>183</sup> UNDRIP art 4.

*framework of the State of which they are part*".<sup>184</sup> This aligns with Indigenous peoples' right to promote, develop and maintain their institutional structures, customs, spirituality, traditions, procedures, and practice, in accordance with international human rights standards, as stated in article 34 of the UNDRIP.<sup>185</sup>

The intention with the right of Indigenous peoples to self-determination was for it to be interpreted as a right to negotiate their status and representation within the relevant states.<sup>186</sup> Exercising self-determination through self-governance results in Indigenous communities having the ability to determine their own social, economic and political development,<sup>187</sup> which can include having an inherent Indigenous authority that establishes laws.<sup>188</sup> The right to self-determination is further important for the application of article 23 of the UNDRIP which includes Indigenous peoples' right to determine and develop social programs affecting them, as well as administer such programmes through their own institutions.<sup>189</sup>

It should be noted that the UNDRIP only provides Indigenous peoples the right of internal self-determination, as implied in article 46 of the UNDRIP, rejecting the right to external self-determination. The article was included because of concerns during the negotiations of the UNDRIP that the Indigenous peoples right to self-determination might be interpreted as granting the right to secession.<sup>190</sup> This assurance has been considered unnecessary, as Indigenous peoples are most often not geographically or economically positioned to seek such independence.<sup>191</sup> Due to Indigenous peoples limited resources and their vulnerability, internal self-determination is widely accepted and the benefits of partnerships with states acknowledged.<sup>192</sup>

Nevertheless, there are examples of Indigenous peoples having assumed a wide range of authority. Greenland is a self-governing territory of Denmark,

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<sup>184</sup> EMRIP, 'Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples' (n 181) para 12.

<sup>185</sup> UNDRIP art 34.

<sup>186</sup> Erica-Irene A Daes, 'Discrimination against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples' (1993) UN Doc E/CN.4/Sub.2/1993/26/Add.1 para 26.

<sup>187</sup> Shin Imai, 'Indigenous Self-Determination and the State' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous peoples and the law: comparative and critical perspectives* (Hart Publishing 2009) 292.

<sup>188</sup> *ibid* 293.

<sup>189</sup> UNDRIP art 23.

<sup>190</sup> Tobin (n 5) 35.

<sup>191</sup> *ibid*.

<sup>192</sup> Erica-Irene A Daes (n 186) para 28.

and about 90 percent of its population are Inuit.<sup>193</sup> In 2009, an Act on Greenland self-government came into force,<sup>194</sup> which provides that the people of Greenland can decide to seek independence and enables them to take responsibility for a great deal of their internal affairs, though not without exceptions.<sup>195</sup> This has been viewed as an inspiring measure of the implementation of Indigenous peoples' right to self-determination.<sup>196</sup> The Special Rapporteur on Indigenous peoples rights noted that even though Greenland is a positive example of the implementation of article 3 of the UNDRIP, the standards of international human rights must continue to be upheld.<sup>197</sup> Further, the Special Rapporteur noted challenges for Greenland to gain full independence, *inter alia*, due to their financial dependency on Denmark, deficiency of qualified personnel in many domains and institutions being inherited from Denmark, such as the education system and the judicial system.<sup>198</sup>

Indigenous peoples' right to self-determination is a cross-cutting right of the UNDRIP, which affects Indigenous peoples' ability to exercise all other rights,<sup>199</sup> including their cultural, economic and social rights. Therefore, the ability of Indigenous peoples to exercise their right to self-determination is essential for the community to meet their children's needs and development, including in regard to education and child welfare.<sup>200</sup> The EMRIP references the poignant statement made by Australian Aboriginal and Torres Strait Islanders in the Uluru Statement from the Heart; "*When we have power over our destiny our children will flourish.*"<sup>201</sup>

### 3.3. The Tension between Indigenous Peoples' Rights and Universal Children's Rights

This chapter intends to investigate tensions and clashes between Indigenous peoples' rights and children's rights. From a children's rights viewpoint, it

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<sup>193</sup> UNHRC, 'Visit to Denmark and Greenland, Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay' (2023) UN Doc A/HRC/54/31/Add1 para 7.

<sup>194</sup> Lov om Grønlands Selvstyre, Lov nr 473 af 12 juni 2009 (Denmark).

<sup>195</sup> UNHRC, 'Visit to Denmark and Greenland' (n 193) para 8.

<sup>196</sup> *ibid* 33.

<sup>197</sup> *ibid* 35.

<sup>198</sup> *ibid* 37.

<sup>199</sup> EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples' (n 4) para 13.

<sup>200</sup> *ibid* 3.

<sup>201</sup> Australian Aboriginals and Torres Strait Islanders, 'Uluru Statement from the Heart' (*The Statement*) <<https://ulurustatement.org/the-statement/view-the-statement/>> accessed 20 May 2025; Cited in EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples' (n 4) para 3.

discusses how Indigenous peoples' perspectives and understandings of the BloC principle might differ and be more beneficial for an Indigenous child. The first sub-chapter highlights challenges that have followed the BloC principle and how Indigenous peoples have been excluded from its legal development in the past. The second sub-chapter examines how laws can be interpreted from different perspectives. That is, Indigenous peoples' understanding of legal principles might result in a different interpretation of the law, possibly better suited for the Indigenous child. Lastly, the third sub-chapter highlights the need to combat epistemic injustice in relation to legal terms, such as the BloC.

### 3.3.1. The Challenges of the Best Interests of the Child Principle

The principle of the BloC is intended to guide decisions related to child welfare.<sup>202</sup> However the history of the BloC has been associated with justifying removing Indigenous children from their communities.<sup>203</sup> One of the issues with the principle is that it was historically developed on the grounds of European colonial ideology<sup>204</sup> and was shaped by liberal legal notions which emphasised individuals, formal equality and universality, principles rooted in western colonial history.<sup>205</sup> The universal application of the BloC has a history of institutionalising cultural biases.<sup>206</sup> These biases persist around the world. An example of that would be serious cultural biases towards Inuit parents in Denmark. As recently as 2023, the Special Rapporteur on Indigenous Peoples Rights observed, while on an official fact-finding mission, that assessments in Denmark did not recognize the diverse cultural context of Danish-born parents and Inuit parents, which has resulted in Inuit parents being wrongly assessed as having cognitive disabilities.<sup>207</sup> Further, prejudice regarding Inuit families in Denmark have resulted in social workers filing unconfirmed assumptions about abuse and violence in Inuit families.<sup>208</sup> Another example which highlights existing biases towards Indigenous peoples is the overrepresentation of Aboriginal children in out-of-home care in Australia. This situation in Australia can be largely attributed to lack of consultation with Indigenous organisation and communities,<sup>209</sup> as well

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<sup>202</sup> Tesarek (n 113) 408.

<sup>203</sup> *ibid* 410; Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence* (42nd Parl, 1st Sess, No 150 (14 May 2019)) 28.

<sup>204</sup> Tesarek (n 113) 408.

<sup>205</sup> Kline (n 9) 390.

<sup>206</sup> Tesarek (n 113) 411.

<sup>207</sup> UNHRC, 'Visit to Denmark and Greenland' (n 193) para 20.

<sup>208</sup> *ibid* 21.

<sup>209</sup> UNHRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia' (2017) A/HRC/36/46/Add.2 paras 90–91.

as racism, which is reflected in the public portrayal of Aboriginal peoples, often stereotyped as poor parents.<sup>210</sup>

The broad wording of the BIoC principle may seem flexible, neutral and sensible. However, historical context has shown that it is not.<sup>211</sup> The CRC has stated the following:

*“The flexibility of the concept of the child’s best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child’s best interests has been abused by Governments and other State authorities to justify racist policies”*<sup>212</sup>

Furthermore, Tesarek<sup>213</sup> points out that the Commissioner for Human Rights for the Council of Europe has stated that:

*“Governments - or individual adults - have sometimes misused the 'best interests of the child' to justify actions that in reality have violated the rights of the child [...] Children of Indigenous peoples have been forcefully removed from their families and placed in boarding schools so that they could be introduced to 'civilization', again in the name of their 'best interests' [...] Such actions are based on extreme patronizing and not on any genuine concern for children's interests; they have no support in the Convention on the Rights of the Child. Excuses for violations of children's rights are clearly not what the principle of the best interests is about.”*<sup>214</sup>

However, these arguments fall short of realising that at the time, Indigenous child removals were considered culturally justified, rather than “misuse” or “manipulation” of the principle.<sup>215</sup> It was considered commonsensical to protect children from a way of life that was perceived as “savage” and

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<sup>210</sup> *ibid* 30.

<sup>211</sup> Tesarek (n 113) 409.

<sup>212</sup> CRC, ‘General Comment No. 14’ (n 2) para 34.

<sup>213</sup> See Tesarek (n 113) 409.

<sup>214</sup> Thomas Hammarberg, ‘The Principle of the Best Interests of the Child – What it means and what it demands from Adults: Lecture by Thomas Hammarberg, Commissioner for Human Rights Council of Europe’ 4 <<https://rm.coe.int/16806da95d>> accessed 13 May 2025.

<sup>215</sup> Tesarek (n 113) 409.

assimilation was considered inevitable.<sup>216</sup> However, it should be noted that Hammarberg continues to acknowledge that the meaning of the principle depends on resources, development and culture of each country,<sup>217</sup> and that cultural differences may justify different approaches to children upbringing.<sup>218</sup> Further, he notes that different family structures and living standards should be factored into the determination of the BIoC.<sup>219</sup> For child protection systems to be culturally appropriate it is important to acknowledge these differences. In other words, though the principle of the BIoC is universal, the meaning behind the principle differs.<sup>220</sup> Certain actions that violate a child's physical autonomy and safety are unequivocally harmful to the child's best interests. However, there are other practices that may be perceived as controversial in one society while being accepted in another.<sup>221</sup>

A universal application of the BIoC is therefore problematic. It is prone to counter intentions, which create conditions that justify removals of Indigenous children.<sup>222</sup> In that context critics argue that human rights were originally established by a Western culture, that “*human rights are part of a distinct modernist vision of the good and just society that emphasizes autonomy, choice, equality, secularism, and protection of the body.*”<sup>223</sup> This approach provides that human rights impose a cultural norm as a universal truth.<sup>224</sup> In other words, it is argued that although human rights are recognised universally, they originated from the West and therefore are a form of imperialism.<sup>225</sup> However, it is important to note the participation of the “Global South”, their recognition of human right norms, as well as their contribution to the development of the UN and parliaments worldwide.<sup>226</sup> In the establishment of the UDHR in 1948, fifty-eight countries assembled from different parts of the world.<sup>227</sup> The UNCRC was furthermore adopted unanimously in 1989 by the UN General Assembly.<sup>228</sup> The UN has evolved

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<sup>216</sup> Sarah De Leeuw, ‘State of Care: The Ontologies of Child Welfare in British Columbia’ (2014) 21 *cultural geographies* 72.

<sup>217</sup> Hammarberg (n 214) 4; Cited in Tesarek (n 113) 409.

<sup>218</sup> Hammarberg (n 214) 5.

<sup>219</sup> *ibid*; Cited in Tesarek (n 113) 410.

<sup>220</sup> Tesarek (n 113) 410.

<sup>221</sup> *ibid*.

<sup>222</sup> *ibid* 411.

<sup>223</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006) 220.

<sup>224</sup> Seth D Kaplan, *Human Rights in Thick and Thin Societies: Universality without Uniformity* (Cambridge University Press 2018) 103.

<sup>225</sup> Ahmed Shaheed, ‘Is “Human Rights” a Western Concept?’ (*IPI Global Observatory*, 17 October 2018) <<https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/>> accessed 13 May 2025.

<sup>226</sup> *ibid*.

<sup>227</sup> *ibid*.

<sup>228</sup> *ibid*.

in tandem with the rapidly changing world and Member States are currently 193.<sup>229</sup>

Nevertheless, it should be noted that states are the recognized subjects of international law.<sup>230</sup> Indigenous peoples have been isolated and excluded, and most Indigenous peoples have never taken part in a state-building process.<sup>231</sup> Therefore, they did not have the opportunity to participate in law-making within the states in any effective way. Indigenous peoples have been excluded from such processes either by law or been in-directly excluded due to language and prejudice. This has resulted in Indigenous peoples' limited ability to defend their rights.<sup>232</sup>

In summary, the BIoC is problematic, firstly because it has the history of providing a legitimate justification for removing children from their families and communities. Secondly, Indigenous peoples were in the past excluded from the development and interpretation of the BIoC principle.

### 3.3.2. Interpretation through the Lens of Indigenous Peoples

It has been noted that the CRC considers that, when determining the BIoC, there must be a comprehensive consideration of all factors, ensuring a holistic physical, psychological, moral and spiritual integrity of the child.<sup>233</sup> Therefore, a child's Indigenous identity is one factor to be taken into consideration. However, Tesarek argues that to conduct a culturally appropriate BIoC assessment, it must be recognised that the child's culture extends to all other factors in the determination of the BIoC. In other words, the BIoC should be determined through an Indigenous lens.<sup>234</sup> This could further be referred to as an emic legal interpretation.

Emic is a term used by anthropologists when referring to a local system of meaning.<sup>235</sup> It provides an "insider" perspective and emphasises on the understanding of members of the society, their concepts, values and

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<sup>229</sup> United Nations, 'About Us' (*United Nations*) <<https://www.un.org/en/about-us>> accessed 13 May 2025.

<sup>230</sup> Madison Thulien, 'Indigenous Exclusion / Resistance and the Convention on the Rights of the Child in Canada' (*Canadian Bar Association*) <<https://www.cba.org/sections/child-and-youth-law-section/resources/indigenous-exclusion-resistance-and-the-convention-on-the-rights-of-the-child-in-canada/>> accessed 13 May 2025.

<sup>231</sup> Erica-Irene A Daes (n 186) para 24.

<sup>232</sup> *ibid.*

<sup>233</sup> CRC, 'General Comment No. 14' (n 2) para 5.

<sup>234</sup> Tesarek (n 113) 410–411.

<sup>235</sup> Eddie Bruce-Jones, 'Anthropology as Critical Legal Intervention? Instrumentalization, Co-Construction and Critical Reformulation in the Relationship between Anthropology and International Law' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 352.

culture.<sup>236</sup> The approach intends to study a system from within the culture and revolves around understanding the internal characteristics of that culture.<sup>237</sup> An etic or “outsider” perspective is its counterpart, which provides an understanding of a society from a universal viewpoint.<sup>238</sup> While etic approaches offer cross-cultural strategies, they are often developed from a standpoint that by no means reflects a shared interpretations of cultures, values, and beliefs.<sup>239</sup> An emic perspective can be useful when analysing and understanding legal principles through a lens of the framework established by those within the society who have an insider's understanding.<sup>240</sup> In the context of legal pluralism, anthropological insights and cultural perspectives can be helpful when applying legal principles that leave room for interpretation.<sup>241</sup> However, it should be noted that an emic/etic distinction can be problematic since it implies a division of general versus specific. Therefore, it can, as an abstract theoretical construction, stigmatize minorities even more. Nevertheless, it can be helpful to think of legal interpretation from different perspectives, such as from the outsider's perspective or of someone within the community. The understanding of a system might give different results when interpreting legal principles, such as the BIoC.

The intention of the flexibility of the BIoC is for the assessment to be made on a case-by-case bases, since there is no one-fits-all definition of the principle. This includes having the cultural and upbringing of the child in mind. Though the BIoC is a flexible term, there is an argument to be made that legal frameworks interpret the principle from an outsiders perspective<sup>242</sup> and that such an interpretation of the term has the tendency to disadvantage certain groups.<sup>243</sup> Some jurists might argue that jurisprudence articulates the law's probable intent.<sup>244</sup> However critical realists and anthropologists point

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<sup>236</sup> Philipp Kastner, ‘Towards Internalized Legal Obligations to Address Justice and Accountability? A Novel Perspective on the Legal Framework of Peace Negotiations’ (2012) 23 Criminal Law Forum 218 <<http://link.springer.com/10.1007/s10609-012-9174-4>> accessed 12 May 2025.

<sup>237</sup> See Till Mostowlansky and Andrea Rota, ‘Emic and Etic’ (*The Open Encyclopedia of Anthropology*, 29 November 2020) <<https://www.anthroencyclopedia.com/entry/emic-and-etic>> accessed 13 May 2025.

<sup>238</sup> Kastner (n 236) 218; For origins of the terms see Marvin Harris, ‘History and Significance of the EMIC/ETIC Distinction’ (1976) 5 Annual Review of Anthropology 329, 331 <<https://www.annualreviews.org/doi/10.1146/annurev.an.05.100176.001553>> accessed 12 May 2025.

<sup>239</sup> Clarence St.Hilaire, ‘Framing Indigenous Perspectives through Emic and Etic Approaches’ in Sylvanus Barnabas (ed), *Indigenous and Minority Populations - Perspectives From Scholars and Writers across the World* (IntechOpen 2023) 3.

<sup>240</sup> Kastner (n 236) 218.

<sup>241</sup> Bruce-Jones (n 235) 354.

<sup>242</sup> *ibid* 352.

<sup>243</sup> St.Hilaire (n 239) 10.

<sup>244</sup> Bruce-Jones (n 235) 352.

out that court judges interpret child suffering through a lens of their own cultural norms and acceptance.<sup>245</sup>

### 3.3.3. Epistemic Injustice

Epistemic injustice refers to an injustice regarding the legitimacy of knowledge and understanding. It refers to an unjust structure of making meaning and producing knowledge, by exclusion, silencing and distrust.<sup>246</sup> According to Fricker there are two forms of epistemic injustice: testimonial injustice and hermeneutical injustice. Testimonial injustice is when prejudice leads to the listener distrusting the speaker's view. Hermeneutical injustice is "*when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences.*"<sup>247</sup> Fricker gives the examples that testimonial injustice might be that the police does not believe the speaker because he is black, while an example of hermeneutical injustice is that one might suffer sexual harassment in a culture that does not have that critical concept.<sup>248</sup>

Hermeneutical injustice happens when certain groups cannot express aspects of their experiences because of gaps in the available interpretive resources, such as social norms, understandings and practices, as well as languages. These gaps occur because these groups do not engage fully in the practices that generate these social meanings. This has further been divided into two categories. First, a *cognitivist reading*, resulting in groups not being able to make sense of their own experience through those meanings.<sup>249</sup> Second, a *communicative reading*, which stems not from a lack of understanding but a lack of being able to communicate that understanding to others, due to mismatches between the interpretive resources available of the two groups. Thereby, Indigenous groups might fully understand their own experience of their practices but have communicative barriers when conveying these experiences to the colonist, due to insufficient interpretive framework, including language. This leads to interpretive frameworks, such as certain concepts and principles, being forced on to Indigenous peoples.<sup>250</sup>

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<sup>245</sup> *ibid.*

<sup>246</sup> Ian James Kidd, José Medina and Gaile Pohlhaus, 'Introduction to The Routledge Handbook of Epistemic Injustice', *The Routledge Handbook of Epistemic Injustice* (Routledge 2017) 1.

<sup>247</sup> Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007) 2.

<sup>248</sup> *ibid.*

<sup>249</sup> Dina Lupin Townsend and Leo Townsend, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35 *Social Epistemology* 153; Citing Fricker (n 247).

<sup>250</sup> Townsend and Townsend (n 249) 153; Citing Fricker (n 247).

There is an argument to be made that Indigenous peoples need to be able to articulate themselves by using language and interpretive framework that encompasses their understanding. Indigenous communities have historically been excluded from participating in practices in which legal concepts and their meaning, such as the BIoC, have been developed. This has resulted in Indigenous communities having to claim their rights by adapting their understandings and experiences to such legal concepts.<sup>251</sup> This argument has further been made in the context of the Indigenous peoples' different knowledge and understanding of "property", noting that:

*"In this case, the root of the problem is that Indigenous peoples have been marginalised from the discursive practices through which the conceptual vocabulary of international law has been developed. One way to address this, then, would be to insist on greater participation of Indigenous peoples in these practices and to explore how Indigenous systems of law can be integrated into international law."*<sup>252</sup>

The same could be applied to the understanding of "child" or "childhood". The UNCRC is based on a formal definition of a child by setting an age limit of 18 years old as a norm,<sup>253</sup> which does not necessarily correspond to the understanding of different cultures. Many cultures make a distinction between children and adults, not in relation to the date of birth, but their competence and assumption of responsibility.<sup>254</sup> Further, although many countries were involved in the drafting of the CRC, a specific view of children remains.<sup>255</sup> The preamble of UNCRC describes children and childhood as a time of special vulnerability, in need of adult protection.<sup>256</sup> However, some societies have contrasting views about what these terms entail. This is evident in the views regarding children's legal responsibilities. Many societies, including Indigenous communities, understand children as having rights, as well as responsibilities.<sup>257</sup> Specifically in relation to their unique knowledge they are expected to share with their communities.<sup>258</sup>

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<sup>251</sup> Townsend and Townsend (n 249) 154.

<sup>252</sup> *ibid* 155.

<sup>253</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 1.

<sup>254</sup> Manfred Liebel, *Decolonizing Childhoods : From Exclusion to Dignity* (Policy Press 2020) 137.

<sup>255</sup> Madison Thulien (n 230).

<sup>256</sup> *ibid*.

<sup>257</sup> *ibid*.

<sup>258</sup> *ibid*.

The colonial view that the West *knows* better what the best way of life is, is the root to discriminatory practices. Colonial invasion was justified by the colonist “saving” the Indigenous peoples by teaching them the “right” way of life. Such cultural oppression goes hand in hand with hermeneutic injustice.<sup>259</sup>

If Indigenous peoples would be given the opportunity to determine and interpret the BIoC principle, it could still have an epistemic form of injustice. The requirement for Indigenous peoples to frame their family relations in terms of the BIoC might limit their ability to express these relations, resulting in a form of hermeneutical injustice. However, this can also be viewed as empowering Indigenous communities to set forth their views by giving them a legally recognised “voice” to interpret the principle of the BIoC.<sup>260</sup> Nevertheless, as has been noted, the term was primarily established in a historical and colonial context. The western approach to child development and well-being might not be able to articulate the complex relationship it has with the Indigenous community and culture. Thereby, the BIoC still imposes a certain ideology onto Indigenous peoples and amounts to a form of institutional hermeneutic injustice,<sup>261</sup> because of the failure of the legal system to include Indigenous peoples’ understanding of legal principles.

Therefore, to balance epistemic injustice of the understanding of the BIoC there is a need to give Indigenous peoples room at the table when exploring how Indigenous legal systems can be incorporated into international human rights law, as well as domestic law-making.

### 3.4. Aligning the Best Interests of the Child in the UNCRC with the Right to Self-Determination under UNDRIP

The BIoC principle has been criticized for bringing Eurocentric and western views upon Indigenous peoples. The concept of the BIoC provides further conflicting views when read with the UNDRIP right to self-determination which includes Indigenous peoples’ rights to freely structure their cultural development<sup>262</sup> and internal affairs,<sup>263</sup> including child and family affairs. Indigenous norms might clash with Eurocentric norms historically tied to the BIoC principle. The BIoC principle could limit the right to self-determination of Indigenous peoples by imposing norms that they must adhere to, rather

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<sup>259</sup> Townsend and Townsend (n 249) 152.

<sup>260</sup> See *ibid* 148–152.

<sup>261</sup> See *ibid* 153.

<sup>262</sup> UNDRIP art 3.

<sup>263</sup> *ibid* 4.

than applying their own principles and factors that are essential to the best interests of the Indigenous child.<sup>264</sup>

To align the principle of the BIoC with the right to self-determination, a solution could be to give Indigenous communities more control over the interpretation of the BIoC. In other words, transferring the jurisdiction of Indigenous child welfare systems to Indigenous communities. This would provide Indigenous communities the opportunity to establish culturally appropriate systems, including providing their own definition of the BIoC.<sup>265</sup> However, as has been noted, Indigenous peoples are not geographically or economically in a position to seek independence. Therefore, most Indigenous peoples seek “*democratic reforms and power sharing within existing states*”.<sup>266</sup> The right to self-determination provides that states have a duty to assure, through legal frameworks, that Indigenous peoples’ aspirations are considered and to ensure a democratic sharing of power.<sup>267</sup>

International human rights treaties, such as the UNCRC put obligations upon states that have ratified them. Article 2(2) of the ICCPR states that state parties are obliged “*to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*” This provides that states are to adopt any approach that meet their obligations under the treaty.<sup>268</sup> Similar wording is to be found in article 3 of the UNCRC, stating that “*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*”.<sup>269</sup> The CRC, in their General Comment No. 5, further states that to realise the rights of the UNCRC, states need to engage with all segments of society.<sup>270</sup> Further the CRC notes that the Human Rights Committee’s General Comment No. 3 should be seen as complementary in regards to the provision.<sup>271</sup> General Comment No 3 says that states should choose the method of implementation of the ICCPR.<sup>272</sup> In other words, international human rights treaties provide an discretionary

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<sup>264</sup> Tesarek (n 113) 412.

<sup>265</sup> *ibid* 414.

<sup>266</sup> Cited by Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2007) 168; from ‘Statement of the Four Directions Council Distributed during the 1995 Commission Working Group’.

<sup>267</sup> Erica-Irene A Daes (n 186) para 25.

<sup>268</sup> Tom Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’ (2012) 34 *Human Rights Quarterly* 549–550 <<https://muse.jhu.edu/article/475696>> accessed 12 May 2025.

<sup>269</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 3.

<sup>270</sup> CRC, ‘General Comment No 5’ (n 144) para 1.

<sup>271</sup> *ibid* 5.

<sup>272</sup> CCPR, ‘CCPR General Comment No 3: Article 2 (Implementation at the National Level)’ (1981) para 1.

approach for states to choose the most effective way to realise the rights within the treaties.<sup>273</sup>

Therefore, there is the possibility for states to give Indigenous communities the opportunity to establish culturally appropriate systems, including providing their own definition of the BioC, while remaining under the authority of the state.<sup>274</sup> In other words, an Indigenous community could have jurisdiction over their own child and family services, while bound by the international commitments of the state. This approach would allow cultural differences to exist within geopolitical borders, providing a pluralistic approach.

Moreover, there is an argument to be made that providing Indigenous communities with such jurisdiction represents the most effective means of complying with the CRC. Such an argument would state that amendments, aimed at conforming existing social interpretations with international human rights standards, should be linked to cultural perceptions, by actors which have a clear understanding of the socio-cultural environment.<sup>275</sup> Further, amendments should not replace existing social understanding, but rather add to them. In other words, legislation should add to existing customs of Indigenous peoples to bring forth social change, rather than replacing them.<sup>276</sup> Indigenous communities have made strong statements about their importance of protecting their children. As the Yellowhead Institute stated:

*“Indigenous laws have always prioritized and protected Indigenous children’s immediate and lifelong best interests, including their safety, security and well-being. The best interests of an Indigenous child is inextricable from the best interests of that child’s family, community and nation. Children are at the heart of Indigenous societies.”<sup>277</sup>*

Often Indigenous communities are expected to be unwilling to change and therefore to stay unaltered.<sup>278</sup> However, this assumption does not take into account their connections with the rest of the world and ignores the possibility that communities might want to take part in the developments of human rights, instead of being opposed to them.<sup>279</sup> Many Indigenous communities

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<sup>273</sup> Zwart (n 268) 551.

<sup>274</sup> Tesarek (n 113) 414.

<sup>275</sup> Zwart (n 268) 558.

<sup>276</sup> *ibid* 560–562.

<sup>277</sup> Naomi Metallic and others, ‘An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: Does Bill C-92 Make the Grade?’ (Yellowhead Institute 2019) 4.

<sup>278</sup> Liebel (n 254) 140.

<sup>279</sup> *ibid*.

are receptive to adopting human rights measure in their practices.<sup>280</sup> Further, many Indigenous communities both use and want to use human rights frameworks, though they should be in harmony with their own practices and beliefs.<sup>281</sup> Indigenous communities have stated that they do agree with decisions regarding their children having to be in the child's best interests. The conflicting views are regarding answering "*what is* in the child's best interests".<sup>282</sup>

In this context it is important to highlight that Indigenous peoples have a right to develop their institutional structure, customs and practice, in accordance with international human rights standards.<sup>283</sup> States have a responsibility to both recognize and strengthen their Indigenous peoples' institutional structures.<sup>284</sup> This requires a dialogue between Indigenous authorities and states to achieve these ends,<sup>285</sup> so that they can work together in a complementary and necessary way to guarantee Indigenous peoples' rights.<sup>286</sup> A state's engagement with Indigenous communities must be founded on respect and dialogue, avoiding unilateral and discriminatory subordination or interference.<sup>287</sup> In other words, space for dialogue for exchange of understanding and mutual learning between states and Indigenous systems is important to realise Indigenous peoples' rights.

To summarise, the BloC principle can limit the rights to self-determination because Indigenous people's interpretation of the principle might be different than the one of the dominant actors. The principle of the BloC, like all human rights, can be interpreted in various ways.<sup>288</sup> A possible solution towards aligning these two legal concepts would be to give Indigenous peoples jurisdiction over Indigenous child welfare, while bound by international treaties, which are ratified by the state. To do so, there is a need for dialogue between the state and the Indigenous communities. Further it can be argued that this could be the most effective way for the state party to comply with the UNCRC. The reason is that Indigenous peoples have the best

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<sup>280</sup> Tobin (n 5) 180.

<sup>281</sup> Liebel (n 254) 141.

<sup>282</sup> Chiefs of Ontario, 'Concerns & Recommendations on Bill C-92, An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: From the Chiefs of Ontario to the House of Commons Standing Committee on Indigenous and Northern Affairs (INAN)' 14 <<https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR10491410/br-external/ChiefsOfOntario-e.pdf>> accessed 13 May 2025.

<sup>283</sup> UNDRIP art 34.

<sup>284</sup> UNHRC, 'Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples' (2019) UN Doc A/HRC/42/37 para 82; UNDRIP art 5.

<sup>285</sup> UNHRC, 'Rights of Indigenous Peoples' (n 284) para 82.

<sup>286</sup> *ibid* 83.

<sup>287</sup> *ibid* 109.

<sup>288</sup> Liebel (n 254) 157.

understanding of the needs of their children and what is in their best interests from a socio-cultural context.

## 4. Indigenous Jurisdiction over Child Services in Canada

This chapter intends to demonstrate how Canada has attempted to tackle the challenges of Indigenous children overrepresentation in child welfare systems. The *Act respecting First Nations, Inuit and Métis children, youth and families* came into force in 2020. To understand the evolution of the Act, this chapter begins by explaining how Indigenous child welfare operated before the Act was implemented. Sub-chapter 4.2. examines the Act itself. Firstly, by investigation to the role of the BloC principle within the Act. Secondly, by exploring the jurisdiction the Act provides Indigenous peoples in Canada. Lastly, the chapter highlights concerns and criticism Indigenous peoples and their representatives have voiced towards the Act.

### 4.1. The Structure of Indigenous Peoples' Child and Family Services Before 2020

Three hundred provincial and territorial child welfare agencies provide Aboriginal child welfare services in Canada. They operate in thirteen different jurisdictions in Canada, ten provinces and three territories, which are governed through provincial and territorial legislative frameworks. The provinces and territories are responsible for child welfare within their borders, but services to Aboriginal children and families living on reserves are dependent on funding provided from the federal government. Such government funded services must comply with provincial legislation and standards and be compatible with services provided off reserves.<sup>289</sup> The same laws have applied to Aboriginal child welfare services as to non-Aboriginal ones. There has been significant and improved involvement in child welfare laws within the country, as most of provincial and territorial child welfare laws give special consideration to Aboriginal children, families and communities.<sup>290</sup>

There are a few models of how this has been executed in the past. The most common ones have been: i) through provincial and territorial authority, ii) delegation, iii) integrated governance, iv) self-governance by band-by-law and v) tripartite agreements. The *provincial and territorial authority model*

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<sup>289</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 18.

<sup>290</sup> *ibid* 20.

does not transfer jurisdiction to Indigenous communities. Most Indigenous peoples living off-reserve adhere to this model.<sup>291</sup> The most prevalent governance model is the *delegated delivery model (delegation)*, whereby provincial governments delegate the responsibility of operating child welfare services to Aboriginal agencies. However, it should be noted that such delegated agencies are required to adhere to provincial and territorial laws to receive funding.<sup>292</sup> The *integrated governance model* is less common, which includes Aboriginal communities and provincial governments to share governance responsibilities over child welfare agencies. It gives Aboriginal communities greater authority, moving beyond delegated authority.<sup>293</sup> Another model is *self-governance by Band-by-Law*. This was set up in 1980 when the complete control and responsibility of child welfare services of Spallumcheen Indian Band was recognized by British Columbia and the federal government. The Spallumcheen Indian Band was the first Indigenous community in Canada to exercise complete jurisdiction over child welfare services and to not be constrained by provincial legislation.<sup>294</sup> Another model is a *tripartite agreement*, signed in 1999 by Nisga'a Lisims First Nation, giving them the right to create their own child welfare laws on their lands, though they had to be consistent with provincial standards.<sup>295</sup>

As stated, most Indigenous communities have operated under a delegated model. However, some Indigenous child welfare professionals working under a delegated model have expressed concerns about sustaining colonial practices and imposing them on Indigenous communities.<sup>296</sup> Though, provincial and territorial legislation has evolved towards being more culturally sensitive and most containing provisions considering Indigenous children. An argument is that those legislations do not fully represent the needs of Aboriginal peoples, since they are not made by Aboriginal peoples.<sup>297</sup> This argument further states that shifting control to Aboriginal communities would be more fitting to the Aboriginal children's and family needs.<sup>298</sup> Preliminary evidence has suggested that those services provided by

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<sup>291</sup> Nico Trocmé and others, 'Child Welfare Services in Canada' in Lisa Merkel-Holguin, John D Fluke and Richard D Krugman (eds), *National Systems of Child Protection: Understanding the International Variability and Context for Developing Policy and Practice* (Springer International Publishing AG 2019) 40.

<sup>292</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 18.

<sup>293</sup> Trocmé and others (n 291) 40.

<sup>294</sup> *ibid* 41.

<sup>295</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 19–20.

<sup>296</sup> Trocmé and others (n 291) 41.

<sup>297</sup> *ibid*.

<sup>298</sup> Nico Trocmé, Della Knoke and Cindy Blackstock, 'Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System' (2004) 78 *Social Service Review* 596.

Indigenous communities have more success in keeping children within their homes.<sup>299</sup> However, developments and comparisons of policy and structural alternatives of the different Aboriginal child welfare models has been claimed to be largely unexamined.<sup>300</sup> Consistent and detailed nation-wide reporting on Aboriginal children was one of the calls to action made by the Truth and Reconciliation Commission of Canada.<sup>301</sup> The Commission's report further noted that despite the expansions of Aboriginal child welfare agencies, the overrepresentation continued. This indicates that the intention seems to have been to establish more such agencies rather than ones with adequate funding to provide culturally adequate support.<sup>302</sup> Further, the report notes the lack of monitoring of the impact of the different initiatives made,<sup>303</sup> stating that it is difficult to get clear insight into the Aboriginal child welfare throughout the country.<sup>304</sup>

The Commission further stated in its report in 2015 that reform is essential to address the national Aboriginal welfare crisis. To achieve this reform, legal frameworks must be established that acknowledge the importance of Aboriginal agencies.<sup>305</sup> Further, it was emphasised that steps should be taken to shift the control of Aboriginal children over to their communities.<sup>306</sup>

## 4.2. An Act respecting First Nations, Inuit and Métis Children, Youth and Families

It is evident that Indigenous welfare services in Canada have a problematic history. In that regard the Human Rights Commission of Canada has received various complaints by or on behalf of Indigenous peoples relating to inadequate services on reserves, including federal funding, support for education, health, policing services, as well as child welfare services.<sup>307</sup> In

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<sup>299</sup> Nico Trocmé and others, 'Mesnmimk Wasatek: Catching a Drop of Light: Understanding the Overrepresentation of First Nations Children in Canada's Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003)' (Centre of Excellence for Child Welfare 2005) 15.

<sup>300</sup> Vandna Sinha and Anna Kozlowski, 'The Structure of Aboriginal Child Welfare in Canada' (2013) 4 *The International Indigenous Policy Journal* 14–15.

<sup>301</sup> Truth and Reconciliation Commission of Canada, 'Truth and Reconciliation Commission of Canada: Calls to Action' (2015) no 2.

<sup>302</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 27.

<sup>303</sup> *ibid.*

<sup>304</sup> *ibid* 36.

<sup>305</sup> *ibid* 55.

<sup>306</sup> *ibid* 53.

<sup>307</sup> Canadian Human Rights Commission, 'Submission to the Committee on the Elimination of Discrimination Against Women in Advance of the Committee's Development of the List of Issues Prior to Reporting for Canada's 10th Periodic Review' (Canadian Human Rights Commission 2019) HR4-115/2024E-PDF 8 <<https://www.chrc->

2007, a complaint was filed under the Canadian Human Rights Act<sup>308</sup> against Canada, claiming, *inter alia*, that funding for First Nations child welfare was discriminatory.<sup>309</sup> A series of landmark rulings were made by the Canadian Human Rights Tribunal, starting in 2016, which found that the federal program and funding for child welfare services on reserves were discriminatory against First Nations children and families. The Tribunal ordered the federal government to provide sufficient funding and support to ensure the delivery of services that meet their actual needs.<sup>310</sup> These rulings require the government to ensure that First Nations children have equal access to services, which may involve exceeding the care standards provided in similar off-reserve communities, underlining substantive equality.<sup>311</sup> The rulings acknowledge the need to provide services that meet the best interests of the Indigenous communities and thereby the best interests of the children, emphasising the special status of Indigenous children and their right to substantive equality.<sup>312</sup> The Tribunal further emphasised that substantive equality provides that the needs of each individual child must be considered, including in regard to their historical disadvantages.<sup>313</sup>

Two measures have been identified that are needed to reform Indigenous child and family services in Canada. One is funding equity and the second is *Indigenous jurisdiction over child and family services*.<sup>314</sup> Furthermore, the call from Aboriginal peoples for jurisdiction in child welfare is echoed in various reports, such as the Royal Commission on Aboriginal Peoples

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[ccdp.gc.ca/sites/default/files/documents/CHRC-Submission-to-the-Committee-on-the-Elimination-of-Discrimination-Against-Women.pdf](https://ccdp.gc.ca/sites/default/files/documents/CHRC-Submission-to-the-Committee-on-the-Elimination-of-Discrimination-Against-Women.pdf)>.

<sup>308</sup> Canadian Human Rights Act, RSC 1985, c H-6.

<sup>309</sup> First Nations Child and Family Caring Society of Canada, 'Preliminary Briefing Sheet Bill C-92 An Act Respecting First Nations, Métis and Inuit Children, Youth and Families' 1 <<https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR10454334/br-external/FirstNationsChildAndFamilyCaringSocietyOfCanada-e.pdf>> accessed 13 May 2025.

<sup>310</sup> Canadian Human Rights Commission (n 307) 8; See *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* [2016] Canadian Human Rights Tribunal 2 [472–484].

<sup>311</sup> Canadian Human Rights Commission (n 307) 9.

<sup>312</sup> See *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* (n 310) paras 427 and 465.

<sup>313</sup> *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* [2017] Canadian Human Rights Tribunal 14 [69].

<sup>314</sup> Canada, Library of Parliament, 'Legislative Summary of Bill C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families' 42nd Parl, 1st Sess, No. 42-1-C92-E (7 November 2019) 4.

(1996),<sup>315</sup> the Joint National Policy Review (2000),<sup>316</sup> Wen:de Report (2005),<sup>317</sup> and the reports from the Truth and Reconciliation Commission.

The implementation of the Act, which came into force in 2020, was *inter alia*, a response to the first five calls to action promulgated by the Truth and Reconciliation Commission in 2015,<sup>318</sup> which regarded child welfare. They included measures for the federal, provincial, territorial, and Aboriginal governments to reduce the overrepresentation of Aboriginal children in the child welfare system.<sup>319</sup> Further, they called for the enactment of Aboriginal child welfare legislation. This should be achieved by the following means: i) formally recognizing Aboriginal governments' entitlement to establish and operate their own child welfare agencies ii) requiring consideration of the legacy of residential schools in the decision-making processes of child welfare agencies and courts, and iii) establishing culturally appropriate placement of Aboriginal children into temporary and permanent care as a priority.<sup>320</sup>

The Act has the objective to make improvements and reform Aboriginal child welfare systems. It further aims to answer the call of Aboriginal peoples throughout the country to recognize and affirm their inherent jurisdiction over Indigenous child welfare.<sup>321</sup> Furthermore, it was to answer the call to recognize that different services are important to account for the great diversity of First Nation, Inuit and Métis communities, and to ensure that the services are culturally appropriate.<sup>322</sup> The Human Rights Commission of Canada has stated that the implementation of the Act is encouraging and a step forward by, *inter alia*, underlining the importance of substantive equality, preventive care and continuity of culture and language.<sup>323</sup> However,

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<sup>315</sup> Canada, Royal Commission on Aboriginal Peoples, 'Report of the Royal Commission on Aboriginal Peoples: Volume 1: Looking Forward, Looking Back' (Canada Communications Group 1996) 15.

<sup>316</sup> Rose-Alma J McDonald and Peter Ladd, 'First Nations Child and Family Services, Joint National Policy Review: Final Report' (Department of Indian Affairs and Northern Development; Assembly of First Nations 2000) 15.

<sup>317</sup> Cindy Blackstock and others, 'Wen:De: We Are Coming to the Light of Day' (First Nations Child & Family Caring Society of Canada 2005).

<sup>318</sup> Indigenous Services Canada, *Technical Information Package: An Act Respecting First Nations, Inuit and Metis Children, Youth and Families* (Indigenous Services Canada 2020) 12.

<sup>319</sup> Truth and Reconciliation Commission of Canada, 'Truth and Reconciliation Commission of Canada: Calls to Action' (n 301) no 1.

<sup>320</sup> *ibid* 4.

<sup>321</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence* (42nd Parl, 1st Sess, No 150 (30 April 2019)) 2.

<sup>322</sup> Canada, Library of Parliament (n 314) 2.

<sup>323</sup> Canadian Human Rights Commission (n 307) 9.

disappointment has been expressed that the Act does not include funding provisions.<sup>324</sup>

It should be noted that the term “Indigenous peoples” in the Act has the same meaning assigned by the definition “Aboriginal peoples of Canada” in section 35(2) of the Constitution Act, 1982.<sup>325</sup> The preamble of the Act states Canada's recognition of the legacy of the residential schools and the harm caused to Indigenous peoples through colonial policies and practices. It also underlines the importance of supporting Indigenous family and community unification.<sup>326</sup> The legislation acknowledges the inherent right of Indigenous peoples to self-government by affirming the jurisdiction of First Nations, Inuit and Métis over their child and family services. Moreover, it establishes national principles for the provision of child and family services in relation to Indigenous children, including the BIoC, the importance of cultural continuity, and the concept of substantive equality.<sup>327</sup> Its intention is to provide Indigenous peoples the option of choosing their own solution to child welfare.<sup>328</sup>

#### 4.2.1. Jurisdiction

The Act affirms Indigenous peoples, groups and communities, that hold rights recognized and affirmed by section 35 of the Constitution Act, the inherent right of self-government in relation to child and family services. This includes legislative authority and the authority to administer and to enforce its laws.<sup>329</sup>

For Indigenous communities, groups or peoples to exercise such jurisdiction they must give notice of such intent to the Government of Canada and the governments of each of the provinces and territories in which they are located.<sup>330</sup> However, this does not allow Indigenous laws to prevail over federal, provincial and territorial laws. To gain such precedence, the Indigenous governing body must request a coordination agreement with the Government of Canada and the respective provinces and territories.<sup>331</sup> If no agreement is reached within twelve months of the request the Indigenous laws will regardless take precedence over federal, provincial, and territorial laws.<sup>332</sup> Once Indigenous laws are recognised, they are accorded the same

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<sup>324</sup> Canada, Library of Parliament (n 314) 5.

<sup>325</sup> An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 (n 19).

<sup>326</sup> *ibid* preamble.

<sup>327</sup> *ibid* 2 and 3.

<sup>328</sup> Indigenous Services Canada (n 318) 6.

<sup>329</sup> An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 (n 19) s 8(a) and 18.

<sup>330</sup> *ibid* 20(1).

<sup>331</sup> *ibid* 20(2).

<sup>332</sup> *ibid* 20(3).

force of law as federal laws.<sup>333</sup> Though Indigenous laws are given the same weight as federal laws, federal laws cannot affect the interpretation of Indigenous laws, apart from the Act itself.<sup>334</sup> Further, federal laws do not automatically apply to Indigenous laws, other than the Act itself and the Canadian Human Rights Act.<sup>335</sup> In the circumstance of a conflict between Indigenous and federal laws, the Indigenous laws take precedence.

However, it is necessary for the Indigenous law to comply with section 15 of the Act regarding the "Provision of Child and Family Services" and section 10 of the Act which regards the BIoC principle.<sup>336</sup> Furthermore, section 23 provides an exception, stating that Indigenous laws apply in cases involving Indigenous children, "*except if the application of the provision would be contrary to the best interests of the child.*" Further, Indigenous laws must comply with the provisions of the Canadian Human Rights Act.<sup>337</sup>

In summary, the Act provides Indigenous communities with the possibility of full governance over their child and family services. However, it includes some restrictions and an exception, limiting and compromising the possibility of full Indigenous governance.

#### 4.2.2. Best Interests of the Child

The interpretation and administration of the Act is to be guided by the principle of the BIoC, according to section 9 of the Act. The Act further sets out in section 10(1) that when making decisions in relation to an Indigenous child, the BIoC should be the *primary consideration*.<sup>338</sup> The Act provides *factors to be considered* in section 10(3) when determining what is in the best interests of the child. These factors are not exhaustive, though they include the child's cultural upbringing, the child's need for stability, the child's relationship with its parents, the child's views and preferences, any family violence and any measures relevant to the child's security and well-being.<sup>339</sup> These consideration are to be interpreted in a manner that is in accordance with the relevant Indigenous law.<sup>340</sup> Although, when considering these factors, section 10(2) states the requirement that:

*"[...] primary consideration must be given to the child's physical, emotional and psychological safety, security and*

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<sup>333</sup> *ibid* 21(1).

<sup>334</sup> *ibid.*

<sup>335</sup> *ibid* 21(2).

<sup>336</sup> *ibid* 22(1).

<sup>337</sup> *ibid.*

<sup>338</sup> *ibid* 10(1).

<sup>339</sup> *ibid* 10(3).

<sup>340</sup> *ibid* 10(4).

*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.*"<sup>341</sup>

Thus, section 10(2) states the *primary considerations*, while section 10(3) provides *factors to be considered*. Accordingly, the Act establishes which perspectives should be given greater weight when determining the BIoC in decisions made by child and family services.

#### 4.2.3. Views of Indigenous Peoples in Canada

Many view the Act as a milestone for Indigenous communities in Canada, voicing that the legislation has provided some with hope of empowering Indigenous peoples to reclaim their jurisdiction and ensure their children's rights.<sup>342</sup> Indigenous organisations have emphasised that Indigenous peoples have held and practiced their inherent right to lawmaking jurisdiction for thousands of years, as well as taken care of the well-being of their children. Despite this, this jurisdiction has neither been respected nor recognized as a part of a Nation-to-Nation relationship by the Canadian State.<sup>343</sup> This right has previously not been recognised in section 35 of the Constitution as an Aboriginal peoples' treaty right, making the Act a significant step forward.<sup>344</sup> Nevertheless, various actors have expressed concerns regarding the Act. Many of them are in relation to section 10 regarding BIoC principle.

#### *Criticism towards the Best Interests of the Child Principle*

The First Nations Child and Family Caring Society (Caring Society) stated that the interpretation of the BIoC is shaped by Western experiences.<sup>345</sup> This has led to a history of the BIoC interpretation contributing to the overrepresentation of Indigenous children in the child welfare systems for the past 50 years.<sup>346</sup> The National Chief Robert Bertand, Congress of Aboriginal Peoples, has emphasised the colonial roots of the BIoC principle and its lack of understanding of Indigenous communities and families.<sup>347</sup> Chief Judy

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<sup>341</sup> *ibid* 10(2).

<sup>342</sup> Metallic and others (n 277) 4.

<sup>343</sup> *ibid* 14; Naomi Metallic, Hadley Friedland and Sarah Morales, 'The Promise and Pitfalls of C-92: An Act Respecting First Nations, Inuit, and Métis Children, Youth and Families' (Yellowhead Institute 2019) 10.

<sup>344</sup> Metallic and others (n 277) 16.

<sup>345</sup> First Nations Child and Family Caring Society of Canada (n 309) 2.

<sup>346</sup> Metallic and others (n 277) 16.

<sup>347</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Standing Committee on Indigenous and Northern Affairs, 30 April 2019* (n 321) 3.

Wilson further emphasised that the BIoC was created without participation of Indigenous peoples. She goes on to explain that the needs of their children could not be based on the western colonized view of the BIoC principle.<sup>348</sup>

The National Chief Robert Bertrand has moreover stated that the legislation should provide that Indigenous communities can themselves define what constitutes the BIoC.<sup>349</sup> In documentation of the Standing Committee on Indigenous and Northern Affairs, many Indigenous representatives and individuals shared this view that Indigenous peoples need to be the ones to determine what is in the best interests of the children within their communities.<sup>350</sup>

Indigenous communities have referred to the BIoC principle as a well-intentioned but misguided principle that continues to cause their communities and children harm. Furthermore, they have stated that imposing external ideas of the BIoC, which do not reflect the best interests of Indigenous children, constitutes a failure of reconciliation.<sup>351</sup> The Chiefs of Ontario explained their belief that it would be in the best interests of Indigenous children if the community could speak their knowledge of their communities and themselves determine how their children would best be served. Further, they emphasise that there is no one-size fits all solution when assessing the BIoC.<sup>352</sup>

### *Criticism towards the Act*

The Caring Society has further expressed the importance of the criteria for the BIoC being general and open to interpretation, especially given its primacy.<sup>353</sup> The Caring Society argues that though section 10(3) acknowledges important considerations of the Indigenous child, including culture, language and its relationship to family, it only states that those factors should be *considered*. Further, they argued that the weight given to the section is unclear in relation to section 10(2), which states the primary considerations.<sup>354</sup> Furthermore, the Caring Society noted that there is no reference to the land as sacred within the Act, which is a fundamental part of the child's best interests and cultural continuity.<sup>355</sup> Additionally, it is argued

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<sup>348</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Standing Committee on Indigenous and Northern Affairs, 14 May 2019* (n 203) 42.

<sup>349</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Standing Committee on Indigenous and Northern Affairs, 30 April 2019* (n 321) 3.

<sup>350</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence* (42nd Parl, 1st Sess, No 150 (7 May 2019)) (J. Hughes) 5.

<sup>351</sup> Chiefs of Ontario (n 282) 15.

<sup>352</sup> *ibid.*

<sup>353</sup> First Nations Child and Family Caring Society of Canada (n 309) 5.

<sup>354</sup> *ibid* 6.

<sup>355</sup> *ibid* 3.

that prioritizing the BIoC diminishes the importance of the principles of “substantive equality” and “cultural continuity.”<sup>356</sup>

The Yellowhead Institute has stated positive views towards the Act recognising the importance of a child’s relationship with the community and connection to culture. However, the institute stresses that the relationships must further be understood in law as essential to Indigenous children’s emotional and psychological safety, security, and well-being.<sup>357</sup> The institute further expresses its concerns that even though national standards provide guidance for interpreting the Act, without additional wording, courts may still interpret the law in a way that balances a child’s need for community and culture with the child’s best interests. This approach does not recognize these elements as integral parts of the child’s best interests.<sup>358</sup>

During the adoption of the Act, twenty-four briefs were considered from various Indigenous communities and other actors.<sup>359</sup> Many of them argued that the definition of the BIoC principle, stated in section 10 of the Act, should be defined and limited by Indigenous laws and read from an Indigenous perspective.<sup>360</sup> The First Nations Assembly did not express opposition towards the BIoC principle, but stated that it should be interpreted in alignment with the laws enacted by the governing bodies of Indigenous peoples. This would establish the BIoC principle as central, while allowing First Nations to set standards in accordance with their customs, values and practices.<sup>361</sup> This has further been emphasised by the Native Women’s Association of Canada, which highlighted that the principle should be defined and interpreted from within the child’s community as the BIoC principle

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<sup>356</sup> *ibid* 6.

<sup>357</sup> Metallic, Friedland and Morales (n 343) 5.

<sup>358</sup> *ibid*.

<sup>359</sup> Parliament of Canada, ‘Bill C-92, An Act Respecting First Nations, Inuit and Métis Children, Youth and Families’ (*House of Commons*) <<https://www.ourcommons.ca/Committees/en/INAN/StudyActivity?studyActivityId=10599732>> accessed 13 May 2025.

<sup>360</sup> Chiefs of Ontario (n 282) 5; Congress of Aboriginal Peoples’, ‘Congress of Aboriginal Peoples’ Submission to the Standing Committee on Indigenous and Northern Affairs: Bill C-92, An Act Respecting First Nations, Inuit and Métis Children, Youth and Families’ 4 <<https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR10459350/br-external/CongressOfAboriginalPeoples-e.pdf>> accessed 13 May 2025; Nishnawbe Aski Nation, ‘Submission of the Nishnawbe Aski Nation to the Standing Committee on Indigenous and Northern Affairs Re, Bill C-92: Promising Purpose, Problematic Provisions’ 2 <<https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR10491859/br-external/NishnawbeAskiNation-e.pdf>> accessed 13 May 2025.

<sup>361</sup> Assembly of First Nations, ‘Bill C-92 - Proposed Amendments Submitted to the Standing Committee on Indigenous and Northern Affairs’ 3 <<https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR10470382/br-external/AssemblyOfFirstNations-e.pdf>> accessed 22 May 2025.

could be applied with inherent biases by judges, social workers, and lawyers that lack cultural competence.<sup>362</sup>

Furthermore, concerns regarding the Act have been expressed in relation to the jurisdiction aspects of the Act. At first sight, it seems that Indigenous laws are given prominence. However, they are only given prominence as long as they align with certain legislative frameworks.<sup>363</sup> Section 23 provides that Indigenous laws can be set aside if they are not in the best interests of the child. This exception is concerning, for it allows for the infringement of Indigenous laws if they are considered to be contrary to the child's best interests. However it is unclear how and who makes that determination.<sup>364</sup> Further, section 22(1) provides that sections 10 to 15 of the Act would prevail over Indigenous laws, should they not be in line with the principles stated in them.<sup>365</sup> Therefore, the Indigenous law paramountcy does not include the sections that are in relation with the BIoC.<sup>366</sup> This could possibly have the effect of putting up barriers for Indigenous laws to make a difference for Indigenous communities, as most decisions regarding child welfare are determined on the grounds of the BIoC principle.<sup>367</sup>

Section 10(4) states the importance of interpreting the principle of the BIoC in a way that is consistent with Indigenous laws, "*to the extent that it is possible to do so*". This has been argued to open the door for Indigenous lawmaking jurisdiction being challenged and overturned constantly.<sup>368</sup> The Act does not specify a threshold that outlines the various reasons framed as BIoC that can initiate intervention by provincial and territorial actors.<sup>369</sup>

Concerns have been raised regarding the uncertainty of the limitations set by the BIoC principle of section 10 of the Act. It allows almost unlimited ways for federal and provincial governments to overthrow Indigenous law jurisdictions on the grounds of the BIoC principle.<sup>370</sup> While the Act acknowledges jurisdiction, it does not eliminate federal and provincial oversight or interventions by authorities. The Yellowhead Institution

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<sup>362</sup> Native Women's Association of Canada, 'Final Report on Government Engagement Mechanisms on An Act Respecting First Nations, Inuit and Métis Children, Youth and Families' (Native Women's Association of Canada 2023) 56.

<sup>363</sup> First Nations Child and Family Caring Society of Canada (n 309) 8.

<sup>364</sup> *ibid* 2; concern was also expressed in Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence* (n 350) (Grand Chief Constant Awashish) 10 and 14.

<sup>365</sup> First Nations Child and Family Caring Society of Canada (n 309) 2 and 8.

<sup>366</sup> Metallic, Friedland and Morales (n 343) 7.

<sup>367</sup> *ibid*.

<sup>368</sup> *ibid* 16; Nishnawbe Aski Nation (n 360) 2.

<sup>369</sup> First Nations Child and Family Caring Society of Canada (n 309) 6.

<sup>370</sup> Metallic and others (n 277) 16.

expressed their concern that the Act is “*echoing hollow promises rather than creating real change for Indigenous children, families and communities.*”<sup>371</sup>

## 5. Synthesis: Comparing the Analytical Framework to the Case of Canada

This chapter applies the concepts and perspectives presented in the analytical framework of chapter three to the case of Canada from chapter four. It will elaborate on how the findings from Canada resonate and relate to the analytical perspectives.

It is evident that Canada has taken measures to implement the BIoC principle, as obliged by article 4 of the UNCRC. In 2003 the CRC stated in a concluding observation that Canada should appropriately analyse the BIoC principle and adequately define it in legislation.<sup>372</sup> With section 10 of the Act, one perspective is that the principle has been defined in the legislation. However, whether it was adequately defined and has been appropriately analysed in the context of Indigenous children is up for discussion.

The UNCRC states that the BIoC shall be the primary considerations. This is also present in section 10(1) of the Act. Section 10(3) provides factors to be considered when determining the best interests of an Indigenous child. Furthermore, section 10(2) provides factors that primary considerations must be given to. Altogether, this provides a comprehensive basis for an assessment where all relevant factors are considered, as interpreted by the CRC.<sup>373</sup> The CRC further states that collective rights of the child must be taken into considerations as a part of determining the best interests of the individual child,<sup>374</sup> as well as their cultural background and their way of life.<sup>375</sup> This also aligns with the Act, for section 10(4) provides that sections 10(1) and (3) are to be interpreted in relation to the Indigenous child so that it is consistent with Indigenous laws of the community the child belongs to. However, the Act provides limitations to Indigenous laws, one being that they must comply with the BIoC principle of section 10 of the Act.

Section 10 of the Act states not only what factors should be considered when determining the BIoC, but also what should be the primary considerations.

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<sup>371</sup> *ibid* 8.

<sup>372</sup> CRC, ‘Consideration of Reports Submitted by States Parties under Article 44 of the Convention’ (n 145) paras 24 and 25.

<sup>373</sup> CRC, ‘General Comment No. 14’ (n 2) para 2.

<sup>374</sup> CRC, ‘General Comment No. 11’ (n 15) para 32.

<sup>375</sup> EMRIP, ‘Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples’ (n 4) para 6.

This is problematic because these factors might not necessarily reflect the understanding of the BIoC within the different Indigenous communities. The Canadian governments interpretation of what is important for Indigenous children might not adequately articulate the complex relationship Indigenous children have with their communities and culture. If the government dictates what factors should be considered, it might impose the government's ideology of what constitutes the BIoC onto the Indigenous communities, which amounts to a form of institutional hermeneutical injustice. Indigenous peoples understanding of children's needs might differ from that of the Canadian government. Therefore, Indigenous peoples might not be able to articulate their understanding and knowledge within the framework provided by the State. This could be in relation to different understandings of the importance of kinship relationships and cultural and spiritual beliefs, or the responsibility of the child's extended family and community.<sup>376</sup>

International law is a living law that is constantly developing and adapting to different cultures and a rapidly changing world. This includes the interpretation of the UNCRC being subject to change and development<sup>377</sup> and thereby the BIoC principle. The colonial roots of the BIoC principle leave many sceptical of its good intention and associate it with reasoning for the removal of Indigenous children rather than assuring their well-being. The role of the BIoC is standardised in many societies, but the definition of the BIoC is left to society to determine.<sup>378</sup> However, the principle is argued to often be misguided. Though the BIoC principle is broad and open for interpretation, it has a history of prioritising western perspectives, disregarding other perspectives and consider them inferior. These views are what has painted the picture of Canadian Indigenous child welfare in the past, where the BIoC principle was applied to Indigenous children without the participation of Indigenous peoples and their views disregarded,<sup>379</sup> a clear example of epistemic injustice.

This thesis argues that the meaning behind the BIoC principle must capture the understanding and knowledge of Indigenous peoples. To balance the epistemic injustice, Indigenous communities must therefore effectively participate in the development of how their Indigenous legal systems can be harmonised with international human rights law. Indigenous peoples in Canada must be able to take part in the development of legal terms, rather

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<sup>376</sup> Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (n 12) 5.

<sup>377</sup> Liebel (n 254) 154.

<sup>378</sup> Tesarek (n 113) 412.

<sup>379</sup> Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Standing Committee on Indigenous and Northern Affairs, 14 May 2019* (n 203) 42.

than adjusting their understanding to a term that reflects the ideology of the State or an assumed universally existing ideology.

When a dominant society attempts to impose its views on marginalized communities, children's rights may be violated, as those imposed views may not serve their best interests. As presented in the previous chapter, many Indigenous communities argue that the assessment of the BIoC of an Indigenous child would be best based on the knowledge and understanding of the Indigenous community the child belongs to. This argument is based on that cultures from Indigenous peoples and their way of life might not align with the ones of the Canadian State and Canadian society at large. An extended family household and the responsibility and independence expected from children might, from an outsider's perspective, be viewed as neglect on behalf of the parents. Indigenous children might therefore be vulnerable to having their way of life being interpreted as contrary to their own best interests.<sup>380</sup> Indigenous legal interpretation of the principle of the BIoC could give the most adequate results for the Indigenous child's development and well-being. This is not to argue that the importance of a child maintaining their connection with their culture justifies the violation of other rights.<sup>381</sup> Nevertheless, children's rights, including their best interest, must be understood in a contextualized manner. An Indigenous legal interpretation would involve interpreting laws and legal norms from within the Indigenous community, its culture and legal tradition in which they operate, rather than imposing an interpretation provided from the Canadian government. Local knowledge and experience could provide a better understanding of what would be in the Indigenous child's best interests.<sup>382</sup> This aligns with the criticism Indigenous communities have stated towards the Act, presented in chapter four, that Indigenous communities should themselves define what constitutes the best interests of their children.

Canada might not be failing to comprehend Indigenous children's different culture and values. In fact, the legislator makes efforts towards reconciliation. The Act acknowledges Indigenous peoples' jurisdiction and gives them room to write their own laws, thereby expanding the understanding of the BIoC and the sui generis relation Indigenous peoples have with their culture. However, the Canadian government might not understand how culture and values may differ and how they affect an Indigenous child. For this reason, dialogue mechanisms are important for the State and Indigenous peoples to exchange

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<sup>380</sup> Liebel (n 254) 139.

<sup>381</sup> *ibid* 141.

<sup>382</sup> See Bruce-Jones (n 235) 354.

experiences and expertise in order to strengthen Indigenous peoples' institutional structures.

The Act was evidently implemented as a protective legislation for Indigenous peoples, recognizing their rights as Indigenous peoples. However, the report of the Truth and Reconciliations Commission has stated that whenever the Canadian State has implemented legislation of policies to protect Aboriginal peoples they have done so by ignoring or limiting their right to self-determination, on the grounds of it being in the best interest of Aboriginal peoples.<sup>383</sup> This has resulted in cultural and ethnical destruction of Aboriginal communities.<sup>384</sup> Further the Commission indicated that the strongest tool Aboriginal peoples have in Canada to protect their right is their right to self-determination, therefore it is important that this right is fully recognized.<sup>385</sup> Indigenous peoples right to self-determination affects their ability to exercise all other rights provided in the UNDRIP,<sup>386</sup> and is essential for Indigenous communities to meet their children's needs.<sup>387</sup> The Act affirms Indigenous peoples rights to self-determination, including their inherent rights to self-government in relation to child and family services.<sup>388</sup> This right was previously not recognized in Canada. However, as found in the previous chapter, Indigenous peoples state that the right to self-determination has always been theirs. Indigenous peoples have practiced their lawmaking rights for thousands of years, as well as taken care of their own children,<sup>389</sup> even though the Canadian State had previously not recognized this right. Not recognising Indigenous peoples' knowledge about lawmaking and competence in operating according to their legal frameworks is yet another example of epistemic injustice.

There is a risk of contradictions arising between the right to self-determination and the concept of the BIoC, as provided for in section 10 of the Act. The Act provides that Indigenous peoples' right to determine their own child welfare according to their own Indigenous laws, can be limited if they are not considered in the child's best interests. However, the Act stays silent regarding how that is determined or who is supposed to determine it. This could lead to various ways for territorial, provincial, or national

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<sup>383</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' (n 10) 209.

<sup>384</sup> *ibid.*

<sup>385</sup> *ibid.*

<sup>386</sup> EMRIP, 'Rights of the Indigenous Child under the United Nations Declaration on the Rights of Indigenous Peoples' (n 4) para 13.

<sup>387</sup> *ibid.* 3.

<sup>388</sup> An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 (n 19) preamble.

<sup>389</sup> Metallic and others (n 252) 14; Metallic, Friedland and Morales (n 312) 10.

governments to hinder Indigenous peoples in taking care of their children in accordance with their own values. Indigenous representation within the legal system of Canada is furthermore limited,<sup>390</sup> which might lead to judges and workers not grasping the differences in culture and needs of Indigenous children. It might therefore be important that professionals within the legal apparatus are themselves Indigenous. Even though non-Indigenous judges might take Indigenous cultures and values into consideration, they are more likely to continue to interpret the law based on their own understanding.

The Canadian State is obligated to implement the UNCRC in the most effective way. An argument to be made is that aligning the two legal principles, the BIoC and the right to self-determination, by giving Indigenous peoples room to interpret the BIoC principle themselves in accordance with the UNCRC, would be the most effective way. This way might not only align the BIoC with the right to self-determination but could further enhance both principles. It would empower Indigenous peoples' right to self-determination and ensure that the best interests of an Indigenous child is interpreted in a culturally appropriate manner and with the child's cultural understanding. It is important to emphasise that Indigenous peoples in Canada can be assumed to want what is best for their children. Furthermore, it can certainly be expected that Indigenous peoples want to comply with human rights, but in a way that in line with their own practices and beliefs.<sup>391</sup>

In summary, the Act does recognize Indigenous peoples' right to self-determination, including the right to self-governance over their child welfare. However, this right is limited in two ways. Firstly, the interpretative guidelines on the BIoC principle, provided in section 10 of the Act, restricts Indigenous peoples to interpret the principle in accordance with their own knowledge and understanding. This leads to them having to adjust their legal interpretations to the one provided in the Act. Secondly, the right is limited because it leaves room for territorial, provincial and national governments to intervene without clear limits. The establishment of the Act provided an opportunity to align the two concepts, the BIoC and the right to self-determination, by giving Indigenous peoples a possibility to claim jurisdiction over their child and family welfare services. Both these limitations restrict Indigenous communities from interpreting the principle through an Indigenous lens and from a culturally appropriate understanding, resulting in upholding epistemic injustice. This limits the possibility of aligning the BIoC principle with the right to self-determination.

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<sup>390</sup> Metallic, Friedland and Morales (n 343) 7.

<sup>391</sup> Liebel (n 254) 141.

## 6. Conclusion

The thesis has presented the problem that Indigenous peoples' right to self-determination can be limited by the BIoC principle. For the purpose of making a contribution to the discussions surrounding the dilemma, the thesis started with the main research question: *how can the principles of BIoC and self-determination be aligned in law and in practice?* To answer this question, the thesis attempted to clarify how the principles are interconnected and explored ways for them to not only coexist but further enhance each other.

The BIoC principle has been viewed as problematic because it has a past of being interpreted from a culturally decontextualised understanding, which does not represent the needs of all children. The thesis argues that for the BIoC principle to be applied in a culturally appropriate way in cases of Indigenous children, it must be done through an Indigenous lens. This would allow the BIoC to be determined by an understanding of the internal characteristics of the culture of the child. This would furthermore provide a better understanding of what constitutes the individual Indigenous child's best interest. In that context, the thesis states that recognizing Indigenous peoples' right to self-determination, and thereby the right to autonomy and self-governance is a key factor for the BIoC principle. It would provide the most effective application of the BIoC principle in accordance with its purpose. Its purpose being to ensure the child's rights and the child's holistic development. Therefore, the thesis argues that Indigenous peoples should have the possibility of claiming jurisdiction over their child welfare and apply their own Indigenous laws. Furthermore, for Indigenous peoples to have their own welfare systems in accordance with Indigenous laws is a fundamental requirement for epistemic justice. That is, recognizing that Indigenous peoples' knowledge and understanding is not inferior to the dominant actor's knowledge and understanding. Indigenous peoples must take part in legal development, rather than having their understanding adjusted to what is already established.

The thesis showed how this issue is relevant in the case of Canada, which implemented *An Act respecting First Nations, Inuit and Métis children, youth and families* in 2020. The Act provides Indigenous peoples with the opportunity to claim jurisdiction over their own child and family services and recognizes their right to self-determination and self-governance. However, the thesis has highlighted two limitations to this right. Firstly, the Act states that Indigenous laws must comply with the BIoC principles. However, the Act provides not only that the BIoC should be the primary consideration in the making of decisions or the taking of actions in relation to an Indigenous child, but furthermore states guidelines on how the BIoC should be

determined. This exacerbates epistemic injustice as it indicates that Indigenous peoples are less competent to know what is in their children's best interest. Secondly, the Act does not define how or who determines whether Indigenous laws and provisions are contrary to the BIoC, leaving the door open for provincial, territorial and national government to intervene by reasoning from their non-Indigenous perspective and understanding.

The case of Canada served well for illustrating the issue that by limiting the right to self-determination, the scope of Indigenous peoples being able to apply their understanding and knowledge of how to take care of their children, is also limited. Although Canada has recognised Indigenous peoples' right to self-determination, the right is limited to them having to adjust their understanding and interpretation in a way that aligned with the dominant actors. This could possibly result in the status quo.

A discussion about the interconnectedness of the BIoC and the right to self-determination, and how they can be aligned to enhance each other, is important and useful for future practices. However, the answer to the research question remains largely theoretical. Though the case of Canada was used to give a more practical perspective, the actual results of the implementation of the Act in concrete cases was not analysed. Other approaches and research designs could have been useful to gain more insight into the legislation's effectiveness. For example, examining how different Indigenous communities within Canada have implemented the Act or conducting interviews with personnel from different Indigenous child and family services in different territories and provinces. However, the Act was only implemented in 2020, resulting in limited availability of case law to analyse. This thesis could possibly be a contribution to such future evaluation of implementation of the Act. Furthermore, a comparative legal analysis between countries that have implemented legislation providing Indigenous peoples with jurisdiction over their child welfare could have been useful, to study in a constructive way the beneficial and disadvantageous legal implementations.

The purpose of the thesis was to make a contribution to debates about the dilemma between the principle of self-determination and the BIoC counteracting each other. This was achieved by theoretically unpacking the problematics of the BIoC principles and by showing how ignoring and limiting Indigenous peoples' right to self-determination can result in the BIoC principle not being interpreted in a way that reflects the culture and needs of an Indigenous child. The thesis further contributed to the debate by highlighting that full recognition of Indigenous peoples' right to self-determination would lead to the BIoC principle being interpreted in a culturally appropriate manner and in fact be in the best interests of the

Indigenous child. The findings of the thesis could hopefully be worthy of consideration when investigating similar challenges in other parts of the world.

Researching Indigenous children's rights is important, not only to explain their historical disadvantages but to better understand their current marginalization and to identify alternative and improved pathways for future practices.

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