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## Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation

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# **YOUNG PEOPLE AS HUMANS IN FAMILY COURT PROCESSES: A CHILD RIGHTS APPROACH TO LEGAL REPRESENTATION**

**The Honourable Donna J. Martinson and  
Caterina E. Tempesta\***

*The authors, a retired British Columbia Supreme Court judge and a senior member of Ontario's Office of the Children's Lawyer, address the important issue of legal representation for children. They are co-chairs of the Steering Committee which guided the development of the Canadian Bar Association's new and comprehensive Child Rights Toolkit. As such, they are well-placed to discuss how a child rights approach, as required by the United Nations Convention on the Rights of the Child to which Canada is a ratifying party, supports legal representation for children who find themselves caught in contentious family law proceedings before the courts.*

## **PART I. SETTING THE STAGE**

“Are children human?” asked Lady Brenda Hale, Justice and now President of the Supreme Court of the United Kingdom, in the title of her June 2017 keynote presentation at the World Congress on Family Law and Children's

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Rights in Dublin, Ireland. She described how children's human rights in the United Kingdom can be overlooked in court processes in ways that treat them as less than fully human. We pose an offshoot of Lady Hale's question: Are children's human rights worth the legal protections provided by lawyers that Canada's legal system affords to adults in family law court cases?<sup>1</sup> We suggest in this article that they are, but that many children do not experience these protections.

We argue that legal representation for children by a child advocate in family court proceedings is necessary in order to achieve just, equality-based outcomes for them and that governments have obligations to provide funding for such representation. We are pleased to address this concern about access to justice for children in honour of Professor Judith Mosoff, whose teaching, writing, and community activism were dedicated to ensuring representation for vulnerable people, especially children.

Children's lack of legal representation is particularly concerning in complex, contentious family law cases before the courts, where the stakes for children and their well-being are very high. It is now well-recognized that toxic stress—which can be caused by domestic violence, alienation, or other harmful behaviour, and exacerbated by ineffective court processes—can lead to

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<sup>1</sup> At a practical level, legal representation in family law cases is not affordable to many adults, nor consistently available through government-funded legal aid programs for all family law matters across jurisdictions. The critical difference, however, is that adults unquestionably have the legal right to participate in court proceedings and to have a lawyer if they are able to obtain one. This is not the case for children.

significant short- and long-term damages to children and their healthy development.<sup>2</sup>

Further, children's ability to obtain legal representation depends on the Canadian jurisdiction in which they live.<sup>3</sup> For example, in British Columbia, children are not entitled to a "legal aid" lawyer when a court is determining their best interests; yet in Ontario, the Office of the Children's Lawyer provides significant legal

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- <sup>2</sup> Sibylle Artz et al, "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014) 5:4 Intl J Child Youth & Family Studies 493; Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26:2 Can J Fam L at 395 at 396. See also Alberta Family Wellness Initiative, "The Brain Story", online: <[www.albertafamilywellness.org/what-we-know/the-brain-story](http://www.albertafamilywellness.org/what-we-know/the-brain-story)>: discussing how "[b]rain health (including risk for physical and mental illness) is determined by more than just our genes" and how early experiences can be built into children's brains and bodies.
- <sup>3</sup> See Debra Lovinsky & Jessica Gagné, "Legal Representation of Children in Canada" (Paper presented to The Family, Children and Youth Section, Department of Justice Canada, 2015) at 8. See also Nicholas Bala & Claire Houston, "Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada" (Paper presented to The Family, Children and Youth Section, Department of Justice Canada, 31 August 2015). Both of these recent papers were prepared for the Federal Department of Justice in support of the comprehensive *Child Rights Toolkit*, a project of the United Nations *Convention on the Rights of the Child* Subcommittee of the Canadian Bar Association's National Children's Law Committee, May 2017, online: <[www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit](http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit)> [Child Rights Toolkit]. The papers include helpful reviews of general case law, legislation, and some of the literature on legal representation in Canada; this article will not duplicate this important work.

services to children, funded by the government, in certain family court processes.<sup>4</sup>

The ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system.<sup>5</sup> *Meaningful Change for Family Justice: Beyond Wise Words* indicates that legal representation in the family justice system is an important element of access to justice,<sup>6</sup> and refers to the problematic unmet need for legal services, which it calls widespread and pervasive and one that particularly impacts the most vulnerable.<sup>7</sup> The report states, "the majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process."<sup>8</sup> This results in minimal legal protection to children, our most vulnerable citizens, in a way that discriminates against them based solely on their age.

A similar concern was highlighted in the final report of the Bach Commission which made proposals for

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<sup>4</sup> For more information see The Honourable Donna J Martinson and Caterina E Tempesta, "Legal Representation for Children in Family Law Cases: A Rights-Based Approach" (delivered at the Access to Justice for Children: Child Rights in Action Conference, CLEBC and the Children's Law Section of CBABC, May 2017) [A Rights-Based Approach].

<sup>5</sup> *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 101, [2015] 1 SCR 401.

<sup>6</sup> Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013).

<sup>7</sup> *Ibid* at 19.

<sup>8</sup> *Ibid* at 16.

the re-establishment of the “right to justice” in England and Wales, including a statutorily-protected right to legal representation, as a fundamental public entitlement.<sup>9</sup> Referencing children’s participatory rights under Article 12 of the United Nations *Convention on the Rights of the Child*,<sup>10</sup> the Commission’s recommendations include the need for government-funded legal representation in “all law concerning children”.<sup>11</sup> This is consistent with the child rights approach espoused in this article.

### **DEVELOPMENT OF A CHILD RIGHTS APPROACH**

The *Canadian Charter of Rights and Freedoms*<sup>12</sup> (the *Charter*), as well as other domestic and international human rights instruments, ostensibly provide equal benefit of and protection of the law without discrimination for the human rights of all people, including *Charter* protection from discrimination based on age. However, children’s unique circumstances make the realization of those rights much more difficult for them than for adults. Their rights can be overlooked or even undermined by adults. Recognizing this, Canada played a leading role in creating

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<sup>9</sup> The Bach Commission, *The Right to Justice: The Final Report of the Bach Commission* (London: Fabian Policy Report, September 2017) at 6, 7, 13–18.

<sup>10</sup> 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*Convention*].

<sup>11</sup> *Supra* note 9 at 31.

<sup>12</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

the *Convention*,<sup>13</sup> ratifying it in 1991. It is the most universally ratified treaty in history, with only one country, the United States, having failed to do so. The *Convention*'s child rights approach, which applies to all children under the age of eighteen, not only sets out the specific human rights of children, such as those focusing on their safety, security, and well-being, but also the legal mechanisms required to implement them.

An integral part of the implementation of the *Convention* is the creation of the United Nations Committee on the Rights of the Child (the Committee) to examine the progress made by "States Parties" in achieving the realization of the obligations undertaken in the *Convention*.<sup>14</sup> The Committee periodically provides "General Comments" on the interpretation of the Articles of the *Convention*. The two most relevant to family law are General Comment 12 (2009), "the right of the child to be heard",<sup>15</sup> and General Comment 14 (2013), "the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)".<sup>16</sup>

These General Comments provide authoritative direction to States Parties like Canada on their obligations

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<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Ibid*, art 43.

<sup>15</sup> UN Committee on the Rights of the Child, *General Comment No 12 (2009): the right of the child to be heard*, 2009, UN Doc CRC/C/GC/12 [General Comment 12].

<sup>16</sup> UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 2013, UN Doc CRC/C/GC/14 [General Comment 14].

under the *Convention*. States Parties must submit initial and periodic reports on the national status of children's rights to the Committee, to which the Committee raises concerns and makes recommendations in "Concluding Observations."<sup>17</sup> Both General Comments and Concluding Observations have been referred to by Canadian courts in interpreting domestic law.<sup>18</sup>

### **THE CHILD RIGHTS APPROACH TO DETERMINING THE BEST INTERESTS OF CHILDREN – AN OVERVIEW**

The child rights approach in the *Convention* sees the concept of the child's best interests as ensuring both the full and effective enjoyment of all of the rights in it and the child's holistic development. The Committee states that "an adult's judgment of a child's best interests cannot override the obligation to respect all of the child's rights under the *Convention*",<sup>19</sup> which include the child's participation rights. Both rights are foundational principles of the *Convention*. The child's best interests is a threefold concept:<sup>20</sup> (i) a substantive right—considering the child's

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<sup>17</sup> *Convention*, *supra* note 11, art 44.

<sup>18</sup> See e.g. *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26–27, [2013] 3 SCR 157 (citing a General Comment) [*Divito*]; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at paras 186–187, [2004] 1 SCR 76 (citing a Concluding Observation) [*Canadian Foundation for Children*]; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 462 (citing a General Comment).

<sup>19</sup> General Comment 14, *supra* note 16 at para 4.

<sup>20</sup> *Ibid* at para 6.



best interests as a *primary* consideration when different interests are being considered—not on the same level as other interests when there is a conflict;<sup>21</sup> (ii) a fundamental interpretative legal principle; and (iii) a rule of procedure—requiring legal guarantees;<sup>22</sup> and strict procedural safeguards.<sup>23</sup>

Legal procedural safeguards are critical in ensuring that children’s rights are not overlooked or undermined. The need for legal representation for children when their best interests are being formally assessed by courts in family law cases<sup>24</sup> is one of the eight key safeguards identified by the Committee. It concludes, correctly in our view, that legal representation is a critical means of actualizing the rights of children and ensuring the implementation of the other seven safeguards: (i) ensuring the right of the child to express his or her own views; (ii) establishing relevant facts; (iii) avoiding delays in decision making; (iv) using qualified professionals; (v) ensuring appropriate “legal reasoning”; (vi) making sure there are mechanisms to review or revise decisions; and (vii) using child rights impact assessments.

The last procedural safeguard, using child rights impact assessments, safeguards children’s interests more broadly. It includes the requirement for governments to assess all government actions, including budget decisions, to ensure the *Convention’s* child rights approach is

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<sup>21</sup> *Ibid* at para 37.

<sup>22</sup> *Ibid* at para 46(b).

<sup>23</sup> *Ibid* at para 47.

<sup>24</sup> *Ibid* at para 96.

implemented. Doing so is an important aspect of government's responsibility to provide services for children, and, in particular, legal representation.

### **GAPS IN IMPLEMENTING THE CHILD RIGHTS APPROACH**

While Canada has ratified the *Convention* and in doing so, has stated that all our laws, practices, policies, and procedures comply with it, there are significant gaps between what is required to implement a child's rights approach and what is actually happening. Steps have been taken across the country to advance the well-being of children in the family court system through the inclusion of children's voices via parenting assessments, "hear the child" reports, and other mechanisms.

There are, however, two significant shortcomings to these approaches. First, with the exception of judicial meetings with children, children's views are most often presented to courts indirectly through adult third parties without the participation of children in the rest of the decision-making process. Second, these approaches address only one of the eight procedural safeguards—ensuring the right of children to express their views; it does not afford children the ability to address substantive, equality-based outcomes overall through legal representation. In particular, it excludes the child from participating in the presentation and testing of evidence; in addressing the expertise of proposed experts; in guarding against unreasonable delays; and in participating in all the legal arguments, including those relating to how the child's views are weighed; and reviewing the ultimate decision for correctness.

The Committee's most recent *Concluding Observations (Canada)*<sup>25</sup> identified three gaps relevant to the need for legal representation: inadequate mechanisms for facilitating meaningful and empowered child participation in legal processes that impact children; the lack of education on children's rights for all professional groups working for or with children, including lawyers and judges; and the need for more effective allocation of resources by governments, using a child-specific approach.

### A MAP OF THIS ARTICLE

In the remainder of this article, we elaborate on the need for legal representation for children in family court proceedings.<sup>26</sup> In Part II, we consider important aspects of

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<sup>25</sup> UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Canada*, 61st Sess, UN Doc CRC/C/CAN/CO/3-4 (2012) (Concluding Observations on the Combined Third and Fourth Periodic Report of Canada, adopted by the Committee).

<sup>26</sup> This article does not discuss critiques related to the universalist and arguably, Euro-centric nature of the *Convention* and the differences in the political economy of childhood across various countries and contexts. For criticisms and responses, see e.g. Priscilla Alderson, "Common Criticisms of Children's Rights and 25 Years of the IJCR" (2017) 25:2 Intl J Child Rts 307; Michael Freeman, "Culture, Childhood and Rights" (2011) 5:15 The Family in Law 15; Helmut Wintersberger, "Work, Welfare and Generational Order: Towards a Political Economy of Childhood" in Jens Qvortrup, ed, *Studies in Modern Childhood: Society, Agency, Culture* (London, UK, Palgrave Macmillan: 2005) 201. It is beyond the focus and scope of this article to address these issues. We would simply note, however, as posited by Freeman and Alderson, that there can and should be universal children's human rights values that provide basic standards of justice across countries and cultures that support the protection and

children's lived realities relevant to fair and just outcomes in family law cases.

Part III focuses on the role of the *Convention*, together with the *Charter*, in Canadian family law practice; the legal status of the *Convention*; substantive equality principles in the *Convention* relevant to family law proceedings, including the participation rights of young children; and six core components of court processes that speak to the need for legal representation: gathering information relevant to just outcomes; obtaining the child's views; determining the need for and weight to be attached to expert assessments; ensuring timely processes; making the overall best interests decision(s); and reviewing decision(s) for correctness.

Part IV considers the debate about the nature of children's legal representation and makes the case for children's advocates.

In Part V, we conclude by arguing that governments and the legal profession must do more to ensure that children have legal representation. If they do not, there will continue to be an unacceptable risk of error in decision making.

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harmonious development of children. These human rights involve complex principles that may be open to local interpretation while still maintaining those core standards. The fact that all but one country (the United States) has ratified the *Convention* supports this conclusion.

**PART II. CHILDREN’S LIVED REALITY:  
RELEVANT LEGAL  
AND SOCIAL CONTEXTS**

Children do not have the same ability as adults to know their rights; to access remedies through a lawyer or otherwise; or to have a say in matters that affect them individually, as part of a particular group, or as children generally. They cannot vote and their rights can conflict with adult rights, even those adults meant to protect them. The greatest challenges are faced by the most vulnerable children: indigenous and racialized children, children with special needs, LGBTI2S children, immigrant and refugee children, and children living in poverty. It is also common for adults to view children paternalistically, to see them as non-competent people on their way to adulthood, about whom protective decisions must be made.

**A PATERNALISTIC VIEW OF CHILDREN**

In *Children: the Silenced Citizens*,<sup>27</sup> the Senate Standing Committee on Human Rights referred to this paternalistic, needs-based approach as treating children as “human becomings” rather than human beings.<sup>28</sup> It observed that “the rights-based approach is of particular importance in the discussion of children’s rights because of children’s often intense vulnerability, the frequent competition between children’s rights and those of adults, and the resulting ease with which a more paternalistic and needs-

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<sup>27</sup> Senate, Standing Committee on Human Rights, “Children: The Silenced Citizens: Final Report of the Standing Senate Committee on Human Rights” (April 2007) [The Silenced Citizens].

<sup>28</sup> *Ibid* at 24.

based approach can be adopted.”<sup>29</sup> Birnbaum and Bala<sup>30</sup> have identified three assumptions upon which paternalistic thinking, which keeps children out of family court processes, is based: i) children are “lacking the legal and psychological capacity to participate”; ii) parents know what is in the best interests of their children and because of that, children’s views can adequately be represented by them; and iii) keeping them out of the process will shelter them from the “turmoil of their parents’ relationship breakdown.” We will deal with each assumption in turn; we suggest that they are inconsistent with modern thinking, and applying them discriminates against already vulnerable children.

### **LACK OF CAPACITY**

This assumption about children and their capacity fails to recognize that children are persons in their own right, with their own perspectives about what is in their best interests. It is based on an outdated notion about the nature of childhood and child development that has informed the evolution of legal principles relating to children. That is, that there is a universal way of looking at how children mature—a one-size-fits-all approach—which is often tied to their age.<sup>31</sup>

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<sup>29</sup> *Ibid* at 27.

<sup>30</sup> Rachel Birnbaum & Nicolas Bala, “The Child’s Perspective on Legal Representation; Young Adults Report on Their Experiences with Child Lawyers” (2009) 25:1 Can J Fam L 11 [The Child’s Perspective on Legal Representation].

<sup>31</sup> See “Life, Survival and Development” in Child Rights Toolkit, *supra* note 3 (content experts: Dr. Sara McNamee, Dr. Alan Pomfret, Dr. Patrick Ryan, Dr. Sam Frankel, Dr. Rachel Birnbaum, Childhood and

This assumption has been replaced by what has been called a “new paradigm,”<sup>32</sup> which views children and their capacity through a modern lens; it is different in four essential ways. First, universalism is replaced with diversity so that the child’s experience of childhood is recognized within a cultural context. Second, the child is viewed as a human “being” in the world now, which makes children’s rights a feature of their present, and not their future, place in society. Third, the child is recognized as a competent “meaning maker” at any age, so that understandings of the child are not based on adult assumptions but rather engagement with the individual child. Fourth, the child is seen as a participating actor in his or her own right, making children valid contributors in shaping the social world of which they are part.<sup>33</sup>

Treating children and their ideas with dignity and respect in this way both improves the quality of decision making and contributes to children’s sense of self-worth and healthy development. In *Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children’s Rights*, the authors’ extensive literature review shows that children and adolescents “feel powerless in situations of family change, find themselves in situations over which they have little control, feel that they have no say, and want to know what is happening to them and to have a voice.”<sup>34</sup> They suggest that a continued lack of

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Social Institutions Program, King’s University College at the University of Western Ontario).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Joanne Paetsch et al, *Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children’s Rights*, (Canada:

participation can marginalize children, put a barrier between children and adults, reduce a child's sense of self, and lead to feelings of frustration, anger, alienation, and distrust. They also conclude that children's direct participation can empower them to develop a sense of social competence, to understand the relationships between actions, decisions, and their consequences, to develop responsibility and ownership of situations, to develop skills in citizenship, and to develop protective factors in their lives.<sup>35</sup> They conclude that children often see things differently and at a much more practical level than adults and that their ideas can assist in reaching creative solutions.

### **THE DANGER OF DEFERRING TO PARENTS IN CONTESTED CUSTODY PROCEEDINGS**

Parents in contested family law court proceedings are ill-placed to adequately represent their children's views or address their best interests more broadly. Deferring to parents in these circumstances can, in fact, be harmful to children. The trend in family dispute resolution and the thrust of family law access to justice reforms has been to use courts only as a last resort; people who can resolve their disputes usually do. The remaining cases are often complex and contentious, involving allegations of domestic violence, alienation, and/or other harmful behaviour.

The parents are in court *because* they cannot agree on the central issue—what is in the best interests of the children. There are many reasons for the lack of

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National Judicial Institute and Canadian Research Institute for Law and the Family, 2009) at 10.

<sup>35</sup> *Ibid.*



agreement—for example, gender-based concerns for women.<sup>36</sup> Regardless of the reasons, children find themselves in emotionally-charged circumstances involving concerning allegations. It is difficult for parents, who each often have strongly-held views, to objectively assess whether the child should participate, and if so, how, and what is, in fact, in their best interests overall. In these circumstances, children's interests can be overlooked or undermined.<sup>37</sup>

We therefore support the Committee's conclusion that separate legal representation is required for children when their best interests are being formally assessed by courts. The Committee further states that when there is a potential conflict between the parties in the decision, *a legal representative* is needed, in addition to a guardian or representative of the child's views.<sup>38</sup> In contentious family law proceedings, there is actual rather than potential conflict, highlighting the importance of legal representation for the child.

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<sup>36</sup> The Honourable Donna Martinson & Professor Emerita Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11 at 22 [Judges as Equality Guardians].

<sup>37</sup> See *Re D (A Child)* (2006), [2006] UKHL 51 at para 60, [2007] 1 AC 619, Baroness Hale confirming the need for separate legal representation for the child where the child's views and interests may not be properly presented to the court, particularly where there are legal arguments that the parties are not putting forward.

<sup>38</sup> General Comment 14, *supra* note 16 at para 96.

## **KEEPING CHILDREN OUT OF THE COURT PROCESS**

If done in a manner sensitive to the child's particular circumstances, including their age, maturity, and social context, affording children the opportunity to participate in family court proceedings will not harm them or expose them to further conflict. Rather, it can benefit them by ensuring that they understand why their input is sought; how, what, and with whom it will be shared; how it will be factored into the decision-making process; and by providing children with some control over their participation in the process, including the right not to participate, if that is their wish.<sup>39</sup>

In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views. Even in the few true "parental alienation cases", efforts should be made to enable children to share their views, although the court may have to determine the weight to be assigned to those views. In addition, in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other, or may have had experiences with the "alienated" parent that justify the estrangement. In such cases, it would not be desirable to exclude the child's perspective from the decision-making process.

Even in cases where parents are careful to avoid influencing their children's views, it is inevitable that children will be influenced by the words and actions of

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<sup>39</sup> Even young children's right to participate must be respected. This is discussed in greater detail below in Part III, "Capable of Forming Their Own Views".

those around them. The possibility of parental influence on its own should not be a basis for excluding children's participation nor for discounting their expressed views. An approach that considers the extent to which the child's views are rooted in reality, or might reasonably be perceived as such by the child, is preferable, as it considers the situation from the child's perspective. Reviewing the substance of a mature child's reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful is unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views.

In cases where there has been abuse, neglect, or domestic violence, providing the child with the opportunity to participate may enhance the child's safety so long as it is facilitated in a manner that is sensitive to the child's unique circumstances.

### **PART III. LEGAL UNDERPINNINGS OF CANADIAN FAMILY LAW PRACTICES**

The *Convention's* focus on the primacy of children's best interests within a child rights legal framework applies to family law cases. The implementation of the best interests principle "requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity."<sup>40</sup>

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<sup>40</sup> General Comment 14, *supra* note 16 at para 5.

## LEGAL STATUS OF THE *CONVENTION* IN CANADA

With few exceptions, the *Convention* has not been incorporated directly into domestic law. Canada nonetheless recognizes the *Convention*'s authority, taking the position that it has incorporated it indirectly by ensuring that its laws are compliant with it.<sup>41</sup> The *Convention*'s important international human rights norms should inform the development of Canada's laws, policies and practices. Canada has never suggested otherwise; it broadly acknowledges its *Convention* obligations and any discussions/debates relate to how it should be implemented.

The Supreme Court of Canada has consistently held that the values reflected in international human rights law, and specifically those in the *Convention*, are relevant to Canadian legal analysis, both generally and in family law cases.<sup>42</sup> It is "a well-established principle of statutory

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<sup>41</sup> See *The Silenced Citizens*, *supra* note 27 at 8–16.

<sup>42</sup> In a general context, see e.g. *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 92, [2009] 2 SCR 181; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 37, [2015] 3 SCR 909 [*Kanthasamy*]; *Canadian Foundation for Children*, *supra* note 19 at para 12, in which the Court concluded that the best interests of the child is not a principle of fundamental justice, but stated that it "is a legal principle that carries great power in many contexts"; *Winnipeg Child and Family Services v K LW*, 2000 SCC 48 at para 7, [2000] 2 SCR 519 [*Winnipeg Child and Family Services*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 69, 174 DLR (4th) 193 [*Baker*]. In the context of family law cases, see e.g. *I (AMR) v R (KE)*, 2011 ONCA 417 at para 82, 2 RFL (7th) 251 (child abduction); *GAGR v TDW*, 2013 BCSC 586, 31 RFL (7th) 363 and *NMK v RWF*, 2011 BCSC 1666 (both citing *BJG*

interpretation that legislation will be presumed to conform to international law,” which, of course, includes the *Convention*.<sup>43</sup> Canada’s *Charter* must also be presumed to provide protection at least as great as that afforded by similar protections in the *Convention* and other international human rights instruments. In this respect, as a treaty to which Canada is a signatory, it is binding.<sup>44</sup>

Two *Charter* rights relevant to legal representation in family law cases are those found in sections 7 and 15. Section 7 protects children’s security of the person rights to both physical and psychological integrity, and the right not be deprived thereof except in accordance with the principles of fundamental justice. We suggest that legal representation is one such principle given the interests at stake for children in family law matters. A child also has the section 15 right not to be discriminated against based on, among other factors, age.

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*v DLG*, 2010 YKSC 44, 89 RFL (6th) 103, (which is a decision of the first author).

<sup>43</sup> Courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. *R v Hape*, 2007 SCC 26 at paras 53–54, [2007] 2 SCR 292 [*Hape*]. See also *Canadian Foundation for Children*, *supra* note 19, and *Ordon Estate v Grail*, [1998] 3 SCR 437, 166 DLR (4th) 193.

<sup>44</sup> *Divito*, *supra* note 18 at para 25. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416; *Health Services and Support–Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 70, [2007] 2 SCR 391; and *Hape*, *supra* note 43 at para 55. For a list comparing *Charter* sections with relevant sections in the *Convention*, see “The Charter and Constitutional Protection for Children in Canada” (content expert Cheryl Milne) in *Child Rights Toolkit*, *supra* note 3.

### **Contextualized and Impartial Decision-Making**

An essential aspect of Canada's implementation of human rights, including those of children, is the requirement to engage in contextual legal analysis;<sup>45</sup> it is the way in which human rights are incorporated into legal analysis, based on substantive equality principles.<sup>46</sup> It requires an understanding of the lived realities of children, including those identified in Part II. Canada's then Chief Justice, Beverley McLachlin, in speaking about judging in a diverse society,<sup>47</sup> explained the importance of contextual analysis, stating that "the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose."<sup>48</sup> She added that "[t]o judge justly, [judges] must appreciate the human beings and situations before them, and appreciate the *lived*

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<sup>45</sup> In *Kanthisamy*, *supra* note 42 at para 35, the Supreme Court of Canada discussed the importance of contextual analysis, stating that, the "best interests principle is 'highly contextual' because of the 'multitude of factors that may impinge on the child's best interest'". See also *Winnipeg Child and Family Services*, *supra* note 42; *Baker*, *supra* note 42.

<sup>46</sup> For further discussion see, "The Legal Framework: Substantive Equality as a Fundamental Constitutional Value", in *Judges as Equality Guardians*, *supra* note 37 at 22.

<sup>47</sup> Chief Justice Beverley McLachlin, "Judging: the Challenges of Diversity, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada" (delivered at the Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, 7 June 2012).

<sup>48</sup> *Ibid* at 13.

*reality* of the men, women and *children* who will be affected by their decisions.”<sup>49</sup>

Contextual analysis ensures that, in family law cases, the *Convention*, the *Charter* and other human rights instruments inform proposed family laws and policies impacting on children; inform the common law as it develops, including principles of evidence that are relevant in family proceedings; apply to the way in which existing laws that impact children are interpreted and applied; and apply to practices and procedures that relate to just processes and outcomes for children. The requirement to analyze laws, policies, procedures and practices arises at all stages of the court process; legal representation for children is required to ensure that their human rights are both implemented and enhanced in this way.

Children’s human rights are also linked to the legal requirement that decision makers must be impartial. Chief Justice McLachlin has spoken about what she calls “informed impartiality.”<sup>50</sup> An impartial decision maker must have an understanding of human rights laws and how they relate to the lived reality of the child whose rights are at issue. Informed impartiality includes an understanding that there are subjective elements to judging, recognizing that judges may have biases inconsistent with those human rights: “like everyone else, judges possess preferences, convictions and—yes—prejudices.”<sup>51</sup>

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<sup>49</sup> *Ibid* at 14 [emphasis added].

<sup>50</sup> *Ibid* at 6.

<sup>51</sup> *Ibid* at 7.

This recognition is particularly important in family law cases in which children's participation is being considered. All legal professionals, including judicial decision makers, have to reflect on whether they have, in fact, embraced the child rights-based approach required by the *Convention*, or whether, in reality, they are consciously or unconsciously using a paternalistic, needs-based approach in making best interests decisions generally or in making decisions about the need for legal representation. A child's legal representative can help ensure, throughout family law proceedings, that decisions are made with informed impartiality.

### **ADDRESSING SUBSTANTIVE EQUALITY THROUGH THE *CONVENTION* IN FAMILY LAW CASES**

In this section, we consider how the *Convention* addresses the lived reality of children discussed in Part II. The Committee has identified four of the *Convention*'s articles as substantive, foundational principles: non-discrimination; best interests as a primary consideration; the inherent right to life and development; and participatory rights.<sup>52</sup>

#### **Non-Discrimination**

Article 2 requires Canada to respect and ensure the rights in the *Convention* "to each child within their jurisdiction

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<sup>52</sup> UN Committee on the Rights of the Child, *General Comment No 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)*, 34th Sess, UN Doc CRC/GC/2003/5 (2003) at para 12 [General Comment 5].



without discrimination of any kind.” It follows, we suggest, that all rights, including participation rights, apply to all children. If an adult, whether a parent, lawyer, judge, or other professional, is of the view that children, or particular children, such as those in family violence and alienation cases, should not be heard, that judgment cannot override the obligation, found in the *Convention*, to respect the rights of *all* children to participate.

### **Best Interests of the Child as a Primary Consideration**

The *Convention*’s child rights approach emphasizes the primacy of children’s best interests; they should be accorded special importance because of the challenges children face in implementing their rights. Article 3(1) of the *Convention* requires that the best interests of the child be “a primary consideration . . . in all actions concerning children” by institutions and decision makers, including courts of law. “Courts of law” encompasses all relevant judicial processes including conciliation, mediation and arbitration processes.<sup>53</sup>

As we noted in Part I, the Committee specifically states that making children’s best interests a primary consideration means that they may not be considered on the same level as all other considerations.<sup>54</sup> It points to children’s dependency, maturity, legal status, and often voicelessness, as justification for this conclusion.<sup>55</sup> Children are less able than adults to make a strong case for their own interests, and those involved in decisions

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<sup>53</sup> General Comment 14, *supra* note 16 at para 27.

<sup>54</sup> *Ibid* at para 37.

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

affecting them must be explicitly aware of their rights.<sup>56</sup> If the interests of children are not highlighted, there is a real danger that they may be overlooked or subjugated to adult interests or paternalistic considerations.

### **Inherent Right to Life and Development**

Article 6 provides that every child has the inherent right to life; States Parties “shall ensure to the maximum extent possible the survival and development of the child.” This article espouses the modern view of child development, as discussed in Part II, which sees children as persons in their own right, with their own perspectives about what is in their best interests.<sup>57</sup>

### **Children’s Participation Rights**

The concerns identified in Part II emanate from the participation rights enshrined in Article 12 of the *Convention*. Article 12(1) contains *two* rights: the right to express views, *and* to have them taken seriously and given due weight in accordance with the child’s age and maturity: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

The Committee confirms that in cases of separation and divorce, “the children of the relationship are

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<sup>56</sup> *Ibid.*

<sup>57</sup> “Life, Survival and Development” in Child Rights Toolkit, *supra* note 3.

unequivocally affected by decisions of the courts.”<sup>58</sup> It encourages ongoing participation, which includes information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.<sup>59</sup> The Committee indicates that States should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.<sup>60</sup> Legal representation in family law processes is a significant way to give meaning to this right.

### **Capable of Forming Their Own Views**

The threshold for a child being given the opportunity to express their views should, it has been argued, be a low one,<sup>61</sup> giving each child a chance to have a say in a way that is consistent with the new paradigm of child development. Capacity refers simply to cognitive capacity to form views and communicate them.<sup>62</sup>

The Committee supports a low threshold, saying that the requirement should be seen not as a limitation, but rather an obligation to assess capacity to form an autonomous opinion to the greatest extent possible:

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<sup>58</sup> General Comment 12, *supra* note 15 at para 51.

<sup>59</sup> *Ibid* at para 3.

<sup>60</sup> *Ibid* at para 11.

<sup>61</sup> For further discussion on capacity see “Competence, Capacity and Consent” in Child Rights Toolkit, *supra* note 3 (content expert Dale Hensley QC).

<sup>62</sup> *BJG v DLG*, *supra* note 42 at para 27.

Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences<sup>63</sup>

There is, therefore, no presumption of incapacity. Article 12 imposes no age limits and the Committee discourages the introduction of limits that would restrict the child's rights to be heard.<sup>64</sup>

### **Given Due Weight in Accordance with Age and Maturity**

By requiring that due weight be given to a child's views in accordance with age and maturity, Article 12 makes clear that age alone cannot determine the significance of these views. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view.<sup>65</sup> "Maturity" refers to the ability to understand and assess the implications of a particular matter. The greater the impact of the outcome on the life of

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<sup>63</sup> General Comment 12, *supra* note 15 at para 21.

<sup>64</sup> *Ibid* at paras 20–21.

<sup>65</sup> *Ibid* at para 29.

the child, the more relevant the appropriate assessment of the maturity of that child.<sup>66</sup>

Moreover, if the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child *as a significant factor in the settlement of the issue*.<sup>67</sup>

Highly relevant to family law cases is the fact that Article 12 is viewed as directly—“inextricably”—linked to Article 3(1), which makes a child’s best interests a primary consideration in all actions. Again, this is consistent with the modern view of childhood. The Committee states that:

Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.<sup>68</sup>

### **Role of Parents in Parenting Decisions**

Article 5 requires that Canada respect the responsibilities, rights, and duties of parents and guardians to provide, in a manner consistent with the child’s evolving capacities, appropriate guidance and direction “in the exercise by the child of the rights recognized by the Convention.” This is *not* a general deferral to the decision-making role of parents

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<sup>66</sup> *Ibid* at para 30.

<sup>67</sup> *Ibid* at para 44.

<sup>68</sup> General Comment 14, *supra* note 16 at para 43 [citations omitted].

but rather a statement of the obligations of parents to help children implement their rights under the *Convention*, including rights to participate in matters affecting them and to be free from harm.

### **FULLY PARTICIPATING IN FAMILY COURT PROCESSES: CORE COMPONENTS**

In 2010, in *BJG v DLG*, the Yukon Supreme Court discussed how children should participate in family law court proceedings and the role of legal representation.<sup>69</sup> In that case, the Court stated that more than lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of decision making and to their short- and long-term best interests, children must be informed of their legal right to be heard; given an opportunity to fully participate in the process; have a say in how they participate; have their views considered in a substantive way; and be informed of the results and how their views have been taken into account.

The Court added that separate legal representation for children is an effective way of ensuring that their participation is meaningful.<sup>70</sup> We consider what "full participation" with legal representation entails in our

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<sup>69</sup> *Supra* note 42 (which is, at noted there, a decision of the first author). The Committee, in its most recent (December 2012) Concluding Observations with respect to Canada, *supra* note 25, commented favourably on this decision, which it said ruled that all children have the right to be heard in custody cases.

<sup>70</sup> *BJG v DLG*, *supra* note 42 at para 48.

discussion below of six core components of a child rights approach.<sup>71</sup>

### **i. Gathering of Information/Evidence Relevant to Just Outcomes**

Whenever the child's best interests are being assessed, relevant information, based on substantive equality principles, must inform the decision. The Committee states that facts and information relevant to a particular case must be obtained by well-trained professionals to establish the elements necessary for the best-interests assessment.<sup>72</sup> A child rights approach includes obtaining evidence that supports the child's views. Critical to the implementation of this safeguard is the need to assess potential evidence for admissibility and reliability.

### **ii. Obtaining the Child's Views**

The Committee states that "communicating with children to facilitate meaningful child participation and identify their best interests" is one of the essential procedural safeguards. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.<sup>73</sup>

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<sup>71</sup> For additional steps lawyers for children can take, see "Developing a Child Rights Practice", in Child Rights Toolkit, *supra* note 3 (content expert Suzanne Williams).

<sup>72</sup> General Comment 14, *supra* note 16 at para 92.

<sup>73</sup> *Ibid* at para 89. See also General Comment 12, *supra* note 15 at para 13.

Participation, facilitated by legal representation, includes recognition that: participation is a process, not a momentary act;<sup>74</sup> the child can choose to participate in a proceeding either directly or through a representative;<sup>75</sup> a child has the right to be informed about all aspects of the process;<sup>76</sup> and a child should not be interviewed more often than necessary, especially when harmful events are being explored, as the “hearing of a child is a difficult process that can have a traumatic impact on the child”.<sup>77</sup>

The Committee recommends a five-step implementation process: (i) preparation, including being informed of the right to be heard and the process to be followed at the hearing; (ii) the hearing, the context of which must be enabling and encouraging; (iii) assessment of capacity; (iv) being informed about the weight given to the views of the child; and (v) complaints, remedies, and redress when their right to be heard and to have their views given due weight is violated, including access to an appeals process in the context of judicial proceedings.<sup>78</sup>

The Committee also suggests nine basic requirements for the implementation of the right to be heard to avoid tokenism. Participation processes must be: (i) transparent and informative—children must be provided with full, accessible information about their participation rights; (ii) voluntary; (iii) respectful; (iv) relevant to

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<sup>74</sup> General Comment 12, *supra* note 16 at para 13.

<sup>75</sup> *Ibid* at para 35.

<sup>76</sup> *Ibid* at para 25.

<sup>77</sup> *Ibid* at para 24.

<sup>78</sup> *Ibid* at paras 40–47.



children's lives; (v) child-friendly; (vi) inclusive; (vii) supported by appropriately trained adults; (viii) safe and sensitive to risk—children must be aware of their right to be protected from harm and where to get help, if needed; and (ix) accountable—a commitment to follow-up and evaluation is essential.<sup>79</sup>

### **iii. Determining the Need for and Weight to Be Attached to Expert Assessments**

The use of expert parenting assessments is not uncommon in family court cases. Children's rights can be profoundly impacted by such assessments about their best interests, both positively and negatively. Two significant issues arise, which require a lawyer's expertise: the determination of whether such a report is needed at all; and a consideration of the reliability of the report (and its admissibility if there is a trial).

With respect to the first issue, such reports can be time-consuming, costly, and may exacerbate an already conflicted situation. Questions may arise such as: What is the specific purpose of the report? What type of expertise is required to achieve that purpose? Does any specific expert have the necessary qualifications? How will the report actually be prepared in ways that are just for all parties, particularly the child? As the Committee states, having "qualified experts" is a necessary procedural safeguard.

With respect to the second issue, the weight to be attached to the report must be considered. It is essential that

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<sup>79</sup> *Ibid* at para 134.

the qualifications of the expert, the methodology used, and the validity of the conclusions drawn be assessed, through cross-examination, the calling of expert evidence when appropriate, and legal argument.

#### **iv. Ensuring Timely Processes**

The timeliness safeguard is particularly important in family law cases. The Committee explains the negative impact of delays:

The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.<sup>80</sup>

Lawyers for children are well-placed to ensure that decisions are made in the shortest time possible by making effective use of tools such as case management, trial management, and court rules aimed at preventing frivolous or vexatious court applications and unreasonable delay.

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<sup>80</sup> General Comment 14, *supra* note 16 at para 93. This was echoed by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v CM*, [1994] 2 SCR 165 at para 44, 113 DLR (4th) 321.

**v. Making the Overall Best Interests Decision(s)**

Judges have complex decisions to make involving the weighing of various rights and interests against the backdrop of the substantive and interpretative principles supported by the *Charter* and the *Convention*. Children's views may not be determinative; however, as we have noted, they must not only be heard, but taken seriously and given due weight in accordance with the child's age and maturity. Lawyers for parents/guardians have the opportunity to make legal submissions at all stages of family law cases. Children should not be denied this aspect of fundamental justice.

Judges must make findings of fact, often involving assessments of credibility—one of the most challenging aspects of decision making. As previously stated, judging with informed impartiality requires constant checking of preferences and biases based on personal experience. This is particularly true in cases alleging family violence and alienation. Reliance on myths and stereotypes about women and children and their credibility must be carefully guarded against.<sup>81</sup> Lawyers have an important role to play in ensuring, through their advocacy, that the ultimate decision is based on informed impartiality. Judges must, of course, also determine the relevant legal principles—which include substantive equality principles—and apply them to the facts. Again, lawyers have a significant role to play in ensuring that courts consider all relevant legal issues.

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<sup>81</sup> See “Myths about Women’s Credibility” in *Judges as Equality Guardians*, *supra* note 37 at 34.

Judges must employ appropriate “legal reasoning” and any decision concerning a child must be “motivated, justified and explained.”<sup>82</sup> That motivation should state explicitly all the factual circumstances regarding the child; what elements have been found relevant in the best interests assessment; the content of the elements in the individual case; and how they have been weighted to determine the child’s best interests. If the decision differs from the child’s views, the reasons for that divergence should be clearly stated, showing how the child’s best interests were a primary consideration and why other considerations outweighed the child’s views.<sup>83</sup>

#### **vi. Review of the Correctness of the Decision**

A key safeguard identified by the Committee is a mechanism to review or revise decisions. This procedural legal safeguard is particularly important in family law cases because of the significant impact decisions have on children’s lives. An aspect of legal representation is not only to explain the decision to the child, but also to provide an evaluation of its legal correctness, and the potential of an appeal, if necessary.

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<sup>82</sup> General Comment 14, *supra* note 16 at para 97.

<sup>83</sup> *Ibid.*

#### **PART IV. NATURE OF CHILDREN'S LEGAL REPRESENTATION: PROVIDING AN INFORMED CHILD'S PERSPECTIVE**

The issue of the nature of legal representation has not been without controversy.<sup>84</sup> The three most common models are: friend of the court (*amicus curiae*); best interests or litigation guardian; and the traditional role of lawyer as advocate (child advocate). Of these, only a child advocate provides the child with the opportunity to meaningfully and effectively participate in the process by: confidentially<sup>85</sup> obtaining information and providing advice aimed at allowing the child to make informed choices; ensuring that the court has evidence and legal arguments relevant to the child's position; and providing the safeguards required to maximize the possibility of an outcome that is fair and just, including access to appeal processes. The child advocate role is, we suggest, most consistent with the child rights approach found in the *Convention*.

#### **INADEQUACY OF THE FRIEND OF THE COURT AND BEST INTERESTS / LITIGATION GUARDIAN MODELS**

An *amicus curiae* typically involves a lawyer who meets with the child and ensures that the court is provided with the child's views. An *amicus*, however, does not advocate

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<sup>84</sup> See Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian?" (2013) 51:4 Fam Ct Rev 681.

<sup>85</sup> Under codes of professional conduct, breach of privilege *may* be possible where risk of death or "serious harm" is imminent.

for the child's interests from the perspective of the child. There is no confidentiality attached to the child's communications with the lawyer and the lawyer does not provide advice to the child. Use of an *amicus* inadequately protects the legal rights of both adults and children in court processes.

A best interests or litigation guardian stands in the place of the child, making recommendations based on what the lawyer considers is in the best interests of the child. This role undermines the child's participation rights as envisioned by the *Convention*, replacing the child's voice with that of the guardian. It also arguably inappropriately usurps the role of the judge, since the guardian makes recommendations on the ultimate issue the judge must decide—what is in the best interests of the child.

### **MORE THAN JUST VIEWS—PROFESSIONAL RESPONSIBILITIES OF A CHILD ADVOCATE**

The role of a child advocate most closely aligns with the rights-based approach espoused by the *Convention*. This form of legal representation can best facilitate the meaningful and effective implementation of children's participation rights. The role of the child advocate goes beyond simply advising the court of the views of the child. As with adult clients, the lawyer, to be competent, has professional responsibilities to ensure that the choices the child makes are informed by appropriate information and advice. How information is conveyed to the child must take into account the child's particular circumstances, including his or her age, level of maturity, cognitive abilities and social context. A lawyer must also make a preliminary

assessment of capacity, which, using a rights-based approach, is, as we have said, a low threshold.

The *Model Code of Professional Conduct* confirms that a lawyer must, “as far as reasonably possible, maintain a normal lawyer and client relationship” when a client’s ability to make decisions is “impaired because of minority or mental disability”.<sup>86</sup> This includes having and applying relevant knowledge, skills and attributes, which encompasses “investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action.”<sup>87</sup>

The *Model Code* further states that a lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.<sup>88</sup> In the experience of the second author, the involvement of a child’s lawyer can assist in facilitating resolutions through settlement discussions with parents; the parents have the benefit of the informed views of the child from an independent source.

Providing legal representation to the child-client may have the added benefit of assisting children, even in cases where there are allegations of alienation, in expressing their views freely with the benefit of the advice

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<sup>86</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 3.2-9.

<sup>87</sup> *Ibid* at 3.1-1.

<sup>88</sup> *Ibid* at 3.2-4.

of an independent professional who is able to provide assurances of confidentiality. However, once the child has the advice and gives informed instructions, the lawyer has the obligation to implement the instructions effectively.

### **SUPPORT FOR THE CHILD ADVOCATE MODEL**

Support for the child advocate model is found in Canadian case law, and in research considering children's perspectives on participation.

#### **Judicial Support**

In *Re W*, an early and often-cited case which provides support for the child advocate model, Justice Rosalie Abella, then a judge of the Ontario Provincial Court, describes the equality issues at play when children have legal representation:

Lawyers for children can therefore be expected to do no more and no less than any other party's lawyer in the adversarial process. . . . So long as the forum is the courtroom, the child's lawyer should represent his or her young client in a way which reflects equal participation with the other parties in this forum.<sup>89</sup>

This ability of child's counsel to participate—to file or call evidence and make submissions on all the evidence—was confirmed by the Ontario Court of Appeal

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<sup>89</sup> (1979), 27 OR (2d) 314 at para 6, 13 RFL (2d) 381.



in *Strobridge v. Strobridge*.<sup>90</sup> Both cases were cited with approval by the Quebec Court of Appeal in *F(M.) c L (J)*,<sup>91</sup> which compared a child advocate to a best interests advocate. The comments of Justice Rothman demonstrate how the role of a child advocate best facilitates the child's right to be heard, even in cases in which alienation may be an issue:

In my respectful view, if a child is sufficiently mature to express himself on a vital question such as custody or access by his parents, then he has the right to be heard on that question and the right to have his wishes fairly put in evidence before the court.<sup>92</sup>

### **Research on the Perspectives of Children**

Birnbaum and Bala have also made an important contribution to the discussion about children's legal representation by providing the perspectives of young people.<sup>93</sup> They spoke to young adults about their experiences with legal representation in family law cases when they were children. The thrust of their work suggests that an advocacy role approach "will leave children more

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<sup>90</sup> (1994], 18 OR (3d) 753 at para 36, 4 RFL (4th) 169. See also *CR v Children's Aid Society of Hamilton* (2004), 4 RFL (6th) 98, [2004] OJ No 1251 (Ont Sup Ct J); *LC v Catholic Children's Aid Society of Metropolitan Toronto* (1992), 99 DLR (4th) 77 at paras 33, 35, [1993] OJ No 1823 (Ont Ct J (Gen Div)).

<sup>91</sup> 2002 CanLII 63106 (Qc CA).

<sup>92</sup> *Ibid* at para 35.

<sup>93</sup> The Child's Perspective on Legal Representation, *supra* note 30 at 25.

satisfied with the process.”<sup>94</sup> They summarize their findings this way:

The voices of these youths seem clear about what they want from their lawyers—to listen, provide information, and most significantly, to put forward their views in court. The participants wanted their lawyers to investigate their cases more fully, gather all the relevant information about their circumstances, and advocate for their views.<sup>95</sup>

They conclude that “for older children, lawyers should generally adopt a traditional advocacy approach, guided by the child’s express wishes and not their ‘interests’” and that the latter “‘interest-based’ approach” usurps the voice of the child as well as the role of the judge.<sup>96</sup> They raise important questions about the qualifications of lawyers for children, including interdisciplinary training as well as greater access to mental health professionals to assist lawyers in understanding their child clients and ensuring that all necessary information is before the court.<sup>97</sup>

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<sup>94</sup> *Ibid* at 22.

<sup>95</sup> *Ibid* at 60.

<sup>96</sup> *Ibid* at 22.

<sup>97</sup> *Ibid* at 67.

## **FAMILY RELATIONS AT RISK?**

Lord Wilson of the United Kingdom Supreme Court in *Re LC.*, in the context of an application to add a child as a party in an international child abduction case, opined that the “intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects their interests.”<sup>98</sup> We suggest, respectfully, that this concern fails to consider that lawyers, as officers of the court, have professional obligations to act with courtesy and respect, while, at the same time, firmly advancing their client’s position. As Justice Abella stated in *Re W*, the lawyer is an officer of the court and, as such, is obliged to represent the child’s interests in accordance with well-defined standards of professional integrity.<sup>99</sup> The lawyer may also serve as a buffer between the parent(s) and the child and can assist in brokering settlement by re-directing the focus of the parties to the interests of the child and the impact of the conflict on them. In addition, courts have the ability in various ways to control their own processes.

One must also be cautious about equating the negative effects of parental conflict with children’s rights to have their voices heard and be adequately represented in family law proceedings. The causes of difficulties in family relationships generally go much deeper and should not be a justification to deny to children meaningful participation

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<sup>98</sup> [2014] UKSC 1 at para 48, [2014] AC 1038.

<sup>99</sup> *Supra* note 89 at para 5.

and just outcomes. The overarching goal is to reach a fair, just, equality-based decision about the best interests of children within the child rights framework we have described. Legal representation, when cases are within the court process, is an important aspect of achieving that goal.

**PART V. INDEPENDENT LEGAL  
REPRESENTATION:  
PREVENTING AN UNACCEPTABLE RISK OF  
ERROR**

In *A Roadmap for Change*, Canada's National Action Committee on Access to Civil and Family Justice reinforced the point that the primary goal in family law reform is achieving fair and just outcomes.<sup>100</sup> We suggest an unacceptable risk of error is created if room is not made in family court processes for children's active and equal participation with independent legal representation supported by government. The interests at stake are of the highest order: children's day-to-day realities and relationships with parents can be altered in substantial ways, or even severed, by family court orders. Making the "right" decisions for children can significantly benefit them; the opposite is also true.

Some argue that the interests in criminal cases are of a higher order, favouring the use of limited resources to provide legal representation in those cases over family law matters. This approach minimizes the protection and advancement of children's rights in an area of law with the

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<sup>100</sup> *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 9.

potential to impact on their daily lived realities in ways that may negatively impact on their physical and psychological integrity. Prioritizing legal representation for children in family law proceedings may not only benefit individual children, but also send a strong public message that our society places a very high value on the human rights of *all* citizens.

For these reasons, the *Convention* imposes clear obligations, as opposed to relying on charitable inclinations, on Canadian governments to implement children's rights under the *Convention*; doing so includes providing appropriate legal representation.<sup>101</sup> We have emphasized government responsibility to assess all government actions, including budget decisions, to make sure that the *Convention's* child rights approach is implemented. Priority must be given to the safety, security, and well-being of children in all respects.

Some Canadian laws and policies on legal representation for children are not consistent with a child rights approach, and therefore not in the best interests of children.<sup>102</sup> For example, section 203 of British Columbia's *Family Law Act*<sup>103</sup> significantly limits the ability of courts to appoint lawyers for children as required

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<sup>101</sup> General Comment 5, *supra* note 52 at para 11. General Comment 5, para 24 also emphasizes the importance of State Parties like Canada paying attention to children's need to access remedies, including access "to courts with necessary *legal* and other assistance". (emphasis added)

<sup>102</sup> For a helpful summary of Canadian legislation and case law, see Legal Representation for Children, *supra* note 3 at 26–32, 39–44.

<sup>103</sup> SBC 2011, c 25.

by the *Convention*.<sup>104</sup> The judge can do so only if satisfied that (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child; and (b) it is necessary to protect the best interests of the child.

Provisions like this marginalize children's rights and interests; significantly undervalue the harm that can be caused to them; and inappropriately delegate the judge's decision-making responsibilities to parents who have been unable to agree. Even if the judge decides to appoint a lawyer, the court is encouraged to ("may") allocate the costs among the parties. This expectation is unrealistic for most parents before the courts and inappropriately sidesteps governmental responsibilities to provide legal representation to children.

We also suggest that limiting legal representation in these circumstances violates children's rights under section 7 of the *Charter* as informed by the *Convention*. Children have rights to security of the person, which may be engaged in family law disputes. Those rights cannot be deprived except in accordance with the principles of fundamental justice, which may include the requirement for legal representation. The Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* identified the section 7 interests at stake

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<sup>104</sup> In *JESD v YEP*, 2017 BCSC 495 and 2017 BCSC 666 the court did not appoint a lawyer for a child who was almost 16 and wanted one. In this case, and other British Columbia cases cited in it, there was significant conflict of the kind we have described, conflict that may well have caused and will continue to cause harm. Yet, the courts found, applying section 203, that a lawyer for the child should not be appointed.

for parents *and children* and the risk of error in a child protection case caused by a lack of representation:

Without the benefit of counsel, the appellant [mother] would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's *and her children's* s. 7 right to security of the person.<sup>105</sup>

There is no principled reason why the same analysis would not apply to the need for legal representation for the child since it is the child, more than anyone else, who is most directly and significantly affected by judicial decisions. In *I. (A.M.R.) v. R. (K.E.)*, the Ontario Court of Appeal found a breach of the child's section 7 rights in a family law case involving a return application in a child abduction matter in which the child was a Convention refugee. The Court concluded that procedural safeguards, including legal representation, were necessary and found that an "order under the Hague Convention has a profound and often searing impact on the affected child."<sup>106</sup> Court orders in contentious family law cases can similarly have profound and searing effects on children.

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<sup>105</sup> [1999] 3 SCR 46 at para 81, 50 RFL (4th) 63 [emphasis added]. See, more recently, *JT v Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55 at para 8, 371 Nfld & PEIR 84, where the Court emphasized that the *child's right* to security of the person is engaged since the child's psychological integrity and well-being may be seriously affected by interference with the parent-child relationship.

<sup>106</sup> *Supra* note 42 at para 120.

Having recently celebrated the 25th anniversary of the ratification of the *Convention* and the 35th anniversary of the enactment of the *Charter*, Canada's federal, provincial and territorial governments have an opportunity to revisit their approaches to the implementation of the *Convention*. The provision of state-funded legal representation in family law matters in all jurisdictions would be a significant way of facilitating effective and independent implementation of the rights of children. Professor Mosoff would have agreed that children deserve no less.



