

Best Interests of the Child: Meaning and Application in Canada:

Discussion Paper for Conference Participants

A. Introduction

A.1. Why focus on the Best Interests of the Child?

“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.” (Convention on the Rights of the Child, Article 3.1)

The best interests of the child (hereafter BIC) is one of the basic principles of the Convention on the Rights of the Child (hereafter Convention). Effective application of it is key for improving implementation of the Convention in Canada. While the principle was applied in some areas of domestic law prior to the Convention, e.g. custody and access determinations, it is now applicable to all policies and practices that affect children individually and as a group.

Better understanding and effective application of the BIC would have significant benefits for children in Canada. On the other hand, lack of clarity, inconsistency, and failure to apply the principle have negative impacts in the lives of children that can be avoided.

The principle, stated in Article 3, is also referenced in seven other articles, dealing with a wide range of matters in the lives of children:

- In Article 9, BIC is the only reason for separation from parents (Article 9.1) and the only reason for denial of contact with a non-custodial parent (Article 9.3).
- Article 18, one of the articles on parental responsibility, states that “the best interests of the child will be their basic concern.”
- Article 20 links the BIC with the right to cultural identity by explicitly stating that the BIC for wards of the state includes “due regard” for “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”
- Article 21 makes the BIC the paramount principle for adoption.
- Articles 37 and 40 use the BIC as a threshold factor within criminal justice. Article 37 says children should be detained separately from adults unless it is in their best interests to be together.
- Article 40 guarantees children’s right to a fair trial, unless that is not in their best interest by reason of age or circumstance.

The Convention is indivisible and its articles interdependent. Application of the BIC is expected to influence the interpretation and application of all Convention articles and to interact with the other principles, notably the rights to non-discrimination, survival, and respect for the child’s views (articles 2, 6 and 12).

A. 2. Why now?

In 2003 the UN Committee on the Rights of the Child asked Canada to review and improve application of the BIC in Canada. This resulted from Canada's second report on implementation of the Convention in Canada. In 2009 Canada will present its third report and we will celebrate the 20th Anniversary of the Convention. The issues highlighted in the 2003 recommendation need to be addressed in Canada:

“The Committee values that the State party upholds the principle of the best interest of the child to be of vital importance in the development of all legislation, programs and policies concerning children, and is aware of the progress made in this respect. However, the Committee remains concerned that the principle that primary consideration should be given to the best interest of the child is still not adequately defined and reflected in some legislation, court decisions, and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children. Furthermore the Committee is concerned that there is insufficient research and training for professionals in this respect.”

The Committee recommends that the principle of “best interests of the child” contained in article 3 be appropriately analyzed and objectively implemented with regard to individuals and groups of children in various situations (e.g. Aboriginal children) and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children. The Committee encourages the State party to ensure that research and educational programmes for professionals dealing with children are reinforced and that article 3 of the Convention is fully understood, and that this principle is effectively implemented.” (Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.215, 3 October 2003, paragraphs 24 and 25.)

A.3. What do we hope to achieve?

The effective application of the BIC in Canada is an on-going objective that requires the collaboration of many actors. The objectives for this initiative are to develop:

- (1) a deeper and broadly shared understanding of the BIC
- (2) shared knowledge of good practices, tools, and processes to determine best interests in individual and group applications within a variety of domains;
- (3) directions for policy and legislative development;
- (4) a basis for the development of professional training;
- (5) a network of persons interested in effective implementation of BIC.

B. Themes Arising in Implementation of the Best Interests of the Child

B.1. Meaning and Interpretation of BIC

The BIC is not defined in the Convention, but there is agreement that the BIC puts the interests of children at the centre of decision-making, rather than the interests of adults, parents, or the State. Some say the rest of the Convention serves as a definition, while others use the BIC to interpret the other provisions. While flexibility in interpretation can be an advantage, the BIC has also been criticized for its vagueness and for being nothing more than an “empty vessel” that allows broad discretion by decision-makers. Inconsistency in interpretation means unequal treatment between children across Canada.

On the content side, the factors to be considered and the weight of different factors in determining the BIC in a particular context are matters of debate. There are divergent views about what is in the best interests of a child or children, based on research, culture, professional training, personal experience and values, and dominant ideologies. Sometimes there is a tension between present and future interests. Does the BIC include the interests of the adults who care for the child? Judgments between conflicting claims are sometimes difficult to adjudicate.

On the process side, who should decide and how is equally contentious. Many processes try to use an objective evaluation of all options and outcomes based on scientific evidence. Others argue that all judgment is subjective and biased by the predispositions of the decision-maker/s. Some tests focus on the absolute best for a specific child, while others focus on choosing between realistic options. Some assert that different approaches to determining the BIC are needed for different contexts, while others promote greater consistency through use of consistent guidelines. A particularly challenging question is whether attempts to determine the BIC can have a detrimental impact for children, because of costs and/or unintended consequences. Competing concepts lead some to assert that the only decision to be made is who should be the decision-maker.

Questions for discussion include:

- How do different interpretations affect application of the BIC? Does social science research provide a more objective basis for making decisions?
- Who should decide? Are there good practices in resolving disputes over BIC?
- Are guidelines useful? Is consistency important for equitable treatment or does BIC require individual decisions? Should there be different approaches to BIC in different contexts?
- Are child impact assessments a useful tool to determine BIC in a policy context?
- Can attempts to determine BIC do more harm than good for affected children?

B.2 Best Interests and Participation

The right of children to be heard and to have their views considered in decisions that affect them is another key principle in the Convention. Child participation in processes to

determine the BIC is a developing field, with a wide divergence in practice across Canada. A child's emerging right of self-determination is variously interpreted in legal statutes (according to age) and sometimes comes into tension with the BIC, which is often interpreted as protecting the interests of children who are not considered able to make decisions for themselves. As a whole, the Convention combines protection rights and participation rights, which depend on the age and developing capacity of the child.

In practice, there is a growing commitment and interest in active participation by young people in decision-making processes that affect them. Research shows a wide range of practice in Canada, from total exclusion to full inclusion of children in processes used to determine best interest. In the Convention, the principle of participation applies both in individual cases and in policy-setting and program planning. The challenge is applying it effectively, taking into account differing ages, different circumstances of children and their communities, and the specific context for participation.

Questions to be considered include:

- How can decision-making processes be made child-friendly?
- Are there good practices for the participation of children in determining best interests? Are they transferable? Are there situations where it is harmful?
- How much weight should be given to views of children relative to other factors?
- Are decision makers equipped to receive a child's opinions and views?
- How can child witnesses in formal court processes be protected and enabled to participate without undue influence, intimidation, or later repercussions?
- Participation practices vary widely across Canada; should there be more consistency to ensure fair treatment of all children, and avoid tokenism?

B.3. Best Interests and Other Considerations

The BIC is "a primary consideration" in the Convention, not "*the* primary" or "paramount" consideration. In some situations compromises are made between the BIC and other considerations. Considerations that come into tension with the BIC include parental claims that they have the right to make decisions for their children, cultural traditions, public security concerns, and other laws. When there are competing interests, questions are raised about the basis for compromise and the relative weight to be given to the BIC and to the Convention generally relative to other interests or laws.

Questions to be considered include:

- Under what conditions does the BIC become secondary to other considerations?
- Are there ways to reduce the tension between the different interests that come into play in decisions relating to children?
- Are there good practices and/or guidelines to help resolve competing interests?
- Are policy changes needed to clarify the relationship between individual rights and communal/cultural rights in the application of the BIC?

B.4. Best Interests of Children as a Group

The BIC is most commonly applied in individual cases, such as custody, health care, and refugee claimant decisions. Article 3 refers to both “the child” and “children” as a group; it includes application of the BIC to legislative measures, policies, and programs for children. Using the BIC as a test for legislative proposals and public policy decisions has had limited application in Canada.

There is potential to prevent negative and unanticipated impacts on children by using BIC as a screen for proposed legislation, policy and programming. One suggestion is that child impact assessments become part of the public policy process. This could be similar to gender analysis or environmental impact assessments. In some countries, the impact of annual budgets for children is evaluated as part of the budget process. Institutional structures, such as children’s advocates or ministers responsible for children, can be mandated to take a proactive role and raise the profile of children in relation to other stakeholders and constituencies. Sometimes there are tensions between the interests of children as a group and the best interests of a particular child.

Questions to be considered include:

- What would a child impact assessment include?
- Where should responsibility for conducting and considering child impacts be located? Who should be consulted in assessing child impacts?
- What structures, approaches, or good practices exist for including BIC in policy processes?
- How can young people participate in public policy processes to ensure BIC are considered?

B.5 Best Interests and the Canadian Constitution

Understanding the links between the BIC and Canada’s legal framework can help to advocate for appropriate policy changes. One factor in Canada is coordination of federal and provincial jurisdictions within our federal system of government. Many children’s issues fall under provincial jurisdiction, while the federal government has monitoring and reporting authority for children’s rights generally and has more direct responsibility for issues affecting Aboriginal children. Jurisdictional disputes often hamper realization of a child’s rights in individual cases and can result in delay or inaction at the level of policy and programming. In the case of Aboriginal children, the recent initiative to establish Jordan’s Principle highlights how application of the BIC could help to resolve jurisdictional disputes. If implemented, it would provide necessary services to the child without delay and government agencies would then work out their respective responsibilities between themselves.

Some countries embed the rights of children in their constitutions. In Canada it is often assumed that the Charter of Rights and Freedoms covers all human rights, but there is no

reference to specific rights for children in the Charter. Discrimination, one of the core principles of the Convention, is also prohibited in the Charter of Rights and Freedoms, but it has seldom been applied to issues relating to children, despite the inclusion of age as one of the prohibited grounds of discrimination. In some cases, courts have found no discrimination when the differential treatment of the child is based on developmental factors, using the BIC to justify it. In other cases there may be discrepancy between approaches to BIC under the Charter and its central role in the Convention; in one Charter case the Supreme Court held that BIC, although an important legal principle, was not vital to our societal notion of justice. While the BIC is incorporated in specific laws for family life, immigration, and child welfare, it is not embedded as a general principle of law in Canada.

Questions to be considered include:

- What constitutional protection or grounds exist for the BIC and children's rights in general?
- What legislative changes are needed to embed the BIC in Canadian law?
- How can both levels of government ensure that BIC is central to their approach to programs, policies and laws affecting children?

Application of BIC in Specific Contexts

Exploring how the BIC has been applied in the context of specific policy and program areas for children can provide lessons learned, good practices, and models for application. The workshops are designed to allow participants to share information based on their experiences and research in specific fields. If possible, each workshop will identify measures that could be taken for more effective application of BIC in their field.

The contexts are being chosen in response to interest of participants. Participants in each workshop are asked to consider the following questions:

- What are key issues in relation to the BIC in this field?
- What are good practices in applying the BIC in this field?
- How is child participation incorporated into decision-making on the BIC in this field?
- What other Convention articles and principles have a considerable effect in the application of the BIC in this domain? Other sources of rights?
- How could the implementation of current practices relating to the BIC be improved?
- What policy changes could facilitate more effective application of BIC?
- What issues still need to be resolved to achieve a more common and effective approach to the application of the BIC in this domain?

Workshops

Family law
Youth Justice
Child Welfare
Aboriginal Children
Adoption
Health Care
Education
Immigration
Early Childhood and Care