

EXCLUDED IN THE “BEST INTERESTS OF THE STATE”: TREATMENT OF MINOR  
CANADIANS UNDER IMMIGRATION AND REFUGEE PROTECTION LAWS

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A Thesis submitted to the Faculty of Graduate Studies of  
The University of Manitoba

in partial fulfillment of the requirements for the degree of

MASTER OF LAWS (LL.M)

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University of Manitoba, Winnipeg

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## ABSTRACT

In this thesis, I focus on minor Canadian children born to non-citizens detained under the Immigration and Refugee Protection Act of 2001. My argument is that the standard of treatment meted out to such children is different to that of Canadian children with a detained parent in the Canadian prison system. While both actions are claimed to be “in the best interests of the child,” I assert that the law treats best interests of Canadian children differently when their parents are detained under immigration laws.

Tracing a general evolution of the concept of “best interests of the child” (BIOC) laid down in Article 3 (1) of the United Nations Convention on the Rights of the Child, I analyze its reception and application in Canadian immigration laws. After that, I contrast the same with the application of this principle under child protection laws in Ontario and British Columbia. These two provinces have two of the three Immigration Holding Centres (IHC) in Canada and therefore permit the best comparison.

I analyze the discourses surrounding detention of non-citizens’ children, including laws, policies, guidelines, oral/written reasonings to understand the process of legitimization involved and the inherent contradictions within them. Applying Lajos Brons’ concept of “sophisticated othering” I argue that Canada indulges in the process of “othering” when it interprets a legal concept (BIOC) differently for two similarly placed subjects.

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*To do evil a human being must first of all believe that what he's doing is good, or else that it's a well-considered act in conformity with natural law. Fortunately, it is in the nature of the human being to seek a justification for his action.*

-Aleksandr Solzhenitsyn (The Gulag Archipelago)

## Chapter I. Introduction

Children are detained under immigration laws in different parts of the world. Practices and regulations in many countries attempt to distinguish unaccompanied minors, families with children and others in the refugee and migration contexts to apply different treatments. Still, the lines get blurred, and children end up inside prisons or structures that resemble prisons.

In Canada, the detention of children under immigration laws is nothing new. In most cases, children are confined informally as “guests” with their detained parents. Their detention is, therefore not recorded and due to this reason, there is a lack of any accurate statistics (de-facto detention). However, reports and articles comment on the existence of the practice from the 1980s to the present. A report of *Canada Employment and Immigration, Finance and Administration* (NHQ) of 1989 refers to the condition of detention of women and children in the immigration detention centres.<sup>1</sup> Stephen Foster refers to the brief presented by Toronto Refugee Affairs Council (TRAC) to the Legislative Committee on Bill C-86 in 1992; which mentions the detainment of children including five babies in the now-closed Celebrity Inn Detention Centre in Mississauga, Ontario.<sup>2</sup> Another report by the Canadian Coalition for the Rights of the Children of 1999 similarly notes the practice of detaining children with their non-citizen parents at Celebrity Inn Detention Centre in Mississauga, Ontario, Skyline Hotel in Niagara Falls, Ontario and Laval Centre in Quebec.<sup>3</sup> The Canadian Council for Refugees highlighted in 2000 the dilemma that detained migrant mothers face of either having their children held with them inside these centres

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<sup>1</sup> Stephen Foster, “Immigration detention” (1992) 8 J Law Soc Policy 107 at 132.

<sup>2</sup> *Ibid* at 132.

<sup>3</sup> Canadian Coalition for the Rights of Children, *The UN Convention on the Rights of the Child: How Does Canada Measure up?* (1999) at 112, online <<http://www.walnet.org/csis/reports/CCRC-MEASURE.PDF>>.

or separated.<sup>4</sup> The detention of children received some prominence recently after the detailed report by Hanna Gros and Yolanda Song on this practice under immigration laws in Canada.<sup>5</sup> A more recent report by Hanna Gros and Samer Muscati specifically chronicles the issue of Canadian children detained in immigration detention facilities.<sup>6</sup> Detaining children under immigration laws is a documented practice in Canada.<sup>7</sup>

The above reports focus on the quantitative aspects of such detention. The present study is, however, concerned with qualitative aspects, i.e., the justification for this practice. As it will be explained in the following pages, the standard of “best interests of the child” (BIOC) plays an important role in these detentions. BIOC has a notable presence in Canadian immigration and refugee protection laws and the next section introduces the legal framework surrounding the detention of children.

## 1.2 Legal Framework

The legal framework surrounding the detention of children on immigration/refugee protection grounds provides a compelling demonstration of the dilemma between the state’s interest in immigration control and its obligation towards children.

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<sup>4</sup> Canadian Council for Refugees, *Canadian NGO Report on Women and Children Migrants* (2000) online: <<http://ccrweb.ca/en/canadian-ngo-report-women-and-children-migrants>>.

<sup>5</sup> See generally Hanna Gros & Yolanda Song, "'No Life for a Child' A Roadmap to End Immigration Detention of Children and Family Separation" (International Human Rights Program, University of Toronto, 2016), online: <[https://ihrp.law.utoronto.ca/utfl\\_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf](https://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf)> [Gros & Song].

<sup>6</sup> See Hanna Gros, *Invisible Citizens: Canadian Children in Immigration Detention* (International Human Rights Program, University of Toronto, 2017), online: <[https://ihrp.law.utoronto.ca/utfl\\_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf](https://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf)>.

<sup>7</sup> A more detailed discussion with statistical information on the detention of children under immigration laws in Canada can be found in Section 1.5 “Scale of the Issue”, *infra* at 22.

The *Immigration and Refugee Protection Act*<sup>8</sup> (*IRPA*), *Immigration and Refugee Protection Regulations*<sup>9</sup> (*IRPR*) and the *Enforcement Manual No.20*<sup>10</sup> (*ENF20*) set out when a permanent resident or foreign national can be detained. An officer of the Canada Border Services Agency (CBSA) makes the original decision to detain a non-citizen. This can take place during the person's entry into Canada. A CBSA officer initiates the process when he is of the impression that the individual poses a flight risk or is a danger to the public. Detention is resorted to also if "the officer is not satisfied of the identity of the foreign national" or "is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality."<sup>11</sup> The *IRPA* does not preclude the detention of minors although it specifies that minor children may be detained as a matter of last resort after taking into consideration *inter alia* the best interests of the child.<sup>12</sup> Regulation 249 of *IRPR* supplements this caution with a few "special considerations" to be applied to minors in relation to their detention.<sup>13</sup> It states:

For the application of the principle affirmed in section 60 of the Act that a minor child shall be detained only as a measure of last resort, the special considerations that apply in relation to the detention of minor children who are less than 18 years of age are:

- (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
- (b) the anticipated length of detention;
- (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- (d) the type of detention facility envisaged and the conditions of detention;
- (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and

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<sup>8</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

<sup>9</sup> *Immigration and Refugee Protection Regulations* (SOR/2002-227) [*IRPR*].

<sup>10</sup> *Immigration, Refugees and Citizenship Canada, ENF 20 Detention*, online: <<http://www.cic.gc.ca/english/resources/manuals/enf/enf20-eng.pdf>> [*ENF 20*].

<sup>11</sup> See generally *IRPA supra* note 8, div 6; See also *IRPR supra* note 9, s 244.

<sup>12</sup> *IRPA supra* note 8, s 60 ("For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.").

<sup>13</sup> *IRPR supra* note 9, s. 249.



(f) the availability of services in the detention facility, including education, counselling and recreation.

The *Enforcement Manual (ENF)*, according to CBSA is “intended as a support and guide for CBSA officers in the execution of their enforcement related responsibilities.”<sup>14</sup> *ENF20*, which is a guide for the officers in exercising their powers for detention under *IRPA*, unequivocally states that minor children cannot be detained for their protection and the responsibility to protect children lie with youth protection agencies.<sup>15</sup> It states:

A60 stipulates that it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account other applicable criteria including the best interests of the child (BIOC).

R249 identifies the special considerations that apply in relation to the detention of minor children under 18 years of age. These considerations are described in R249 as follows:

- a. the availability of alternative arrangements with local child care agencies or child protection services for the care and protection of the minor children;
- b. the anticipated length of detention;
- c. the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- d. the type of detention facility envisaged and the conditions of detention;
- e. the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and
- f. the availability of services in the detention facility, including education, counselling, and recreation.

*ENF20* reiterates the “detention as a last resort” caution of *IRPA* and also specifies the commitment of CBSA in the cases where “school-age children” are detained in the Immigration Holding Centres (IHC) to provide them with education.<sup>16</sup>

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<sup>14</sup>Canada Border Services Agency, “CBSA Enforcement Manual – Part 1 - Introduction”, online: Maynard Kischer Stojicevic <<http://vancouverlaw.ca/resources/Customs-Enforcement-Manual-1-of-3.pdf>>.

<sup>15</sup> *ENF20 supra* note 10, ¶5.10.

<sup>16</sup> *Ibid* (“In response to those considerations, the CBSA is committed in providing education after seven days for school age children in CBSA IHCs.”).

When CBSA detain parents, and no other family member is present outside to take care of the children, the decision regarding such children, including children born in Canada is left to their parents. If they choose to, their children accompany the parents in detention as *de-facto* or guest detainees.<sup>17</sup> The drawback with leaving such a decision to parents is that their personal concern for the children and hope for an early release might triumph over the long-term impact of detention on the children. Interestingly, there is no mention of this *de-facto* system of detention in the *IRPA*, *IRPR* or *ENF20* either under the provisions concerning children or vulnerable groups. It is under the section “detention” inside CBSA’s website where references to this system are mentioned. The page with the title “Special consideration for vulnerable people” on CBSA’s website states:

... Accompanied minors may be permitted to remain with their detained parents in a CBSA immigration holding centre if it is in the child's best interest and appropriate facilities are available. During IRB immigration proceedings, an IRB representative is assigned to represent the best interests of unaccompanied minors and vulnerable people. ...<sup>18</sup>

As will be discussed later in this chapter, such *de facto* or guest detention of children happens frequently. *IRPA* stipulates a mandatory review of the decision to continue such detention of the parents by a member of the Immigration Division (ID member) within 14 days in the case of designated foreign nationals and within 48 hours in the case of other foreign nationals or permanent residents.<sup>19</sup> During this process, the Minister’s representative argues for continued detention on one side and the detainee or his legal representative resists it on the other side.<sup>20</sup>

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<sup>17</sup> See Gros & Song, *supra* note 5 at 33-34.

<sup>18</sup> CBSA, *Arrest, detentions and removals – Detentions*, online: Canada Border Services Agency <<http://www.cbsa-asfc.gc.ca/security-securite/detent-eng.html>> [CBSA].

<sup>19</sup> *IRPA*, *supra* note 8, ss 57(1), 57.1(1).

<sup>20</sup> See Immigration and Refugee Board of Canada, “Detention Review Hearings”, online: <[http://www.irb-cisr.gc.ca/Eng/detention/Documents/detention\\_e.pdf](http://www.irb-cisr.gc.ca/Eng/detention/Documents/detention_e.pdf)> at 3.

After the first review, a person whose detention is approved by the ID member is held in one of the three IHCs at Toronto, Vancouver, and Laval (Quebec) or in provincial detention facilities.<sup>21</sup> Although CBSA states that it makes arrangements with the provincial correctional facilities only to hold detainees with a “violent criminal background,” it specifies that areas which are not served by IHCs are an exception to this rule. Thus, even low-risk detainees can find themselves in provincial correctional facilities outside the jurisdiction of the three IHCs. CBSA has arrangements with such provincial facilities in Vancouver too, where the IHC is designed to hold detainees only up to 48 hours.<sup>22</sup> This includes the accompanying child if there is one involved. CBSA has arrangements with more than 180 detention facilities all over Canada in addition to the IHCs to detain non-Canadian citizens.<sup>23</sup> Thus it is clear that the detention of children along with their non-citizen parents is a practice in the Canadian immigration and refugee protection system.

This leads to the question about the compliance of such detention with the provisions of international legal instruments which do not endorse the practice of detaining children by national legal systems in general.<sup>24</sup> Article 3(3)(f) of *IRPA* lays down the obligation to construe its provisions in compliance with international human rights instruments.<sup>25</sup> BIOC attained a firm footing within international law through Article 3 of the *UN Convention on the Rights of the Child*

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<sup>21</sup> CBSA, “Federal Arrangements with Partners and Stakeholders for Immigration Detention” (2016) online: <<http://news.gc.ca/web/article-en.do?nid=1111649>>.

<sup>22</sup> See CBSA *supra* note 18; Gros & Song, *supra* note 5 at 63, n 19; Hanna Gros & Paloma van Groll, “*We Have No Rights*”: *Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada*, Renu Mandhane ed, (IHRP, University of Toronto, 2015) at 78 [Gros & van Groll] (here, however, the time is mentioned as 78 hours).

<sup>23</sup> CBSA, “Statistics of all Detention Facilities Used by CBSA” (4 November 2015) (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2016-04047, informal information request File No. A-2016-04047 KAB).

<sup>24</sup> See *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS. 3, art 37 (entered into force 2 September 1990, ratification by Canada 13 December 1991) [UNCRC].

<sup>25</sup> *IRPA*, *supra* note 8, s 3(3)(f) (“Objectives — immigration ... (3) This Act is to be construed and applied in a manner that ... (f) complies with international human rights instruments to which Canada is signatory.”).

(*UNCRC*).<sup>26</sup> Many laws in Canada including provisions of *IRPA* and *IRPR* contain references to this concept of BIOC.<sup>27</sup> The uneasy position that the concept of BIOC occupies within immigration laws, especially concerning the detention of children has to be analysed further in such a context. While such a detailed analysis is offered in Chapter III, there is a need here for an initial understanding of BIOC and how it fits in the legal framework surrounding immigration control. How does any interpretation of this term permit the detention of children? Is the interpretation of BIOC uniform in all contexts involving possible detention of children?

### 1.3 Best Interests of the Child

“Best interests” is a frequently applied standard in governing questions that affect children.<sup>28</sup> However, the actual application of the standard is fraught with challenges.<sup>29</sup> In *Young v Young*, L’Heureux-Dubé, J commented on the difficulty that the concept poses to judges:

A determination of the best interests of the child encompasses a myriad of considerations, as child custody and access decisions have been described as “ones of human relations in their most intense and complex form”. ... Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula.<sup>30</sup>

As a flexible concept, some researchers have argued that it is even used to justify the very actions it seek to protect children from, including child abuse in certain cases.<sup>31</sup> In some instances, it allows

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<sup>26</sup> *UNCRC*, *supra* note 24, art 3.

<sup>27</sup> See *IRPR*, *supra* note 9, ss 117(2), 117(3); *IRPA*, *supra* note 8, ss 25(1), 60, 67(1)(c), 68(1), 69(2).

<sup>28</sup> Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Martinus Nijhoff Publishers, 2002) at 1 [Breen].

<sup>29</sup> See generally LeAnn Larson LaFave, “Origins and Evolution of the Best Interests of the Child Standard” (1979) 34 *S D Law Rev* 460.

<sup>30</sup> *Young v Young*, [1993] 4 SCR 3 at para 71 cited in Noel Semple, “Whose Best Interests? Custody and Access Law and Procedure” (2010) 48:1 *Osgoode Hall LJ* 287 at FN10.

<sup>31</sup> See generally Samantha Jeffries, “In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the ‘Expert’ Assessments That Guide Judicial Determinations” (2016) 5:1 *Laws* 14, online: <<http://www.mdpi.com/2075-471X/5/1/14>>.

adjudicators to rationalize their prejudices including homophobia<sup>32</sup> or is used as a smokescreen to advance adult interests.<sup>33</sup> To determine what is best for a child is a riddle so complex that Robert Mnookin commented it to be a task as difficult as finding the very “purposes and values of life itself.”<sup>34</sup> Claire Breen, in her attempt to understand the standard of “best interests of the child” points out the difficulty in forming any consensus on the very concept of “child” and what would be in its “best interests.”<sup>35</sup> In spite of all the drawbacks, its pervading presence can be detected in many laws and judicial decisions that deal with children. It occupies a prominent place in *UNCRC* and is considered as one of its general principles.<sup>36</sup>

My research explores the malleability of BIOC in two different Canadian contexts, immigration/refugee protection and provincial child protection. Isolating the “Canadian child” and placing it in these two different contexts, I ask whether this standard facilitates a differential treatment of non-citizens’ children.

Children, unquestionably, deserve equal protection irrespective of their citizenship or birth. However, the lines of separation that legal systems draw end up making arbitrary distinctions. Citizenship is one such area. Canada and the US are the only two developed immigrant-receiving nations which retain the concept of birthright citizenship in its purest form (*jus soli*). It means that if you are born here, you are a citizen. The distinction that law makes between children born to

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<sup>32</sup> Clifford J Rosky, “Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia” (2009) 20:257 *Yale JL & Feminism* 257 at 270. See generally Eileen P Huf, “The Children of Homosexual Parents: the Voices the Courts Have Yet To Hear” (2001) 9:3 *J Gender Soc Pol’y & L* 695.

<sup>33</sup> For a general discussion, See Michael Freeman, “The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?” (1997) 11 *Int J Law, Poliy Fam* 360.; Breen, *supra* note 28.

<sup>34</sup> Robert H Mnookin, “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39:3 *Law & Contemp Probs* 226. at 260.

<sup>35</sup> See Breen, *supra* note 28 at 17.

<sup>36</sup> *UNCRC*, *supra* note 24, art 3. (1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”)

foreigners in Canada and outside Canada creates this unique category of children who are “Canadian citizens”, just like children born to Canadian citizens. However, as I explain in the coming chapters, because their parents are not citizens, their own status fails to ensure them a treatment like the one provided to such other children. The principal purpose of making this distinction between children born to foreigners and to Canadian citizens inside Canada is to strengthen the argument regarding the differential treatment by choosing two truly comparable subjects. I also focus on such a small category (Canadian children born to non-citizens) to expose the differentiation as will be explained in the concluding chapter.

#### 1.4 Objectives of the Research

Although the age of majority is interpreted differently amongst different cultural and national contexts, one feature that stands out in legal discourses surrounding children is an apparent propensity to treat them as a vulnerable group deserving protection. Refugee or migrant children, however, pose a dilemma for such discourses. On the one hand, there is a need to consider their vulnerability. On the other hand, there is the controversial aspect of their parents’ status as foreigners.<sup>37</sup> The object of my research is to subject the legal discourses surrounding the interpretation of the term “best interests of the child” to a critical analysis in two identified contexts. First context is the detention of Canadian born children with their non-citizen parents under immigration laws and the role played by the term BIOC in this process. Next is the role played by the concept of BIOC within the context of child protection where detention of children

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<sup>37</sup> See Francesca Meloni et al, “Children of Exception: Redefining Categories of Illegality and Citizenship in Canada” (2014) 28:4 *Child & Soc’y* 305 at 307-308. See also Rachel Kronick & Cécile Rousseau, “Rights, compassion and invisible children: A critical discourse analysis of the parliamentary debates on the mandatory detention of migrant children in Canada” (2015) 28:4 *J Refugee Studies* 544 at 549 [Kronick & Rousseau].

is avoided. Subsequently, I analyze whether the interpretation of the terms provides grounds for suspecting the existence of a process of differentiating the Canadian children born to non-citizens and those of citizens. Applying Lajos Brons' concept of "sophisticated othering" I argue that Canada indulges in the process of "othering" when it interprets a legal concept (BIOC) differently for two similarly placed subjects.

I try to understand if legitimization of an act of detaining children is done relying on the impersonal authority of a malleably interpretable term, i.e., BIOC. I explore the potential for text to serve as both a product of an exclusionary strategy and as a resource in the process of a politically exclusive interpretation.

### 1.5 Theory and Methodology

Critical discourse analysis (CDA), is considered as a useful tool for making an analysis as described above.<sup>38</sup> CDA seeks to analyze the reproduction of social dominance by studying the discourses that facilitate them. It attempts to bridge the discourses that remain at a micro level and the concepts of power and dominance that stay at the macro levels to make a unified critical analysis.<sup>39</sup> The convenience that CDA offers lies in its dual approach to discourse as both constituting the social world and being influenced by social practices in a continuum.<sup>40</sup> This is particularly useful in laying a foundation to my claims as to the role played by discourses surrounding the BIOC in facilitating the "othering" of the non-citizens' child. The "othered" entity

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<sup>38</sup> See generally Kronick & Rousseau, *ibid*; Matt Jantzi, "'Stranger Danger': A Critical Discourse Analysis of the Immigration and Refugee Protection Act" online: (2015) 6 Soc'gy Major Research Papers, online: <[http://scholars.wlu.ca/soci\\_mrp/6](http://scholars.wlu.ca/soci_mrp/6)>.

<sup>39</sup> Teun A van Dijk, *Discourse and Power* (New York: Palgrave Macmillan, 2008) at 87.

<sup>40</sup> Marianne Jørgensen & Louise J Phillips, *Discourse Analysis as THEORY and method* (SAGE Publications, 2011) at 61 [Jørgensen & Phillips].

here, the immigrant's Canadian born child is legally or practically indistinguishable from a Canadian born child of a Canadian citizen. However, discourses surrounding immigration detention create a separate space for such children. Such children remain inside the detention facilities with their parents in their best interests and undergo *de facto* detention. Thus, the process of othering that takes place here carves a new category of children who *can* be detained. That done, this process then continues its justification for treating the children differently because they belong to a different category. The non-existent category of a different kind of Canadian children is created here and then the category is used as a justification for the continued differentiation.

Kronick and Rousseau used critical discourse analysis in 2015 to study parliamentary debates around the passing of Bill C-31, which sought to detain certain asylum seekers.<sup>41</sup> Although the context is different and the authors were focusing on the discussions surrounding children belonging to asylum seekers (mostly born outside Canada), the study is significant from two reasons. First, their analysis explains how discourses often construct these children as “appendages to their parents” resulting in some sort of invisibility in the eyes of law which in turn leads to their *de facto* detention. They claim that due to this invisibility, such children's best interests are not taken into consideration by a refugee board member during the detention review hearing. Second, they adopt the method laid down by Theo Van Leeuwen on discursive construction of legitimization to reveal how the notion of “best interests of the child” was turned “upside down” in the parliament. They raise the concern that discourses even claim such detention to be in the “best interests of the child”.<sup>42</sup>

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<sup>41</sup> Kronick & Rousseau *supra* note 37 at 556 – 558.

<sup>42</sup> *Id* at 557



I refer to the term legitimization (or legitimation as Van Leeuwen refers to it) as something which “entails acceptance of a claim or a claimant into the domain of moral acceptability or moral obligation”.<sup>43</sup> According to Van Leeuwen, forms of such legitimation can be indirect, making no reference to its object of legitimation or be apparent with direct and detailed references to the practice that it seeks to legitimize.<sup>44</sup> Of the four major categories that Van Leeuwen lists for analysing the construction of legitimization in discourse, what is referred to mostly in my research is the first category of “authorization.” It refers to “legitimization by reference to the authority of tradition, custom, law, and/or persons in whom institutional authority of some kind is vested.”<sup>45</sup> He further classifies authorization into personal authority, expert authority, role model authority, impersonal authority, authority of tradition and authority of conformity. Legitimation through authorization provides an answer to “why” questions such as why should a text be interpreted in such a manner. In the personal authority paradigm, the answer is a reference to a person of authority which can be an official fulfilling a judicial function in legal discourses or a president issuing executive orders. In the case of expert authority, there is a shift from “status” to “expertise” and the question is answered as “because the expert says so.” In impersonal authority, the reference is to laws, rules, policies or guidelines. The boundaries of tradition and conformity are somewhat

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<sup>43</sup> Herbert C Kelman, “Reflections on social and psychological processes of legitimization and delegitimization” in John T Jost & Brenda Major, eds, *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (Cambridge University Press, 2001) 54 at 57; see also Robert D Lamb, *Rethinking Legitimacy and Illegitimacy: A New Approach to Assessing Support and Opposition across Disciplines* (Washington DC: Rowman & Littlefield, 2014), online: <[https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/140519\\_Lamb\\_RethinkingLegitimacy\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/140519_Lamb_RethinkingLegitimacy_Web.pdf)> (“Legitimation, sometimes called legitimization, is the process of granting or gaining legitimacy...” at 15).

<sup>44</sup> Theo Van Leeuwen, *Discourse and Practice: New Tools for Critical Discourse Analysis* (New York: Oxford University Press, 2008) at 105 [Van Leeuwen] (The other categories that he lay down are Moral evaluation, rationalisation, mythopoesis, and multimodal legitimisation).

<sup>45</sup> *Ibid* at 105.

blurred with the answer under the former being “because it is what is always done” and the latter being “that is what everyone does.”<sup>46</sup>

I apply evaluative method to analyze my hypothesis relying on secondary sources including publicly available statistical and other data on detained refugees. To explain the relevance of this research by pointing out the scale of the problem, I made 12 informal information requests through Government of Canada’s “Open Government” portal for ATI records and received data covering a period between 12 December 2009 and 30 January 2016.<sup>47</sup> Amongst other information, the records contained the date-wise details of minor Canadian children accompanying foreign national parents in detention [referred to as First ATI data hereafter]<sup>48</sup>.

This data was in the form of fifteen documents in portable document format containing 1850 pages with each page containing information for each day. There were, however, gaps with some dates missing. The upper left corner of each page contained a number indicating the total number of children inside the detention facility on that day. It also provided the specific details of “Canadian” children broken down according to age, gender, and date of detention.

This data supplied by CBSA posed some difficulties. It did not include any detention-facility-wise break up of the children with dates. The data only contained some general statistics for different detention facilities in the entire country. The absence of such specific information made it difficult to ascertain whether children were detained in the three immigration detention centres or in provincial prisons. Furthermore, as mentioned earlier, data was absent for certain dates. I assumed these to be representing days without any new entries. The specific details of the children presented

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<sup>46</sup> See generally *ibid* at 106-109.

<sup>47</sup> Government of Canada, Open information portal, online <<http://open.canada.ca/en/open-information>>.

<sup>48</sup> CBSA, “Minor Report” (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2015-18222, informal information request File No. A-2015-18222 QC JS) [First ATI data].

a scope for arriving at some perturbing realizations. One such conclusion is that a child was detained for more than 2 years. This was found out in the following manner:

The details of a four-day-old male child detained on 24<sup>th</sup> August 2013 is mentioned for the first time on the data for 28<sup>th</sup> August 2013. It is mentioned continuously every day thereafter until 04 November 2015. It led me to conclude this as the child's duration of detention, and I calculated the days in between using a date calculating software which revealed it to be 802 days. I calculated the duration of detention of all the children (more than 50) this way by noting their dates of detention as mentioned in the day to day data and the date on which their details stop appearing in the data. After preparing such a detailed list of the duration of their detention, I narrowed the list further down to only those children who were detained for more than 100 days.

Incidentally, this data was a part of the original query made by Gros and referred to in their report of 2017.<sup>49</sup> Although I rely on the same data for my findings, I have approached it differently. The overall focus of Gros was on ascertaining an average number of children, and they have not specified individual cases except that of one boy who spent 803 days in detention.<sup>50</sup> I have, on the other hand, focused on individual cases ascertained through the method detailed above.

On 8<sup>th</sup> February 2017, I made a formal request under ATI for the following information:

“Records of all minors who accompanied their parents to the immigration detention facilities (including Immigration Holding Centers and other detention facilities used by CBSA to detain immigration detainees) for more than 24 hours between 01.01.2010 and 01.01.2017 broken down by their birth status (Canadian Citizenship), age, duration of stay therein, citizenship of their parent/s, details of the detention facility and their final status (released or deported).”

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<sup>49</sup> Gros, *supra* note 6, FN 23.

<sup>50</sup> *Ibid* at 16.

I received their response on 28<sup>th</sup> October 2017 [referred to as Second ATI data hereafter].<sup>51</sup> It consisted of a simple six-page document which, instead of including the details I sought in a single table, produced it in different tables with very less specific information. However, as I had already interpreted the numbers from the First ATI data mentioned earlier, all I required was a reconfirmation from this Second ATI data. The Second ATI data did confirm the details mentioned in the First ATI data. The First and Second ATI data will also be used to explain how CBSA was not careful in accounting with regards to the number of children detained/housed. This will be explained and analysed in Chapter IV.

To understand the implementation of BIOC within the Canadian context, I analyse the periodic reports of Canada to the Committee on the Rights of the Child (CRC) under *UNCRC* and the responses of CRC to these reports in Chapter III. For this purpose, I also examined the older statutes that dealt with immigration and refugee protection in this Chapter. This included the old *Immigration Act*<sup>52</sup> and the amendment to it in 1992.<sup>53</sup> Next was the question of legal interpretation of BIOC and its impact on detention of children which required an analysis of the decisions involving BIOC. In Chapter III, I also undertook a quantitative analysis of the decisions involving BIOC involving two periods, the first one between 13 December 1991 on which date Canada signed UNCRC to 09 July 1999 when the decision in *Baker v Canada (Minister of Citizenship and Immigration)* was handed out<sup>54</sup>. The second period is between 09 July 1999, the date when the decision in *Baker* was delivered, and 28 June 2002 when *IRPA* came into force. The analysis identifies the number of decisions referring to the concept of BIOC after the judgment of the

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<sup>51</sup> CBSA “Record of Minors” (released by CBSA under the *Access to Information Act*, on 28 October 2017 under File No. A-2017-01936 / JOW [Second ATI data]. See Appendix A.

<sup>52</sup> RSC 1985, c I-2.

<sup>53</sup> An Act to Amend the Immigration Act and Other Acts in Consequence Thereof, Third Session, Thirty-Fourth Parliament, 40-41 Elizabeth II, 1991-92.

<sup>54</sup> [1999] 2 SCR 817, [1999] SCJ No 39.

Supreme Court of Canada in *Baker* was delivered. Simply put, the purpose of this analysis is to show how BIOC enter into discourses surrounding immigration law to remain more or less a passive spectator. It confirms the limited impact of international law, specifically the signing of *UNCRC*. Canada's signing of *UNCRC* failed to influence the decisions of courts dealing with children under immigration law context substantially while there was a phenomenal jump in the average number of decisions per year referring to BIOC after the delivery of the decision in *Baker*. I limited the period in the second phase to 28 June 2002 as the *IRPA* came into effect on that day which contained specific provisions directing the consideration of BIOC which influenced the judicial pronouncements after that.

To conduct this review, I used Lexis Nexis Quicklaw, the online legal database. The first part of the search was made for decisions matching this exact search string including the operators: ("best interests of the child" OR "best interest of the child") AND "immigration act." The results were further limited to the decisions delivered between 13 December 1991 and 09 July 1999. The courts that delivered these decisions were limited to the Federal Court of Canada, Trial Division and Immigration & Refugee Board of Canada as these are the two bodies which routinely deal with the question of immigration. All the decisions were broadly assessed to ensure that they dealt with the question of children within an immigration context. For the next period between 09 July 1999 and 28 June 2002, i.e., from the day that the *Baker* decision was pronounced to the day *IRPA* came into effect, I used the same terms and results. These results were also scrutinized for ensuring relevance to the search as detailed above in the case of the first string.

Next, I undertook a content analysis of a few decisions of the Immigration Division and Supreme Court of Canada involving non-citizens with Canadian children between 2010 and 2017 to understand the interpretation of BIOC and the othering that takes place. These judgments were

selected through LexisNexis Quicklaw using strings prepared through a combination of the following terms, characters, and operators: “Immigration Act,” “immigration and refugee protection act,” (“best interests of the child” OR “best interest of the child”), “guest,” (“minor” OR “child” OR “children”) and “detention.” All of these decisions were assessed to ascertain whether they involved the detention or “housing” of a Canadian born child.

The relevant decisions that remained thereafter were just five. These were *Baker v Canada (Minister of Citizenship and Immigration)*<sup>55</sup>, *B.B and Justice for Children and Youth v Minister of Citizenship and Immigration*<sup>56</sup>, *Canada (Minister of Citizenship and Immigration) v Shote*<sup>57</sup>, *Kanhasamy v Canada (Citizenship and Immigration) (SCC)*<sup>58</sup> and *Kanhasamy v Canada (Citizenship and Immigration) (FCA)*<sup>59</sup>. I reviewed these five decisions and they supported the finding that in most cases involving detention of a Canadian child born to a non-citizen, BIOC has received scant regard or was merely used as a catchphrase. This will be explained in Chapter III.

The *Chairperson’s Revised Guideline on Detention* issued by the Immigration and Refugee Board came into effect on April 1, 2019.<sup>60</sup> The provisions dealing with the detention of minors in this document will be analysed briefly in Chapter IV to raise a concern whether this document will make any substantial changes to the existing state of affairs.

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<sup>55</sup> *Ibid.*

<sup>56</sup> (24 August 2016) Toronto IMM-5754-15 (Federal Court) [*BB*].

<sup>57</sup> (2004) FC 115, [2004] FCJ No 125.

<sup>58</sup> *Kanhasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, [2015] SCJ No 61 [*Kanhasamy* cited to SCC].

<sup>59</sup> *Kanhasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113, [2015] 1 FCR 335, [2014] FCJ No 472 (FCA) [*Kanhasamy FC*].

<sup>60</sup> Immigration and Refugee Board of Canada, *Chairperson Guideline 2: Detention - Guidelines Issued by the Chairperson, Pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act (2019)* online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx> [*Chairperson Guideline 2*].

## 1.6 Scale of the Problem

The death of many detained migrants between 2010 and 2014 played a significant role in putting the issue of immigration detention, especially of children in the spotlight.<sup>61</sup> A report by the Canadian Council for Refugees in 2009 on detention and the best interests of the child, mentions eight Canadian children detained with their mothers.<sup>62</sup> This included one newborn child, who spent 48 days immediately after delivery in detention with her mother.<sup>63</sup>

The latest and the two most comprehensive studies that investigated and reported this issue are by the researchers of the International Human Rights Program (IHRP) at the University of Toronto in 2016 and 2017.<sup>64</sup> In their first report of 2016, through ATI requests and interviews, *inter alia* with detainees, refugee lawyers, and other researchers, the detention of children in the two IHCs at Laval and Toronto was studied. The purpose of the report was to publish their research findings on different aspects of immigration detention involving children, its detrimental effect on them and provide recommendations to ensure that Canada's immigration detention regime complies with international law. The report revealed that an average of 242 children were detained each year between 2010 and 2014 and that a guest detainee spent thrice longer in detention compared to children under formal detention orders.<sup>65</sup>

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<sup>61</sup> See Andrea Woo, "Groups Demand Inquest into CBSA Custody Death." *The Globe and Mail* (6 February 2014), online <<http://www.theglobeandmail.com/news/british-columbia/groups-demand-inquest-into-cbsa-custody-death/article16723585>>; Nicholas Keung, "Detainee's Death Sparks Call to End 'Shroud of Secrecy'." *Toronto Star* (22 June 2015) online: <<http://uml.idm.oclc.org/login?url=http://search.proquest.com.uml.idm.oclc.org/docview/1690181870?accountid=14569>>; Colin Perkel, "Yet another Death in Immigration Custody Sparks Anger among Rights Groups." *The Canadian Press* (9 March 2016) online: <<http://uml.idm.oclc.org/login?url=http://search.proquest.com.uml.idm.oclc.org/docview/1772284052?accountid=14569>>

<sup>62</sup> See generally Canadian Council for Refugees. *Detention and Best Interests of the Child* (2009), online: <<http://ccrweb.ca/sites/ccrweb.ca/files/detentionchildrensummary.pdf>>.

<sup>63</sup> *Ibid* at 1.

<sup>64</sup> See generally See Gros & Song, *supra* note 5.

<sup>65</sup> *Ibid* at 9.

IHRP then released a follow-up report in February 2017 titled “Invisible Citizens: Canadian Children in Immigration Detention”. This report focused on Canadian children in detention and highlighted the issue of the inadequate consideration given to BIOC during detention hearings. It also published the data received through ATI reports revealing that Canadian children spent longer times in detention than non-Canadian children detained.<sup>66</sup>

My analysis of the First ATI data on minor Canadians accompanying their non-citizen parents in immigration detention from CBSA revealed hundreds of detentions between 12 December 2009 and 30 January 2016.<sup>67</sup> Isolating some of these cases of long-term detention from all the days reported and calculating their periods of detention revealed some disturbing trends. The following table lists 25 Canadian children detained with their parent(s) for more than 100 days between 2009 and 2016:

**Table 1 List of Canadian children who were detained with their parents as guests for more than 100 days between 28.08.2009 to 30.01.2016<sup>68</sup>**

Placeholder Name	Reported Age*	Date of detention	Date of release/deportation	Period of detention**
A	1 year old	28 Aug. 2009	17 Apr. 2010	232 days
B	3 years	3 Nov. 2009	24 Apr. 2010	172 days
C	1 year 3 months	9 Jan. 2010	19 Oct. 2010	283 days
D	5 year 2 months	9 Jan. 2010	19 Oct. 2010	283 days
E	5 years 6 months	18 Dec. 2010	21 Apr. 2011	124 days
F	7 years 2 months	18 Dec. 2010	21 Apr. 2011	124 days
G	2 years 8 months	5 Oct. 2011	18 Jan. 2012	105 days

<sup>66</sup> Gros, *supra* note 6 at 6.

<sup>67</sup> First ATI data, *supra* note 62.

<sup>68</sup> *Ibid.*



H	11 years 1 month	28 Feb. 2012	28 Jun. 2012	122 days
I	5 years 4 months	28 Feb. 2012	28 Jun. 2012	122 days
J	1 year 3 months	3 Mar. 2012	29 Jun. 2012	119 days
K	7 years 7 months	3 Mar. 2012	29 Jun. 2012	119 days
L	5 years 5 months	3 Mar. 2012	29 Jun. 2012	119 days
M	12 years 3 months	3 Mar. 2012	29 Jun. 2012	119 days
N	1 year 7 months	12 Jun. 2012	21 Dec. 2012	192 days
O	8 months	19 Jun. 2012	21 Dec. 2012	183 days
P	4 year 4 months	19 Jun. 2012	18 Dec. 2012	183 days
Q	10 months	16 Apr. 2013	16 Sept. 2013	153 days
R	4 years 3 months	4 May 2013	3 Oct. 2013	152 days
S	2 years	24 Aug. 2013	4 Nov. 2015	802 days
T	10 months	10 Nov. 2013	17 Feb. 2014	100 days
U	3 years 1 month	4 Apr. 2014	22 Nov. 2014	232 days
V	3 years 1 month	5 Apr. 2014	7 Oct. 2014	185 days
W	9 months	10 Oct. 2014	2 Feb. 2015	115 days
X	9 years 5 months	25 Feb. 2015	30 Jan 2016	339 days +****
Y	8 years 5 months	20 May. 2015	7 Nov. 2015	171 days

\* On the date of their release/deportation

\*\* Calculated by looking for the date on which the data stopped mentioning a specific detainee minor and considering it as the date of his/her release using Date Calculator v.2.68

\*\*\*\* Date of release not specified as data only received until 30.01.2016

Of these, the most troubling are the cases of ten children who have spent more than six months in detention, four of whom were above four years of age during the time of their detention. Red colour for the font is used to emphasize these cases. The number of children in detention for anywhere between a week to 3 months was also quite high.

These results were confirmed on an analysis of the Second ATI data.<sup>69</sup> This data was limited to a six-page document with the details sought broken up into different sets. For example, the duration of detention and nationality was dealt with in separate tables. Although it prevented me from calculating the duration of their detention nationality wise, it stated that 5 Canadian born minors were detained between 2010-2017.<sup>70</sup> This figure contradicted the information in the First ATI Data which contained details of more than fifty “Canadian” children detained between 2010 and 2015. Similarly, *Gros* observes in their second report of 2017 that on an average 48.2 Canadian children have stayed in IHC Toronto between 2011-2015.<sup>71</sup> Thus, it is hard to make a conclusion as to the exact number of Canadian children detained since the first set of data revealed hundreds of children and the second set of data mentioned it to be only 5 Canadian children. It is to be noted that the First ATI data is much more detailed (More than 2000 pages) compared to the second ATI data. What is of significance for my research is that both cases clearly admitted that Canadian children were being detained under immigration laws. Thus, my reliance on these data is with two purposes; to emphasise the fact of detention and to reveal the extent of it in certain cases.

### 1.7 Nature of the Detention Facilities

The IHC in Laval is owned by Correctional Services, Canada and is operated under an agreement between them and CBSA. The IHC in Montreal is operated under a third-party service contract. IHC in Vancouver is inside the airport and only accommodates short stays up to 48 hours after which, detainees are transferred to a provincial correctional facility. Rachel Kronick et. al. examined the experience of detained children and families in Canada in 2015 revealing the adverse

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<sup>69</sup> Second ATI data, *supra* note 65.

<sup>70</sup> *Ibid* at 3.

<sup>71</sup> *Gros*, *supra* note 6 at 16.

impact of detention on the children.<sup>72</sup> They studied the Toronto and Montreal IHCs, community health centres and family homes with migrant parents and children between the age of 13 and 18. Their research highlights the features of the IHCs that are identical to prisons including constant surveillance by guards, barbed wires and strictly regulated wake-up and meal times. Men are separated from their wives and children with only one or two short visits permitted per day.<sup>73</sup>

In their 2016 report, Gross and Song concur with these observations. Their findings go further and mention the imposition of punishments in the form of “suspension of privileges” and transfer to a facility with higher security if the detainees breached any rules.<sup>74</sup> They note the constant disruption of sleep and body searches for everyone including minors on entering or exiting the IHC every time.<sup>75</sup> Gross and Song question the quality and adequacy of the educational facility provided to children with instruction being limited to merely second language tutoring in one IHC.<sup>76</sup> Both reports call attention to the limited indoor or outdoor recreational facilities for children with the outdoor area confined to a fenced concrete floor with a few old toys and a television. According to the data provided by CBSA itself, in the Toronto IHC, children are provided access to an outside play area only on the fulfillment of three conditions i.e., “at the request of the parent”, “at the availability of a guard presence” and in the absence of any male detainees in the yard.<sup>77</sup>

In another subsequent study, Kronick et. al further illustrated the experiences of detained families.<sup>78</sup> They observe the perception of detention even on 21-month-old toddlers and the older

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<sup>72</sup> See generally Rachel Kronick, Cecile Rousseau, & Janet Cleveland, “Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study.” (2015) 85:3 Am J Orthopsychiatry 287 [Kronick, Rousseau & Cleveland]

<sup>73</sup> *Ibid* at 290, 291.

<sup>74</sup> Gros & Song *supra* note 5 at 15.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

<sup>77</sup> CBSA, “Greater Toronto Area” (21 January 2016) (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2015-18226, informal information request File No. A-2015-18226\_QC\_PF).

<sup>78</sup> See Kronick, Rousseau & Cleveland, *supra* note 72.

children expressing outright frustration.<sup>79</sup> Children were commonly noted to be demonstrating psychological distress and psychiatric symptoms.<sup>80</sup>

Two conclusions can be drawn from the above discussion. First, the facilities in which these children are detained have the trappings of a regular prison. Second irrespective of how these institutions are named or designed, children perceive the environment negatively and this impacts their physical and mental well-being. My research moves beyond these previous reports. It uses the previous research as foundation to argue that the detention of minor children clearly challenges the idea of “best interests of the child”.

### 1.8 Structure of the present research

Moving forward, the next chapter will develop a conceptual background for the research. I begin by tracing the origins of the concept of BIOC through the evolutionary journey of children as a property of the father to a property of their parents and then to independent beings with their own rights. To further understand the differential treatment of similarly placed children, a deeper understanding of the concept of BIOC is necessary. I dissect the term BIOC and expand on why it is important to consider BIOC as a “practice”. This is necessary to fully comprehend the heights of flexibility the term BIOC offers to the agency or individual interpreting it.

The third chapter tracks the transformation of the term BIOC and its understanding within both Canadian immigration laws and family laws in the last few decades. To compare the family/child protection laws, two provinces, British Columbia and Ontario were selected as CBSA operates

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<sup>79</sup> *Ibid* at 205.

<sup>80</sup> *Ibid*.

their immigration holding centres so that the comparison is jurisdictionally fair. As of April 2018, the only three IHCs that CBSA operates are in Quebec (Laval), Ontario (Toronto) and British Columbia (Vancouver). Of these, Quebec was excluded due to the materials being in French. I highlight the role of *UNCRC* and its impact on the Canadian legal system to argue that such an impact has remained restricted to the level of lip service within immigration laws.

The fourth chapter sets out my core argument as to the othering of the non-citizens' child in the form of differentiation. I demonstrate the covert nature of this othering relying on different forms of othering proposed by Lajos Brons. I undertake an analysis of such othering within the judgments, laws, policies, and guidelines on BIOC. This is built upon the evidence of Canada's practice of this subtle form of othering in the past, especially in immigration issues.

The fifth and final chapter explains the difficulty in following the common approaches adopted to resolve the conundrum of detained non-citizens' children.

## Chapter II. Best Interest Transactions: State, Society, and Family

### 2.1 Introduction

The concept of BIOC cannot be separated from the question of children's rights or their status.<sup>81</sup> My central argument is that BIOC is interpreted differently in the Canadian context where desire of the parents (to let children remain with them as guests in detention) and the interests of the state (to let detained parents' choice clash with the interests of the child. Thus, when a parent chose, the children can be detained inside the facility along with them. (legal aspects regarding this is explained further in Chapter III). To understand the incorrectness in such a situation, there is the need to understand the changes in the perception of children's rights. If we trace the journey of children's rights, the gradual variations in interpretation of BIOC can also be discerned according to how the law views the child. The child continued to be considered a possession of someone or something and BIOC reflected those changes.

This chapter comprises of two parts. The first part analyzes the evolution of children's rights where the status of the children, the treatment meted out to them by the state and other agencies and the gradual appearance of BIOC will be discussed. I confine the general discussions on legal and other developments to that in the UK (to trace the common law origins of the concept) and Canada with some references also to the international law in the context of *UNCRC*.<sup>82</sup> The second part discusses the conceptual basis of the best interests standards through the analysis of different studies which

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<sup>81</sup> See generally Katherine Covell & R Brian Howe. *The Challenge of Children's Rights for Canada* (Waterloo: Wilfred Laurier University Press, 2001) at 22-23.

<sup>82</sup> *UNCRC* supra note 24.

attempted to decipher this standard. This part sees “BIOC” as a practice as opposed to a tradition to understand the flexibility of the standard.

## 2.2 Transfer of possession: Transactions between Family and State

The development of children’s rights is rife with instances of its resistance against the patriarchal society. Western legal tradition, during the early years, regarded children as legally incapable and thus made them entirely subject to the control of the parent, specifically the father.<sup>83</sup> As a possession, the child could be alienated or killed and did not possess any standing in law to question such treatment.<sup>84</sup> While the rights of the father over his child remained enforceable under common law, reciprocal duties were not.<sup>85</sup> In the traditional patriarchal collectivist hierarchy, children remained at the bottom with women placed somewhat similarly.<sup>86</sup>

Changes were slow and started appearing by the end of the nineteenth century as a part of the broader call for state intervention into the family affairs. Even at this point, there was a marked reluctance to interfere with a father’s right over the children. On the rights of the father over children, courts in the UK would interestingly draw an analogy to “property rights.”<sup>87</sup> Writing on children’s rights in 1911, W.H. Stuart Garnett commented that fathers’ rights over children are guarded with “the same jealousy as those of feudal lord or guardian in chivalry.”<sup>88</sup> At the same time, “orphans, bastards, deserted children, children of idiots or cripples or felons” were

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<sup>83</sup> Anne McGillivray, “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada” (2011) 19 Int J Child Rights 21 at 22 [McGillivray].

<sup>84</sup> *Ibid* at 23.

<sup>85</sup> *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 23 (Lord Eldon LC).

<sup>86</sup> Mothers, however, were graciously deemed entitled to a right to “reverence and respect” from children although without any powers over them. See William Blackstone, *Commentaries*, Vol. I, (London: W. Maxwell, 1869) at 452-453.

<sup>87</sup> *Re Agar-Ellis* (1883) LR 24 ChD 317, CA.

<sup>88</sup> William Hubert Stuart Garnett, *Children and the Law* (London: John Murray, 1911) at 2.

considered the responsibility of the state under the English Poor Law system and were accommodated in workhouses.<sup>89</sup>

Within the context of family, a movement calling for reforms made some significant strides during this time in the U.K, triggered by the decision in *R v Greenhill* of 1836. In *Greenhill*, three children were removed from the custody of their mother and handed over to the father whose cruelty towards them were on record.<sup>90</sup> The immediate result was the passing of *Custody of Infants Act* in 1839 which permitted mothers to petition for access to their children under seven years of age.<sup>91</sup> This age restriction was extended to sixteen years in 1873.<sup>92</sup> The *Guardianship of Infants Act* of 1866 on custody of infants where the language shifted for the first time to “welfare of infant” is considered by McGillivray as the germination point of the Best Interests.<sup>93</sup> Common law notions of father’s absolute rights were thus challenged from two side, the increased intervention of the state and the advancements of a slowly burgeoning feminist movement.

Irving Browne commented in 1882 on child custody in the United States that “The courts in recent times have gone to great lengths in relaxing the rule recognizing the father's paramount right of custody of his infant child. Especially has the mother's equal natural right grown in regard, and the *best Interests of the child have become the decisive test.*”<sup>94</sup> (emphasis supplied)

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<sup>89</sup> See generally, William Chance, *Children under the Poor Law* (London: Swan Sonnenschein, 1897). For the conditions and treatment of children in workhouses, see generally David Roberts, “How cruel was the Victorian Poor Law?”, (1963) 6:1 *The Historical J* 97.

<sup>90</sup> *R v Greenhill* (1836) 4 Ad and E 624; For the entire history of the case and its impact see John Wroath, *Until they are Seven: The Origins of Women's Legal Rights*, II ed (Waterside Press, 2006).

<sup>91</sup> Rebecca Probert, *Family Law in England and Wales* (Kluwer Law International, 2011) at 23.

<sup>92</sup> *The Custody of Infants Act, 1873* (UK), 36 & 37 Vict. c. 12, s.1.

<sup>93</sup> McGillivray *supra* note 83 at 28 [Parental merits were to be subsumed under the interests of the child.].

<sup>94</sup> Irving Browne, *The American Reports: Containing All Decisions of General Interest Decided in the Courts of Last Resort of the Several States with Notes and References* (Bancroft-Whitney, 1882) at 327.



One important aspect to note at this point is that pauper children, ones outside the context of the family remained more or less the property of either the organizations or institutions that housed them or the State well into the twentieth century. These organizations were free to make decisions regarding the children they deemed fit. In 1874, the idea of sending such children to Canada from England was explored starting with fifty girls housed inside the Kirkdale Workhouse in Liverpool. They sent these children to Ontario in 1869.<sup>95</sup> Although discontinued later for a brief period, it is significant to note the dispersibility and portability with which the state or its instruments regarded children outside the context of the family.

Within the family, children's rights share a trajectory with women's rights in many aspects. To an extent, women shared the position of being a "patriarchal property". In his article on child politics, Göran Therborn presents an interesting perspective of how the feminist movement assisted in an increase in the visibility of child politics and in conceptualizing it.<sup>96</sup> He argues that the gendered language of the feminist movement which deconstructed the concept of "family" from a patriarchal collective to a more individualized entity, opened up scope for discussing the rights of children too.<sup>97</sup> Indeed, one of the early radical feminists, Shulamith Firestone wrote in 1970 that the issue of oppression of children has to be included in any program for feminist revolution.<sup>98</sup>

In Canada, the reforms in England were slowly resonating. The *Guardianship of Minors Act* was enacted by the Legislative Assembly of Ontario in 1887 empowering the courts to decide upon custody of the children on application by mothers.<sup>99</sup> English child-rescue organizations,

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<sup>95</sup> Neil Sutherland, *Children in English Canadian Society: Framing the Twentieth Century Consensus* (Waterloo: Wilfred Laurier University Press, 2000) at 6 [Sutherland].

<sup>96</sup> Göran Therborn, "Child Politics: Dimensions and Perspectives" in Eugeen Verhellen, ed, *Monitoring Children's Rights* (Martinus Nijhoff, 1996) 377 at 384-385.

<sup>97</sup> *Ibid.*

<sup>98</sup> Shulamith Firestone, *The Dialectics of Sex* (Bantam Books, 1971) at 104.

<sup>99</sup> *Statutes of the Province of Ontario* (John Notman, 1887) at 70.

workhouses, and individuals started sending destitute children to Canada, and by 1874, the number of children sent reached an all-time high of 1000 every year.<sup>100</sup> A brief lull ensued, induced by the highly critical Report of Inspector Andrew Doyle who was sent by England's Local Government Board to investigate the plight of these children. The shipping of pauper children from England continued in the 1880s with a renewed enthusiasm.<sup>101</sup> The inclination to welcome these "minor destitutes" might even have been motivated by an economic need in Canada for farm labourers and domestic servants during this time.<sup>102</sup> Again, they were merely a possession in the hands of the state. One can observe the dehumanization in this context when one reads about the prejudices which surfaced later including allegations that these children were "hereditarily tainted" and "saturated with evil."<sup>103</sup>

Works of English reformers had an impact outside the common-law world. Eglantyne Jebb, an English reformer, whose initiatives resulted in the establishment of "Save the Children International," led to the proclamation of the *Declaration of the Rights of the Child* in 1923. Her further initiatives pushed the League of Nations to adopt the Declaration in 1924.<sup>104</sup> In 1959, the United Nations adopted the Declaration in an extended form. Principles 2 and 7 of the declaration mentioning specifically that the "standard of best interests of the child" to be taken into consideration while enacting laws concerning children and as a guiding principle for persons who are responsible for the child's education and guidance.<sup>105</sup> In 1989, *UN Convention on Rights of the*

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<sup>100</sup> Sutherland, *supra* note 106 at 5.

<sup>101</sup> *Ibid* at 28.

<sup>102</sup> *Ibid* at 9.

<sup>103</sup> *Ibid* at 29.

<sup>104</sup> *Geneva Declaration of the Rights of the Child*, League of Nations, O.J. Spec. Supp. 21, at 43 (1924), online <<http://www.un-documents.net/gdrc1924.htm>>.

<sup>105</sup> *Declaration of the Rights of the Child*, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

*Child (UNCRC)* more broadly incorporated Best Interests as a primary consideration for all actions concerning children by public or private authorities.<sup>106</sup>

*UNCRC* had an impact on the legal systems all over the world. All member states of the United Nations except the United States which refrained from ratification due to various objects including the prohibition on execution of children under 18 years. However, despite the direct incorporation of BIOC in *UNCRC*, the concept is not defined in it. This is attributed by some authors as an intentional omission to avoid a difference in opinion (as to what best interests should include) arising among member states.<sup>107</sup>

## 2.3 Conceptual Analysis of BIOC

### 2.3.1 Introduction

Claire Breen's analysis of BIOC as a western tradition published in 2002 is a deeply insightful work that explores the theoretical foundations of BIOC.<sup>108</sup> According to her, the evolution of children's status begins from paternal control to joint parental control and finally into the realms of BIOC. She argues retains some paternalistic features. She identifies the tradition of child rights as a distinct and modern idea, proceeding with the BIOC tradition. She opines

This latter tradition concerning the rights of parents ultimately gave way to the standard of the best interests of the child, a tradition which, although paternalistic in nature, was based upon a greater degree of interventionism into family life. This paternalistic approach has continued to exist somewhat uneasily alongside the tradition of children's rights which has emerged more recently and which would appear to favor a greater degree of autonomy for the child.

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<sup>106</sup> *UNCRC supra* note 24 Art III.

<sup>107</sup> Michael Freeman, "Article 3 : The Best Interests of the Child" in Andre Alen et al, eds, *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff, 2007) at 31 [Freeman].

<sup>108</sup> Breen, *supra* note 28 at 16.

I build upon this journey traced by Breen and trace a distinct trajectory as will be detailed in the following pages. My interpretation involves three stages. In the first stage, the child remained the property of its father within the context of the family and the state or other individuals/organizations outside the context of the family (In the case of destitutes, orphans, etc.). In the second stage, children struggled for liberation from the idea of being a paternal property and ended up being a common family possession. In the third and final stage, which continues, there is a constant struggle against the interests of the state and the family. In this current stage, there is an effort to assert independence by the child. It is important to understand such stages as these will help in revealing the interests that the concept of BIOC served during each stage.

In the discussions here, my approach may appear to be considering children as a possession instead of viewing them as individuals. One could argue that such an approach rejects the progress in the child rights movement and the gradual recognition of children as individuals possessing independent status. However, although such a movement is underway, it is doubtful that children have yet achieved individual status. My analysis of the detention of children in the Canadian context highlights the continued need to push towards viewing children as “independent”.

### *2.3.2 BIOC as a “practice”*

References to BIOC within the matters involving child-custody and welfare can be traced back to legislation and decisions from the early 19<sup>th</sup> century in the United States and England.<sup>109</sup> Few

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<sup>109</sup> *Commonwealth v Smith*, 1 Brewster 547 (Court of Common Pleas, 11<sup>th</sup> Dist., Philadelphia) (...the best interests of the children require that a principle of natural justice should, for the time and in particular instances, override the legal or natural rights of the parents, or either of them); Nathaniel Cleveland Moak, *Reports of Cases Decided By the English Courts: With Notes and References to Kindred Cases and Authorities* (William Gould & Son, New York, 1883) at 184 (where a parent gives or surrenders his child to another for nurture and adoption, the court, looking to the best interests of the child, should refuse to direct its re-delivery to the parent.).

Canadian decisions involving questions of custody of children during this period refer to BIOC.<sup>110</sup> As a broad policy governing all decision-making involving children, there was an increase in its inclusion in different statutory texts and discussions concerning children being incorporated into Article 3 of *UNCRC*. For our discussion, the need is to understand the nature of this standard so that its flexibility permitting a differential treatment of children can be deciphered.

One of the earliest efforts to explain Best Interests is by Goldstein et al. in 1973.<sup>111</sup> Based on psychoanalytical theory, they attempted to understand the best interests in the context of child placement. Their central arguments were threefold. First, they claimed that the child's interests should be given paramount importance. Second, they demanded parental autonomy in raising children, and third was the demand for non-intervention by the state in the continuity of the child's relationship with the parent.<sup>112</sup> Michael Freeman made a critical analysis of *Best Interests* in 1997 to explain the inherent contradictions within Goldstein et al.'s analysis.<sup>113</sup> Freeman points out how inadvertently the authors end up treating children as "property" with their reliance on institutional practices that structure and restructure such a practice in spite of their strict opposition to such an idea.<sup>114</sup> He comes to such a conclusion on the basis of the refusal by the authors to address the issue of corporal punishment inflicted on children by their parents which is possible only if children are considered by them as a "property". Freeman has made this criticism against legal systems (English, US) also in the past, claiming that "Children appear in the law as legal objects

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<sup>110</sup> See *In re Brandon*, (1878) OJ No 324, 7 PR 347 (Ontario Practice Court); *In re Martha Jane Scott*, (1879) OJ No 342, 8 PR 58 (Ontario Practice Courts); *In re Murdoch*, 9 PR 132 (Ontario Practice Courts); *In re Scott*, 8 PR 58 (Ontario Practice Courts); *In re Dickson* 12 PR 659 (Ontario Practice Courts).

<sup>111</sup> Goldstein, Joseph, Anna Freud & Albert J Solnit. *Beyond the Best Interests of the Child*, 2d ed (New York: The Free Press, 1979) at 105.

<sup>112</sup> *Ibid* at 106. For the sake of convience, I will refer hereafter to a subsequent revised and updated volume in 1996 which consolidated all these three works. Joseph Goldstein, Anna Freud & Albert J Solnit, *The Best Interests of the Child : The Least Detrimental Alternative*, (New York: The Free Press, 1996) [*Best Interests*].

<sup>113</sup> See generally Michael Freeman, "The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?" (1997) 11 Int J Law, Poliy Fam 360 [Freeman, "The best Interests"].

<sup>114</sup> *Ibid* at 365.

rather than as legal subjects. They are property, rather than persons, a problem population that needs to be controlled.”<sup>115</sup> With respect to the English legal system, he further comments, “... the approach in this country sees the child as the, private property of his parents. The very concept of parental rights, most obviously the right to physical possession, expresses this relationship”. As mentioned by Freeman and as observable in the writings of different scholars on the topic, the idea of children ending up being “property” one way or the other in the end has continued to be a problem.<sup>116</sup> This aspect of children being considered as a possession recurs because in most cases, BIOC is judged by a third party and children are not considered mature enough to decide what is in their interests, thereby denying their independence.

The next aspect that helps in deciphering the concept of BIOC is its conceptual foundation. Claire Breen finds convenience in an approach treating BIOC as a tradition due to various reasons, one of which is the flexibility that it offers in accommodating different interpretations. Breen states:

[T]he best interests standard may be described as a strand of tradition, which, it is suggested, should become the guiding tradition in the metatradition of societal cohesion as those traditions that coalesce to form the meta-tradition are to be regarded as dynamic and amenable to change. An approach such as this would allow for the reconstruction of any erroneous interpretation of the message contained in the tradition of best interests. ‘New beginnings’ are possible for best interests.<sup>117</sup>

It is essential to adopt such an approach for dissecting the concept of BIOC which thrives in a variety of contexts as the basis of diametrically different practices. Her assertion is consistent with the fact that many decisions in varied cultural settings are made about children invoking long or short-term interests of the child, although there may not be any specific mention of BIOC. The question as to whether such long or short-term interests are, in reality, the best interests of the child

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<sup>115</sup> Michael Freeman, “Towards a critical theory of family law” (1985) 38 Current Legal Problems 153 at 159

<sup>116</sup> See generally, Jonathan Montgomery, “Children as property?” (1988) 51 Mod LR 323.

<sup>117</sup> Freeman, “The best Interests, *supra* note 113 at 10, 11.

or not continues to haunt BIOC even in modern settings. Breen mentions the case of female genital mutilation; a practice carried out in the victim's "best interests."<sup>118</sup> This way, Breen justifies the incoherent dynamicity in practice of such a tradition of BIOC while letting it survive under a broad theory of "tradition." The idea of putting forward such a distinction, she writes, is to "permit the beneficial characteristics of the traditions to remain in force but allows them to operate at a different level which may be more truly cohesive than a level which may be essentially coercive in nature."<sup>119</sup> It is arguable that only such an outlook can provide any coherence to the analysis of an open-ended concept without judging the normative correctness of its strands in practice. Traditions, obviously are a collection of opposing principles, never speaking with "one voice" and this nature helps in making out a coherent picture of BIOC when viewed through its lens.<sup>120</sup> The drawback with Breen's approach is that it is an attempt to justify a very flexible standard that sometimes defeats its own purpose due to such flexibility. Breen's exercise is constructive. Mine is more inclined towards exposing the potential for misuse of the BIOC standard.

I choose to regard BIOC, instead, as a "practice." The resistance of child rights movement against the façade of independence which I mentioned as a feature of the third stage in the development of child rights is closely linked with such "practice" of BIOC. The concept of "practice" clarifies the social conflict between the opposing groups here and the child, the actual subject, who is caught in between. The idea here is to expand the understanding of BIOC from the narrow conceptual confines of tradition, analyze it from a broader idea of human conduct in general. This approach

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<sup>118</sup> See generally *ibid* at 89-140.

<sup>119</sup> *Ibid* at 11.

<sup>120</sup> Jack M Balkin, "Tradition, Betrayal, and the Politics of Deconstruction" (1990) Paper 283 Yale University Faculty Scholarship Series, online: <[http://digitalcommons.law.yale.edu/fss\\_papers/283](http://digitalcommons.law.yale.edu/fss_papers/283)> at 6.

provides a few advantages. Such an expansion can rationalize the transfer of control over the child from parents to the state by reducing BIOC to something that anyone can practice.

Michael Oakshott has laid down a clear concept of this broader idea of “practice.”<sup>121</sup> He defines it as “a set of considerations, manners, uses, observances, customs, standards, canons, maxims, principles, rules, and offices specifying useful procedures or denoting obligations or duties which relate to human actions and utterances.”<sup>122</sup> While Breen suggests her concept of “tradition,” operates at a non-coercive level, it does retain some requirements of compliance. On the other hand, Oakshott’s ‘practice’ is wider and “obligation or duties” is only one of many things. The focus here is on subscription. One may subscribe or not to a “practice”.<sup>123</sup> “Practice” liberates BIOC to such an extent that it will snugly exist in a variety of circumstances from detention to non-detention. It will even justify problematic measures like sending indigenous children in Canada to residential schools in “their best interests.”<sup>124</sup> The interests of destitute, orphan or other children outside the context of family, difficult to analyze within the concept of “tradition,” will be able to be understood in this way. Because the State or some agency deemed it in the best interests of the destitute or orphan child to send to a different country/place, it is claimed to be the right decision. BIOC is just a “practice” here, merely a habitual action. It could even be argued that as a practice, it becomes devoid of any conceptual elements, rendering it an empty term, essentially bending to any interpretation. This happens in the case of detention of non-citizens’ children in the Canadian context as well. The detention of such children with their parents and on

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<sup>121</sup> Michael Oakshott, *On Human Conduct* (London: Oxford University Press, 1975) at 55-56.

<sup>122</sup> *Ibid* at 55.

<sup>123</sup> *Ibid* at 58.

<sup>124</sup> See generally, Marlee Kline, “Child Welfare law, ‘Best Interests of the Child’ Ideology, and First Nations” (1992) 30:2 Osgoode Hall Law J 375.



the basis of their best interests, is a practice, a mere routine as will be examined in the following chapters.

To summarize, BIOC can be approached as a practice to make sense of its application in varied contexts for different purposes. Continuing the discussions in this background, the forthcoming chapters analyze the existence and operation of BIOC as a practice. The foundations laid down in this chapter will help in understanding the treatment of children differently under immigration laws, where the choice of non-citizen parents on detention questions is considered as being in children's best interests.

### Chapter III. “Best Interests” of the Child in the Canadian Legal System

#### 3.1 Introduction

Law is discourse. Legal text, as well the surrounding interpretation, provides the impersonal authorization to rationalize an action. In this chapter, by using the understanding of BIOC as a practice and tracing BIOC under immigration and child protection laws, I uncover two different interpretative treatments that BIOC receives in Canada. While one authorizes detention, the other hesitates. This builds the reference point for the next chapter which discusses how differentiation works through these legal provisions and the discourses that orbit these legal provisions.

The concept of BIOC now occupies a very important position within *UNCRC*.<sup>125</sup> Article 3(1) of *UNCRC* stipulates that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The Committee on the Rights of the Child (CRC), the international body of experts that monitors the implementation of *UNCRC* considers Article 3(1) as one of the four general principles of the convention.<sup>126</sup>

The text of *UNCRC* is roughly based on the *UN Declaration on the Rights of the Child (UNDRC)* proclaimed 30 years before the coming into force of *UNCRC*.<sup>127</sup> An essentially identical form of *UNCRC*’s Article 3 remains as Article 2 in the *UNDRC*. Article 2 of the *UNDRC* declares that

[t]he child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions

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<sup>125</sup> *UNCRC*, *supra* note 24, art 3(1).

<sup>126</sup> Freeman, *supra* note 121 at 1.

<sup>127</sup> *Declaration of the Rights of the Child*, GA Res 1386(XIV), UNGAOR, 14<sup>th</sup> Sess, Supp No 16, UN Doc A/4354 (1959) [*UNDRC*].

of freedom and dignity. In the enactment of laws for this purpose, *the best interests of the child* shall be the paramount consideration.”<sup>128</sup> [emphasis added]

The discussion on BIOC arises prominently in the context of immigration and child welfare. Different studies have explored the overlapping of immigration, detention, and deportation with family law and the impact of such overlap on the subjects.<sup>129</sup> In a study of single deportable parents in the USA, Timothy Yahner observes that, especially in the context of child custody, while “... the Immigration law relies on a carefully enumerated clockwork system of regulations, ... the family law typically centers on the amorphous “best interests” standard...”.<sup>130</sup> Yahner quotes Thronson in this regard who observed that immigration law is “fundamentally at odds with the child-centered values of family law.”<sup>131</sup> This difference in values is evident in the case of Canadian family law too. The concept of BIOC holds a fundamentally inviolable status within family law, especially child protection and child custody.

While immigration remains within the realm of the Federal government, child welfare remains mostly within the jurisdiction of the provincial/territorial governments. The pertinent question, therefore, is whether *UNCRC*, specifically the concept of BIOC under Article 3, has been implemented similarly within the two areas of domestic laws of concern, immigration, and child protection.

The question of implementation is easier to understand through the reports submitted by the Canadian government to the CRC and the CRC’s response. *UNCRC* requires its parties to submit

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<sup>128</sup> Commission on Human Rights, *Report of the 34th session*, UNESCOR, 1978, Supp No. 4, UN Doc E/1978/34 at 124 .

<sup>129</sup> See generally Sheryl Burns, *Single mothers without legal status in Canada caught in the intersection between immigration law and family law* (YWCA Vancouver, 2010).

<sup>130</sup> Timothy E Yahner, “Splitting the Baby : Immigration, Family Law, and the Problem of the Single Deportable Parent” (2015) 45:6 Akron LR 769 at 784 [Yahner].

<sup>131</sup> David B Thronson, “Exploring Immigration Law as Federal Family Law in the Context of Child Custody” (2007) 59 Hastings Law J 453 at 507 cited in *ibid* at 784.

periodic reports on the measures adopted to give effect to the rights under the convention within the two years of its entry into force and every five years after that.<sup>132</sup> In 1993, Canada designated November 20<sup>th</sup> every year as a National Child Day to commemorate *UNCRC* and *UNDRC*.<sup>133</sup> Apart from these symbolic gestures, the first periodic report of the government, submitted to the CRC in 1994, was a mere outlining of the existing federal/provincial laws which mentioned the principle of BIOC.<sup>134</sup> Canada highlighted an amendment made to the *Immigration Act* in 1992 in the first report. It claimed that "... [t]he Immigration Act and the regulations enacted under it were amended in 1992 to increase protection for prospective immigrants, including children. Further amendments to the regulations are being considered to improve and safeguard of the best interests of the child."<sup>135</sup> These amendments, however, were anything but child protection measures. The amendments, in fact, made the immigration process tighter by bringing-in the controversial concept of a "Safe Third Country" [STC] provision which summarily denied refugees access to Canada if they had arrived at its border through a designated safe third country.<sup>136</sup> Although it took another 10 years for an actual STC to come into effect between the US and Canada, technically after the amendment, ineligible refugees could include child refugee claimants as well.

The "further amendments" mentioned above in Canada's periodic report of 1994 took another ten years to materialize in the form of the new *Immigration and Refugee Protection Act*. In reality, neither the old *Immigration Act* of 1985 or the *Immigration Regulations* of 1978 contained any provisions of significance which treated matters involving children differently or directed acting

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<sup>132</sup> *UNCRC*, *supra* note 24, art 44.

<sup>133</sup> *Child Day Act*, SC 1993, c. 18.

<sup>134</sup> See generally Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention - Initial reports of States parties due in 1994 - Canada*, CRC, 1994, UN Doc CRC/C/11/Add.3 at 1.

<sup>135</sup> *Ibid* at 14.

<sup>136</sup> Mark Anthony Drumbl, "Canada's New Immigration Act: An Affront to the Charter and Canada's Collective Conscience?" (1994) 24 *La Rev droit l'Université Sherbrooke* 385.

in their best interests.<sup>137</sup> The only concession that the *Immigration Act* granted to minors was under Sections 29(4) and 69(4) which provided for the appointment of a representative or letting the parent or guardian represent the minor during removal or refugee status inquiry proceedings. What is noticeable here is the absence of any directions to consider BIOC in the case of removal or detention. Section 103 of the *Immigration Act* which dealt with detention used the term “person” throughout, treating minors and adults similarly.<sup>138</sup> Any Immigration officer can order such a person’s detention if he/she is unable to satisfy the officer “with respect to that person’s identity” or if “... there is reason to suspect that the person may be a member of an inadmissible class...”.<sup>139</sup> The signing of the convention, thus, had no impact on these provisions.

This domestic law-international law polycephaly within the Canadian legal system was noted by the CRC in its concluding observations on the first report of Canada in 1995:

... The Committee expresses its concern about the value of the Convention in domestic law. Certain basic provisions and principles of the Convention, particularly those relating to non-discrimination, *the best interests of the child* and the respect for the views of the child, *have not always been adequately reflected in national legislation and policy-making*. [emphasis added]

Article 37(b) of *UNCRC*, dealing with the deprivation of liberty, states that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time<sup>140</sup>

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<sup>137</sup> *Immigration Act*, RSC 1985, c I-2 as repealed by Immigration and Refugee Protection Act, SC 2001, c 27 [*Immigration Act*]; *Immigration Regulations*, 1978, SOR/93-44.

<sup>138</sup> *Immigration Act*, *ibid*, s 103.1.

<sup>139</sup> *Ibid*.

<sup>140</sup> *UNCRC*, *supra* note 24, art 37(b).

The discord between Art. 37(b) and the aforementioned provisions within the *Immigration Act*, specifically regarding the detention of children did not go unnoticed by the CRC which further commented that:

The Committee recommends that the Government address the situation of unaccompanied children and children having been refused refugee status and awaiting deportation in the light of the Convention's provisions. Deprivation of liberty of children, particularly unaccompanied children, for security or other purposes should only be used as a measure of last resort in accordance with Article 37 (b) of the Convention.<sup>141</sup>

In spite of this observation, the state of affairs continued more or less unchanged. This is discernable from the report submitted by Canada in 2001. In it, it was stated that:

Detention of an unaccompanied child at an immigration facility for more than a brief period, the time required to ensure that the child will receive proper care elsewhere, *is unusual*. Detained children are always held apart from the rest of the incarcerated population. They are closely monitored and have access to common areas where toys, games, television, books and outdoor recreation activities are made available. There is also on-site medical staff available.<sup>142</sup> [emphasis added]

Here, the Canadian Government more or less admitted that such detention happens, although not “usually”. In 2003, the Committee responded to this report with an observation similar to the earlier one recommending that Canada “Refrain, as a matter of policy, from detaining unaccompanied minors and clarify the legislative intent of such detention as a measure of “last resort”, ensuring the right to speedily challenge the legality of the detention in compliance with article 37 of the Convention”.<sup>143</sup> Events, however, did happen during the preceding period bringing in changes to

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<sup>141</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention - Concluding observations of the Committee on the Rights of the Child: Canada*, CRC, 1995, UN Doc CRC/C/15/Add.37 at 5.

<sup>142</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Second periodic Reports of State Parties due in 1999: Canada*, CRC, 2001, UN Doc CRC/C/83/Add.6 at 91 [*Second Periodic Report: Canada*].

<sup>143</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention - Concluding observations: Canada*, CRC, 2003, UN Doc CRC/C/15/Add.215 at 11.

the legal landscape surrounding immigration and detention which will be elaborated in the next part.

The discussion on this topic can be split into two at this point, the first being the treatment and evolution of the BIOC standard within immigration laws and the second being its position under provincial childcare laws.

### 3.3 BIOC Under Immigration Laws

Two events significant to the discussion of BIOC under Canadian immigration laws happened during the period around the submission of the first and second report by Canada to the CRC (1994 and 2001).<sup>144</sup> First, the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*. Second, the *Immigration Act* was repealed by the enactment of the *Immigration and Refugee Protection Act* of 2002.

*Baker* involved a review of the discretionary powers of the Minister of Citizenship and Immigration for staying the deportation of a woman with Canadian-born dependent children on humanitarian and compassionate (H&C) grounds. Although ratified, Canada had not implemented *UNCRC* and the argument to consider BIOC in disposing H&C applications had been rejected by the Federal Court of Appeal *inter-alia* on that very reason.<sup>145</sup> The Federal Court observed that:

... It is clear that a treaty made by the executive branch of government does not have legal effect over rights and obligations within Canada unless implemented by statute. This Convention has never been adopted by either federal or provincial legislation in Canada. It is clear that legislation implementing a treaty should be interpreted by reference to the treaty even in the absence of real ambiguity in the

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<sup>144</sup> It is to be noted that although the second periodic report was due in 1999, Canada submitted the same only in 2001. It only covered the period between January, 1993 and December, 1997. See *Second Periodic Report: Canada, supra* note 142 at 3.

<sup>145</sup> *Baker supra* note at 54 paras 18-21 (Federal Court of Appeal).

legislation, but it has in no way been demonstrated that the Immigration Act is legislation implementing the Convention on the Rights of the Child.<sup>146</sup>

The Supreme Court of Canada, on appeal, adopted a slightly different position concerning the question of non-implementation. The majority, led by *L'Heureux-Dubé*, commented on the value of international human rights as aids in interpreting domestic laws and concluded:

“[t]he principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.”<sup>147</sup>

It was also an instance of the court focusing specifically on BIOC and the impact of Article 3 of *UNCRC*. On the question of BIOC, the majority concluded that:

... for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.<sup>148</sup>

The judgment incited different responses. Some blamed the Supreme Court for having ushered in unimplemented international law through the backdoor. Others claimed that the Supreme Court had facilitated the use of babies by exploitative mothers as trump cards to obtain citizenship.<sup>149</sup> Nevertheless, BIOC found consistent mention within most discussions involving children within immigration and family law after *Baker*. The following table illustrates the increase in references to BIOC in judicial decisions after Canada signed *UNCRC* (Phase I) and after the pronouncement

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<sup>146</sup> *Ibid* at para 18.

<sup>147</sup> *Baker supra* note 54 at ¶75.

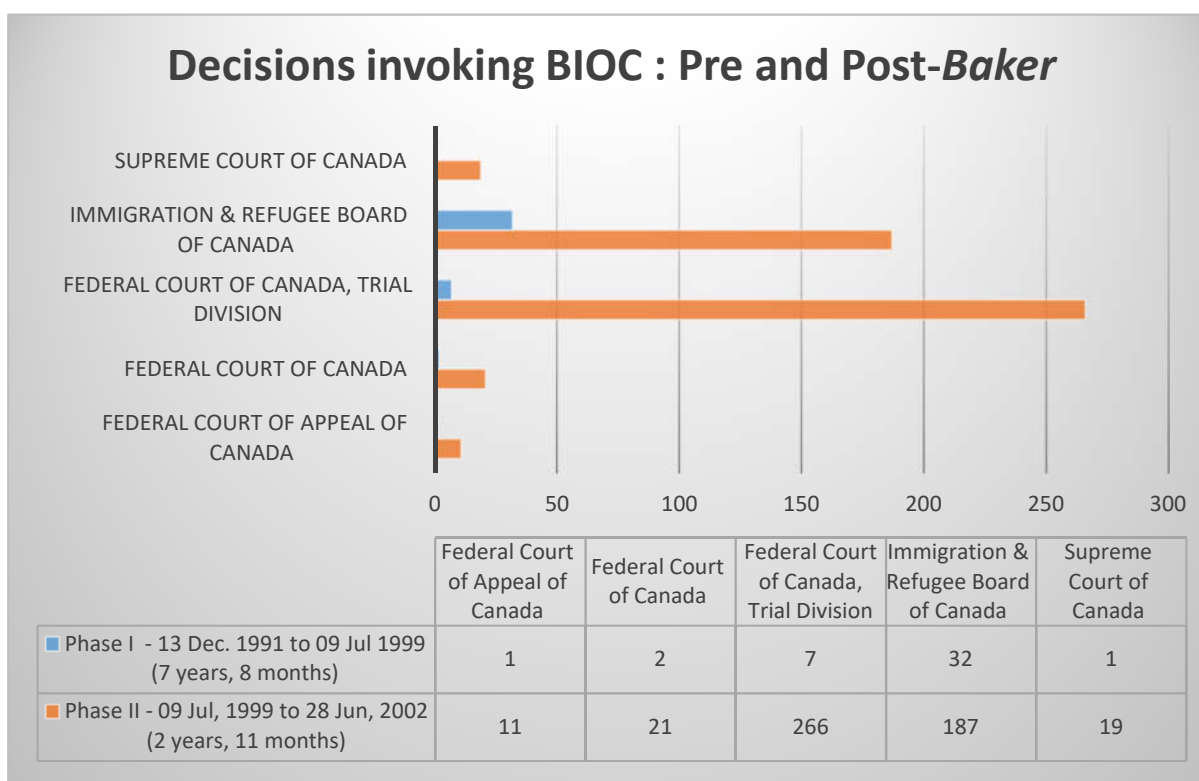
<sup>148</sup> *Ibid* at para 75.

<sup>149</sup> Sharryn Aiken & Sheena Scott, “*Baker v. Canada (Minister of Citizenship and Immigration) and the Rights of Children*” (2000) 15:January JL & Soc Pol'y 211 at 241-243.



of the decision in *Baker* until the coming into effect of *IRPA* in 2002 (Phase II). This does not necessarily mean that such a mention had any impact on the decisions but they point to the emphasis that was being laid on mentioning the term BIOC while deciding such matters.

Table 2 BIOC and *Baker* decision<sup>150</sup>



The *Immigration and Refugee Protection Act (IRPA)* came into existence during this same period a year before the submission of the second periodic report by Canada in 2003. *IRPA* made significant changes to the existing system of detention under immigration laws. BIOC principle finds repeated mention within the text of both *IRPA* and its regulations, the *Immigration and*

<sup>150</sup> For more details on the methodology used to prepare the table, please see “Methodology” in Chapter 1 at 17.

*Refugee Protection Regulations (IRPR)*. Section 25.1 of *IRPA*, which deals with humanitarian and compassionate (H&C) considerations, provides the Minister with discretionary powers to consider the cases of inadmissible or ineligible applicants for permanent residence on H&C grounds.<sup>151</sup> It contains a direction to the Minister to take the best interests of the child affected while considering such cases.<sup>152</sup>

In 2015, the Supreme Court of Canada considered the BIOC element in Section 25.1 of *IRPA* in a matter involving a seventeen-year-old failed refugee claimant from Sri Lanka, Jeyakannan Kanthasamy.<sup>153</sup> An immigration officer denied his application for permanent residence after a superficial BIOC analysis. Both the Federal Court and the Federal Court of Appeal upheld the decision of the officer.<sup>154</sup> Overturning the decision of the officer, the Supreme Court held that insufficient consideration of BIOC can render a decision under Section 25.1 unreasonable.<sup>155</sup> The court offered a detailed analysis on the need to consider BIOC with references to a number of its prior decisions that discuss BIOC including *Baker* and sternly criticized the casual application of BIOC by the immigration officer in the following words:

[T]he Officer's analysis of the "best interests" factor cannot be characterized as anything other than perfunctory. She simply stated, in a single paragraph, that Jeyakannan Kanthasamy's best interests lay in returning to Sri Lanka where he had grown up and where his immediate family continued to reside. In my view, this fails to accord with the "serious weight and consideration" this Court in *Baker* identified as essential to a proper appreciation of a child's best interests ... by evaluating Jeyakannan Kanthasamy's best interests through the same literal approach she applied to each of his other circumstances ... she misconstrued the best interests of the child analysis...<sup>156</sup>

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<sup>151</sup> *IRPA supra* note 8 s.25.1.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Kanthasamy supra* note 58.

<sup>154</sup> *Kanthasamy v. Canada (Citizenship and Immigration)*, 2013 FC 802, [2014] 3 FCR 438, [2013] FCJ No 848 (FC); *Kanthasamy FC supra* note 59.

<sup>155</sup> *Kanthasamy, supra* note 58 at para 39.

<sup>156</sup> *Ibid* at para 57.

Although courts are called to perform such periodic iterations breaking down components of BIOC, *Kanhasamy* is the second instance where the court had the opportunity to do so in the context of immigration law after *Baker*.<sup>157</sup> The court in *Kanhasamy* insisted on identifying and defining BIOC and examining it “with a great deal of attention in the light of all the evidence” and directed that the decision makers “do more than simply state that the interests of a child have been taken into account.”<sup>158</sup> The Court referred to the Minister’s guidelines on the subject which lists different factors to be considered while making determinations on BIOC.<sup>159</sup>

*Kanhasamy* is hailed as a precedent which goes beyond a mere expansion the scope of BIOC analysis under Sec. 25.1 of *IRPA*. In fact, some commentators consider the court to have opened up the scope for the application of international law in discretionary decision making by relying on the provision of *UNCRC* instead of the *Canadian Charter of Rights and Freedoms*.<sup>160</sup> However, the Court in *Kanhasamy* did not focus much on the conceptual or definitional aspects of BIOC, choosing to restrict itself to a practical analysis of the factors to be considered as mentioned above. The decision, however, serves to emphasize the fact that BIOC in many cases, remains a catchphrase or a passing reference.

Division 6 of *IRPA* contains provisions relating to detention and release of permanent residents or foreign nationals. According to the provisions under this division, an officer of Canadian Border Services Agency (CBSA) can make the decision to arrest a permanent resident or foreign national if he/she “has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a

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<sup>157</sup> The other contexts, especially criminal and family law will be discussed in the preceding sections.

<sup>158</sup> *Kanhasamy*, *supra* note 58 at para 39.

<sup>159</sup> *Ibid* at para 40.

<sup>160</sup> Emily Chan & Jennifer Stone, “Where no court has gone before : Primacy and centrality of the best interests of the child principle - Case Comment on *Kanhasamy v. Canada*” (2015) 29:2 Can J Adm Law Pract 219 at 232-233.

proceeding that could lead to the making of a removal order by the Minister”.<sup>161</sup> Detention is resorted to also if “the officer is not satisfied of the identity of the foreign national” or “is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.”<sup>162</sup> One of the most significant provisions in *IRPA* in considering BIOC is section 60. It lays down that “it is affirmed as a principle, a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”<sup>163</sup> There are two significant aspects of this section. First, it lays down the scope for detaining children. Second, it does so while noting the BIOC principle. To supplement this consequential yet shortly worded provision, Regulation 249 of *IRPR* undertakes the task of explaining some further “special considerations” in the case of detaining such children:

- (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
- (b) the anticipated length of detention;
- (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- (d) the type of detention facility envisaged and the conditions of detention;
- (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and

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<sup>161</sup> *IRPA supra* note 8, s.51.

<sup>162</sup> *Ibid*, s.55.

<sup>163</sup> *Ibid*, s. 60.

(f) the availability of services in the detention facility, including education, counselling and recreation.<sup>164</sup>

Section 60 considerations are explained in *ENF*, the enforcement manual explained in Chapter I. *ENF 20* (Detention) states in Clause 5.10 “detention of minor children” that “*IRPA* does not allow a minor child to be detained for their protection. Child protection responsibility rests with the provincial youth protection agencies. A60 stipulates that it is affirmed as a principle that *a minor child shall be detained only as a measure of last resort, taking into account other applicable criteria including the best interests of the child.*”<sup>165</sup> [emphasis added] The words “shall be detained... taking into account... best interests of the child”, interestingly, reveals how BIOC can be interpreted by the statute to be one of the considerations *resulting* in a decision to detain the child. In other words, under certain circumstances, the legal system may consider detaining a child in that *child’s best interests*.

Clause 5.10 also asserts that “A60 is consistent with the UN Convention on the Rights of the Child to which Canada is a signatory and which provides that an administrative authority must take the interests of the child into account.”<sup>166</sup> After stating that “[w]here safety or security is not an issue, the detention of minor children is to be avoided,” it adds in the next line that “[d]etention of a minor child, however, is not precluded where the minor is considered a security risk or danger to the public.” As observed earlier, the explicit authorization for detaining minors within the very same legal provisions that seek to avoid detention is a feature of *IRPA* and *IRPR*. *ENF20*, as guidance, only adds few references to *UNCRC*.

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<sup>164</sup> *IRPR*, *supra* note 9, s 249.

<sup>165</sup> *ENF20*, *supra* note 10 at para 5.16.

<sup>166</sup> *Ibid.*

The actual detention of minor Canadian children when CBSA detains their non-citizen parents happens informally as guests.<sup>167</sup> When CBSA detains parents, and no other family member is present outside to take care of the children, the decision regarding such children, including children born in Canada has to be taken by their parents. If they chose, their children accompany them in detention as *de-facto* or *guest* detainees.<sup>168</sup> No explicit reference to such a de-facto system of detention is present in *IRPA*, *IRPR* or *ENF20* either under the provisions concerning children or vulnerable groups. It is found only in CBSA's website under the section "Special considerations for vulnerable people." This page states that "[a]ccompanied minors may be permitted to remain with their detained parents in a CBSA immigration holding centre if it is in the child's best interest and appropriate facilities are available."<sup>169</sup> Canada is applying the BIOC in the immigration context concerning children even during such *de facto* detention. The statement of the Canadian government in its periodic report to the Committee on the Elimination of Racial Discrimination in 2016 supports such an assumption. It says

With respect to children, the principle of the best interests of the child is applied in efforts to assist children of refugees and immigrants throughout the immigration continuum, including at the time of detention... CBSA officers carefully consider what is in a child's best interest. ...Accompanied minors may be permitted to remain with their detained parents in an immigration holding centre if a CBSA officer considers it to be in their best interest...<sup>170</sup>

In expressing its disappointment with the nature of Canada's implementation of *UNCRC*, the CRC noted:

The Committee is concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all

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<sup>167</sup> See Chapter 1, Section 1.5, Scale of the Problem.

<sup>168</sup> See Gros & Song, *supra* note 5 at 33-34.

<sup>169</sup> CBSA, *Arrest, detentions and removals – Detentions*, online: Canada Border Services Agency < <http://www.cbsa-asfc.gc.ca/security-securite/detent-eng.html> > [CBSA].

<sup>170</sup> Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention - Twenty-first to twenty-third periodic reports of States parties due in 2015 - Canada*, 2016, UN Doc CERD/C/CAN/21-23 at 10.

legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children. In particular, the Committee is concerned that the best interest of the child is not appropriately applied in asylum-seeking, refugee and/or immigration detention situations.<sup>171</sup>

Thus, in spite of the references to it in different laws relating to immigration and refugee protection, “best interests” standards are interpreted differently in different contexts. BIOC in each such context establishes itself as a practice, a term that liberates the concept from the confines of definitional consistency and allows unlimited contextual flexibility.

### 3.4 BIOC under Provincial Child Protection Laws

Unlike its presence under immigration laws, BIOC has a long history under family laws, especially in the context of child-custody and child-protection in Canada. It finds repeated mention, sometimes merely as a phrase rather than a principle, in judicial decisions as early as 1878.<sup>172</sup> However, such references remained restricted to adoption or custody questions. Moreover, the early laws were woefully crude to address the actual issue of child protection. Most of the efforts were initiated by the interest to contain the rising issue of children in the streets in emerging cities.<sup>173</sup>

As the scope of this project is limited to detention practices in British Columbia and Ontario, I will be dealing with the child protection laws in these two provinces. In British Columbia, the *Child, Family and Community Service Act* of 1996 (CFCSA) deals with the matter of child welfare and

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<sup>171</sup> Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, CRC, 2012, UN Doc CRC/C/CAN/CO/3-4 at 8-9 [CRC, 2012 Report].

<sup>172</sup> See note 110.

<sup>173</sup> See generally Reza Barmaki, “The Bourgeois Order and the ‘Normal’ Child: The Case of Ontario, 1867–1900” 5(3) IJMHA 263.

protection.<sup>174</sup> In Ontario, a similar law, *Child and Family Services Act* of 1990 (*CFSA*) deals with the issue of child protection and welfare.<sup>175</sup>

Division 3 of *CFCSA* contains the provisions that guide police and other authorities on finding children who require protection. Sec. 27 of *CFCSA* empowers the police to take charge of a child if the officer “has reasonable grounds to believe that the child's health or safety is in immediate danger.”<sup>176</sup> In most cases where police arrest the parent/s of children and they have not put any alternate arrangements for the care of such children in place, police resort to the provisions of this section.<sup>177</sup> The police officer has to report the circumstances and hand over the child to the Provincial Director of Child Welfare (the Director) who works under the Ministry of Children and Family Development (MCWFD).<sup>178</sup> A “child welfare worker” employed by the MCWFD can also investigate the matter independently or in collaboration with the police investigate and report to the director.<sup>179</sup> The director can apply to the court and in the absence of any alternative arrangements for care and protection of the child, request for temporary or continuing custody of the child.<sup>180</sup> A court can also order permanent transfer custody of the child to any person other than the child’s parent.<sup>181</sup>

BIOC has a significant role in the proceedings for temporary, continuing or permanent custody of children under *CFCSA*. Most of the decisions by the director and orders by the court on protection,

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<sup>174</sup> RSBC 1996 c46 [*CFCSA*].

<sup>175</sup> RSO 1990, c11 [*CFSA*].

<sup>176</sup> *Ibid*, s. 27(1).

<sup>177</sup> Amanda V McCormick, Hayli A Millar & Glen B Paddock, *In the Best Interests of the Child: Strategies for Recognizing and Supporting Canada’s At-Risk Population of Children with Incarcerated Parents* (2014) at 14, online: Centre for Public Safety and Criminal Justice Research < [https://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents\\_Amended.pdf](https://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents_Amended.pdf)> [McCormick, Millar & Paddock].

<sup>178</sup> *CFCSA supra* note 174 **Error! Bookmark not defined.** at s. 27(1).

<sup>179</sup> Govt. of British Columbia, “B.C Handbook for Action on Child Abuse or Neglect for Service Providers” (June 2017), online: <[http://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/public-safety/protecting-children/childabusepreventionhandbook\\_serviceprovider.pdf](http://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/public-safety/protecting-children/childabusepreventionhandbook_serviceprovider.pdf)> at 12.

<sup>180</sup> *CFCSA supra* note 174, s.33-50.

<sup>181</sup> *Ibid*, s.54.01.



custody or placement of the child are directed to be made by the statute only if it is "in the child's best interests."<sup>182</sup> Section 4 directs the consideration of a non-exhaustive list of factors in ascertaining BIOC. The factors listed are as follows:

- (a) the child's safety;
  - (b) the child's physical and emotional needs and level of development;
  - (c) the importance of continuity in the child's care;
  - (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
  - (e) the child's cultural, racial, linguistic and religious heritage;
  - (f) the child's views;
  - (g) the effect on the child if there is delay in making a decision.
- (2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.<sup>183</sup>

What is worth noting here is not the individual components of BIOC within *CFCSA* and *IRPA* but the functional impact of BIOC on the decision-makers. The most striking contrast between Sec. 60 of *IRPA* is the utilisation of BIOC for enablement of detention. There is a fairly large number of reported cases involving disputes concerning placement and protection of children under *CFCSA*. However, specific instances of children placed in foster care upon arrest and incarceration of their parent/s are difficult to trace. Many scholars note this difficulty in their studies. McCormick et. al comment in their 2014 report on children with incarcerated parents that "Although Section 27(1)10 of British Columbia's Child, Family, and Community Service Act lays the groundwork for police to take control of a minor when their parent is arrested and when there is no appropriate caregiver, it is not clear how often this occurs."<sup>184</sup> They quote the study by Cunningham & Baker of 2004 which claimed that "83% of 45 provincially incarcerated women reported that when they were arrested, they had no time to arrange appropriate care for their

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<sup>182</sup> *Ibid.*, ss. 6, 28, 41, 42.2, 44, 44.1, 45, 46, 49, 54, 54.01, 55-57.1, 60, 67, 71, 97.1.

<sup>183</sup> *Ibid.*, s.4.

<sup>184</sup> McCormick, Millar & Paddock, *supra* note 177 at 14.

child”.<sup>185</sup> Through the data collected from 45 women in provincial correctional facilities, Cunningham & Baker found that out of 90 children, “about half of the children lived under an open child protection file and many (43%) had no contact with their biological fathers.”<sup>186</sup> In a 2013 study, the same authors concluded that “21% of the children were in foster care while the mother was in custody while 24% were living with their fathers.”<sup>187</sup> Although difficult to ascertain, certain glimpses of statistics are present in other studies. Shields (1990) found that 15% of children belonging to a group of 20 women at the Burnaby Correctional Centre were under the legal custody of the Ministry of Social Services and the rest were with their relatives.<sup>188</sup> The idea here is not to pass judgment on the quality of interpretation of BIOC but the individuality of BIOC which allows two different “worst case” decisions for subjects possessing a similar legal status. In the *IRPA* context, it permits detention as a last resort and in a child protection context, it permits foster care as a last resort.

In Ontario, the provincial government’s Ministry of Children and Youth Services designates independent organizations as Children’s Aid Societies (CAS) with powers to investigate cases of children needing protection and provide such protection if required.<sup>189</sup> Here, a child protection worker, who is a director of such a Children’s Aid Society or someone appointed by him, upon referrals, reports or information that a child is in need of protection, investigates the case and applies to the court to take the child into custody.<sup>190</sup>

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<sup>185</sup> *Ibid.*

<sup>186</sup> Alison Cunningham & Linda Baker, *Invisible Victims: The Children of Women in Prison* (2004), online: CiteSeerX <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.9642&rep=rep1&type=pdf>> at 3.

<sup>187</sup> Alison Cunningham & Linda Baker, *Waiting for Mommy Giving a Voice to the Hidden Victims of Imprisonment*. (2003), online: London Family Court Clinic <<http://www.lfcc.on.ca/WaitingForMommy.pdf>> at 11.

<sup>188</sup> Elizabeth Mary Shields, *Mothers in Prison: An Examination of Familial Ideology and Social Control in the Burnaby Correction Centre for Women* (Simon Fraser University, 1990) [unpublished] at 74.

<sup>189</sup> *Ibid.*, ss 15(2), 15(3).

<sup>190</sup> *Ibid.*, s 40-43.

The very purpose of this law as stated in its preamble is to “promote the best interests” of the child.

<sup>191</sup> Scattered references to BIOC are present throughout this statute.<sup>192</sup> Compared to its counterpart in British Columbia, the factors to be considered while assessing BIOC are, however, expanded to include “The child’s physical, mental and emotional needs, and the appropriate care or treatment to meet those needs” and “the child’s relationships by birth or through an adoption order.”<sup>193</sup>

One common feature in British Columbia and Ontario is the complete prioritization of child’s interest over that of the parents. This was also a prominent suggestion of the Gove Inquiry into Child Protection, a Commission of Inquiry appointed by the provincial government of British Columbia after the controversial death of a six-year-old at the hands of his mother following prolonged neglect and abuse in 1995.<sup>194</sup> Similarly, *Catholic Children's Aid Society of Toronto v I.S* decided by the Ontario Court of Justice involved two children who were abandoned by their mother and taken from the custody of a father who was a habitual offender and placed in crown wardship permanently. The court observed that “[T]he best interests of a child take priority over the desires and interests of the parent.”<sup>195</sup> In the context of child custody and welfare, the norm is often the primary consideration of the child’s actual interests over the parents. This fits in the third stage of child rights that I explained in Chapter II where the struggle is ongoing to establish an interest separate from that of the parents or the State.

One exception to the rule of keeping children out of detention facilities is mother child-programs where children are allowed to remain with their incarcerated mothers. The practice of allowing

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<sup>191</sup> *Ibid*, s 1(1).

<sup>192</sup> *Ibid*, ss 51(3.1), 51.1, 57 (1), 57.1, 58, 59, 61, 62, 64-66, 69,70, 77, 80,81, 103, 136,139, 139, 145, 149, 153-153.2, 154.

<sup>193</sup> *Ibid*, ss 1, 6.

<sup>194</sup> Andrew Armitage, “Lost Vision: Children and the Ministry for Children and Families” (1998) 118 B C Stud 93 at 97. See generally Thomas J Gove, *Report of the Gove Inquiry into Child Protection in British Columbia* (British Columbia Department of Social Services, 1995).

<sup>195</sup> 2012 ONCJ 335, [2012] OJ No 2523 [*Catholic Children's Aid Society* cited to ONCJ] at 112.

incarcerated mothers to keep their infant children in the absence of any alternative arrangements was common in the 19<sup>th</sup> century.<sup>196</sup> Although the programs were discontinued, presumably due to the impact of prison conditions on the children, there have been instances of revival at least in the case of young infants in Canada throughout the twentieth century. Two provincial programs that are often mentioned in studies is that of “babies behind bars” program instituted in around 1980 at the Portage Correctional Institution for Women in Manitoba and at Twin Maples Correctional Centre for Women in British Columbia.<sup>197</sup> The program in Manitoba placed an age limit of 10 months on infants to remain with their mothers. The one in British Columbia restricted it to babies born during the period of incarceration or where the babies are not older than 2 years on the date of their mothers’ expected date of release.<sup>198</sup>

In 1989, to study more about the approach and management of women in federal prisons, a “Task Force on Federally Sentenced Women” (TFFSW) was established.<sup>199</sup> Its first report, “Creating Choices” was published in 1990 containing many radical ideas including a suggestion that children live with their incarcerated mothers.<sup>200</sup> This is considered to have led to the emergence of Correctional Service Canada’s Mother-Child Program (MCP).<sup>201</sup> Eligible mothers can apply to have their children reside with them through this program. Age and other restrictions vary and full-

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<sup>196</sup> Jeanne Marie Greenough, *Women-centered corrections, creating choices for federally sentenced women or a continuation of paternalistic practices?* (MA Thesis, Mount Saint Vincent University, 1999) at 35, online: Library and Archives Canada <<http://www.nlc-bnc.ca/obj/s4/f2/dsk2/ftp01/MQ37799.pdf>>.

<sup>197</sup> See James Boudouris, *Parents in prison: addressing the needs of families* (American Correctional Association, 1996) at 16; Linda MacLeod, *Sentenced to Separation - An Exploration of the Needs and Problems of Mothers Who Are Offenders and Their Children* (Ottawa, 1986) at 41-47 [Linda MacLeod].

<sup>198</sup> Linda MacLeod, *ibid.*

<sup>199</sup> Margaret Shaw, “Issues of Power and Control - Women in Prison and Their Defenders” (1992) 32:4 *Brit J Crim* 438 at 441.

<sup>200</sup> Task Force on Federally Sentenced Women, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (Correctional Service Canada, 1990) at 120, online: <<http://www.csc-scc.gc.ca/women/tocec-eng.shtml>>.

<sup>201</sup> Sarah Brennan, “Canada’s Mother-Child Program: Examining Its Emergence, Usage and Current State” (2014) 3:1 *Can Graduate J Sociology & Crim* 11 at 14.

time residency is permitted only for children up to the age of 4 years.<sup>202</sup> The information about this program is admittedly scarce and the support for this program itself is on a decline.<sup>203</sup> MCP places significant emphasis on the age of the child and child remaining unaware of the restricted nature of the detention facility. MCP is the only exception to the general interpretation of BIOC against detaining children in the context of child protection and custody. MCP is explained here only for the purpose of showing how even this limited exception is a declining practice and it cannot be equated to the “housing” of non-citizen’s children with their parents during immigration detention. Even in the cases where the mother-child program was applied, the settings designed to distinguish them from prisons (“... [R]esidence resembles a condo - like setting with parks for the children to play in...”), concerns were expressed by the court as to their suitability for children.<sup>204</sup> The obvious conclusion is that within the context of child protection/child custody law, there remains no scope for exposing children for prolonged periods inside prisons.

Thus, we can understand from the above discussion that in the context of the “domestic child,” the law interprets BIOC differently; a BIOC that directs the placing of such children in care when their parents are arrested/detained; a BIOC different from that applied in immigration contexts. The question as to why and how such a differential interpretation happens will be discussed in the next chapter which analyses the relationship between this differentiation and a process of othering inherent in such acts.

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<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid* at 16, 22, 25.

<sup>204</sup> See *R v Whitford*, 2008 BCSC 1378, [2008] BCJ No 1954, W.G. Parrett J. [*Whitford* cited to BCJ] (“It is in many respects startling, to put it mildly, to consider incarcerating in a federal institution the accused's new child who is still under the age of one. The sentence, however, is for the mother, not the child. Others have the heavy burden of monitoring the best interests of the child and acting appropriately” at 23).

## Chapter IV. Othering as differentiation: The Child Protection Law/Immigration Law Dichotomy

In the first three chapters, I described the scale of the issue (detention of non-citizens' Canadian children), utilisation of BIOC as the rationale for such detention, provided a conceptual background to the concept of BIOC and discussed the legal provisions surrounding BIOC and detention to expose the differential understanding of BIOC within immigration law and family law.

In this chapter, I make my core arguments regarding the “othering” that happens directly and indirectly when the legal system interprets a standard differently for two similarly placed subjects. I am subjecting the legal discourses surrounding the decisions to detain non-citizens' Canadian children to conceptual scrutiny at this point. I also rely on the data and conclusions arrived in the previous chapters regarding the existence of such a differential treatment to substantiate my arguments.

I undertake the conceptual analysis through the ideas developed by Lajos Brons and reinforced by references to past practices of Canada which fit into the argument. The oral and written discourses surrounding such decisions to detain children with their parents acquires importance in this context. With such a conceptual tool, I analyze the discourses surrounding the detention of non-citizens' Canadian children.

### 4.1 Introduction

“[D]etention is sometimes in the best interests of the child,” Paul Aterman, who is presently the Deputy Chairperson, Immigration Appeal Division (IAD) reminded the Standing Senate

Committee (Canada) on Human Rights in 2007.<sup>205</sup> This reflects a different conception of BIOC when it comes to the children belonging to non-citizens. Judges and other decision-makers interpret the BIOC standard differently as compared to the way it is applied to Canadian children belonging to Canadian citizens while deciding the question of their detention. This different interpretation lets them subject the non-citizens' children to defacto detention as guests through a conscious oversight. It is considered so insignificant that often there is not even a mention of it as detention and even the number of children in detention are not clearly accounted for. In the Second ATI data, CBSA mentioned that their "systems do not currently allow the capture of minors who are housed (not subject to a formal detention order themselves) ...".<sup>206</sup> Often this lack of accounting connects with the view that children detained as guests are detained in their best interests, as noted by Aterman, and as an act of courtesy to the children and/or their parents.

Discourses within the text of guidelines, policies, judgments and laws surrounding the decisions to detain this category of children need to be analysed at this point as they all attempt to justify (legitimize) the outcome. Van Dijk explains legitimation within the institutional context as a form of justification and opines that:

...speakers are usually described as engaging in legitimation as members of an institution, and especially as occupying a special role or position. Legitimation in that case is a discourse that justifies 'official' action in terms of the rights and duties, politically, socially or legally associated with that role or position. Indeed, the act of legitimation entails that an institutional actor believes or claims to respect official norms, and hence to remain within the prevalent moral order.<sup>207</sup>

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<sup>205</sup> Senate of Canada, Standing Senate Committee on Human Rights, *Children: The Silenced Citizens - Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, (April, 2007) at 133 (Chair: Raynell Andreychuk).

<sup>206</sup> Second ATI data, *supra* note 65 at 1.

<sup>207</sup> Teun A van Dijk, *Ideology: A Multidisciplinary Approach* (London: Sage, 1998) at 256.

The policies, decisions, and determinations are legitimized through the written or oral discourses surrounding them. This is merely compliance with the concepts of accountability and transparency which directs such authorities to furnish publicly and legally acceptable reasoning for such policies, decisions, and determinations. These discourses are the locations where the “practice” of BIOC can be traced.

In these points, the public officials or judges are compelled to reveal the thinking process that went through the decision-making and one can see that within these documents, BIOC has an existence distinct from the conventional interpretations. It remains as a set of words with substantial malleability to assist in a specific process. BIOC here is used to justify detention.

This chapter offers an analysis of those discourses surrounding such decisions in different contexts. The analysis is using the lens of critical discourse analysis through which it identifies the process unfolding, which is a subtle form of othering. It is not the language of the text which will be scrutinized but instead the forces and compulsions that operate behind the utilisation of such a standard (BIOC) in the text to justify detention.

#### 4.2 Othering through Differentiation

“Other” and “Othering” is a firmly rooted concept in social theory and other areas of research.<sup>208</sup>

Much of the discussion focus on the broadly drawn dichotomies or binary oppositions and an unequal relationship between the two.<sup>209</sup> In most cases, the elevation of “self” and the consequential marginalization of the other is a visible exercise. Lajos Brons proposes an interesting

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<sup>208</sup> See generally Alison Mountz, “The Other” in *Key Concepts in Political Geography* (London: Sage, 2009) 328; Lajos Brons, “Othering, an Analysis” (2015) 6:1 *Transcience* 69, online: <[http://www2.hu-berlin.de/transcience/Vol6\\_No1\\_2015\\_69\\_90.pdf](http://www2.hu-berlin.de/transcience/Vol6_No1_2015_69_90.pdf)> [Brons].

<sup>209</sup> Mike Crang, *Cultural Geography* (London: Routledge, 1998) cited in Brons, *ibid* at 70.



distinction within the process of othering, a cruder form of othering and a sophisticated one, although both have a similar objective of excluding a person or group.

He classifies the visible setting up of a superior self and inferior other as one such crude process.<sup>210</sup>

His emphasis remains on the perceived “difference” in the relationship between the otherer and the othered, which is negative in the case of crude othering and neutral in the case of sophisticated othering. Examples of crude othering cited include the classic “rational West” and “irrational East” distinction.<sup>211</sup> There is a very apparent projection of the superiority of one over the other. Stereotypical assumptions often form the basis for such claim of superiority. “Refugees are just queue-jumping economic migrants” is one such instance of regular crude othering. “Que-jumping” is the notion here and “we” the model immigrant or model citizen queuer is alleged to be different from them, who clandestinely masks their status as regular economic migrants and “jumps queue”.

The sophisticated othering, on the other hand, relies on a reasonable primary argument. This argument allows it to express itself with a greater persuasive force and legitimacy. A popular (mis) conception of atheists being necessarily amoral is cited by Brons as an example of such sophisticated othering.<sup>212</sup> It results from the reasoning that moral rules are God's commands and a non-believer, who does not believe in god, will not believe in moral rules either. Here the reasonable primary argument is that “moral rules are God's commands.” However, from that argument flows the unreasonable one that “atheists, therefore, will not believe in moral rules.” Thus, sophisticated othering’s claim for legitimacy, based on persuasive and seemingly reasonable

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<sup>210</sup> *Ibid* at 70.

<sup>211</sup> *Ibid* at 71.

<sup>212</sup> *Ibid*.

primary argument unlike the crude othering which relies primarily on self-affirmation, make the former relatively immune to criticism. The other here is not “inferior, but radically alien.”<sup>213</sup>

The reason for mentioning these two forms of othering here is to clearly distinguish both and highlight how one provides a veneer of legitimacy although finally resulting in the same process of exclusion. In a democratic governmental setting, it is difficult to engage in crude othering due to its susceptibility to being exposed. Thus, it becomes necessary for democratic states to resort to subtler means to exclude individuals, groups or communities that are deemed undesirable. Such processes retain all the characteristics of the sophisticated othering including elaborate attempts to provide a primary, seemingly neutral objective reasoning to finally perform the act of othering resulting in the exclusion of an individual or community.

Before examining how Canada performs such an exercise in the case of non-citizens’ Canada born children, it will be helpful to look at the historical example of excluding black immigrants from entering Canada in the beginning of the twentieth century which involved a similar process.

An Order in Council of 1911 issued by Wilfred Laurier’s government prohibited the landing in Canada of “any immigrant belonging to the Negro race, which race is deemed unsuitable for the climate and requirements of Canada.”<sup>214</sup> Kelly et al. mention that the inability to survive cold as a reason to exclude black immigrants was a part of not only this document but the active discourse during this period.<sup>215</sup> The argument was that while fairer Caucasians can endure the harsh cold climate, the darker immigrant belonging to “negro race” are unsuitable and may not be able to

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<sup>213</sup> Brons, *ibid* at 72.

<sup>214</sup> Library and Archives Canada, “Orders in Council – Décrets-du-Conseil.” RG2-A-1-a, volume 1021, PC 1911-1324, 12 August 1911, PC 1911-1324, online: Canadian Museum of Immigration <<https://pier21.ca/research/immigration-history/order-in-council-pc-1911-1324>>.

<sup>215</sup> Jennifer R Kelly & Mikael Wossen-Taffesse, “The Black Canadian: An Exposition of Race, Gender, and Citizenship” (2012) 46:1 J Can Stud 167, online: <[http://muse.jhu.edu/journals/journal\\_of\\_canadian\\_studies/v046/46.1.kelly.html](http://muse.jhu.edu/journals/journal_of_canadian_studies/v046/46.1.kelly.html)> at 174.

handle the conditions. Here, the primary argument indicates a concern for the welfare of the individuals and their ability to withstand the harsh climate, and it leads finally to justify their exclusion. To an extent, the primary argument may not be summarily brushed aside, since there is scientific research which attempts to connect climate, geography and human skin colour.<sup>216</sup> So at least for a moment, the ultimate objective of exclusion is masked by the scientific tone of the primary argument.

This process can be termed as a form of differentiation. The differentiation is between races, i.e., Negroid and Caucasian. One is claimed to be able to endure the harsh climate and the other not. These processes of differentiation and othering in such cases are at the same time mutually complementary and reproductive, in other words, othering and differentiation remain entwined in such a way that it becomes difficult to differentiate them. It must be noted here again that this differentiation process is distinct from the cruder anti-immigrant or xenophobic discourses such as painting immigrants as criminals, although both necessarily have a similar objective.

This idea of sophisticated othering proposed by Brons can be applied to the detention of children. Here, linguistic attempts to other the children as “our” and “theirs” by the legal system and its actors are not done explicitly but by a similar form of differentiation. To understand this, the context of children and immigration and the texts surrounding detention decisions need to be analyzed first. The process of detaining children does not happen often through written orders but most of the time merely through oral directions after providing the choice to their parents. There is thus a need for analyzing both written and spoken discourses including the laws concerned,

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<sup>216</sup> Nina G Jablonski & George Chaplin, “Human Skin Pigmentation as an Adaptation to UV Radiation.” in Avise JC & Ayala FJ, eds, *Light Evol IV Hum Cond* (Washington: National Academies Press, 2010).

directions and orders of legal actors involved, statements made by such detained children's parents to researchers and the text within CBSA's documents.

I divide the discourses into three sub-sections for this analysis. First, the discursive construction of detention as *non-detention* and the claim of these actions being taken in their "best interests" by different legal actors in their everyday communications. Second, the discursive construction of detention within the laws, policies, and guidelines concerning the treatment of detained immigrants and their children. Third, the text of some decisions to detain non-citizens containing references to their children.

#### 4.3 Text as a tool: Laws, policies, and guidelines

According to Van Leeuwen, "authorization legitimation" legitimizes actions by referring to authority including law.<sup>217</sup> It is difficult to infer "othering" from analyzing individual laws. The differentiation and the consequent othering become apparent only when one examines the legal system as a whole and its treatment of similarly placed subjects. The legal basis for detaining children and the provisions dealing with the same were discussed extensively in the previous chapter, and it laid bare two different legal approaches with regard to children under immigration laws and family laws; the former permitting their detention and the latter carefully avoiding it. The following table explains the duality building upon the legal provisions discussed in Chapter III.

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<sup>217</sup> See generally Van Leeuwen, *supra* note 44 at 106-109.

## 3 Differentiation within the Canadian Legal System

	<i>Child Protection Laws</i>	<i>Immigration Law</i>
<i>Nationality of subjects</i>	<b>Canadian</b>	<b>Canadian</b>
<i>Nationality of Subjects' parents</i>	Canadian	Foreigners
<i>Triggering factor</i>	Parental detention	Parental detention pending deportation
<i>Decision on subjects</i>	Foster or alternate care arrangements.	Allowed to be housed/detained with parents.
<i>Basis of decision</i>	Application of law	Choice of parents.
<i>Duration</i>	-	From 1 day to 803 days <sup>218</sup>
<i>Concept relied on</i>	<b>Best interest of the child</b>	<b>Best interest of the child</b>

The text of most of the provisions discussed in the previous chapter attempt to derive their legitimacy from the concept of BIOC. The statement on CBSA's website (mentioned in the previous chapter) that "accompanied minors may be permitted to remain with their detained parents in a CBSA immigration holding centre if it is in the child's best interest ..." is a good example.<sup>219</sup> This statement discursively constructs detention as a measure adoptable in the best interests of the child. Thus, the statement both derives its legitimacy from BIOC and supplies an interpretation to BIOC. It also remains couched in terms that mask the fact of detention inside a facility by terming it as "remaining with" instead of "detained with." The idea here is to emphasize that because the children are free to leave whenever they want (although they cannot as their parents are detained inside), they cannot be considered as "detained". A fallacy in the form of a false dilemma attempts to mask the fact that parental choice and interest of the state are the

<sup>218</sup> See Table 1 at page 25.

<sup>219</sup> See CBSA, *supra* note 189.

predominant factors playing out. The most recent example of this is the Ministerial direction titled “National Directive for the Detention or Housing of Minors” on the 6<sup>th</sup> of November, 2017.<sup>220</sup> It purportedly aimed to bring clarity to the issue of detaining minors. CBSA stated that the directive is focussed on “keeping children out of Canada’s immigration detention system and keeping families together” and is supposed to guide officers making detention decisions involving children.<sup>221</sup>

This document carefully undertakes the task of explaining the terms to avoid any scope for controversies. It distinguishes “housed” from “detained” as follows:

Detainee or Detained [:] An adult or minor subject to an Order for Detention under A55 of the IRPA.

...

Housed (Minor) [:] A foreign national, permanent resident or Canadian citizen who, after the completion of a BIOC, is kept with their detained p/lg at an IHC at the latter's request. A housed minor is not subject to an Order for Detention and is free to remain and re-enter the IHC subject to the p/lg consent in accordance with the rules and procedures of that facility.

The distinction in terminology, however, is merely technical and is not something adhered to strictly. CBSA itself keeps using these terms interchangeably. Furthermore, the decision to house/detain the children is often left to their parents/legal guardian, and the place of confinement is the one in which such parent or legal guardian remains. The only difference in the case of these children is, therefore, a right to leave the facility if someone remains outside to take care of them.

Apart from a clarification of these terms, the directive merely re-emphasizes the need to consider BIOC as a primary consideration in the case of minors. It also repeats the regular caveat in the

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<sup>220</sup> CBSA, *National Directive for the Detention or Housing of Minors*, online: Canada Border Services Agency <<https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>> [CBSA, *National Directive*].

<sup>221</sup> CBSA, *Minister Goodale issues new direction on keeping children out of Canada’s immigration detention system and keeping families together*, online: Canada Border Services Agency <[https://www.canada.ca/en/border-services-agency/news/2017/11/minister\\_goodaleissuesnewdirectiononkeepingchildrenoutofcanadasi.html](https://www.canada.ca/en/border-services-agency/news/2017/11/minister_goodaleissuesnewdirectiononkeepingchildrenoutofcanadasi.html)>

many other legal provisions that children should be detained as a measure of last resort.<sup>222</sup> Regarding BIOC, the directive lays down a non-exhaustive list of seven factors similar to the ones listed under provincial child protection laws. It directs the CBSA officers to consult the parent or legal guardian first before contacting the child protection services (CPS). CPS is to be contacted only if there is trauma, safety issues, abuse, neglect or if the parent/legal guardian is facing criminal charges.<sup>223</sup> The desire of the parent/legal guardian continues to be the decisive factor that determines whether children should remain with them or not. The differentiation takes a very clear shape here in comparison with the provincial child protection laws.

Similarly, *Chairperson Guideline 2* that came into effect on April 1, 2019 deals with the detention of minors in Section 4. Although this is a welcome development, unsurprisingly, the guidelines reiterate most of the existing cautions in place within the *National Directives*. This includes the direction to detain minors only as a measure of last resort and consideration of BIOC at every review of the decision to continue the detention of a child. It states:

“The Minister must submit its best interest of the child assessment at each detention review when it is detaining a child. The person concerned may also advance arguments regarding the best interest of a child, supported by evidence.”<sup>224</sup>

On a plain interpretation, the idea here appears to contradict the very concept of BIOC. If the guidelines foresee even a remote possibility of “detention” of a child and its continuation despite consideration of the child’s best interests in each review hearing, it is quite clear that these guidelines understand BIOC to be permitting detention. This is clearer in S. 4.1.5 which says that the “Members must explain in their reasons for decision how the best interests of the child were considered in the decision to detain the child or their parent/guardian.” (emphasis supplied). In other words, members

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<sup>222</sup> CBSA, *National Directive supra* note 220 at para 6.

<sup>223</sup> *Ibid* at para 7.

<sup>224</sup> *Chairperson Guideline 2 supra* note 60, S. 4.1.3

must explain how BIOC enabled the detention of the specific child in question. This can be considered as a strengthening of the practice.

Furthermore, the same old slips on terminology occur throughout the provisions without any explanations like “decision to detain the child”, “detention of the minor” “detained or housed”.

The discourses within the texts, as stated earlier, perform the differentiation both directly and indirectly. Directly by providing authorization legitimation for detention. Indirectly, I fear, by failing to admit that detention can, in no case, be in the best interests of any child.

#### 4.4 Language and framing within official statements and responses

The discourses within official statements and responses strive to paint the exercise as “not being detention.” The words that recur in such statements and responses are “housed” or “accompanied” or “guest.” The ATI data that I have received as a response from CBSA is a good example of such discourse.

In the Second ATI data, CBSA explained some data gaps because “...CBSA systems do not currently allow the capture of minors who are *housed* (not subject to a formal detention order themselves) with a *detained* parent/guardian”.<sup>225</sup> [emphasis added] Here, they have differentiated the confinement of minors from their detained parents as being “housed.” In another part of the same communication, CBSA notes that:

Minors who are accompanied by a parent or guardian may be *housed* with their parent or guardian in a detention facility if it is in the *best interest of the child* ...

Not all accompanied minors are formally detained — some are *housed* with their parent/guardian if it is determined to be in the *best interest of the child*. In all cases, a Canadian citizen minor may be *housed* with their parent/guardian if it is

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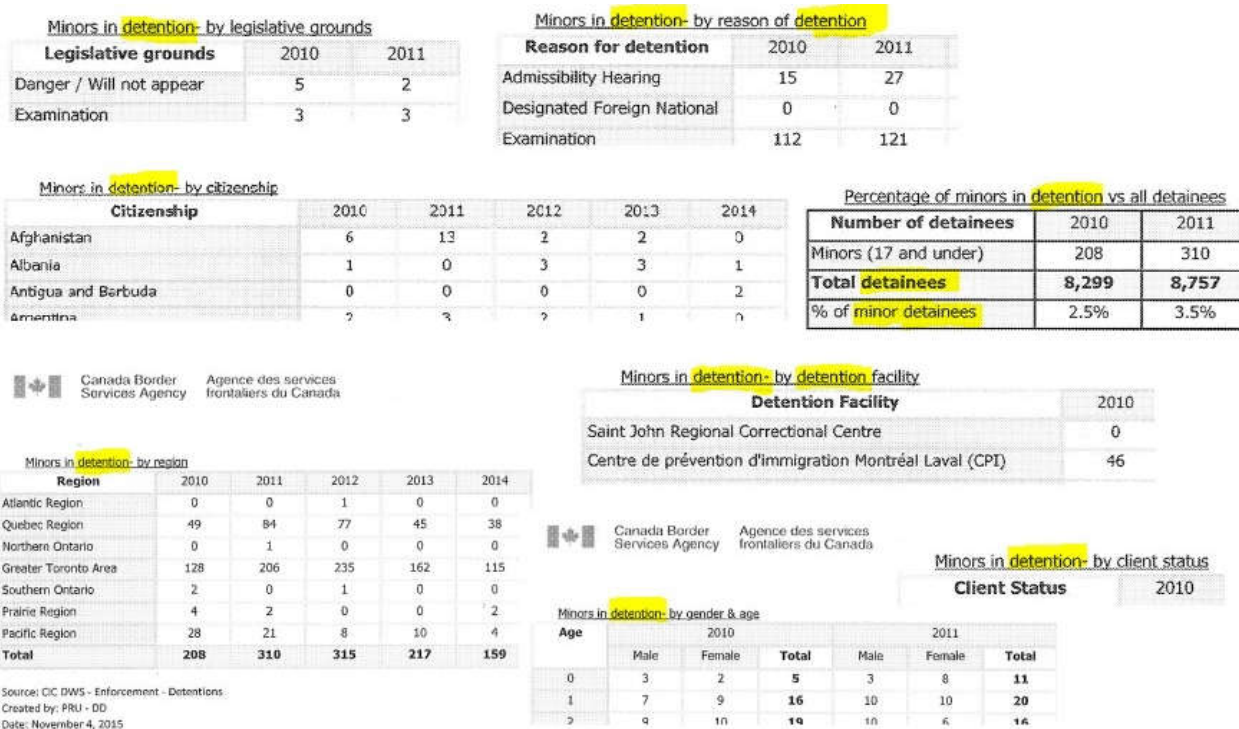
<sup>225</sup> Second ATI data, *supra* note 65 at 1.



determined to be in the *best interest of the child* but can never be detained.<sup>226</sup> [emphasis added].

When the term “detained” connoting confinement in a facility that curtails liberty is used for the parents, children are “housed” instead in the same facility. One explanation could be that the “authorization legitimization” for such an assertion is derived from a lack of formal detention order in the case of children. However, CBSA itself makes frequent mention of “minors detained” and “minors in detention” referring to such “informally housed” children in other documents as can be seen in Figure 1 below. It is a collage of snapshots from the documents received from CBSA revealing this aspect.<sup>227</sup> The figures do not distinguish between unaccompanied and accompanied minors.

Figure 1



<sup>226</sup> *Ibid.*

<sup>227</sup> Second ATI data, *supra* note 65 [Highlights added].

Number of Minors **Detained** over 24 hours between October 29, 2015, and February 18, 2016

Age	Gender	Client Status	Citizenship	Legislative Ground	Reason for <b>Detention</b>	Region	Detention Centre	Total Days <b>Detained</b> Immigration Hold
17	Male	Foreign National	St. Vincent and the Grenadines	Will not appear	Removal	Greater Toronto Area	IHC -ONT	171
16	Male	Foreign National	Argentina	Will not appear	Removal	Greater Toronto Area	IHC -DNT	10

The gentler “housed” or “accompanied” revert to the harsher “detained” and vice versa between or even inside some documents. In the data supplied by CBSA on the number of minors detained, the heading of each set carefully mentions “Minor Canadian Children: *Accompanying* Foreign National Parents”, but the terms inside the tables slip and specifies their dates of *detention*.<sup>228</sup> Figure 1 below shows a snapshot from one of the documents obtained from CBSA revealing this slip.

**MINOR REPORT: 05 Children**


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**Minor \*\*Canadian\*\* Children: **Accompanying** Foreign National Parent(s)**

Canadian Citizen	9 years 5 months/female	<b>Detained:</b> 25 Feb 2015
Canadian Citizen	6 years 8 months/female	<b>Detained:</b> 21 Dec 2015
Canadian Citizen	8 years 1 month/male	<b>Detained:</b> 21 Dec 2015

This word-play is also common during the hearings before IRB and other bodies although many of them are not officially documented and only reported by news agencies. One such instance is a news report mentioning the statement by Christopher Marcinkiewicz, (Member, Central Region, Immigration Division, IRB) during the hearing of Glory Ochigbo on her son Alpha, who spent his entire life inside the immigration detention centre. Glory had entered Canada in February 2013

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<sup>228</sup> First ATI data, *supra* note 62.

two months pregnant and was detained pending deportation. She gave birth to her son Alpha in August 2013 while in detention. Her and her son's detentions was continuously extended on the basis that she was the cause of its lengthiness since she could put an end to it by leaving the country. During the hearing referred above, Marcinkiewicz commented regarding detention of Alpha that "... he is not in detention, he is accompanying you here as a visitor".<sup>229</sup> This notion of a baby born and raised in detention as a visitor highlights the collective perception of detention of children as normal by the legal system in the immigration context.

CBSA repeatedly claims that such "housing" is based on the "best interests" of children.<sup>230</sup> This inconsistency regarding the terms by CBSA, read together with the comments justifying such confinement to be in the children's best interests highlights an unhelpful commitment to addressing technicalities by focusing on terminological flaws. It also reveals the consistent interpretation of BIOC in the immigration law context which lets BIOC be the authorization legitimation for detaining children.

#### 4.5 Text and decisions

The interpretation of BIOC by the ID members during the detention reviews generally follow the decision of the Federal Court of Canada in *Canada v Shote*<sup>231</sup>. *Shote* was a judicial review of an individual who received refugee status under a false name and was later found to be inadmissible based on undisclosed criminal convictions. In a review of his detention, a member of the

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<sup>229</sup> Patrick Cain, "Immigration detention 'woefully unsuited for children,' report charges", *Glob News Canada* (2016), online:<<https://globalnews.ca/news/2953723/immigration-detention-woefully-unsuited-for-children-report-charges/>>. See generally, *Chaudhary v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 OR (3d) 401.

<sup>230</sup> See Second ATI data, *supra* note 65.

<sup>231</sup> *Canada (Minister of Citizenship and Immigration) v Shote*, (2004) FC 115, [2004] FCJ No 125 [*Shote* cited to FC].

Immigration Division, IRB (ID) ordered his release on the ground that he was the father of a newborn child in Canada and the best interests of the newborn child must be taken into account. On the application for judicial review, the Federal Court reversed the ID's order on the reasoning that "best interests of the child" was not one of the factors mentioned in paragraph 245(a) of IRPR that determines whether a detainee posed a "flight risk."<sup>232</sup> The decision in *Shote* was interpreted by CBSA and ID members as precluding the consideration of the best interests of a child while deciding detention question of parents.

This practice set after *Shote* reached a culmination in the recent case of *B.B and JFCY v. Minister of Citizenship and Immigration* where the Federal Court slightly altered this understanding.<sup>233</sup> In *B.B.*, CBSA detained a nine-year-old Canadian-born child with her mother for more than a year on the ground that her mother was a flight risk. At every review, based on the decision in *Shote*, the ID member declined to consider the best interests of the Canadian child as relevant for deciding the request for release of the mother. On review to the Federal Court, the matter was settled as the parties consented to the judicial review on certain terms as a part of their settlement agreement.<sup>234</sup> Included in the settlement was an undertaking from the government to supply a clarified understanding of *Shote* to be provided to all ID members. This clarification distributed by CBSA on Aug 8, 2016, specifies that *Shote* does not strictly preclude the consideration of "best interests" of the Canadian children as a relevant factor while deciding on the detention or release of a non-citizen parent.<sup>235</sup> While considered as a substantial gain in regarding children in this decision, there

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<sup>232</sup> *Ibid* at para 29.

<sup>233</sup> *BB and Justice for Children and Youth v Minister of Citizenship and Immigration* (2015) (IMM-5754-15) (ID-IRB).

<sup>234</sup> *B.B and Justice for Children and Youth v Minister of Citizenship and Immigration* (24 August 2016) Toronto IMM-5754-15 (Federal Court) [BB].

<sup>235</sup> Justice for Children and Youth "Instructions from CBSA to its Hearings Officers distributed by CBSA on Aug. 29, 2016", online: Justice for Children and Youth <<http://jfcy.org/wp-content/uploads/2016/11/Instructions-to-CBSA-Officers.pdf>>

remains a complete absence of the child's "best interests" separated from the interests of the parent and the state. The Federal Court, in paragraph (d) states:

The interest of the child who is housed in an Immigration Holding Centre at the request of the detained parent is a factor to be weighed along with the other 5 mandatory factors listed in R. 248. *The overall focus of the analysis under R. 248 remains on the detained parent.*<sup>236</sup> [emphasis added]

The decision, thus, reiterated the existing understanding that is repeated in the guidelines, rules and official clarifications issued by CBSA, that the focus will be on the parents and their choice. If parents chose, children remain with them. It also reveals the reality of a child in detention with a parent to influence the decision on whether the parent remaining in detention is a flight risk.

Thus, in such contexts, although not stated expressly, BIOC is susceptible to become the "choice of the parents". This reinforces my argument that in such a context, the child becomes merely a parental possession and her best interests become entwined with the choice of her parents. Under this viewpoint, one could claim that *BB* has done more harm than good. It might appear to be normalizing the detention of children. Furthermore, it reveals the BIOC standard's potential to be interpreted in a way as to further adult interests and address adult concerns which may be at odds with the best interest of the child. Parental interest may claim the presence of the child inside the detention facility with them as desirable, but the result is detention of the child and the impact of which is not positive on the child. Law confirms the subject here, children, to be a parental possession and BIOC merely as a practice. It appears that many scholars might have overlooked

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<sup>236</sup> *BB*, *supra* note 234 **Error! Bookmark not defined.** at para (d).

this aspect and what is of concern is the absence of any discussion on the morality or even legality of letting the child remain in detention in spite of the detailed discussions on BIOC.<sup>237</sup>

#### 4.6 Family Law and the heart of differentiation

The absence of discussion on housing children with their parent convicted under criminal laws and incarcerated in regular prisons in the previous chapter supports the argument that I am making here. Such discussion is non-existent because the criminal law does not consider prisons as places to “house” innocent children belonging to convicted individuals. In fact, some scholars consider visits by children to see their imprisoned parents as detrimental due to the nature of such facilities and the anxiety, freight, and humiliation that it induces in children.<sup>238</sup> When criminal laws are invoked in a matter, the legal system leaves the innocent children involved with family laws which makes decisions based on a different BIOC.<sup>239</sup> BIOC here is a different social practice, a practice legitimized by the discourses which precludes placing detention as an option. This include volumes of research, guidelines, laws and other text that speak about the need for avoidance of detention in the case of minors, including ones who are convicted for non-serious crimes.

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<sup>237</sup> Petra Molnar Diop & Stephanie J Silverman, “Cracks Where the Light Gets in: Recent Legal Breakthroughs in Detention and Crimmigration in Canada” (2016) *Metropolitiques* 1 at 2, online: <<http://www.metropolitiques.eu/Cracks-Where-the-Light-Gets-in.html>>.

<sup>238</sup> See generally Shawn Bayes, “A Snowball’s Chance: Children of Offenders and Canadian Social Policy” in Frederick Bird & Frances Westley, eds, *Voices From Volunt Sect Perspect Leadersh Challenges* (Toronto: University of Toronto Press, 2011) 333; McCormick, Millar & Paddock, *supra* note 177 at [“... many children find visiting their incarcerated parent frightening, stressful, and, at times, humiliating, given possibly intrusive security checks, long waits, visits behind glass, lack of access to food or toilets, and travelling, often significant distances, for a visit only to be turned away due to a security flag, inappropriate dress, or an institutional/inmate incident, resulting in either the incarcerated parent or the child’s current caregiver restricting visitation to avoid traumatizing the child.” at iii]

<sup>239</sup> The discussion on family laws in this thesis serves only such a limited purpose of documenting the procedure involved in such cases.

However, there is a different practice for children in the immigration law context. They are “housed” in detention facilities in their “best interests.” Some may argue that such detention is not long-term and is sometimes aimed at deporting the family. However, as I have shown in Chapter I, there are instances where such temporary “housing” extends to years. The differentiation is more visible here. Even when an individual is convicted for 3 months under criminal laws, there is no room for negotiating the “housing” of his/her children in prison with them. However, the so-called “temporary” housing of children under immigration laws can go on for years.

Child protection and child custody laws are straightforward and concise when it comes to the treatment of children. All the discussions on the components and elements of BIOC, as mentioned before, unequivocally preclude detaining children. This is the heart of the differentiation that takes place which will be explained in the concluding chapter that follows.

## Chapter V. Conclusion

Nation states justify their existence through a border-making exercise. The process of border creation is performed through the redefinition of laws governing citizenship.<sup>240</sup> This border, drawn to distinguish the non-citizen/citizen binary, moves beyond a simple affirmation of sovereignty. It becomes the device to further the discursive differentiation and starts positioning itself as a primary rationalization for a sophisticated kind of othering. As Rajaram and Grundy-Warr point out, these borders are claimed to be drawn to “protect a community and a society against a phantasmic threat of otherness that tends to become flesh in the demonized and abject figure of a migrant or refugee.”<sup>241</sup>

In this case of Canadian children born to non-citizens before us, the binary between “us” and “them” is not apparent as legal processes maintain the veil of legitimacy. The core strategy of legitimization is an interpretation of BIOC in favour of the desire of the parents to maintain the family unity. Such an interpretation is difficult to resist especially in the light of the recent developments in the US-Mexico border where state forcefully separated thousands of children.<sup>242</sup> Yet, some could argue that such a separation might be in the best interest of the child. The success of the strategy lies in creating a bifurcation fallacy while dealing with the question of children’s detention. It is convenient to claim that the other side of detaining non-citizen’s children is to leave

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<sup>240</sup> Cecilia Menjívar, “Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization” (2014) 10:1 *Annu Rev Law Soc Sci* 353, online: <<http://www.annualreviews.org/doi/10.1146/annurev-lawsocsci-110413-030842>> at 360.

<sup>241</sup> Prem Kumar Rajaram & Carl Grundy-Warr, “Introduction” in Prem Kumar Rajaram & Carl Grundy-Warr, eds, *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (Univ Of Minnesota Press, 2007) 9 at 10.

<sup>242</sup> Levinson, Reade & Mica Rosenberg, “U.S. government says nearly 2,000 child separations at Mexico border in under two months”, *Reuters* (15 June 2018), online: <<https://www.reuters.com/article/us-usa-immigration-children/government-says-nearly-2000-child-separations-at-mexico-border-in-under-two-months-idUSKBN1JB2SF>>.



them in foster care. Placing children in foster care, especially children of detained parents simply means the breaking up of the family and is undeniably a situation that neither the children nor their parents desire. Thus, by projecting this as the alternative to detention, it is easy to silence the parents or critics who are forced to choose the lesser of the two evils projected, detention.

The subject area of citizenship, borders, criminality, children, migration have interconnecting threads. While it is easy to resort to binary thinking for ending discussions, productive discussions must not ignore these interlinks. The whole attempt to expose the cracks in the logic behind the claims of compliance with “best interests of the child” in decisions regarding detaining children of non-citizens is to open up the debate on all other interconnected topics. The nature of my comparisons in this research may appear unjust when it treats detained non-citizens pending deportation akin to convicted criminals. I made such a comparison because the legal system does so in action. While non-citizens are merely “detained pending deportation,” they are still detained and, in some cases, detention lasts years. Children are only being “housed” with detained parents as “guests,” but they are still inside a detention facility effectively unable to leave it in the absence of other relatives outside. While the words used are “best interests of the children,” it is the interests of someone else; parents in some cases, judges in some cases or the state in some cases. Similarly, despite the firm knowledge of many detained non-citizen children (as distinguished from Canadian born children) languishing in the immigration detention trap, I focused on the case of only Canadian children of non-citizens to indicate the citizen-non-citizen binary.

My intention with this research is to expose the differentiation. This could be considered as a means for provoking thought, discussions, and action. By analyzing the conceptual evolution of BIOC and by exposing the dissimilar interpretation of BIOC on two similarly placed subjects, I emphasize the differentiation of the migrant’s child.

Positive steps such as the National Directive for the Detention or Housing of Minors referred to in the previous chapter are encouraging. However, as noted, this fails to prove to be something beyond mere tokenism. In fact, by treating these children as a separate category instead of affording them the same concern and treatment provided to children of Canadian citizens in general, an unjustifiable differentiation is made.

Furthermore, the timing of these measures is suspect as Canada is facing significant pressures to review its immigration detention framework. The UN Human Rights Council conducted its periodic review on the record of Canada in April-May 2018, and the submissions to the working group from organizations/institutions in Canada was not positive. The joint submission of International Human Rights Program, University of Toronto's Faculty of Law and six Canadian organizations, unleashed a scathing criticism of Canada's immigration detention policies and recommends the setting up of an independent body to oversee and investigate CBSA.<sup>243</sup> With regard to the detention of children, the joint submission demanded that:

Children and families with children should not be detained, or housed in detention, except as a last resort and in exceptional circumstances; specifically, where the parents are held on the basis of danger to the public. In all other cases, children and families with children should be released outright or accommodated in community-based alternatives to detention.<sup>244</sup>

Alternatives to detention (ATD) is an often-suggested remedy in the case of immigration detention involving children. It is the rallying cry of activists and scholars involved in exposing the drawbacks of the present system. The *National Immigration Detention Framework* released in

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<sup>243</sup> See generally IHRP "Rights Violations Associated with Canada's Treatment of Vulnerable Persons in Immigration Detention", online: <[https://ihrp.law.utoronto.ca/utfl\\_file/count/media/Canada%20UPR%20Final.pdf](https://ihrp.law.utoronto.ca/utfl_file/count/media/Canada%20UPR%20Final.pdf)>.

It is to be noted that the Canadian Government has announced the setting up of such an agency to oversee CBSA in its 2019 budget. See generally, Catharine Tunney, *Budget includes watchdog agency for border officers*, online: CBC News <<https://www.cbc.ca/news/politics/cbsa-independent-watchdog-1.5063543>>.

<sup>244</sup> *Ibid* at 16,17.

2018 discusses ATD and claims that CBSA is developing an ATD framework.<sup>245</sup> This approach suffers from two drawbacks. The issue of treating the “best interests” of a non-citizen’s child differently remains unsolved. The discussion about ATD is more or less about the fate of the parents. Children are tied to the question of what is to be done with their parents. The question of whether children can be detained or not in the immigration context is not conclusively decided and without such a determination, the possibility continues to exist for it to happen in the future. Thus, unless a conscious effort is made by the State and the legal system in admitting its inconsistent approach to the concept of BIOC, none of these alternatives will provide a long-term solution. Once such an inconsistency is acknowledged, the only option that will be left is automatically “alternatives to detention”. When ATD is proposed as an answer without acknowledging that the best interests of all children in all contexts deserve to be treated in the same way, it lacks a foundation. Such a proposal only becomes a stopgap arrangement, a mere policy without a firm legal footing which can be taken away by a different administration. The key is to treat the immigrant’s child to the same standards as a Canadian’s child, adopting a similar approach to the best interests of both these subjects. The answer of ATD must emerge as a logical solution *through* such an interpretation of BIOC. Then it becomes a right and not a mere act of compassion or charity.

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<sup>245</sup> Canada Border Services Agency, *National Immigration Detention Framework*, online: Canada Border Services Agency <<https://www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html>>.

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## ACCESS TO INFORMATION RESPONSES

- CBSA. “Greater Toronto Area” (21 January 2016) (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2015-18226, informal information request File No. A-2015-18226\_QC\_PF).
- CBSA. “Minor Report” (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2015-18222, informal information request File No. A-2015-18222\_QC\_JS).
- CBSA. “Record of Minors” (released by CBSA under the *Access to Information Act*, on 28 October 2017 under File No. A-2017-01936 / JOW).
- CBSA. “Statistics of all Detention Facilities Used by CBSA” (4 November 2015) (released by CBSA under the *Access to Information Act*, informal request procedure, on 05 January 2017, previously released under File No. A-2016-04047, informal information request File No. A-2016-04047\_KAB ).

## Appendix 1 :Response to the Access to Information Request (A-2017-01936/JOW)



Mr. Sreekumar Panicker Kodiyath  
838 - 220 Dysart Road  
Winnipeg, MB R3T 2M8

Dear Mr. Kodiyath:

This letter is in response to your *Access to Information Act* request. I apologize for the delay in responding to your request.

The Canada Border Services Agency (CBSA) is committed to providing the highest level of client service and we would be pleased to assist you with any questions or concerns you may have regarding the handling of your request. You may contact me at 343-291-6852 or by email at [John.Warner@cbsa-asfc.gc.ca](mailto:John.Warner@cbsa-asfc.gc.ca), using our file number as a reference.

Please refer to the following page for information on the processing of your request.

Yours truly,

John Warner  
Team Leader

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<b>CBSA Request Number</b>	A-2017-01936 / JOW
<b>Your Request Number</b>	
<b>Request Summary</b>	Records of all minors who accompanied their parents to the immigration detention facilities (including Immigration Holding Centers and other detention facilities used by CBSA to detain immigration detainees) for more than 24 hours between 01.01.2010 and 01.01.2017 broken down by their birth status (Canadian Citizenship), age, duration of stay therein, citizenship of their parent/s, details of the detention facility and their final status (released or deported).
<b>Request Disposition</b>	All disclosed
<b>Link to the <i>Access to Information Act</i></b>	<a href="http://laws-lois.justice.gc.ca/eng/acts/A-1/">http://laws-lois.justice.gc.ca/eng/acts/A-1/</a>
<b>Comments</b>	
<b>Address</b>	Access to Information and Privacy Division Place Vanier Tower A 333 North River Road, 14th floor Ottawa, ON K1A 0L8
Should you be dissatisfied with the processing of this request, you may file a complaint within sixty days of receipt of this notice to the Information Commissioner of Canada by writing to:	
<p style="text-align: center;">Office of the Information Commissioner of Canada 30 Victoria Street Gatineau, Québec K1A 1H3</p>	

## Annex A

- The information contained in Annex A only accounts for accompanied minors subject to a formal detention order as CBSA systems do not currently allow the capture of minors who are housed (not subject to a formal detention order themselves) with a detained parent/guardian in a detention facility (parent/guardian subject to a formal detention order).
- For complete information on the number of minors detained/housed or accompanied/unaccompanied, please see Annex B. The data contained in these tables (2014-2015, 2015-2016 and April 1, 2016 to December 31, 2016) were provided manually by CBSA regions.

**Note:** Due to data entry errors, 81 potential minors have been extract as "Adult" rather than accompanied or unaccompanied minors. Note that in order to determine if they were indeed minors (accompanied or unaccompanied), a manual review of each files would be required.

Number of detainees		2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	Total
Minors (17 and under)	Adult	13	27	17	14	6	5	5	81
	Minor - Accompanied	177	265	259	161	142	88	63	1125

## Minors Accompanied - Duration of Stay

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
<b>Under 48 hours</b>	71	105	93	69	48	22	16
<b>48 hrs – 9 days</b>	65	11	97	43	49	33	39
<b>10-39 days</b>	16	43	53	35	37	25	22
<b>40-90 days</b>	3	6	14	10	6	5	1
<b>91-180 days</b>	0	0	1	4	0	2	6
<b>181+ days</b>	0	0	0	0	2	1	0

## Minors Accompanied – Facility Detained

Number of detainees	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Provincial facility	1	0	1	0	1	0	0
Federal facility	5	1	3	1	3	0	1
Municipal facility	1	1	0	1	0	0	0
Immigration Holding Centre	171	265	255	160	141	88	63
Other	0	0	1	0	0	0	0

\*CBSA does not detain minors in federal correctional facilities. "Federal facilities" refers to RCMP and CBSA offices (not federal – CSC – jails)

### Minors Accompanied – Age

Number of detainees	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
0-5 years old	73	93	97	50	46	28	21
6-11 years old	55	88	88	67	56	32	25
12-17 years old	50	85	74	45	40	28	18

### Minors Accompanied – Final Disposition

From a detention perspective we cannot determine final status of the minors (released or deported) but can provide final disposition of their detention tracking

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Release for Departure - No Order	6	28	30	16	16	9	1
Release for Removal	43	79	81	50	39	25	9
Released by Minister - Conditions Only	0	0	1	0	0	0	0
Released for Removal by Non-NCMS office	2	4	2	2	0	0	0
Released on Bond	7	19	9	7	19	8	8
Released on Conditions - no Bond	34	63	66	41	41	36	19
Unconditional Release	14	7	7	4	2	6	6

**Note:** The Canada Border Services Agency (CBSA) is currently reviewing its systems to expand reporting capabilities. These statistics are considered accurate as of the date pulled (March 23, 2017) but are subject to revision at a later date once the reporting issues are addressed and data is re-evaluated.

\* Vertically: The content data exceeds the total amount due to transfers and multiple detention holds.

\*\* Horizontally: The content data exceeds the total amount due to month over month carry-overs.



\*\* This status only represents their current citizenship and not their citizenship at the time of detention.

### Minors Accompanied – Citizenship

Number of detainees	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	Total
Hungary	20	14	24	18	12	4	10	102
Mexico	19	35	17	9	7	2	4	93
United States of America	8	24	15	19	13	3	7	89
Unknown	13	28	15	8	12	5	0	81
Nigeria	12	6	17	16	12	3	3	69
Romania	7	15	19	0	1	0	9	51
Korea, Republic of	6	14	6	0	3	3	2	34
St. Vincent and the Grenadines	4	13	6	5	1	2	0	31
Portugal	5	2	11	7	5	0	0	30
Spain	4	1	2	11	5	3	0	26
Congo, Democratic Republic of the	0	2	8	4	6	3	2	25
France	4	6	1	2	6	4	1	24
St. Lucia	2	13	6	3	0	0	0	24
Italy	5	4	3	3	5	0	2	22
India	0	6	3	1	2	3	6	21
Iraq	3	5	5	0	0	7	0	20
Israel	4	3	7	2	3	0	0	19
Poland	2	7	3	2	0	1	4	19
Croatia	0	0	5	5	5	3	0	18
Afghanistan	7	5	0	0	0	4	1	17
Iran	4	6	5	2	0	0	0	17
Netherlands, The	5	2	6	3	0	0	0	16
Colombia	3	1	0	4	3	3	0	14
Sri Lanka	4	0	8	0	2	0	0	14
Jamaica	0	3	3	1	5	1	0	13
Sudan, Democratic Republic of	0	0	0	3	5	5	0	13
Namibia	1	1	2	1	6	1	0	12
Pakistan	1	6	2	1	1	0	1	12
British Citizen	2	3	3	0	0	2	1	11
China, People's Republic of	2	1	3	4	1	0	0	11
Ireland, Republic of	1	0	1	6	0	0	2	10
Albania	1	1	2	1	1	1	2	9
United Kingdom and Colonies	5	2	2	0	0	0	0	9
Barbados	2	2	1	2	1	0	0	8
Germany, Federal Republic of	0	3	2	0	0	3	0	8
Turkey	2	5	0	0	0	1	0	8
Argentina	2	1	2	1	0	1	0	7
Australia	1	1	1	0	2	2	0	7
Burundi	0	0	2	3	0	0	2	7
Costa Rica	2	2	3	0	0	0	0	7
Czech Republic	2	1	1	1	1	1	0	7
Ethiopia	0	0	4	0	0	3	0	7
Cuba	3	1	0	1	1	0	0	6
Belgium	0	0	2	0	0	2	1	5
Canada	4	0	1	0	0	0	0	5
Greece	1	1	0	0	1	2	0	5
Peru	0	1	0	0	0	1	3	5
Sweden	0	0	4	1	0	0	0	5
Switzerland	0	0	2	0	3	0	0	5
Bangladesh	0	1	3	0	0	0	0	4
Guinea, Republic of	0	3	0	0	1	0	0	4
Norway	0	0	3	0	0	0	1	4
Taiwan	0	2	2	0	0	0	0	4
Trinidad and Tobago, Republic of	2	2	0	0	0	0	0	4
Antigua and Barbuda	0	0	0	0	2	1	0	3

Brazil	2	0	1	0	0	0	0	3
Burkina-Faso	0	0	0	0	0	0	3	3
Ecuador	0	3	0	0	0	0	0	3
Egypt	0	0	1	2	0	0	0	3
El Salvador	0	0	1	2	0	0	0	3
Honduras	0	1	2	0	0	0	0	3
Japan	0	0	0	3	0	0	0	3
Korea, People's Democratic Republic of	0	0	0	2	0	1	0	3
Latvia	0	0	1	2	0	0	0	3
Ukraine	0	0	1	1	1	0	0	3
Zimbabwe	2	1	0	0	0	0	0	3
Algeria	0	0	0	0	0	2	0	2
Bahama Islands, The	0	0	1	0	1	0	0	2
British Dependent Territories Citizen	0	1	1	0	0	0	0	2
Bulgaria	0	0	2	0	0	0	0	2
Cameroon, Federal Republic of	0	0	1	1	0	0	0	2
Chile	0	0	0	0	0	2	0	2
Djibouti, Republic of	0	0	0	0	2	0	0	2
Eritrea	0	0	0	0	2	0	0	2
Palestinian Authority (Gaza/West Bank)	0	2	0	0	0	0	0	2
Saudi Arabia	0	0	0	0	0	1	1	2
Slovak Republic	0	0	0	0	0	2	0	2
Somalia, Democratic Republic of	1	0	1	0	0	0	0	2
South Africa, Republic of	0	0	0	0	2	0	0	2
Austria	0	0	1	0	0	0	0	1
Belarus	0	0	0	1	0	0	0	1
Botswana, Republic of	0	1	0	0	0	0	0	1
British Overseas Citizen	0	1	0	0	0	0	0	1
Cyprus	0	1	0	0	0	0	0	1
Denmark	0	0	1	0	0	0	0	1
Dominican Republic	0	0	0	0	1	0	0	1
Grenada	0	0	1	0	0	0	0	1
Guatemala	0	0	0	1	0	0	0	1
Guyana	0	1	0	0	0	0	0	1
Hong Kong SAR	0	1	0	0	0	0	0	1
Jordan	0	0	1	0	0	0	0	1
Kuwait	0	0	0	1	0	0	0	1
Mali, Republic of	0	0	0	0	1	0	0	1
Philippines	0	0	0	0	0	1	0	1
Russia	0	0	0	0	1	0	0	1
Singapore	0	1	0	0	0	0	0	1
St. Kitts-Nevis	0	0	0	0	1	0	0	1
Stateless	0	1	0	0	0	0	0	1
Swaziland	0	0	1	0	0	0	0	1
Syria	0	0	0	0	1	0	0	1
Tanzania, United Republic of	0	0	0	0	0	1	0	1
Thailand	0	1	0	0	0	0	0	1
Turkmenistan	0	1	0	0	0	0	0	1
Uruguay	1	0	0	0	0	0	0	1
Uzbekistan	0	0	1	0	0	0	0	1
Venezuela	0	0	0	0	0	0	1	1

## Annex B

The number of detained minors has gone down by 29.1% over the last two years while the number of minors housed with a parent has slightly increased (13.1%). Overall, the total number of detained and housed minors has gone down by 14.3%.

Fiscal year	Detained Minors	Average length of detention	Median length of detention	Housed Minors	Average length of housing	Median length of housing	Total detained and housed minors
2015 - 2016	120	10.4 days	5 days	81	19.7 days	2.5 days	201
2014 - 2015	161	10 days	3 days	71	29.8 days	10 days	232

## Notes:

- Persons are considered to be minors if they are under 18 years of age.
- Minors may only be detained if there are grounds for detention pursuant to the *Immigration and Refugee Protection Act*.
- Minors are detained only as a measure of last resort, taking into account prescribed factors, including alternatives to detention, as well as the "best interests of the child".
- Minors who are accompanied by a parent or guardian may be housed with their parent or guardian in a detention facility if it is in the "best interest of the child".

Fiscal Year	Minors accompanied by parent/guardian*	Unaccompanied minors	Average length of time in a facility (days)	Total # minors in a facility
Apr 1/2016 to Dec 31/2016	114	7	9.4	121
2015-2016	181	20	14.1	201
2014-2015	220	12	16	232

\* Minors accompanied by a parent/guardian in a facility include foreign nationals, permanent residents and Canadian citizens. Not all accompanied minors are formally detained – some are housed with their parent/guardian if it is determined to be in the best interest of the child. In all cases, a Canadian citizen minor may be housed with their parent/guardian if it is determined to be in the best interest of the child but can never be detained.

- In 2015-2016, 201 minors were detained or housed with parents or guardians in an immigration holding centre (IHC).
  - For the period April 1, 2016 to December 31, 2016, the parents of accompanied minors were detained for the following reasons: 78.95% (90) for unlikely to appear; 10.52% (12) for examination; and, 10.52% (12) for identity.
  - Over the last two fiscal years (2014-2015 and 2015-2016), there has been a 14% decrease in the number of minors held in an IHC for immigration-related reasons.
  - So far this fiscal year (2016-2017), 121 minors have been held in an IHC. If the current trend continues to fiscal year-end a further decrease in the number of minors held in an IHC for immigration-related reasons is expected, with an estimated decrease of 22% over 2015-2016.
  - The average length of time a minor spends in an IHC has also seen a decrease. Based on the numbers for the first nine months of this fiscal year, there should be a further decrease by fiscal year end.
- 
- The new National Immigration Detention Framework (NIDF - announced in August 2016) launched the beginning of a transformation agenda to create a better, fairer immigration detention system. The NIDF includes up to \$138 million to improve immigration detention infrastructure, provide better mental and medical health services at CBSA Immigration Holding Centres (IHCs), expand partnerships and alternatives to detention, and reduce the number of minors in detention.
  - The CBSA is also revising its national detention standards. New standards will establish expected practices and national consistency in detention areas such as safety, security, detainee care (including mental health), administration, and management. New guidelines for the detention of minors are also being developed.
  - CBSA legislation and policy are clear in that minors are only detained as a last resort and only after officers carefully consider what is in the best interest of the minor. Officers work with the parent(s) and child welfare authorities to assess best interests of the child. When dealing with minors, CBSA officers will first consider alternate options to detention, such as the availability of alternative arrangements with family members, local child care agencies (or child protection services for the care and protection of the minor children), or the anticipated length of detention of the family of the minor(s).