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Construing the Ethical and Legal Concept of Cultural Safety: Non-Domination, Epistemic Justice, and Constitutional Standards

Karine Millaire and Amandine Catala*

ABSTRACT

Redressing the lasting injustices created by the legacy of the *Indian Act* requires developing and implementing proper descriptive and normative tools, such as the concept of cultural safety. Rooted in concerns for decolonization, cultural safety has attracted attention from scholars and practitioners across a range of disciplines and sectors. To date, however, this growing literature has neglected to identify and theorize the ethical and constitutional foundations of the concept. Yet doing so is crucial for the concept of cultural safety to fully achieve its normative potential. Focusing on the Indigenous context in Canada, this article proposes to fill this

* Karine Millaire, PhD, Assistant Professor, Faculty of Law, University of Montreal, and practicing lawyer in constitutional, Aboriginal, and Indigenous law and human rights. Amandine Catala, Full Professor, Department of Philosophy, Université du Québec à Montréal (UQAM), where she holds the Canada Research Chair on Epistemic Injustice and Agency. She is a Senior Research Associate at the African Institute for Epistemology and Philosophy of Science at the University of Johannesburg. Her research interests include epistemic agency, injustice, and repair, decolonization, linguistic justice, and neurodiversity. Her monograph, *The Dynamics of Epistemic Injustice: Situating Epistemic Power and Agency*, was published by Oxford University Press in 2025. The authors wish to thank Eugénie Godin for her assistance as a law student in the Faculty of Law, University of Montreal.

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gap by analyzing the interwoven ethical and constitutional grounds of the concept of cultural safety. It demonstrates that securing cultural safety requires non-domination and epistemic justice. This underlying ethical normativity, in turn, influences the proper interpretation of the constitutional dimension of cultural safety. This article argues that the ethical and legal concept of cultural safety thus construed entails the full recognition and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) and constitutional standards of respect for consent, self-determination, and self-governance of Indigenous people. The article thus shows that the concept of cultural safety can serve both as a diagnostic and a transformative tool towards "Reconciliation": the concept allows us not only to track failures of cultural safety inherent in the status quo, but also to generate normativity through law and policy.

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RÉSUMÉ

Réparer les injustices persistantes découlant de l'héritage de la *Loi sur les Indiens* nécessite de développer et mettre en œuvre des outils descriptifs et normatifs appropriés comme le concept de sécurité culturelle. Prenant racine dans des préoccupations pour la décolonisation, la sécurité culturelle a retenu l'attention des universitaires et praticien.nes de plusieurs disciplines et milieux. Toutefois, cette littérature grandissante a négligé d'identifier et de théoriser les fondements éthiques et constitutionnels du concept. Or, une telle démarche est cruciale afin que le concept de sécurité culturelle puisse atteindre son plein potentiel normatif. Ancré dans le contexte autochtone au Canada, le présent article propose de combler cette lacune en analysant les fondements éthiques et constitutionnels interreliés du concept de sécurité culturelle. Il démontre que la sécurité culturelle requiert la non-domination et la justice épistémique. L'article soutient que le concept éthique et juridique de sécurité culturelle ainsi conçu implique la pleine reconnaissance et la mise en œuvre de standards constitutionnels garantis par la *Déclaration des Nations Unies sur les Droits des Peuples Autochtones*, à savoir le respect du consentement ainsi que des droits à l'autodétermination et à l'autonomie gouvernementale des peuples autochtones. Cet article démontre ainsi que le concept de sécurité culturelle est utile à la fois à titre d'outil diagnostic et transformateur vers

la « Réconciliation » : le concept permet non seulement d'identifier les échecs en matière de sécurité culturelle inhérents au statu quo, mais également de générer une normativité mise en œuvre par le droit et les politiques publiques.

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INTRODUCTION

CULTURAL safety is an emerging concept resulting from processes of decolonization and the underlying quest for equity and substantive equality. Yet "the idea of genuinely feeling safe and equal as an Indigenous person has always existed."[1] However, academia has only recently begun to capture some dimensions of the multifaceted concept of cultural safety. What seems to be a simple idea actually proves to require a more complex, global approach: deconstructing the epistemological premises of multiple disciplines, which, in their interaction, have constructed a world where Indigenous people are not culturally safe.

The introduction of the concept of cultural safety has been attributed to Irihapeti Ramsden, who belonged to the Ngāi Tahupotiki and Rangitāne Māori tribes in New Zealand. In the context of nursing practice and education in which Ramsden evolved, the concept has been defined as both a process and an outcome "that enables safe service to be defined by those that receive the service."[2] While cultural safety can be applied to various populations, it is primarily discussed in the context of Indigenous persons and communities. The paradigm shift it requires goes beyond cultural sensitization to a reconfiguration of the long-lasting power relations between the dominant society and the colonized minorities.[3]

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1 Yvette Mollen, Innu from Ekuanitshit and innu-aimun language professor (freely collected remarks, translated from French).

2 Irihapeti Merenia Ramsden, *Cultural Safety and Nursing Education in Aotearoa and Te Waipounamu*, (PhD Thesis, Victoria University of Wellington, 2002) [unpublished] at 117. See also Steve Koptie, "Irihapeti Ramsden: The Public Narrative on Cultural Safety" (2009) 4:2 First People Child & Family Rev 30 at 31.

3 Alison J Gerlach, "A Critical Reflection on the Concept of Cultural Safety" (2012) 79:3 Can J Occupational Therapy 151 at 152.

Although some experts initially warned that a narrow definition of cultural safety could limit its application to the nursing area,[4] it has been applied to the healthcare context[5] and education.[6] More recently, cultural safety has also been used in various other contexts, including youth identity and protection,[7] labour relations,[8] research methodologies,[9] and even arts and disability,[10] for example. Despite the growing interest in applying the concept of cultural safety to identify colonial power relations and to remedy inequalities in the provision of public services, the concept remains in need of a comprehensive definition encompassing its multiple dimensions.[11] In particular, the literature shows a lack of attention to an in-depth analysis of the ethical foundations of cultural safety and its consequent normativity within the constitutional and legal realm.

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4 *Ibid* at 155; Elaine Papps, "Cultural Safety: Daring to be Different" in Diane Wepa, ed, *Cultural Safety in Aotearoa New Zealand* (Auckland: Pearson Education New Zealand, 2005) 20.

5 See e.g. Samir Shaheen-Hussain, Alisa Lombard & Suzy Basile, "The Art of Medicine: Confronting Medical Colonialism and Obstetric Violence in Canada" (2023) 401 Lancet 1763; Amélie Blanchet Garneau, Annette J Browne & Colleen Varcoe, "Understanding Competing Discourses as a Basis for Promoting Equity in Primary Health Care" (2019) 19 BMC Health Services Research, No 764 at 2; Marie-Claude Tremblay et al, "Cultural Safety Involves New Professional Roles: A Rapid Review of Interventions in Australia, the United States, Canada and New Zealand" (2023) 19:1 AlterNative 166 at 167; Marie-Claude Tremblay et al, "Promoting Cultural Safety in Health Care: Co-developing an Intervention with Three Atikamekw Communities in Québec, Canada" (2023) 5 Population Medicine (Supplement) A1346; Julie Lauzière, Christopher Fletcher, & Isabelle Gaboury, "Cultural Safety as an Outcome of a Dynamic Relational Process: The Experience of Inuit in a Mainstream Residential Addiction Rehabilitation Centre in Southern Canada" (2022) 32:6 Qualitative Health Research 970 at 971; Simon Brascoupé & Catherine Waters, "Cultural Safety: Exploring the Applicability of the Concept of Cultural Safety to Aboriginal Health and Community Wellness" (2009) 5:2 J Aboriginal Health 6 at 6; Amélie Blanchet Garneau & Jacinthe Pepin, "La sécurité culturelle : une analyse du concept" (2012) 2012:4 Recherche en soins infirmiers 22 at 23. See also National Collaborative Center for Indigenous Health, *Indigenous Cultural Safety: An Environmental Scan of Cultural Safety Initiatives in Canada* (Prince George, National Collaborative Center for Indigenous Health, 2023) ch 1 at 5, online (pdf): <nccih.ca> [perma.cc/MA5H-9584].

6 See e.g. Donna LM Kurtz et al, "Health Sciences Cultural Safety Education in Australia, Canada, New Zealand, and the United States: A Literature Review" (2018) 9 Intl J Medical Education 271 at 272; Sean Yaphe, Faisca Richer, & Carrie Martin, "Cultural Safety Training for Health Professionals Working with Indigenous Populations in Montreal, Quebec" (2019) 14:1 Intl J Indigenous Health 60 at 63; Institut national de santé publique du Québec, *Conditions de succès et limites des formations en*

This article analyses the interwoven ethical and constitutional grounds of the concept of cultural safety applied to Indigenous persons and communities, with a specific focus on the Canadian context. It is then assumed that such a normative approach contributes to a global strategy for interpreting state law applied to Indigenous peoples that better reflects their cultures and protects their rights. According to this view, the complete political rejection of the colonial regime to a point where even legal advocacy in "Canadian" courts should be avoided can only lead to

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sécurisation culturelle pour le personnel de santé et services sociaux, by Gabrielle Désilets (Quebec: Gouvernement du Québec, 2022), online (pdf): <inspq.qc.ca> [perma.cc/9P29-GCNN]; Natasha Blanchet-Cohen et al, "Cheminer vers la sécurisation culturelle en milieu scolaire pour les Innus" (2022) 48:1 R sciences éducation 1.

7 See e.g. Elizabeth Fast et al, "Incorporating Diverse Understandings of Indigenous Identity: Toward a Broader Definition of Cultural Safety for Urban Indigenous Youth" (2017) 13:3 AlterNative 152; Sarah de Leeuw & Margo Greenwood, "Turning a New Page: Cultural Safety, Critical Creative Literary Interventions, Truth and Reconciliation, and the Crisis of Child Welfare" (2017) 13:3 AlterNative 142; Alison J Gerlach, Annette J Browne & Margo Greenwood, "Engaging Indigenous Families in a Community-Based Indigenous Early Childhood Programme in British Columbia, Canada: A Cultural Safety Perspective" (2017) 25:6 Health & Soc Care Community 1763; Emanuelle Dufour, *La sécurité culturelle en tant que moteur de réussite postsecondaire : enquête auprès d'étudiants autochtones de l'Institution Kiuna et des espaces adaptés au sein des établissements allochtones* (Memoire, MSc, Université de Montréal, 2015) [unpublished]; Karine Croteau, *Parentalité du point de vue de mères innues et sécurisation culturelle en protection de la jeunesse: nin, nishutshisshiun, nitinniun mak nitauassimat* (DSW Thesis, Université de Montréal, 2019) [unpublished]; Lisa Ellington & Sonia De Grand'Maison, "*Ashukana* (créer des ponts) : récit d'un projet de décolonisation et de sécurisation culturelle en protection de la jeunesse mené par le Centre d'amitié autochtone du Lac-Saint-Jean" (2022) 155 Intervention 69; Christiane Guay, Lisa Ellington & Nadine Vollant, *Ka Nikanitet : pour une pratique culturellement sécuritaire de la protection de la jeunesse en contextes autochtones*, Problèmes sociaux & interventions sociales, vol 107 (Québec: Presses de l'Université du Québec, 2022).

8 See e.g. Jeanne Desrochers-Arsenault, Jean-Michel Beaudoin & Marie-Ève Dufour, "Quel sens donner à la sécurisation culturelle pour la main-d'œuvre autochtone? : Le contexte du secteur forestier québécois" (2022) 52:8 Can J Forest Research 1119.

9 See e.g. Tahatikonhsontóntie' Quebec Network for Indigenous Health Research, *Cultural Safety in an Indigenous Health Research Context: Final Report of the Roundtables Discussions*, (Kahnawà:ke: Qc-NEIR, 2024).

10 See e.g. Bree Hadley, Janice Rieger & Katie Ellis, "Cultural Safety as a Foundation for Allyship in Disability Arts" (2024) 39:1 Disability & Society 213 at 213.

11 See e.g. Karine Millaire, "Pour la reconnaissance d'un droit à la sécurité culturelle" in Chantal Maillé & Naïma Hamrouni, eds, *Le sujet du féminisme est-il (toujours aussi) blanc ?* (Montreal: Éditions du remue-ménage, 2025).

isolation and the absence of concrete steps towards real changes. Our nations have always been negotiating with other people and developing strategies to reach agreements. The complete rejection of any form of dialogue within the existing system is not even in line with Indigenous cultures.

First, the article identifies the ethical and epistemological underpinnings of cultural safety, which are shaped by structural considerations of epistemic justice[12] and non-domination.[13] Second, it analyses the existing literature on cultural safety in light of its ethical foundations and provides a more comprehensive definition of cultural safety as requiring non-domination and epistemic justice. Finally, this article translates the ethical concept of cultural safety thus construed into constitutional and legal standards. It is argued that the concept of cultural safety demands implementation and respect in domestic law with respect to at least two general standards entrenched in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*): free, prior, and informed consent, and the principles of self-determination and self-governance. This article thus shows that the concept of cultural safety can serve both as a diagnostic and a transformative tool towards "Reconciliation": the concept allows us not only to track failures of cultural safety inherent in the status quo, but also to generate normativity through law and policy.

I. ETHICAL AND EPISTEMIC BACKGROUND

A. Non-Domination

Philip Pettit defines domination as the power or capacity to interfere arbitrarily in the choices or option set of an agent. *Interfering* consists in altering an agent's choice situation or set of options by removing, replacing, or misrepresenting one or more options.[14] For example, imagine that an Indigenous patient complains of terrible pain she is experiencing. A

12 See Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2007).

13 See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, UK: Cambridge University Press, 2012) [Pettit, *On the People's Terms*]. See also Amandine Catala, "Democracy, Trust, and Epistemic Justice" (2015) 98:4 Monist 424 [Catala, "Democracy"].

14 Pettit, *On the People's Terms*, *supra* note 13 at 46.

nurse might interfere with the options of this sick patient regarding recovery and health by refusing to provide—and hence removing the possibility of getting—adequate care (e.g., appropriately attempting to relieve the patient's pain and inquiring into its causes by conducting further tests); replacing it with inadequate care (e.g., telling the patient to rest until the pain subsides); or discouraging the patient from complaining about her symptoms or about the nurse's lack of care by telling the patient that no one will believe her.

The power to interfere *arbitrarily* means the power to interfere without being forced to track the relevant interests of the agent who is subjected to this power. In our example, the patient is subjected to the nurse's power, and the nurse is not forced to track the relevant interests of her patient in getting adequate care: she is in charge of this patient, and no one is around to question her judgment and tell her to respond differently; neither is any procedure in place to guarantee that she does so. If she decides not to help the patient, no further help is forthcoming. Note that even if the nurse decided to act responsibly and professionally by seeking to relieve the pain and looking into its causes, she would still retain the power to interfere, should she change her mind, because there still would not be anyone or anything to guarantee that she would do so. In other words, the patient's (lack of) care is entirely dependent on the nurse's good will: because of the way the system is set up, the nurse always has the power or capacity to interfere—*even if* she decides *not to* exercise this power or capacity—because, regardless of her decision, there are no constraints in place to guarantee that the patient will receive adequate care.

While the decision to interfere rests with the individual nurse, the power or capacity she has to do so comes from the structure of the situation, namely the situation of unchecked, severe power asymmetries (between patients and health care providers) that characterizes the healthcare system. That is, whereas interference arises at the individual level (i.e., it is the individual nurse who interferes), this interference is made possible because of domination at the structural level (i.e., the situation of unchecked, severe power asymmetries that characterizes the background structure of the system wherein interactions between patients and providers take place). For power to be non-arbitrary, then, or for non-domination to obtain, there must be constraints on power that force it to consider the relevant interests of the agent over whom power

is exercised. These constraints can stem from third parties (e.g., labour laws in the context of employment) or from the agents over whom power is exercised, enabling them to *effectively contest* the power to which they are subjected (e.g., strikes). While this section used the example of the healthcare context to illustrate the concept of domination, the severe and unconstrained power asymmetries that characterize domination are found in many other contexts, such as employment, education, the legal, carceral, and asylum systems, as well as child protective services.

B. Epistemic Injustice

Epistemic injustice is a type of injustice that affects a person specifically in their capacity as a knower or epistemic agent, namely as a person who uses, produces, or conveys knowledge. There are two main types of epistemic injustice: testimonial injustice and hermeneutical injustice.[15] *Testimonial injustice* arises when a person is not adequately believed or consulted because their interlocutor has conscious or subconscious biases regarding the person's social identity. For example, if a police officer does not believe the testimony of a Black witness because the witness is Black, the witness thereby faces testimonial injustice. Testimonial injustice thus corresponds to an *undue credibility deficit*. *Hermeneutical injustice* arises when a person is not adequately understood or represented because the society's mainstream pool of interpretive tools (e.g., words, concepts, social representations, collective understandings) does not adequately capture the person's social experience or situation because of the undue influence of dominant groups in the processes that shape or create these interpretive tools. For example, when women were trying to communicate their experience of sexual harassment when the term did not yet exist, their experience remained collectively misunderstood. Hermeneutical injustice thus corresponds to an *undue intelligibility deficit*. Two things should be noted here. First, the lack of adequate concepts (e.g., "sexual harassment") often goes hand in hand with the presence of inadequate characterizations of the situation (e.g., "harmless flirting") that can severely undermine the intelligibility of the claims made by the minoritized group (here, women), whose relevant experience is at stake (here, sexual harassment)—an experience which it is strongly in their interest to render

15 Fricker, *supra* note 12 at 1.

intelligible to others.[16] Second, the lack of adequate terms or understandings in the mainstream that gives rise to this intelligibility deficit can be due not only to the lack of creation of the relevant term (as in the example of sexual harassment);[17] but also to the lack of adoption of terms that minoritized groups have coined at the margins to capture their experiences and situations but that dominant groups refuse to integrate into the mainstream (such as heteronormativity or white supremacy);[18] or to the lack of adequate understandings of existing terms in the mainstream (such as "racism").[19] In all three cases, however, the intelligibility deficit arises because of the marginalization of the experiences and perspectives of minoritized groups and the undue influence of dominant perspectives in shaping mainstream understandings, which thereby become biased in favour of dominant groups.

Epistemic injustice is an *injustice* since it stems from undue biases at the individual or the societal level. Epistemic injustice is *epistemic* in nature since it undermines a person's epistemic agency. Indeed, if you are not adequately believed or consulted because of individual biases on the part of your interlocutor (i.e., if you face testimonial injustice), or if you are not adequately understood or represented because of societal biases in the mainstream pool of interpretive tools (i.e., if you face hermeneutical injustice), this will seriously compromise your ability to successfully use, produce, or convey knowledge (i.e., your epistemic agency), including knowledge about your social experience.

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16 *Ibid* at 151–52.

17 *Ibid.*

18 Kristie Dotson, "A Cautionary Tale: On Limiting Epistemic Oppression" (2012) 33:1 Frontiers: A J Women Studies 24 at 36; Gaile Pohlhaus, "Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance" (2012) 27:4 Hypatia 715 at 722; José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations* (New York: Oxford University Press, 2013) at 97.

19 Catala, "Democracy", *supra* note 13 at 428; Amandine Catala, "Multicultural Literacy, Epistemic Injustice, and White Ignorance" (2019) 5:2 Feminist Philosophy Q, No 4 at 12–14; Amandine Catala, *The Dynamics of Epistemic Injustice: Situating Epistemic Power and Agency* (New York: Oxford University Press, 2025) at 140 [Catala, *Dynamics*].

II. CULTURAL SAFETY AS REQUIRING NON-DOMINATION AND EPISTEMIC JUSTICE

A. Cultural Safety in the Literature: Key Principles

Cultural safety as a *process* aims to improve the quality of services received by Indigenous peoples and their systemic experiences within complex normative frameworks developed in a non-Indigenous context and based on non-Indigenous values and principles. Cultural safety as an *outcome* provides a safe and equitable environment for Indigenous peoples in healthcare and other contexts, such as child and family care, education, research, and labour relations. Initially developed in the nursing and healthcare context in New Zealand, the concept of cultural safety so applied, "aims to unveil often deeply rooted, and largely unconscious and unspoken, assumptions of power held by health educators, students, and providers, and to transfer some of this power to health care recipients."[20]

Cultural safety requires a critical understanding of colonialism, which is both historical and ongoing, and its impact on Indigenous peoples and persons to better redress imbalanced power relations.[21] Wood and Schwass, who were early proponents of cultural safety, along with Ramsden, developed a model that opposed "culturally safe" to "culturally unsafe" practices. Whereas *cultural safety* is represented by the "3Rs" (Recognize, Respect, and Rights), *cultural risk*[22] is represented by the

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20 Gerlach, *supra* note 3 at 152–53, citing Elaine Papps & Irihapeti Ramsden, "Cultural Safety in Nursing: The New Zealand Experience" (1996) 8:5 Intl J Quality Health Care 491 at 493; Irihapeti Ramsden, "Kawa Whakaruruhau: Cultural Safety in Nursing Education in Aotearoa (New Zealand)" (1993) 8:3 Nursing Praxis in New Zealand 4 at 6–7; Vicki Smye & Annette Browne, "'Cultural Safety' and the Analysis of Health Policy Affecting Aboriginal People" (2002) 9:3 Nurse Researcher 42 at 46–47.

21 Isabel Dyck & Robin Kearns, "Transforming the Relations of Research: Towards Culturally Safe Geographies of Health and Healing" (1995) 1:3 Health & Place 137 at 142.

22 While we mention these authors' notion of cultural risk as the opposite of cultural safety, it might be more accurate to speak of cultural vulnerabilization to more directly convey that cultural groups are not vulnerable by nature but are rather *rendered* vulnerable (i.e., they are vulnerabilized) by unjust structures and systems. We borrow the concept of vulnerabilization from Shelley Lynn Tremain, "Philosophy of

"3Ds" (Demean, Diminish, and Disempower).[23] The first step towards cultural safety would then be to identify where a specific practice or a general experience of a person or group falls on the grey scale between these two opposite poles.

More fundamentally, the ethical grounding principles of cultural safety have been tied to treaty relationships between Indigenous peoples and the colonizer, also represented by the Crown in the New Zealand and Commonwealth context. Experts have identified the "3Ps" (Partnership, Participation, and Protection) as key principles embedded in the 1840 *Treaty of Waitangi* between the Māori people and the government of Great Britain.[24] Interestingly, in the Canadian context, the *Royal Proclamation* of 1763 has been acknowledged as embedding a similar principle of protection.[25] It also grounds the constitutional principle of the honour of the Crown, according to which the executive has specific obligations towards Indigenous peoples when their rights and interests are at stake.[26] It could then be argued that the ethical and legal normativity flowing from the principle of the honour of the Crown should guide our interpretation of the concept of cultural safety as applied in Canada.

In practice, cultural safety must be distinguished from the previous stages of sensitivity and awareness (Awareness → Sensitivity → Cultural Safety). Ramsden explains that cultural awareness is the very first step towards understanding that a *difference* exists. More, however, is required to recognize that this difference is *legitimate* and achieve cultural sensitivity. The process must lead the sensitized actors and learners to undergo a conscious analysis of the relative power imbalances between persons and groups, including a critical self-exploration of their own privilege and the barriers they encountered. Ultimately, cultural safety is achieved when

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Disability, Conceptual Engineering, and the Nursing Home-Industrial-Complex in Canada" (2021) 4:1 Intl J Critical Diversity Studies 10 at 27.

23 Pamela J Wood & Margaret Schwass, "Cultural Safety: A Framework for Changing Attitudes" (1993) 8:1 Nursing Praxis NZ 4 at 6.

24 *Ibid* at 12; Dyck & Kearns, *supra* note 21 at 142; Papps, *supra* note 4; Gerlach, *supra* note 3 at 152.

25 See e.g. *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 72.

26 *Ibid* at paras 73, 149; *R v Badger*, 1996 CanLII 236 at para 41 (SCC) [*Badger*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, 18 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Governor General in Council*), 2018 SCC 40 at paras 23–24 [*Mikisew*].

equitable and safe services, as defined by the individuals who receive them, are provided.[27]

Studies show that most courses or policies often stop at the second stage of the process, confusing cultural sensitivity with cultural safety.[28] As these concepts are generally presented as two distinct steps towards an ultimate goal, we could easily conclude that achieving cultural sensitivity is a fair compromise compared to the more demanding objective of cultural safety. This assumption is perhaps reinforced in the context where the liberal worldview supporting the multicultural approach emphasizes the coexistence of cultures and the culturalist discourse, which could leave behind the crucial goal of directly addressing discrimination, racism, and colonial violence against Indigenous peoples.

However, studies also show that positioning cultural sensitivity as a *goal* (or an approach in itself), instead of a temporary step within a dynamic process, can lead to worsening the power-imbalanced relations between Indigenous and non-Indigenous individuals by reinforcing stereotypes or creating ambivalence or confusion for learners.[29] This adverse effect arises from a sensitization approach that emphasizes the distinctions between Indigenous individuals (patients, students, etc.) and the normative system (healthcare, education, etc.), where the system is defined as the norm or reference point.[30] As explained by Gerlach:

> Cultural safety provides an important, alternative, and more critical discourse on culture in that it extends our understanding of culture beyond an exotic "othering" in which a person's behaviours, values, and beliefs are ascribed solely to his or her ethnicity or race [...]
>
> The conceptualization of "culture" and "safety" have been instrumental in shifting the focus of analysis away from ethnocultural characteristics or differences and towards a greater understanding of how peoples' [reality] is inextricably linked to the

27 Ramsden, *supra* note 2 at 117; Koptie, *supra* note 2 at 31.

28 *Ibid*. See also the studies reviewed in INSPQ, *supra* note 6.

29 INSPQ, *supra* note 6 at 1.

30 *Ibid* at 13.

> diverse, complex socioeconomic and political contexts in which they live.[31]

The cultural safety approach requires going much further than sensitization to acknowledge that those differences result from colonialism and its devastating and long-lasting impacts. It requires combining critical theories, methodologies and pedagogy with comparative and culture-embedded epistemology.[32] And above all, it necessitates following a dynamic process grounded in decolonization and reconciliation values and principles, building on awareness and sensitization only in the pursuit of substantive equality and safety.

B. Non-Domination, Epistemic Justice, and Cultural Safety

As noted above, cultural safety refers to both a process and an outcome "that enables safe service to be defined by those that receive the service."[33] Going beyond mere awareness and cultural sensitization, cultural safety requires a thorough restructuring of the power relations between Indigenous and non-Indigenous groups inherited from colonization, in order to secure substantive equality and safety for Indigenous people. Within the framework of cultural safety, Indigenous people cease to be objects of mere awareness or cultural sensitization and become agents of systemic change. This section argues that achieving this kind of robust equality and safety requires both non-domination and epistemic justice. We make use of Pettit's notion of non-domination, which he originally introduced as a way to define political freedom, and suggest that the normative parameters he identified in that context—namely, the requirement of setting constraints on power in order to prevent the capacity to interfere arbitrarily and thereby secure non-domination by being forced to take people's relevant interests into account—are likewise useful to track the normative stakes and conditions necessary to secure the

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31 Gerlach, *supra* note 3 at 155, citing Brascoupé and Waters, *supra* note 5.

32 Gerlach, *supra* note 3 at 154; Annette J Browne et al, "Cultural Safety and the Challenges of Translating Critically Oriented Knowledge in Practice" (2009) 10:3 Nursing Philosophy 167 at 175.

33 Ramsden, *supra* note 2 at 116.

kind of substantive equality and safety for Indigenous people that cultural safety requires.[34]

To show why cultural safety requires both non-domination and epistemic justice, consider for example the fact that Indigenous families in Canada are much more likely to be subjected to interventions from child protective services, including the removal of children from their Indigenous families and communities to place them in non-Indigenous families, thereby severing cultural continuity for the removed children and harming their flourishing.[35] In this context, the institution of child protective services operates in a colonial framework that imposes dominant, Western understandings of what family, care, education, independence, and so on, should look like. Under these circumstances, agents of child protective services enjoy a tremendous amount of power and exercise significant discretion in the assessment of Indigenous children's family situations. Indeed, the gravity of the situation is such that the Supreme Court compared the power dynamics of current child protective services to those of the residential school system, both being "site[s] of assimilation and colonization by forcibly removing children from their homes and placing them with non-Indigenous families."[36] This comparison is a good illustration of Charles Mills' (1997) observation that the racial contract remains alive and well, even as it changes appearances, takes on new forms and presents itself under different guises over time; here, it is the same colonial logic that undergirds both the residential school system and child protective services.

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34 We deem it relevant to use Pettit's definition of non-domination in the context of cultural safety. In doing so, our aim is to give credit where credit is due for the theoretical elements we borrow from Pettit, but note that, beyond this, we are not concerned with the rest of Pettit's theory for our purposes here, or with whether Pettit would approve of our proposed application of the normative parameters he identifies in his theory of non-domination to the context of cultural safety.

35 Robert Leckey et al, "Indigenous Parents and Child Welfare: Mistrust, Epistemic Injustice, and Training" (2022) 31:4 Soc & Leg Stud 559 at 560–61.

36 *Reference Re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 11 [*Ref C-92*], citing National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a, Catalogue No CP32-163/2-1-2019E-PDF (Vancouver: Privy Council Office, 2019) at 282.

What the foregoing shows is that the status quo in Canada is one where cultural safety is cruelly lacking, since Indigenous peoples are prevented from defining what constitutes safe service when it comes to child protective services (among other services). On the contrary, child protective services are structured by power relations between Indigenous and non-Indigenous groups that are characterized by pervasive domination and epistemic injustice. In the context of child protective services, domination is present because social workers and other relevant agents have the power to interfere arbitrarily in the life situation of Indigenous children and their families. These workers and agents often exercise this unconstrained power with impunity, disrupting lives and communities, thereby perpetuating a centuries-old colonial logic of subjugation, destruction, and disempowerment.

Moreover, the case of child protective services also illustrates many forms of epistemic injustice. Studies have shown that "Indigenous families engaged with the system often feel as though their experiences, perspectives and needs are given less credence than those of the state's social workers."[37] Here, there is *testimonial injustice* because of the lack of credibility accorded to members of Indigenous peoples as knowledgeable and reliable witnesses of their own family and cultural experiences. On the flip side of this imbalance in epistemic power—and directly connected to the credibility deficit that Indigenous people face in virtue of their social identity—this testimonial injustice is reinforced by the *credibility excess*[38] that is granted to non-Indigenous "expert" testimony (e.g., social workers or judges in the context of child protective services) that gets substituted for Indigenous people's own authoritative testimony. This gives rise to what has been termed *epistemic entitlement*,[39] which arises when members of dominant groups (here, non-Indigenous people in positions of power)

37 Leckey et al, *supra* note 35 at 565, citing Jeanette E Schmid & Shoshana Pollack, "Developing Shared Knowledge: Family Group Conferencing as a Means of Negotiating Power in the Child Welfare System" (2009) 21:3 Practice 175 at 175; K A MacDonald, *Missing Voices: Aboriginal Mothers Who Have Been at Risk of or Who Have Had Their Children Removed From Their Care* (Vancouver: National Action Committee on the Status of Women, 2022).

38 José Medina, "The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary" (2011) 25:1 Soc Epistemology 15 at 20–22.

39 Kate Manne, *Entitled: How Male Privilege Hurts Women* (New York: Crown, 2020) at 183.

arrogate epistemic authority to themselves and speak for others or in their stead.[40] Epistemic entitlement can also be connected to *testimonial quieting*[41] or to *preemptive testimonial injustice*,[42] which arises when members of minoritized groups are not even consulted, including on matters that directly concern them and for which their epistemic authority should be recognized.

Additionally, *hermeneutical injustice* is also pervasive in the case of child protective services, because not only the conceptions of the family and education but also the crucial notion of "best interest of the child" that are used in the legal system are those of the dominant, settler group, which means that Indigenous perspectives and practices remain marginalized and misunderstood, with dire consequences in the case of child removal. This reflects the *epistemic imperialism* of the legal system,[43] which consists in the imposition of settler values and understandings when adjudicating cases. Epistemic imperialism generates meta-epistemic injustice,[44] where the criteria that are used to determine what counts as knowledge or as justification or as a valid reason are methodologically biased in advance in favor of the dominant group. Moreover, erasing the wrongfulness of the situation, there is no recognized legal category for the harm of cultural loss and discontinuity inflicted on Indigenous peoples.[45] Making matters worse still, the lack of intelligibility accorded to Indigenous claims and interpretations is often masked by the illusion of having established equal citizenship between Indigenous and non-Indigenous citizens.[46]

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40 Leckey et al, *supra* note 35 at 564.

41 Kristie Dotson, "Tracking Epistemic Violence, Tracking Practices of Silencing" (2011) 26:2 Hypatia 236 at 242–243.

42 See Fricker, *supra* note 12 at 130.

43 Rebecca Tsosie, "Indigenous Peoples, Anthropology, and the Legacy of Epistemic Injustice" in Ian James Kidd, José Medina & Gaile Pohlhaus Jr, eds, *The Routledge Handbook of Epistemic Injustice* (New York: Routledge, 2017) 356 at 359.

44 Amandine Catala, "Metaepistemic Injustice and Intellectual Disability: A Pluralist Account of Epistemic Agency" (2020) 23:5 Ethical Theory & Moral Practice 755 at 758; Catala, *Dynamics*, *supra* note 19 at 59–61.

45 Tsosie, *supra* note 43 at 361.

46 *Ibid* at 360.

The foregoing shows that the very concept of cultural safety is a crucial hermeneutical resource or interpretive tool that allows us not only to name both the process and outcome to which it refers, but also to point to the failures of the status quo with respect to the current lack of cultural safety as both a process and an outcome. The concept of cultural safety thus provides both a much-needed diagnostic instrument and an important normative goal: the concept allows us both to track the relevant stakes and areas for improvement or transformation, and to create normativity to secure that goal. Much like how the concept of sexual harassment made it possible not only to name problematic experiences and realities, but also to create normativity by enshrining the concept into law, subsequently giving rise to anti-harassment policies and remedies, similarly the concept of cultural safety requires the creation of institutional arrangements, laws and policies that explicitly aim to foster and protect cultural safety.

As Indigenous scholars have noted, "calls for training and increased sensitivity may fit within the 'seemingly more conciliatory set of discourses and institutional practices that emphasize our [Indigenous peoples'] recognition and accommodation,' while preserving a fundamentally colonial relationship between them and the settler state."[47] This reinforces the idea that cultural safety requires moving beyond awareness and sensitization. Indeed, as the foregoing shows, securing cultural safety requires non-domination and epistemic justice. Otherwise put, non-domination and epistemic justice are preconditions for cultural safety to obtain. As previously noted, cultural safety means that Indigenous peoples have the right to define their own culture, values, practices, and what care, wellbeing, family, education, and justice look like on their own terms. For Indigenous people to successfully engage in the definitional exercise that cultural safety involves, epistemic justice must be secured. That is, their perspectives, testimonies, and understandings must be taken seriously and granted the credibility and intelligibility they deserve. Moreover, for this to be possible in the context of child protective services, the severe and unchecked power imbalances that create

47 Leckey et al, *supra* note 35 at 572, citing Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 6 and Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017) at 45–47.

domination must be addressed by setting constraints on power so that it tracks the relevant interests of the child *as defined by Indigenous communities* themselves—that is, so that non-domination is secured.

The judicial practice exemplified in Canadian case law reflects this need for a better understanding of the best interest of the child interpreted from an Indigenous epistemic perspective. As discussed in more detail in the following subsection, interpretations of positive state law that are not conducted with full consideration of the different "lifeworlds"[48] within which the legal concept of the "best interest of the child" can be grasped tend to detach it from considerations pertaining to cultural safety.[49] Thus decontextualized, legal interpretations often focus on the *biological* and *individualistic* dimensions of "safety" and "life" to the detriment of *cultural, relational* and *collective* definitions and understandings. Similarly, state law often defines the notion of "parent" from a restrictive perspective embedded in Western culture, occluding Indigenous conceptions of family. For example, a court denied grandparents from the James Smith Cree Nation permission for their grandson, placed under the custody of non-Indigenous persons, to have a funeral service at the community center of the Nation with traditional prayers, songs, ceremonies, and food. A three-day wake would have been held prior to the funeral to share stories and honour the deceased's journey back to the Creator. The court found that considerations of cultural safety, including *cultural continuity*, "do not inform or alter the analysis of [who] is a parent within the meaning of the [provincial law]. It does not change [who] should have control of R.S.G.'s body."[50]

Note that securing cultural safety via epistemic justice and non-domination requires adopting a structural and historical lens, in contrast to an individualistic and contemporary one. In the context of child protective services, understanding questions of parenting and child welfare must be set against the historical backdrop of colonial power relations that continue to this day. Under this perspective, questions of parenting and child welfare cannot be reduced to individual capacities or characteristics; rather, they must be understood in light of structural constraints such as

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48 We refer here to the general idea developed in Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

49 See our discussion in subsection III.A.

50 *MG* v *Saskatchewan (Social Services)*, 2023 SKKB 59 at para 29.

intergenerational trauma caused by territorial dispossession and cultural destruction inherited from colonialism. Moreover, cultural safety requires that questions of value (such as a child's best interest) not be reduced to matters of individual beliefs, but instead that structural factors such as cultural community and material resources be considered. Relatedly, cultural safety requires operating a shift in current power relations, as previously noted. As Leckey and colleagues observe, and as discussed in greater detail in the following subsection, "the need is for 'distinct systems, conceived in response to Indigenous realities', not 'Indigenous organizations or personnel applying non-Indigenous laws and regimes.'"[51]

However, it is important to keep in mind that "the settler state has in some places 'marginalized and disadvantaged' [some communities and nations such as] the Inuit to the point that it would be 'impossible' simply to say 'hey, take over your services.'"[52] Two important points should be noted here. First, there can be no cultural safety and community empowerment—in the context of child welfare or in other contexts—without the necessary material resources (e.g., government funding) that these structural changes require. Second, this means that securing cultural safety requires prioritizing not only the choice of the relevant Indigenous community (e.g., to take over child protective services), but also the structural circumstances under which this choice is made: for example, are the relevant material resources or infrastructures made available for the community to be able to take over this competence (e.g., child welfare) in a meaningful, robust, and lasting way?

Consequently, there is a need to recognize and develop a robust conception of Indigenous self-governance rights encompassing rights to resources, as the next section will show. This being said, self-determination and self-governance also encompass the possibility to choose among available normative systems and to decide the level of autonomy a nation or a community finds adequate for a specific area, keeping in mind that such choices are deemed to evolve in the global context of decolonization.

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51 Leckey et al, *supra* note 35 at 562, citing Christiane Guay, Fanny Jolicoeur & Nadine Vollant, "La gouvernance autochtone des services de protection de la jeunesse : un enjeu d'accès à la justice" in Pierre Noreau et al, eds, *22 chantiers sur l'accès au droit et à la justice* (Montreal: Yvon Blais, 2020) 255 at 260 [translated by authors].

52 Leckey et al, *supra* note 35 at 568.

III. TRANSLATING ETHICS INTO CONSTITUTIONAL AND LEGAL STANDARDS

As explained by the Anishinaabe constitutionalist and ethicist John Borrows, "to ensure our legal traditions remain open to new and healthy influences [we must] regard them as being situated within interpretive communities in which those who are affected by them are able to participate in their continued construction."[53] Yet we know that law and ethics are not isolated from each other, and that the unwritten moral grounds of the Canadian Constitution, in particular, have been acknowledged in both legal theory and judicial practice by the Supreme Court.[54] Taking the ethical and epistemological grounds of the concept of cultural safety seriously should lead us to interpret our Constitution and the legal standards applicable in the Indigenous context accordingly.

We argue that cultural safety, defined as requiring non-domination and epistemic justice, further requires respect for at least two general standards entrenched in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), whose constitutional grounds in Canada are supported by serious arguments: self-determination and self-governance, as well as the related principle of free, prior, and informed consent.[55]

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53 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 9–10, citing William Twining, "Law and Anthropology: A Case in Inter-Disciplinary Collaboration" (1973) 7:4 Law & Soc'y Rev 561 and Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983). See also John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019).

54 On the architecture of the Canadian Constitution and the unwritten moral and legal principles shaping it, see e.g. *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) [*Ref re Secession of Quebec*]; *Toronto (City)* v *Ontario (Attorney General)*, 2021 SCC 34 at paras 49–85. These principles include democracy, respect for minorities, the rule of law, constitutionalism, federalism (see *Ref re Secession of Quebec*, *supra* note 54 at 239–40), the independence of the judiciary (see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC)) and the honour of the Crown, which grounds for example the duty to consult Indigenous people when their rights and interests are in play (see *Mikisew*, *supra* note 26 at paras 20, 23).

55 Note that along with human rights such as the right to equality, the right to life, security, liberty, and integrity and the right to health and access to traditional medicine (see *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/61/53 (2007) Annex, arts 1, 2, 7, 24 [*UNDRIP*]; *Canadian Charter of Rights and Freedoms*, s 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to

These global standards, in turn, require respect for more specific legal rules that should be enforceable to ensure cultural safety, understood in light of its proper ethical and epistemological foundations. We suggest this analysis is particularly relevant in the context where the Supreme Court held that the Canadian Constitution must be interpreted to follow "the goal of reconciliation"[56] and its "constitutional path"[57] in the pursuit of "justice linked to reconciliation or reconciliatory justice."[58]

A. Self-Determination and Self-Governance

As demonstrated previously, cultural safety necessitates a shift in normative power relations, which must be translated into the constitutional and legal realm. Hence, the recurring demands of Indigenous peoples to have their rights to self-determination and self-governance acknowledged in the various areas covered by *UNDRIP* include lands

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the *Canada Act 1982* (UK), 1982, c 11), the guarantees pertaining to self-determination, self-governance, consent and cultural rights support the legal normativity of cultural safety. However, the demonstration of the legal grounds of cultural safety *as a distinctive right* goes beyond this article. Similarly, there is an ongoing debate regarding the specific rules governing the interpretation of domestic law in accordance with international instruments, such as *UNDRIP*. Yet *UNDRIP*, which is a declaration and not a treaty, has not been directly implemented in Canadian law, but the *United Nations Declaration on the Rights of Indigenous Peoples Act* acknowledges in its preamble that "the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples" and that it is "a source for the interpretation of Canadian law" (see SC 2021, c 14). Courts have also begun to interpret domestic law in light of its normative principles. See e.g. *R* v *Montour*, 2023 QCCS 4154, appeal as of right to the QCCA; *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at paras 74–111 [*Kebaowek*], rev'd 2026 FCA 174; *Ref C-92*, *supra* note 36 at para 3. On legislative reconciliation, see also Naiomi S Walqwan Metallic, "Aboriginal Rights, Legislative Reconciliation, and Constitutionalism" (2023) 27:2 Rev Const Stud 1.

56 *Quebec (Attorney General)* v *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at paras 12, 168 [*Pekuakamiulnuatsh Takuhikan*].

57 *Ibid* at para 1.

58 *Ibid* at para 148.

and waters,[59] health,[60] justice,[61] family,[62] culture,[63] education,[64] and the economy.[65] The right to self-governance is consequently supported by international law.[66] It also raises the question of whether it is guaranteed in domestic constitutional law under section 35 of the *Constitution Act, 1982*—as notably debated in the context of the *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5 ("Ref C-92"), where the Supreme Court of Canada postponed providing an answer. It consequently remains especially relevant to consider further how the concept of cultural safety, along with the implementation of *UNDRIP* principles, can illuminate the interpretation of constitutional "aboriginal rights" under section 35 and through the prism of normative reconciliation.

UNDRIP acknowledges the right of Indigenous peoples to self-determination, defined as a right to "freely determine their *political status* and freely pursue their economic, social and cultural development."[67] It encompasses "the right to autonomy or *self-government* in matters relating to their internal and local affairs"[68] and "the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[69] This standard of self-determination is further protected through the specific *individual* and *collective* right "not to be subjected to forced *assimilation* or destruction of their culture,"[70] including "depriv[ation] of their integrity

59 *UNDRIP*, *supra* note 55, arts 10, 26–29, 32.

60 *Ibid*, arts 23–24.

61 *Ibid*, art 34.

62 See generally *Ibid*, arts 4–5.

63 *Ibid*, arts 5, 8, 11–13, 15, 31.

64 *Ibid*, art 14.

65 *Ibid*, arts 5, 20–21.

66 S James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004) at 97.

67 *UNDRIP*, *supra* note 55, art 3.

68 *Ibid*, art 4.

69 *Ibid*, art 5.

70 *Ibid*, art 8(1).

as distinct peoples, or of their cultural values or ethnic identities,"[71] "forced assimilation or integration,"[72] and "propaganda designed to promote or incite racial or ethnic *discrimination* directed against them."[73]

In accordance with principles of non-domination and epistemic justice, the *UNDRIP* general standard of self-determination commands *equal* respect for the autonomy of Indigenous persons and communities in the *self-definition* of their own cultural identity. Indigenous identity has been captured by colonial law, such as the *Indian Act*,[74] with the assimilative intent and result of depriving individuals and nations of the epistemic and legal power of defining themselves. For instance, Canadian law still exerts hermeneutical domination[75] over First Nations by delimiting who has "Indian status" and who does not according to rules widely considered to be arbitrary and discriminatory.[76] Hermeneutical domination arises when certain social practices or experiences of non-dominant groups are defined in the mainstream entirely by dominant groups (e.g., Indigenous family practices as problematic or non-Indigenous interventions into Indigenous family matters as legitimate) in a way that makes it impossible for the non-dominant group to effectively contest these unilaterally imposed, dominant understandings of their social practices or experiences—thereby creating domination in the hermeneutical sphere. This long-lasting uncertainty and injustice regarding the powers and rights of Indigenous people to be fully acknowledged *as they define themselves* is a recurring cause of cultural insecurity.

Self-determination also necessitates self-governance in various areas. In the context of childcare, Leckey and colleagues explain that "First Nations 'must be empowered' to substitute their child-welfare services for

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71 *Ibid*, art 8(2)(a).

72 *Ibid*, art 8(2)(d).

73 *Ibid*, art 8(2)(e).

74 RSC, 1985, c I-5.

75 Catala, *Dynamics*, *supra* note 19 at 135–55.

76 See e.g. the results of the consultation conducted by the Standing Senate Committee on Aboriginal Peoples, *Make it Stop! Ending the remaining discrimination in Indian registration* (Ottawa: Seante of Canada, 2022) (Chair: Brian Francis). This injustice could also be a denial of section 9 of *UNDRIP* which guarantees, "the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned" (see *UNDRIP*, *supra* note 55, art 9).

provincial ones. This thrust, which focuses on authority and the space in which it operates, evokes theorizing on jurisdiction."[77] The authors refer to the *Act respecting First Nations, Inuit and Metis Children Youth and Families* ("the *Act*") adopted by the Parliament of Canada in 2019, which "affirm[s] the inherent right of self-government, [including] jurisdiction in relation to child and family services" (section 8(a)). The *Act* acknowledges in its preamble that the government of Canada is committed to implementing *UNDRIP* and sets out core principles applicable to the provision of child and family services in relation to Indigenous children (section 8(b)). These include "the best interests of the child," "cultural continuity," and "substantive equality"—the first being interpreted through the lenses of the other two. The "best interests of the child" is respected when there is "cultural continuity," which is reflected in specific principles[78] directly connected to the process and requirements of cultural safety. While the concept of cultural safety has a broader scope than cultural

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77 Leckey et al, *supra* note 35 at 562 [citation omitted], citing Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 at 424; See also Jess Mant & Julie Wallbank, "The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law's Jurisdiction" (2017) 26:5 Soc & Leg Stud 629; Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18:2 Soc & Leg Stud 139.

78 Section 9(2) of the *Act respecting First Nations, Inuit and Metis Children Youth and Families* provides that cultural continuity is reflected in the following principles:

> (a) cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
>
> (b) the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
>
> (c) a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;
>
> (d) child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and
>
> (e) the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered (See SC 2019, c 24, s 9(2)).

continuity, ensuring *continuity* in the transmission of languages, cultures, customs, ceremonies, and preventing assimilation, for example, are crucial to *secure* cultural safety.

A review of Canadian case law shows that cultural safety has just started to enter judicial discourse and, in the context of family law, is mostly influenced by the *Act*'s guiding principles.[79] However, research shows that including words such as "cultural continuity" in written law is not enough to ensure that judges interpret the concept in light of its inherent epistemological grounds. The "paramount" consideration of the "best interest of the child" in the context of child placement cases, for example, is sometimes referred to as a *distinct* consideration or principle from that of "cultural continuity." Submissions by Indigenous parents and relatives reported in case law reflect the divergence of epistemic perspectives on the matter, with arguments made by Indigenous peoples insisting on the *inherent paramountcy* of cultural continuity in application of the "best interest of the child."[80] Wilyman has emphasized this potential issue with the interpretation of the *Act*:

> Historically, the best interests of the child have been framed by colonial courts which have failed to recognize the significance of cultural continuity. Indigenous groups have argued that cultural continuity and family connection should be recognized as fundamentally important to Indigenous child wellbeing rather than simply considerations to be balanced with other interests. As the legislation stands, there is still a risk that Canadian courts will continue assessing "best interests" without regard for Indigenous laws and traditions, especially given that Indigenous laws are not paramount over the sections dealing with the best interests of the child. Ensuring that cultural continuity is recognized as fundamental to the wellbeing of Indigenous children will be critical to preventing yet another "scoop."[81]

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79 A review of the relevant case law available as of 1 June 2025 has been conducted with the valuable support of Eugénie Godin.

80 See e.g. the debate in *SM* v *Alberta (Child, Youth and Family Enhancement Act, Director)*, 2019 ABQB 972.

81 Kylee Wilyman, "A Nation of Hollow Words: An Act respecting First Nations, Inuit and Métis children, youth and families" (6 July 2020), online (comment): <sasklawreview.ca> [perma.cc/L9GR-8WYN].

As discussed previously, such epistemic injustices inherent in the legal system support the need for the implementation of different systems developed and governed by Indigenous peoples themselves. The *Act* then also acknowledges that an "Indigenous group, community or people" can "exercise its legislative authority in relation to child and family services" through an "Indigenous governing body" acting on their behalf (section 20(1)) and consequently adopt an independent legislative regime. Indigenous peoples also have the option of requesting to "enter into a coordination agreement" with the relevant provincial government (section 20(2)). Note that in Quebec, on the impulse of First Nations and the Atikamekw leadership in particular, the provincial government amended its *Youth Protection Act*[82] to include the possibility for Indigenous nations and communities to enter into an agreement with the provincial government for the establishment of a special youth protection program.[83] The result of such an agreement is an administrative *delegation* of the province's power and not an acknowledgement of any Indigenous constitutional right. While such a delegated power regime currently governs the Manawan and Wemotaci Atikamekw communities, for example, the community of Opitciwan chose to adopt its own independent law[84] and fully affirm their constitutional right to self-governance.

The recognition of the right to self-government included in the *Act* has been notably contested by the Québec government, which has asserted its constitutional legislative power over family matters and challenged the idea that Indigenous councils can be acknowledged equally as governing bodies alongside federal and provincial governments. The Supreme Court confirmed the constitutionality of the *Act* in the *Ref C-92*, but this decision is only half a victory for Indigenous peoples.

Yet hopes were high that the Supreme Court would acknowledge the constitutional right to self-governance in that case. The Supreme Court held in several cases that "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control"[85] of them never annihilated their "pre-existing sovereignty." On the contrary, the honour of the Crown

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82 CQLR, c P-34.1.

83 *Ibid*, s 131.20 (which replaced *ibid*, s 37.5).

84 See *Loi de la Protection Sociale Atikamekw d'Opitciwan*, Atikamekw of Opitciwan (17 January 2022), online (pdf): <sac-isc.gc.ca> [perma.cc/44A3-JH4X].

85 *Haida Nation*, *supra* note 26 at paras 20, 32.

constitutional principle, from which flow the duty to consult[86] and the "existing aboriginal and treaty rights" entrenched in Section 35 of the *Constitution Act, 1982*,[87] delimits the "sovereignty" of the State.[88] Law must be interpreted to "reconcile" these two sovereignties.[89]

However, the *Ref C-92* proved that beyond this general theoretical idea of "reconciliation," the Crown and Indigenous peoples' sovereignties are still far from being acknowledged as *equals* in case law. Both the Québec Court of Appeal and the Supreme Court of Canada acknowledged that the federal Parliament can legislate "over" Indigenous peoples as it "can regulate and delineate Aboriginal rights" and "define the scope of those rights."[90] Hence, the constitutionality of the federal law "acknowledging"—and *allowing*—Indigenous communities to adopt "their own" laws in matters of youth protection, for example, ensures that such Indigenous laws are valid *since allowed* by federal law. In other words, what might look like a recognition of self-governance power in favour of Indigenous peoples ultimately amounts to a reassertion of a domination relation. As demonstrated previously, such domination contributes to colonial epistemic injustice.

The Supreme Court refused to decide whether Indigenous laws in matters of child and family services would be constitutional *autonomously* on the basis of a constitutional pre-existing right guaranteed by section 35 of the *Constitution Act, 1982*. In doing so, judges asserted that the federal Parliament has the power to "acknowledge" legislative power for Indigenous councils *independently* of the actual existence of such a self-governance constitutional right. On the contrary, the Québec Court of Appeal

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86 *Haida Nation*, *supra* note 26 at para 16.

87 *R v Sparrow*, [1990] 1 SCR 1075 at 1109, 1990 CanLII 104 (SCC). See also *Mikisew*, *supra* note 26 at para 86, Abella J, dissenting.

88 Mark D Walters, "The Morality of Aboriginal Law" (2006) 31:2 Queen's LJ 470 at 513–14.

89 *Ibid*; *Mikisew*, *supra* note 26 at paras 21–22; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 66–67 [*Manitoba Metis Federation*].

90 *Renvoi à la Cour d'appel du Québec relatif à la* Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185 at para 448 [*Ref* C-92 CA], cited in *Ref C-92*, *supra* note 36 at para 33. The "Indians, and Lands reserved for the Indians" are a "[m]atter" of federal "exclusive [l]egislative [a]uthority" (see *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5).

had previously concluded that such a conclusion would be contradictory because "[i]f s. 35 does not include this right [of self-governance], then [the corresponding part of] the *Act* must be declared unconstitutional as a whole, because the premise on which it is based is invalid."[91] While highlighting this analysis of the Court of Appeal, the Supreme Court chose to ignore the issue and rather reaffirm the dominant power of the federal government "over ... Indians" (section 91(24) *Constitution Act, 1867*). At best, the *Ref C-92* is then half a victory towards the empowerment of Indigenous peoples within the Canadian law system, considering that the decolonization process "evokes an abolitionist turn from improving the exercise of state power to limiting its space."[92]

That being said, we previously demonstrated that epistemic justice also requires a structural approach that cannot isolate self-governing power over family matters, for example, from the possibility of securing sufficient resources to properly exercise such power in practice. In *R v Montour*,[93] the Superior Court of Québec concluded that the Canadian Constitution guarantees a generic right to economic development for Indigenous peoples, a groundbreaking conclusion that is being challenged on appeal. As pointed out by Justice Bourque:

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91 *Ref C-92 QCCA*, *supra* note 90 at para 453. However, from the domination theory perspective, this divergence in the analysis of the Court of Appeal of Quebec and the Supreme Court of Canada leads to a contradictory result given the principles governing the constitutional doctrine of federal paramountcy. The Supreme Court interpretation led to conclude that sections 21 and 22(3) of the Act are constitutional, which provide that an Indigenous law adopted under the Act has "the force of law as federal law." In application of the federal paramountcy doctrine, such federal law consequently prevails "if there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services that is in a provincial Act or regulation." On the contrary, the Court of Appeal of Quebec would have found those provisions unconstitutional and "invalid because they would have the effect of unilaterally amending the Constitution by giving the laws of Indigenous groups, communities or peoples priority over provincial laws" (see *Ref C-92 QCCA*, *supra* note 91 at paras 538, 541, and 543–44)". *Ref C-92*, *Op citsupra* note 36 at para 35. Following such rationale, fully acknowledging an autonomous legislative power to Indigenous peoples could have the contradictory effect of depriving them of the powerful effects of the paramountcy constitutional doctrine.

92 Leckey et al, *supra* note 35 at 562, citing Amna A Akbar, "An Abolitionist Horizon for (Police) Reform" (2020) 108:6 Cal L Rev 1781 at 1838.

93 2023 QCCS 4154, appeal as of right to the QCCA.

> [We] must be aware of the unexpected consequences of limiting the recognition of [constitutional aboriginal] rights to specific hunting or fishing practices. The [refusal] to recognize modern rights with economic impacts could hinder the enforceability of other important—and maybe less contested—rights. A myriad of rights, many of which are protected by the *UNDRIP*, depends on the right to develop an autonomous economy, such as the right to revitalize cultural traditions and customs, the right to establish and control an education system, the right to establish Indigenous media, etc. *Without independent financial leverage, most collective rights are just empty shells*.[94]

The final conclusion of this case will definitely have a crucial impact on the sustainable development of legal normative frameworks adopted by Indigenous peoples in application of their right to self-government. For instance, while the *Act respecting First Nations, Inuit and Metis Children Youth and Families*[95] acknowledges the constitutional jurisdiction of Indigenous peoples in relation to child and family services, it does not ensure that Indigenous governing bodies exercising their right can secure appropriate redistribution of fiscal resources for providing services that provinces no longer have to provide to them as a consequence. Yet the Atikamekw normative system in matters of family and child services has been applauded by experts. However, while it has not been formally documented yet, serious questions arise as to whether communities such as Opitciwan have sufficient resources to ensure *in practice* the optimal governance of their own legal system.

More broadly, adopting the epistemological perspective of Indigenous peoples and cultures requires embracing a different normative worldview. Indigenous worldviews generally adhere to the circle philosophy, according to which all living elements and the universe are interconnected, encompassing matters such as governance, family, culture, language, education, health, spirituality, justice, environment, and economy.[96]

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94 *Ibid* at para 1295 [emphasis added].

95 SC 2019 c 24.

96 For example, the preamble of the Assembly of First Nations Quebec-Labrador's *Declaration of First Nations' Rights to Self-determination and Cultural Safety* states:

Moreover, studies have shown that correcting the underlying power imbalances and remedying the systemic discrimination to which they give rise necessitates a holistic approach in policymaking.[97] For example, implementing cultural safety in the context of child protection does not only necessitate self-governed systems supported by adequate financial resources. It also requires fair access to judicial and educational resources, as well as a broader right to fully participate and co-develop state law in this area when Indigenous interests are at stake, as discussed below.

B. Free, Prior, and Informed Consent

Standards of self-determination and self-governance cannot be separated from the standard of consent. Those are naturally and conceptually interrelated, as consent is a practical requirement to ensure respect for the self-determination and self-governance choices of persons and communities. That being said, the standard of free, prior, and informed consent is translated into specific rights entrenched in *UNDRIP* and the *Canadian Charter of Rights and Freedoms*, and repeated violations of Indigenous peoples' consent constitute acts of epistemic injustice and domination, hence the importance of dedicating a specific analysis to consent.

In the context of cultural safety, consent can be understood as a legal and ethical standard applicable to both individuals and groups. Violations of the individual consent of Indigenous patients in the healthcare

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> The indivisible rights to self-determination and self-government respecting culture and cultural safety establish a holistic connection linking their languages, their relationship to the land, their spirituality, their history, their unique traditions and cultural practices, and their political, social, international, and economic institutions (see Assembly of First Nations Quebec-Labrador (28 September 2023), Preamble, online (pdf): <cssspnql.com> [perma.cc/5VAA-URPE]).

On the philosophy of the Circle, see generally Georges E Sioui, *Huron-Wendat: The Heritage of the Circle* (Vancouver: UBC Press, 2000).

97 See for example the findings and recommendations of the Quebec Ombudsman, which identified the lack of an overall strategy and interdepartmental coordination for implementing the calls for action of the Viens Commission as a pitfall preventing the Quebec government to eliminate systemic discrimination of Indigenous peoples in public services (see Quebec, Protecteur du citoyen, *First Follow-Up Report on the Viens Commission: Assessment of the 142 Calls for Action of the Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec: Listening, Reconciliation and Progress* (Quebec: Protecteur du citoyen, 2023) at 66–67).

system, for instance, have been well documented.[98] While respect for consent is indisputably a fundamental right in Canada,[99] systemic discrimination and obstetric violence resulting from medical colonialism are common. Hussain defines medical colonialism as "a culture or ideology, rooted in systemic anti-Indigenous racism, that uses medical practices and policies to establish, maintain, and/or advance a genocidal colonial project."[100] Domination and multiple epistemic injustices arise from this systemic culture. Testimonial injustices include not being taken seriously as a patient because of their Indigenous identity or status, or having pain symptoms associated wrongfully with alcohol consumption on the basis of stereotypes and discriminatory bias, for example. Hermeneutical injustices have several sources, including not being understood as an Indigenous person having a different culture and worldview, and not having an available common language and normative framework to communicate and describe injustices resulting from "systemic discrimination" or the absence of "cultural safety," for example. Such injustices are exacerbated in an institutional context like the one prevailing in Québec, where the very existence of "systemic discrimination" has been denied by those in power.[101]

Among many, the emblematic case of Joyce Echaquan illustrates the magnitude of the problem. The thirty-seven-year-old Atikamekw mother of seven children, who had previously experienced obstetric violence by

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98 See e.g. Shaheen-Hussain, Lombard & Basile, *supra* note 5; Quebec, Commission d'enquête sur les relations entre les Autochtones et certains services public, *Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Québec: Listening, Reconciliation and Progress; Final Report*, (Quebec: Government of Québec, 2019).

99 The right to liberty entrenched in section 7 of the Canadian Charter encompasses personal autonomy, which "protects "the right to make fundamental personal choices free from state interference" (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 54" *Carter* v *Canada (Attorney General)*, 2015 SCC 5 at para 64).

100 Samir Shaheen-Hussain, *Fighting for A Hand to Hold: Confronting Medical Colonialism against Indigenous Children in Canada* (Montreal: McGill-Queen's University Press, 2020) at 144.

101 See especially Takwa Souissi, "Systemic Racism in Canada (Plain-Language Summary)" (last modified 25 July 2024), online: <thecanadianencyclopedia.ca> [perma.cc/QBA9-9FVP] ("[i]n Quebec, Prime Minister François Legault said that he was against racism, but that he was uncertain if systemic racism was a real issue in his province").

being pressured several times to undergo an abortion and to be sterilized after the birth of her last child, passed away in a public hospital after having been treated "disdainfully with slurs and taunts based on degrading stereotypes of Indigenous women."[102] She had been admitted a few days earlier for severe abdominal pain. Echaquan filmed the healthcare workers and sent a distress message on Facebook, showing her family, her community and the world "the racist and sexist violence Indigenous women face all too often in the Canadian healthcare system."[103] The coroner Géhane Kamel confirmed that her death "could have been avoided"[104] and that the discrimination faced by Echaquan "was certainly a contributing factor to her death."[105]

While the law is not enough to ensure respect for equality and cultural safety in practice, it certainly plays a crucial role towards reparation[106] and normative change. There is, therefore, a crucial need to also support the constitutional and ethical grounds of the *collective* consent of Indigenous peoples, as recognized in *UNDRIP*. For example, *UNDRIP* protects the right to practice and revitalize their cultural traditions and customs, and the right of Indigenous people not to be forcibly removed from their lands and territories without agreement, as well as just and fair compensation. When consent is not respected in those cases, Indigenous

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102 Shaheen-Hussain, Lombard & Basile, *supra* note 5 at 1763.

103 *Ibid.*

104 Quebec, Bureau du coroner, *Rapport d'enquête: loi sur la recherche des causes et des circonstances des décès pour la protection de la vie humaine concernant le décès de Joyce Echaquan*, by Géhane Kamel (Quebec: Bureau du coroner, 2021) at 19–20 [translated by authors].

105 *Ibid* at 20 [translated by authors].

106 For example, consider the historic settlement of the First Nations Child and Family Services and Jordan's Principle Class Action, providing $23.34 Billion in compensation to affected First Nations individuals and family members (see *Moushoom v Canada (Attorney General)*, 2023 FC 1466 at para 59). On the history of the case, see Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285. In the Quebec context, note that a class action has been recently authorized against doctors and the health care provider Centre intégré de santé et de services sociaux from Lanaudière in the context of sterilization of Atikamekw women without their consent (see *UT* c *Centre intégré de santé et de services sociaux de Lanaudière*, 2025 QCCA 157 at paras 2–5).

peoples are entitled to redress.[107] More generally, Section 18 provides that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights". Section 19 reinforces this right by providing that "States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

In Canada, the Supreme Court has not recognized consent as the general standard yet, but only a constitutional right to be "consulted". By contrast, recent decisions from lower courts tend to depart from this jurisprudence and acknowledge the consent standard in compliance with *UNDRIP*.[108] The duty to consult Indigenous peoples is grounded in the principle of the honour of the Crown, which "is always at stake in its dealings with Aboriginal *peoples*."[109] The duty to consult and accommodate applies in cases of claims "seriously pursued"[110] even if not proven, and its content varies with the circumstances. However, the duty generally protects only a right to an "adequate consultation";[111] "it does not give Aboriginal groups a veto over developments pending proof of their claims."[112] The duty to consult often has to be enforced by courts in cases where Indigenous peoples are not considered at all, and it still places Indigenous peoples in a position of subordination in favour of the federal and provincial governments. Even when respected, the right to be consulted often perpetuates an imbalanced power relation and does not guarantee the absence of testimonial injustices resulting from powerless voices heard but discarded. Moreover, the duty to consult is not a robust enough normative standard to address the epistemic injustices that often result from developing legislative policies under colonial terms.

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107 See *UNDRIP*, *supra* note 55, arts 11, 28. See also *ibid*, art 10 on the right to a "just and fair compensation and, where possible, ... the option of return".

108 See e.g. *Kebaowek*, *supra* note 55 at paras 90–111.

109 *Haïda Nation*, *supra* at para 16, citing *Badger*, *supra* note 26 at para 41; *R v Marshall*, 1999 CanLII 665 at para 49 (SCC).

110 *Ibid* at para 27

111 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

112 *Ibid* at para 80.

Among the several cases where such injustices arise, including notable territorial disputes, it is important to emphasize one example that is especially relevant in the context of cultural safety. Consider the Québec *Act to establish the cultural safety approach within the health and social services network*[113] ("the *Act to establish cultural safety*"), adopted in 2024, which has been widely denounced by First Nations, Inuit and their allies. The *Act to establish cultural safety* has raised virulent critiques, which appear to be nearly unanimous.[114] How can the adoption of a statute said to be aimed at protecting cultural safety actually *infringe* the tenets of cultural safety? This case, we contend, is emblematic of the imposition of a colonial approach and the instrumentalization of the concept of "cultural safety"—translated into a four-provisions bill—resulting in several epistemic injustices.

While the legislative process itself denied any genuine possibility of consultation to Indigenous peoples,[115] the topic discussed would in fact have required an egalitarian co-construction approach. Considering the very purpose of cultural safety, it cannot be achieved without the meaningful participation of Indigenous groups, communities, and nations—starting with the very first step of policy development. Despite the government's claim that it had conducted adequate consultations, this resulted in hermeneutical injustice as no Indigenous body acknowledged the existence of a "consultation" on their own terms. Epistemic injustices were so obvious and hurtful for some Indigenous representatives and governing bodies that they decided to simply deny any legitimacy to the legislative process,[116] resulting in concerning testimonial injustice and

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113 CQLR, c A-20.1.1.

114 See e.g. "College of Physicians Calls on Quebec to Recognize Systemic Racism in Health System", *Global News* (12 September 2023), online: <globalnews.ca> [perma.cc/W4WY-RTNT]; Cassandra Yanez-Leyton, "Dissatisfaction Grows Among First Nations Groups over Quebec Indigenous Health-Care Bill", *CBC News* (13 September 2023), online: <cbc.ca> [perma.cc/4UYA-U2RM]; Assembly of First Nations of Quebec-Labrador et al, Press Release, "Cultural Safety: A Human Right Issue" (5 December 2024), online: <apnql.com> [perma.cc/T7J4-RMGW].

115 Assembly of First Nations of Quebec-Labrador et al, *supra* note 113.

116 For instance, the Joyce's Principle Office and the AFNQL decided not to participate in the legislative process as they felt totally not listened to by the Quebec government (see e.g. Yanez-Leyton, *supra* note 113).

quieting, according to which the first *knowers* of cultural safety were paradoxically ignored and set aside.

The content of the *Act to establish cultural safety* also contains major epistemic injustices, the first consisting in defining cultural safety *from a colonial perspective*. Furthermore, this definition actually reflects cultural awareness—or at best cultural sensitization—rather than cultural safety. As emphasized by the First Nations of Quebec and Labrador Health and Social Services Commission ("FNQLHSSC"):

> Despite the mention of "social justice" in the preamble, the text of section 1 makes no mention of the role of those primarily concerned in the development and implementation of cultural safety approaches. The question of power relationships is also omitted, with section 1 adopting an approach that is centred on the dominant group. Members of this dominant group are asked to:
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> Subpara. 1(2)(1): consider "the values and ... realities" of the dominated group rather than to compare, from an egalitarian perspective, the power relationships and privileges of the two groups by following an approach aimed at deconstructing these dynamics;
>
> ...
>
> Subpara. 1(2)(4)(a): proceed with "hiring Indigenous personnel," referred to in a very general way, without any regard for ensuring the representativeness ... among the senior personnel in positions of power and within the various institutions, in order to redress systemic inequalities;
>
> Subpara. 1(2)(4)(c): undergo "mandatory training ... on Indigenous cultural and historical realities," without specifying that the first "reality" to be taken into account is the existence of power relationships and systemic discrimination;
>
> Subpara. 1(2)(4)(d): to simply take "into account the realities specific to Indigenous women and girls," which amounts to a more superficial approach to awareness-raising.[117]

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117 First Nations of Quebec and Labrador Health and Social Services Commission, *First Nations at the Heart of the Process: For a Genuine Approach to Cultural Safety and Respect for Fundamental Rights; Brief on Bill 32,* An Act to establish the cultural safety

This latter example shows how a consent-based approach reflecting principles entrenched in sections 18 and 19 of *UNDRIP* is crucial to ensure genuine respect for cultural safety. Even more, it illustrates that a lack of such a legislative co-construction approach can actually lead to violations of cultural safety through domination and epistemic injustices. The collective consent principle—or "co-construction" approach—applied to the legislative process has strong legal and ethical grounds. Yet a majority of the Supreme Court held that the constitutional principle of the honour of the Crown can only support the judicial challenge of an *adopted* law when it is contrary to Indigenous rights. The dissenting view, defended by Justice Abella, strongly defends an interpretation that encompasses violations of rights at the legislative stage.[118] However, beyond the specific and evolving question of justiciability, the honour of the Crown is undoubtedly coherent with the consent approach. It is also coherent with the progressively acknowledged right to self-governance and the constitutional and ethical foundations of the Supreme Court's principle according to which the pre-existing sovereignty of Indigenous peoples must be reconciled with the dominant and imposed colonial sovereignty of the Crown.[119] Grasped through the lens of epistemic injustices resulting from imbalanced power relations, these constitutional principles supporting the consent-based approach have even more strength.

CONCLUSION

The legacy of colonialism and genocide through the *Indian Act* regime includes the development and implementation of public institutions and governance systems where Indigenous peoples are not culturally safe. These institutions and systems have been shaped according to colonial epistemic terms and therefore fail to incorporate and to do justice to the worldviews of Indigenous peoples themselves. Decolonization requires addressing this epistemic injustice. To do so, the emerging concept of cultural safety is needed to define and transform the experience of Indigenous individuals and communities. As the normativity of the law has

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approach within the health and social services network, Karine Millaire, ed (Wendake, QC: First Nations of Quebec and Labrador Health and Social Services Commission, 2023) at 12, online (pdf): <cssspnql.com> [perma.cc/SP5K-PDHP].

118 *Mikisew*, *supra* note 26 at para 78.

119 *Ibid* at paras 21–22; *Manitoba Metis Federation*, *supra* note 89 at paras 66–67.

a crucial transformative power, cultural safety must also be defined in legal terms. This article has addressed this goal by analyzing the epistemological, ethical, and constitutional grounds of the legal concept of cultural safety that has been neglected in the literature, with a specific focus on the Canadian context.

The legal concept of cultural safety can be theorized through Pettit's concept of domination and Fricker's concept of epistemic injustice. As both a process and an outcome, according to which "safe service" is defined and identified by Indigenous persons themselves,[120] cultural safety requires moving beyond awareness and cultural sensitization to deconstruct and restructure the domination and power relations between Indigenous and non-Indigenous groups. Incorporated into the legal realm, cultural safety becomes a powerful epistemic tool to name and recognize harmful experiences *as* failures of cultural safety and to create normativity to address them through institutional arrangements, laws and policies.

Following Borrows's constitutional and ethical approach, according to which the law applied to Indigenous peoples must be defined through a hermeneutical community through which they can participate in the construction of such law, this article has explored how the concept of cultural safety must inform the interpretation of the Canadian Constitution. We demonstrated that cultural safety, construed as requiring non-domination and epistemic justice, requires respect for at least two general standards entrenched in the *United Nations Declaration on the Rights of Indigenous Peoples*: self-determination and self-governance, as well as the related principle of free, prior, and informed consent. This latter principle encompasses the co-construction standard in the context of laws and policies that may affect Indigenous rights and interests.[121] The

120 Ramsden, *supra* note 2.

121 This list is not exhaustive. For instance, the concept of cultural safety could support a specific interpretation of the right to equality and the protection against discrimination entrenched in section 15 of the *Canada Charter of Rights and Freedoms*, which would necessitate an additional in-depth analysis.

"reconciliation"[122] and "reconciliatory justice"[123] interpretation approaches, as named by the Supreme Court, should lead us to interpret our Constitution through the lens of cultural safety.

122 See for example the role of the concept to interpret the Constitution in a manner "fostering reconciliation between Canada's Indigenous peoples and the Crown" (*Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 1).

123 This specific expression has been used by the Supreme Court in Quebec, see *Pekuakamiulnuatsh Takuhikan*, *supra* note 56 at paras 18, 148, 203, 223, 229, 230, 318, 319, 322, 323.