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CHILDREN'S PLACE AND VOICE IN QUEBEC'S CHILD PROTECTION PROCEEDINGS

Mona Paré* & Émilie De Bellefeuille** ***

This article explores children's participation and their right to be heard in Quebec's child protection proceedings. While children's participation rights are well protected in international and domestic legal instruments, they have received little attention in relation to child protection. This article aims to fill a gap in the legal literature by reporting on the results of an empirical research project examining children's participation in judicial child protection procedures in Quebec. The participation of judges, social workers, and children in this research sheds light on practice that is clearly inspired by the Quebec's rights-advancing *Youth Protection Act (YPA)* but that remains confronted with uncertainties and inconsistencies. While children are recognized as subjects of rights, many will not have the chance to express their views freely and to be

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heard by the decision-maker. A review of practice leads to a critical analysis of child testimony and legal representation as ways to hear children. The attitudes of the professionals in relation to these practices and gaps in the legislation lead us to suggest various changes that could help make practice more respectful of children's rights.

I. INTRODUCTION

Since the adoption of the United Nations *Convention on the Rights of the Child (CRC)* in 1989,¹ there has been growing interest in children's right to participate in decision-making processes. This interest can be observed in legal developments and academic research in Canada and internationally. Indeed, the *CRC*, ratified by Canada in 1991, recognizes children as subjects of rights and guarantees the right for children to have their opinions heard on all issues that concern them. The Committee on the Rights of the Child, the monitoring body of the *CRC*, has explained that "participation" entails being able to voice opinions and being heard.² Thus, calls to hear children have led to numerous studies on children's place in legal proceedings where cases affecting them are decided. These writings, describing in particular how children should be heard in family law procedures in Canadian provinces and internationally, demonstrate generally the benefits of listening to children.³ Benefits of

¹ 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, accession by Canada 13 December 1991) [*CRC*].

² See Committee on the Rights of the Child, *General Comment No 12 (2009): The right of the child to be heard*, CRCOR, 51st Sess, Supp No 12, UN Doc CRC/C/GC/12 (2009) 1 at 5.

³ See e.g., Nicholas Bala, Rachel Birnbaum & Francine Cyr, "Judicial Interviews of Children in Canada's Family Courts" in Tali Gal and Benedetta Duramy, eds, *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015) 135; Dominique Goubau, "L'enfant devant les tribunaux en matières familiales: Un mal parfois nécessaire" in Benoît Moore, Cécile Bideau-Cayre & Violaine Lemay, eds, *La représentation de l'enfant devant les tribunaux* (Montréal: Les Éditions Thémis, 2009) 109; Catherine J Ross, "From Vulnerability to Voice: Appointing Counsel for Children

children’s participation range from feelings of being heard and included to improved safety and well-being.⁴

CONTEXT AND RATIONALE FOR THE STUDY

While much research has focused on child custody and access cases,⁵ very little has been written on hearing children in judicial child protection proceedings in Canada.⁶ In Quebec particularly, legal literature on child

in Civil Litigation” (1996) 64:4 Fordham L Rev 1571; E Kay M Tisdall, “Subjects With Agency? Children’s Participation in Family Law Proceedings” (2016) 38:4 J Soc Wel & Fam L 362.

- ⁴ See Svein Vis et al, “Participation and Health - A Research Review of Child Participation in Planning and Decision-Making” (2011) 16:3 Child & Fam Soc Work 325.
- ⁵ We note the new, more positive wording that has been introduced in the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2, with amendments that came into force in 2021: “parenting orders” and “parenting time” to replace “custody” and “access”.
- ⁶ More studies exist in other countries (especially England, Sweden, Norway, the United States, and Australia), but most do not concern judicial proceedings or are written by experts in other disciplines. See e.g., Ebenezer Cudjoe, Alhassan Abdullah & Aniceta Aranzanso Chua, “Children’s Participation in Child Protection Practice in Ghana: Practitioners’ Recommendations for Practice” (2019) 46:4 J Soc Serv Res 462; Ganna van Bijleveld, Christine Dedding & Joske Bunders-Aelen, “Children’s and Young People’s Participation Within Child Welfare and Child Protection Services: A State-of-the-Art Review” (2015) 20:2 Child & Fam Soc Work 129; Svein Vis & Sturla Fossum, “Representation of Children’s Views in Court Hearings About Custody and Parental Visitations — A Comparison Between What Children Wanted and What the Courts Ruled” (2013) 35:12 Child & Youth Serv Rev 2101; Katrin Križ & Marit Skivenes, “Child Welfare Workers’ Perceptions of Children’s Participation: A Comparative Study of England, Norway and the USA (California)” (2015) 22:2 Child & Fam Soc Work 11.

protection is scarce and does not focus on children's participation.⁷ Yet, this is an important area of research because, while children's place in these procedures seems well established in Quebec law, practice can be problematic.

Quebec's *Youth Protection Act (YPA)*,⁸ which provides for protection measures for children whose security or development is in danger, gives an important role to children and their families in decision-making processes. Most processes relate to voluntary measures through "social intervention."⁹ These involve the intervention of the province through the Director of Youth Protection (DYP), who is assisted by caseworkers.¹⁰ Other processes are judicial, when a case is referred to the tribunal following the DYP's intervention.¹¹ While the law

⁷ Legal literature discusses various aspects of child protection: see e.g., Laurence Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse : une perspective relationnelle" (2013) 43:1 RGD 49; Sophie Papillon, "Le jugement en matière de lésion de droits de la Chambre de la jeunesse : où en sommes-nous ?" (2015) 56:2 C de D 151; Emmanuelle Bernheim & Marilyn Coupienne, "Faire valoir ses droits à la Chambre de la jeunesse: état des lieux des barrières structurelles à l'accès à la justice des familles" (2019) 32:2 Can J Fam L 237. Only a 1996 article is directly relevant to children's participation: Anne Fournier, "Le droit de l'enfant à la représentation par un avocat en matière de protection de la jeunesse" (1996) 37:4 C de D 971.

⁸ CQLR 2020, c P-34.1 [*YPA*].

⁹ See e.g., agreements on short-term intervention (*ibid*, ss 51.1–51.8), and agreements on voluntary measures (*ibid*, ss 52–55).

¹⁰ There is a DYP responsible for enforcing the *YPA* who is appointed in each region of Quebec.

¹¹ "Tribunal" refers to the Youth Division of the Court of Quebec (*YPA*, *supra* note 8, s 1(g)). It is a specialized court that only hears child

favours voluntary measures, judicial procedures in child protection are very common.¹² It is thus essential to pay attention to children’s participation in these procedures and to examine the ways in which they are heard in practice. Research in this area is timely, as the Special Commission on the Rights of the Child and Youth Protection (Laurent Commission) was mandated in May 2019 to examine Quebec’s youth protection system following concerns about its adequacy.¹³ During its work, the Commission heard many concerns about the child protection system, including about children’s participation being inadequate. This finding is evident in the Commission’s final report, published in April 2021, as well as in the summaries and transcripts of its hearings.¹⁴

protection and juvenile justice cases. The terms “court” and “tribunal” will be used in this article interchangeably to refer to the Youth Division.

- ¹² Over 40% of child protection cases end up in court: Canada, Commission spéciale sur les droits des enfants et la protection de la jeunesse, *Instaurer une société bienveillante pour nos enfants et nos jeunes : Rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse* (Quebec: Gouvernement du Québec, April 2021) at 222, online (pdf): <www.csdepj.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport_final_3_mai_2021/2021_CSDEPJ_Rapport_version_finale_numerique.pdf> [CSDEPJ 2021].
- ¹³ The Laurent Commission is presided over by Régine Laurent. See the mandate of the Laurent Commission: “Une volonté de faire pour nos enfants” (21 May 2021), online: *Commission spéciale sur les droits des enfants et la protection de la jeunesse* <www.csdepj.gouv.qc.ca/home/?L=1>.
- ¹⁴ See *ibid* at 68 and Canada, Commission spéciale sur les droits des enfants et la protection de la jeunesse, *Une volonté de faire pour nos enfants — Plus de 2000 voix entendues : Faits saillants des 42 forums*

Our research thus falls within the broader reflection in progress on child protection in Quebec and in the context of the lack of publications on children's participation in judicial child protection proceedings. Many questions around the pertinence, merits, and modalities of children's participation in protection proceedings have not yet been examined.¹⁵ This article fills gaps in Canadian research by presenting the results of an exploratory research project involving Youth Division judges, caseworkers who work for the DYP, and children who have had an experience in court. We set out to find out the extent of children's participation in judicial child protection proceedings and to uncover the reasons behind this participation: when and how do children participate, and how is their participation viewed by both professionals and the children themselves?

RESEARCH QUESTIONS AND METHODOLOGY

Twelve judges participated in the research through interviews, 17 caseworkers participated by interview or

de la Commission (Quebec: Gouvernement du Québec, May 2020) at 6, [online](http://www.csdepj.gouv.qc.ca/fileadmin/Fichiers_clients/Forums/20200529_Fiche_synthese_forums.pdf) (pdf): <www.csdepj.gouv.qc.ca/fileadmin/Fichiers_clients/Forums/20200529_Fiche_synthese_forums.pdf> [CSDEPJ 2020].

¹⁵ The lack of analysis in the area of child protection proceedings has been recognized internationally: see e.g., Pernilla Leviner, "The Right to a Fair Trial from a Child's Perspective – Reflections from a Comparative Analysis of Two Child-Protection Systems" in Said Mahmoudi et al, eds, *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Leiden: Brill Academic Publishers, 2015) at 271; Stephanie Rap, Denise Verkroost & Mariëlle Bruning, "Children's Participation in Dutch Youth Care Practices: An Exploratory Study into the Opportunities for Child Participation in Youth Care from Professionals' Perspective" (2019) 25:1 *Child Care Prac* 37; Križ & Skivenes, *supra* note 6.

questionnaire, and 10 children aged between 12 and 17 years participated through interview or questionnaire. The choice between an interview or a questionnaire was presented to the participants. One child and five caseworkers chose the questionnaire. Interested judges were recruited with the help of the Associate Chief Justice of the Court of Quebec. Caseworkers were recruited through the integrated health and social services centres (CISSS) and university health and social services centres (CIUSSS), out of which the DYPs operate. Children were recruited with the help of caseworkers and lawyers. All those who expressed interest in the project were included. The empirical research took place in four regions of Quebec between September 13th, 2017 and June 15th, 2020. Interviews were transcribed during the research period. Ethics clearance was obtained from the University of Ottawa, the Court of Quebec, and the participating CISSS/CIUSSS. This latter authorization was required to interview caseworkers and children who are followed by the DYP.

The research participants answered closed and open-ended questions that were adapted to each group. All sets of questions included ones on the frequency of children's participation in court, the risks and benefits of their participation, measures taken to prepare and support children, as well as suggestions for improved practice. Judges were asked to distinguish between different stages of the procedure¹⁶ and different sources of risk to

¹⁶ These include applications related to immediate protective measures (*YPA*, *supra* note 8, s 47), provisional measures (*ibid*, s 76.1), protection (*ibid*, s 37), and review/extension of measures (*ibid*, s 95).

children's security¹⁷ when answering the question on the frequency of children's participation in hearings. The judges were also asked to describe a hearing during which a child is present, to talk about a child's dispensation from testimony, and to discuss the child's exclusion from the courtroom. Caseworkers were asked about children's reactions before, during, and after their testimony in court; factors that increase children's vulnerability; and the caseworkers' role in preparing children before a hearing. Children were asked to describe their day in court, their understanding of the procedure, and their understanding of the roles of the different actors. Children were also asked if they spoke to the judge, if they had the opportunity to say what they wanted during the hearing, and if they felt heard. The children got to describe the feelings they experienced in relation to the hearing and any difficulties encountered. All participants signed a consent form that guaranteed confidentiality and anonymity and stated participants' rights. Thus, when citing a specific participant in this article, they are identified by their group and order of participation (e.g., Judge 1). As the interviews took place in French, most of the participants' statements are paraphrased in English. Translations of participants' citations are by the authors. When an idea expressed by several participants is reported in this article, no reference is included. Instead, we refer to "participants," "interviewees," or to the specific category (e.g., children) in the text.

A first article discussing research results from this project focused on the notion of vulnerability: how professionals perceive this vulnerability in children and

¹⁷ The sources of risk are listed in *ibid*, s 38.

how this perception influences their views on children's participation.¹⁸ This article discusses findings in relation to three questions:

- (1) What are the connections and discrepancies between legislation and practice on child participation?
- (2) What explains children's participation, or lack thereof, in protection procedures?
- (3) How could practice be improved?

Our findings are based on the qualitative research, the law, and the related literature. The analysis of these results allowed us to uncover grey zones in the law, to identify effects of children's participation on the child and on the child protection procedure, and to distinguish between presence in court and hearing the child. This research significantly adds to literature by emphasizing children's voices alongside the views of professionals. The article follows the three research questions to present the research findings and discuss them. First, we examine children's place in judicial proceedings as provided for in the law and as described by the participants. Then, we analyze the risks and benefits of children's participation. Finally, we make recommendations to make practice more respectful of children's rights.

¹⁸ See Mona Paré & Diane Bé, "La participation des enfants aux procédures de protection de la jeunesse à travers le prisme de la vulnérabilité" (2020) 61:1 C de D 223.

II. THE PRINCIPLE OF PARTICIPATION IN LAW AND PRACTICE

In this section, we examine how legislation guarantees children's participation and their right to be heard in child protection proceedings. We also discuss the possible effects of these legal provisions on practice, based on the observations made by the research participants.

STRONG GUARANTEES IN LEGISLATION LEADING TO FAVOURABLE PRACTICE

Current legislation in Quebec gives children an important role in judicial procedures.¹⁹ Like the *CRC*'s article 12, which guarantees the child's right to express their opinion in all matters affecting them,²⁰ the *YPA* includes many provisions on the importance of hearing the child. In its chapter on general principles and children's rights, section 2.3(b) states that interventions must "favour the means that allow the child and the child's parents to take an active part in making decisions and choosing measures that concern them."²¹ Section 2.4(1–2, 4) recognizes the importance of treating the child and their parents "with courtesy, fairness and understanding, and in a manner that respects their dignity and autonomy," ensuring that all information "is presented in language appropriate to the child's age and understanding," and "giving the child and the child's parents an opportunity to present their points of view, express their concerns and be heard at the appropriate time

¹⁹ See the fuller legal analysis, contrasting the *YPA*'s participatory and protective dimensions, *ibid.*

²⁰ They/them are used as inclusive pronouns to lighten the text.

²¹ *YPA*, *supra* note 8, s 2.3(b).

during the intervention.”²² Furthermore, section 6 states that “persons and courts called upon to take decisions respecting a child [...] must give this child, his parents and every person wishing to intervene in the interest of the child an opportunity to be heard.” The *YPA* thus makes a stronger statement in favour of children’s participation than the *Civil Code of Québec (CCQ)*. Article 34 of the CCQ states: “The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.”²³ The conditions of age and power of discernment are absent from the *YPA*.²⁴

This general recognition of the child’s right to be heard and the importance of involving children in the decision-making processes is also evident in the *YPA*’s more specific provisions concerning judicial proceedings.²⁵ First, the child is a party to the proceedings.²⁶ Some of the child’s participation rights stem from this status. For example, the child can decide to apply to the tribunal in case they disagree with decisions made by the DYP²⁷ or to appeal a decision of the tribunal to the Superior Court.²⁸ Second, the child is entitled to their own

²² *YPA*, *supra* note 8, s 2.4(1–2, 4).

²³ Art 34 CCQ.

²⁴ Except regarding testimony: see *YPA*, *supra* note 8, s 85.1.

²⁵ Provisions on participation also occur in relation to voluntary measures, such as *ibid*, s 51, but our research focuses on judicial proceedings.

²⁶ See *ibid*, s 81.

²⁷ See *ibid*, s 74.2.

²⁸ See *ibid*, s 101.

lawyer. According to the law, “[w]here the tribunal establishes that the interests of the child are opposed to those of his parents, it must see that an advocate is specifically assigned to counsel and represent the child and that he does not act, at the same time, as counsel or attorney for the parents.”²⁹ The judge must also inform the child of their right to be represented by a lawyer.³⁰ The child’s legal representation is free of charge for the family.³¹ Finally, the law supports children’s testimony. All children are presumed to be capable to testify, with children under the age of 14 having to promise to tell the truth instead of being sworn in.³² The child’s competency can be disputed by another party, in which case the tribunal will have to be convinced that the child is not able to understand and answer the questions.³³ The law seems to treat child’s testimony as the norm.

Based on our findings, there is a good understanding of children’s rights among the professionals involved. In the interviews, many professionals referred to the child’s party status when talking about the child’s rights and reiterated the fact that the child is considered a subject of rights, who has the right to be heard and to be

²⁹ *Ibid*, s 80.

³⁰ See *ibid*, s 78.

³¹ See *Act respecting legal aid and the provision of certain other legal services*, RLRQ c A-14, ss 4.7(6); *Regulation respecting Legal aid*, CQLR c A-14, r 2, s 7(2). This is not the case for the parents’ legal representation, unless they qualify for legal aid; and because of the costs, many parents come to court without a lawyer’s assistance. This concern was expressed by many judges in this research.

³² See *YPA*, *supra* note 8, s 85.1.

³³ See *ibid*.

represented by a lawyer. Judges confirmed that no questions are asked about the opposition between the child's and the parents' interests to which the law refers. Also, child testimony, while not systematic, is not infrequent. A number of adaptations are made to facilitate the child's testimony. Judges explained how they greet the child, how everyone adapts their tone and language, and how the judge will ensure that counter-interrogation is not harsh. Caseworkers explained that everyone exercises sensitivity in the presence of a child. A child told us that they enjoyed this special attention, as everyone in the courtroom "made sure that I understood what they were talking about, why I was in court, and why it's better that this happens, instead of that."³⁴ Additionally, the law allows, exceptionally, for children to testify outside the presence of the other parties.³⁵ This does not seem to be exceptional practice, as it can be easier for a child to express themselves while their parents and caseworker are outside the room. Judges told us that in these cases, the child must be informed of the fact that the other parties will be made aware of their testimony. In fact, the other parties' lawyers stay in the courtroom to be able to represent and inform their clients. As well, some courthouses have a room where the other parties can follow the child's testimony through closed-circuit television. Finally, it was recognized by judges and caseworkers that adolescents are generally present at hearings, even when they do not testify. This may be linked to the fact that the *YPA* and the Civil Code of Québec set the minimum age of consent in

³⁴ Interview of Child 9 by Mona Paré (11 June 2020), Quebec.

³⁵ See *YPA*, *supra* note 8, s 85.4.

civil matters at 14 years of age.³⁶ Children and judges confirmed that in some instances, the children's presence in court gives them a chance to converse informally with the judge in the courtroom.

MISSING DETAILS LEADING TO GAPS, HESITATIONS, AND INCONSISTENCIES

Despite the clear legislative directive to support children's participation in judicial procedures and the specific provisions that allow them to be heard through testimony and legal representation, the law lacks detail in certain areas. This has led to gaps, hesitations, and inconsistencies in practice.

The *YPA* indicates clearly that children must be given the opportunity to be heard at all steps of the process; yet, there is no indication as to how this should happen. Throughout the social intervention, one can thus assume that the child's caseworkers involve the child in decision-making. The *YPA* requires children over 14 years of age to consent to social measures,³⁷ but further research would be needed to uncover ways in which younger children participate in these processes and the extent of that participation.³⁸ When it comes to judicial procedures, the law is silent on participation, except for the provisions on

³⁶ See e.g., *YPA*, *supra* note 8, ss 52, 64, 72.5; arts 17, 21, 43, 60 CCQ.

³⁷ See *YPA*, *supra* note 8, ss 47, 47.1–47.3, 51.4–51.5, 52, 52.1, 53, 53.1.

³⁸ See CSDEPJ 2020, *supra* note 14 at 47 (Testimonies at the Laurent Commission point to various problems with social intervention, and it has been said that children under the age of eight are not given a right to speak. Such practice contrasts with the law, which does not indicate a minimum age for participation).

child testimony and child representation by a lawyer. These two methods of child participation merit specific analysis.

Testimony is a direct way for the child to be heard, and direct participation is preferred by the Committee on the Rights of the Child, as it interprets the *CRC*.³⁹ The text of the *YPA* seems to encourage the children to be heard, as they are presumed to be able to testify, and declarations of incompetence or dispense are exceptional. Yet, in practice, testimony does not seem to be the optimal way to let children express themselves. First, the purpose of testimony is not to give children an opportunity to “express [their] views freely in all matters affecting” them or “to present their points of view, express their concerns and be heard.”⁴⁰ Instead, its purpose is to establish facts.⁴¹ A caseworker put it bluntly: “It is not a process that is necessarily for the benefit of the children [...] [T]he main purpose is to get evidence.”⁴² The child simply answers questions prepared by the lawyers and possible additional questions posed by the judge during examination and cross-examination, given the judge’s investigative powers.⁴³ In addition, the rules of testimony require

³⁹ See Committee on the Rights of the Child, *supra* note 2, para 35.

⁴⁰ *YPA*, *supra* note 8, s 2.4(4); *CRC*, *supra* note 1, art 12.

⁴¹ For the distinction between testimony and the child’s right to be heard, see Carmen Lavallée, “La parole de l’enfant devant les instances civiles: une manifestation de son droit de participation selon la Convention internationale relative aux droits de l’enfant” in Vincente Fortier & Sébastien Lebel-Grenier, eds, *La Parole et le droit: Rencontres juridiques Montpellier-Sherbrooke*, (Quebec: Éditions RDUS, 2008) 135 at 142. See also Goubau, *supra* note 3.

⁴² Interview of Caseworker 16 by Mona Paré (12 June 2019), Quebec.

⁴³ *YPA*, *supra* note 8, s 77.

children to testify in the presence of all parties, or at least their lawyers, as mentioned above.⁴⁴ This can make it difficult for children to express themselves freely.

Second, as many research participants explained, testifying can be stressful, and child testimony is usually avoided, if it is not needed to establish facts. Thus, most children will not have access to this direct means of expressing themselves in decision-making proceedings; those who do testify, may not be able to express all their views and concerns. The *YPA* takes the stressful nature of testimony into consideration, since it allows the tribunal to dispense a child from testifying when there is possible prejudice to the child's mental or emotional development.⁴⁵ Participants told us that it is often agreed that a child's testimony is not needed, so debates about possible prejudice or about the child's lack of capability to testify are not required. Moreover, a multisectoral agreement is in place to avoid having children, who are victims of crime, testify after their interrogation by the police.⁴⁶ Yet, many caseworkers felt strongly about the lack of clear guidelines on child testimony—especially relating to its appropriateness. No legal provisions or policy principles help to guide practice in this regard.

⁴⁴ See *ibid*, s 85.4.

⁴⁵ See *ibid*, s 85.2.

⁴⁶ See Quebec, Ministère de la Santé et des Services sociaux, "Entente multisectorielle relative aux enfants victimes d'abus sexuels, de mauvais traitements physiques ou d'une absence de soins menaçant leur santé physique" (2001), online (pdf): *Québec Ministère de la Santé et des Services sociaux* <<https://publications.msss.gouv.qc.ca/msss/fichiers/2000/00-807/00-807-04.pdf>>.

The child's legal representation is another way for the child to be heard in the decision-making process, but it is considered an indirect form of participation, as the decision-maker does not have to meet the child to hear them. Many of the judges interviewed stressed the importance of having the child's lawyer as their representative. One judge stated that the lawyer's role should not be under-estimated, especially when there is a frequent turnover among caseworkers.⁴⁷ While some judges praised the work of children's lawyers, there was a general feeling that more could be done to have the children heard and to have their views expressed in court. Many judges and caseworkers noted that lawyers often only meet with the child in court, just before the hearing.⁴⁸ Some noted that lawyers meet only with older children and adolescents and that the younger ones tend to be neglected. In the case of younger children, lawyers may base their representation on the DYP's application, using that information to defend the child's rights and interests in court. A judge expressed their frustration and said that it is important for the child to have a voice and that even if the

⁴⁷ Interview of Judge 7 by Mona Paré (19 February 2018), Quebec [Interview of Judge 7].

⁴⁸ Similar concerns around lawyers' lack of availability were heard during the hearings of the Laurent Commission: see CSDEPJ 2020, *supra* note 14 at 49; CSDEPJ 2021, *supra* note 12 at 63, 238. This shortcoming is also confirmed in international research: see Pernilla Leviner, "Child Participation in the Swedish Child Protection System – Child-Friendly Focus But Limited Child Influence on Outcomes" (2018) 26:1 Int J Child Rights 136; Judith Masson, "Representation of Children in England: Protecting Children in Child Protection Proceedings" (2000) 34:3 Fam LQ 467; Andy Bilson & Sue White, "Representing Children's Views and Best Interests in Court: An International Comparison" (2005) 14:4 Child Abuse Rev 220.

child does not come to court, they should have the possibility to voice their opinion to the lawyer.⁴⁹ This judge said that children from the age of five to ten are the most “abandoned” by their lawyers who should make an effort to meet them. Another judge stated that lawyers’ professional ethics should dictate that they meet with their young clients.⁵⁰ Some caseworkers also voiced their concern, especially about having to bring the child to court only for the lawyer to meet with them. Additionally, one caseworker stated that a simple phone call from the lawyer to the child was not enough.⁵¹ This occasionally happens to avoid bringing the child to court. A judge noted that phone calls can take place in the case of applications for emergency measures and that it is uncomfortable for a child to receive a phone call from a lawyer that they may not even know.⁵² Some participants opined that all professionals are doing their best in the circumstances and that time constraints do not always allow for adequate preparation before a hearing. Further, it is noteworthy that most children interviewed expressed no discontent about

⁴⁹ Interview of Judge 2 by Mona Paré (20 September 2017), Quebec.

⁵⁰ Interview of Judge 7 *supra* note 47.

⁵¹ Questionnaire response by Caseworker 12 (22 October 2018), Quebec [Questionnaire of Caseworker 12].

⁵² Interview of Judge 9 by Mona Paré (20 February 2018), Quebec [Interview of Judge 9].

services that they received from their lawyer,⁵³ and one spoke highly of theirs.⁵⁴

The *YPA*, while recognizing the child's right to legal representation, includes no provision on the lawyer's role in helping the child to be heard and to participate in the judicial proceedings. It has not been stated expressly that the lawyer should understand and represent the child's views in court or at least inform the court of the child's opinion. There is generally no provision in Quebec legislation that addresses the relationship between lawyers and their clients who are minors. In practice, lawyers determine the nature of their mandate in each case, depending on the child's capacity to instruct counsel.⁵⁵

⁵³ However, some caseworkers stated that children often complain to them about not seeing their lawyer, not being able to get hold of them, not having time to ask questions, or feeling that their lawyer does not really know their situation. In this vein, one child stated that "he's a good lawyer, but he doesn't always know what I want" (Interview of Child 10 by Mona Paré (15 June 2020), Quebec), and another talked about the difficulty of reaching their lawyer who is always in court (Interview of Child 1 by Mona Paré (22 May 2018), Quebec [Interview of Child 1]). Similar concerns have been heard elsewhere. See, e.g., Stephanie Block et al, "Abused and Neglected Children in Court: Knowledge and Attitudes" (2010) 34:9 Child Abuse & Neglect 659 at 667.

⁵⁴ Interview of Child 9, *supra* note 34.

⁵⁵ The practice of a child's lawyer is explained by Myriam Cantin, "Le procureur à l'enfant en protection de la jeunesse : à la croisée du clinique et du juridique" in Claire Baudry, Karine Poitras & Dominique Goubau, eds, *L'enfant et le litige en matière de protection: psychologie et droit*, (Québec: Presses de l'Université du Québec, 2016) 211. It also notes the lack of consensus on the role of the child's lawyer. The final report of the Laurent Commission noted the disparities in lawyers' practice when assessing a child's capacity: see CSDEPJ 2021, *supra* note 12 at 237.

According to what we have heard from judges, many lawyers will decide on the nature of their mandate based on the child's age, assuming that children over a certain age will be able to give instructions to them. The Quebec Bar has written reports on the legal representation of children.⁵⁶ In these reports, the Bar Committee distinguishes between the role of lawyers based on children's capacity to give a mandate. The 2006 report, which complements the 1995 report,⁵⁷ explains that, in the case of a capable child, it would be incompatible with professional regulations to present a position that differs from the mandate received from the client.⁵⁸ In the case of a child who is incapable of mandating, but capable of expressing their views, the report recommends that the lawyer counsel the child and state the child's views in court.⁵⁹ The Quebec Court of Appeal, in a family law case, referred to the 1995 report, stating that "the role of an attorney appointed by a mature and capable child is simply to put forward the evidence and the submissions required to support the wishes of the child so that his voice can be heard."⁶⁰ This entails that the lawyer meet the child to assess the child's maturity and capacity. While the judgment concerned a custody case, there is nothing to preclude its application to other cases

⁵⁶ See Barreau du Québec, "La représentation des enfants par avocat", *Mémoire du Comité du Barreau du Québec* (1995); Barreau du Québec, "La représentation des enfants par avocat dix ans plus tard" (2006), online (pdf): [BANQ <http://collections.banq.qc.ca/ark:/52327/bs61009>](http://collections.banq.qc.ca/ark:/52327/bs61009) [Barreau du Québec, "enfants par avocat dix ans plus tard"].

⁵⁷ See *ibid* at 3.

⁵⁸ See *ibid* at 3, 22.

⁵⁹ See *ibid* at 3, 36.

⁶⁰ *F(M) c L(J)*, [2002] RJQ 676 (CA) at para 43, 211 DLR (4e) 350.

involving children and their families in a civil proceeding, including child protection.⁶¹ In practice, this connection is yet to be systematized. While the role of the child's lawyer differs from one jurisdiction to another, practice in Quebec seems to lack consistency.⁶²

An analysis of the *YPA* shows that much importance is given to children's voice and participation in child protection proceedings. Some provisions give practical effect to the generally stated principles, namely those on the child's right to representation by a lawyer and child testimony. The strong statements have clearly had an influence on practice and on the attitudes of professionals towards recognizing children as subjects of rights. Yet, it is also evident that there are variations and gaps in practice, as the *YPA* does not indicate how children should be heard and what the different professionals' responsibilities are in relation to ensuring that children have adequate opportunities to express themselves. In the following section, we explore reasons that motivate professionals to encourage or discourage children's participation in judicial

⁶¹ The Quebec Bar has produced a guide on best practices in child protection, which applies the same principles of the lawyer-child relationship to child protection proceedings. See Barreau du Québec, "Guide des meilleures pratiques en droit de la jeunesse" (2018), online (pdf): *Barreau du Québec* <www.barreau.qc.ca/media/1590/guide-droit-jeunesse.pdf>.

⁶² *Cf* Leviner, *supra* note 15 at 282. Compare for example with Sweden, where lawyers present the child's view and their own view of the child's best interests if the child is under 15 years of age, or Victoria, Australia, where children are entitled representation when they can give instruction, estimated at the age of seven.

protection proceedings, adding children's own viewpoints about such participation.

III. BENEFITS AND RISKS OF PARTICIPATION

How participants perceived benefits and risks of children's participation in judicial protection proceedings explains the presence and absence of children in court; this in turn affects the possibility for children to be heard. The responses from the research showed that some participants focused on the child, while others talked about the process itself.⁶³ Thus, child participation is not necessarily seen as an end in itself, and it can have wider positive and negative implications.

EFFECTS ON THE CHILD

The positive effects of participation on the child can be divided into two main categories. The first concerns the child's feelings and development, while the second relates to learning and information. In the first category, many professionals identified the feeling of being heard as a beneficial effect of children's participation in judicial proceedings. One judge specified that "children need to be heard, and they also need to *feel* that they are heard."⁶⁴

⁶³ See Križ & Skivenes, *supra* note 6. Interestingly, there are similar findings in a study on child welfare workers' perceptions of children's participation in England, Norway, and California). See also Ganna G van Biljeved, Christine WM Dedding & Joske FG Bunders, "Children's and young people's participation within child welfare and child protection services: a state-of-the-art review" (2015) 20:2 Child Fam Soc Work 129.

⁶⁴ Interview of Judge 5 by Mona Paré (16 February 2018), Quebec [Interview of Judge 5].

Some professionals said that being able to engage in self-expression has a liberating and rewarding effect on children. Others asserted that participating in procedures could have a reassuring effect on children and improve their self-esteem. Many of the children interviewed believed strongly that it is important for children to come to court and to be heard, because the proceeding is about their life: “We need to be listened to;”⁶⁵ “they should listen to us more.”⁶⁶ Judges emphasised that participating could be empowering and constructive, especially for adolescents. One judge explained that when adolescents are present, they learn to negotiate as adults. They become conscious of the fact that they have a voice and that their opinions are taken seriously and verified.⁶⁷ Caseworkers also noted that it is important for adolescents to be able to voice their opinion and exercise their rights. This matched the experiences and opinions of many adolescents who participated in the study. One young person explained that while they had never formally testified, the judge asked them if they had something to say.⁶⁸ In other words, being present meant that they could be heard, and since a decision was being made *about* them, the judge should hear what they have to say. Caseworkers linked child participation with a healing process, improved resilience, a sense of

⁶⁵ Interview of Child 4 by Mona Paré (19 December 2018), Quebec.

⁶⁶ Interview of Child 8 by Mona Paré (11 June 2020), Quebec [Interview of Child 8]. Research, internationally, confirms the importance that children give to participation in the context of child protection: see van Biljeved, Dedding & Bunders-Aelen, *supra* note 63; Vis & Fossum, *supra* note 6; Rap, Verkroost & Bruning, *supra* note 15.

⁶⁷ Interview of Judge 1 by Mona Paré (20 September 2017), Quebec [Interview of Judge 1].

⁶⁸ Interview of Child 1, *supra* note 53.

pride, finding relief, a release from secrecy, and being able to move on. One caseworker affirmed that even young children's opinions mean a lot for their fulfilment and emotional development.⁶⁹ Some children also talked about the empowering effect of participation, as this gave them a sense of control and allowed them to name their experiences and emotions. Participation, in the sense of being heard, can thus be empowering and liberating for children. It can improve their confidence and help them progress in their situation.⁷⁰

In the second category—learning and information—participants, especially judges, noted that children's participation in judicial proceedings allowed them to gain a better understanding of the process, rights, roles, and responsibilities of all actors. It also allowed them to hear and understand the judge's decision. A caseworker noted that the process remains abstract for children who are not present in court.⁷¹ Many children recognized the educational benefits of participation. One child said that there is an advantage for the child to learn “all the things of the court.”⁷² Another described how they could not understand any of the explanations that were given to them before the hearing, but once there, things were clear.⁷³ One young person said that they could learn good strategies and

⁶⁹ Questionnaire response by Caseworker 1 (9 May 2018), Quebec [Questionnaire of Caseworker 1].

⁷⁰ See also van Biljeved, Dedding & Bunders-Aelen, *supra* note 63.

⁷¹ Interview of Caseworker 3 by Mona Paré (20 April 2018), Quebec.

⁷² Interview of Child 9, *supra* note 34.

⁷³ Interview of Child 6 by Mona Paré (27 December 2019), Quebec.

be encouraged to do well.⁷⁴ Another recognized that judges can help them analyse their own wants and needs.⁷⁵ They also stated that it is necessary for children to be present, because children need to know what is happening and about the decisions that are made. According to them, children must be part of the conversation. This is consistent with the view that participation should be a dialogue between children and adults.⁷⁶

However, most participants, professionals, and children were of the opinion that participation in the court hearings would not be beneficial to children of all ages. Participation was specifically seen as desirable for adolescents, and most agreed that young children should not be brought to court. Judges set the bar around 13 or 14 years, while caseworkers placed it mostly between 10 and 12 years. This is surprising given that caseworkers were more capable of identifying concrete negative effects of participation on children, such as insomnia, disorganization, and crying. Children who participated in this study were also of the opinion that those under 10 or 12 years of age, taking their maturity into account, would not benefit from participation, because they would not understand what happens in court. The participants based this opinion on their own experience. One young person

⁷⁴ Interview of Child 1, *supra* note 53.

⁷⁵ Interview of Child 3 by Émilie de Bellefeuille (25 November 2018), Quebec.

⁷⁶ See Committee on the Rights of the Child, *supra* note 2 at para 3; E Kay M Tisdall, “Children and Young People’s Participation: A Critical Consideration of Article 12” in Wouter Vandenhoe et al, eds, *Routledge International Handbook of Children’s Rights Studies* (London, Routledge, 2015) at 186.

explained: “The older I get and the more I have to talk, the more I have to state my point of view [...] I’m older now, so I understand things. You know, when I was younger, I didn’t understand the judge’s words”.⁷⁷ It should be noted that no children under the age of 12 years were interviewed in this research.

Reasons other than age were also given as barriers to participation. These included children’s mental health diagnoses and disabilities. As well, parents’ mental health problems were identified as reasons for not bringing children to court because of possible aggressive and impulsive behaviour.⁷⁸ Participants also identified children who are caught in severe parental conflicts as not benefiting from being present at hearings. Children in such situations could face loyalty conflict, a sense of responsibility or guilt for the situation, or be used as an instrument by their parents. This has been widely discussed in the field of child psychology.⁷⁹ In addition, being in the presence of distressed parents can be very stressful for

⁷⁷ Interview of Child 7 by Mona Paré Bellefeuille (30 January 2020), Quebec. We note that all participants were either francophone or bilingual, so the predominantly francophone context of the court did not pose a challenge for them).

⁷⁸ On factors of vulnerability, see Paré & Bé, *supra* note 18 at 255–65.

⁷⁹ See e.g.: Jean-Louis Le Run, “Les séparations conflictuelles: du conflit parental au conflit de loyauté” (2012) 56:3 *Enfances & Psy* 57; Jennifer McIntosh, “Enduring Conflict in Parental Separation: Pathways of Impact on Child Development” (2003) 9:1 *JL & Fam Stud* 63; John H Grych, “Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs” (2005) 43 *Fam Ct Rev* 97; Florence Calicis, “Les séparations conflictuelles: quand les solutions des parents deviennent les problèmes des enfants” (2020) 41:1 *Thérapie Familiale* 33.

children, even when there is no separation conflict between the parents. One young participant told us that because they agreed with the measures requested by the DYP, while their parents opposed those measures, the situation was very stressful for them. They felt that everything was their fault.⁸⁰

Interviewees also found that participation would be difficult for children who are victims of physical or sexual abuse. This aligns with research on potential re-victimisation of children in such procedures.⁸¹ One judge said: “The psychological pressure on a child is very insidious: the caseworker, the police, the judge in the youth court, the preliminary criminal investigation, the criminal trial... It never ends. [...] In the end, we end up with a victim who’s like a sieve.”⁸² Physical and sexual abuse and serious neglect cases are different from most other situations, as there may be a criminal investigation in parallel to the protection proceedings. This means that the child victim may have to tell their story multiple times and testify in court, often against their parent. While these are traumatising situations, judges noted that it is specifically in physical and sexual abuse cases where children are most likely called to testify in court. In such cases, they are often the only witnesses of the abuse they have suffered, and their testimony may be the only way to prove the situation

⁸⁰ Interview of Child 3, *supra* note 75.

⁸¹ See e.g., Asher Ben-Arieh & Vered Windman, “Secondary Victimization of Children in Israel and the Child’s Perspective” (2007) 14:3 *International Review of Victimology* 321; Nicholas Bala, “Double Victims: Child Sexual Abuse and The Canadian Criminal Justice System” (1990) 15:1-2 *Queen’s LJ* 3.

⁸² Interview of Judge 1, *supra* note 67.

that requires protection measures. Despite the possibility of submitting the recording of the child's police interview in lieu of testimony,⁸³ cross-examination may be called for, given perceived shortcomings of the video.

Participants identified several negative effects that presence in court, and especially testimony, could have on children. These included possible stress, anxiety, trauma, pressure from parents, hearing inappropriate information, and being exposed to parental conflict. Caseworkers especially emphasized the anxiety-provoking context of the court and questioned the need for children to be there. A judge noted that participation was a double-edged sword. On the one hand, children want to be heard, and the experience can be liberating for them, while on the other hand, participation can be disastrous, with the child finding it hard, feeling guilty, and getting caught in the conflict.⁸⁴ One young participant recognized that it had been difficult for them to hear certain things that were disclosed in court; they considered that hearing those things was the only disadvantage of going to court.⁸⁵ However, while most children admitted to having been stressed before the hearing, they generally said that they felt relieved afterwards. One young person even said that they were less stressed after having met the judge.⁸⁶ One child explained that going to court allowed them to realize that their lawyer, whom they had not met before, was not strict.⁸⁷ Another

⁸³ See Ministère de la Santé et des Services sociaux, *supra* note 46.

⁸⁴ Interview of Judge 5, *supra* note 64.

⁸⁵ Interview of Child 9, *supra* note 34.

⁸⁶ Questionnaire response by Child 2 (2 October 2018), Quebec.

⁸⁷ Interview of Child 6, *supra* note 73.

young person said that it is important for children to be able to explain what they are experiencing, but they were also relieved that their lawyer could talk for them because it was stressful.⁸⁸ The same participant debunked myths about children's participation and their vulnerability in such situations: "You can't tell children not to go to court just because there are risks that they could find the experience traumatizing, because there are plenty of traumas that can be experienced in any given situation. So, preventing children from being part of this experience, just because there is a risk, I don't think it's worth it."⁸⁹

Some caseworkers brought up the risks that are inherent to an adversarial procedure, where parties may present and cross-examine witnesses. They noted that sometimes, when the child testifies, lawyers may try to invalidate their version of the facts during cross-examination. Some caseworkers also felt that judges do not take children's opinions sufficiently into consideration. One caseworker said that while children feel that they are heard, judges do not always consider their viewpoints, especially if they are young.⁹⁰ While all children's opinions should be considered by decision-makers, it is clear that the weight given to those opinions should be commensurate with the age and maturity of the child.⁹¹ Still, caseworkers

⁸⁸ Interview of Child 3, *supra* note 75. See similar findings internationally: Vis & Fossum, *supra* note 6; Leviner, *supra* note 15; van Biljeved, Dedding & Bunders-Aelen, *supra* note 63.

⁸⁹ Interview of Child 3, *supra* note 75.

⁹⁰ Questionnaire of Caseworker 1, *supra* note 69.

⁹¹ See *CRC*, art 12. This is also confirmed in *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 at para 87.

noted how a judgment can lead to anger when the child finds that it is unfavourable to them, as the child realizes that their testimony had no impact on the decision. A caseworker stated that children who do not agree with the tribunal's decision tend to feel that everything is decided in advance and that their opinion did not matter.⁹² This feeling was confirmed by many of the children interviewed. However, one young participant was able to nuance these positions. They recognized that the judge does not have bad intentions, and "he does what needs to get done."⁹³ They recognized that some children will not like it and will feel like "Oh, he got me. It's going to be the end of the world."⁹⁴ Talking about their friends, they also explained that there are judges whom children like less because "[my friends] don't feel like they are being heard."⁹⁵ In some cases, there seemed to be some basis to such assertions. When the child is not called to testify, and if they are present at the hearing, the judge may or may not talk to them directly. Some of the young participants stated that the judge had not asked them questions and had not invited them to speak. One child in particular was surprised about how little interest the judge had shown them: "The first time, I was astonished that the Judge did not pay attention to me."⁹⁶ Another young person was convinced that the judge believed them less compared to the other parties.⁹⁷ While such concerns were not widely

⁹² Questionnaire of Caseworker 12, *supra* note 51.

⁹³ Interview of Child 1, *supra* note 53.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Interview of Child 3, *supra* note 75.

⁹⁷ Interview of Child 8, *supra* note 67.

shared, they show that children's participation and experience of the court hearing varies and depends on the judges they meet along their journey. A judge who has to decide on an emergency measure may give the child less attention than one who reviews their situation, for example.⁹⁸ The type of application⁹⁹ can have an effect on children's participation as much as the attitudes of the professionals involved.

EFFECTS ON THE PROCESS

While the effects of participation on the child and on the process are interconnected, some of the participants' responses focused clearly on the process and its outcome. Among benefits relating to the process, judges told us that the child's presence allows the judge to explain the decision to them, and this may make it easier for the child to understand and accept the decision. One judge clarified further that the child's presence allows for direct contact, so the judge can make it clear that they understand what the child is going through and that there are expectations

⁹⁸ Once a judge has rendered a decision declaring that the security or development of a child is in danger (*YPA, supra* note 8, s 38), an application for extension or revision (*ibid*, s 95) must be presented before the same judge unless "the judge is absent or unable to act" (*ibid*, s 95.1). This is not the case for motions to extend the immediate protective measures applied by the DYP or for motions to obtain measures while proceedings are in progress since they must be heard promptly.

⁹⁹ The different types of applications to the court include those concerning immediate protective (emergency) measures, provisional measures (while proceedings are in progress), protection, and extension and review of measures. See *supra* note 16.

towards the child's parents and the child.¹⁰⁰ A caseworker called the tribunal a positive place, a place of change.¹⁰¹ They explained how the formal environment of the court has an impact on the child and that the child is more likely to listen to the judge than to their caseworker.

On the other hand, it was also said that the child's participation allows the judge to have a better understanding of the situation. This was particularly noted by children, who felt that they were the best placed to talk about their own experience. Judges also recognized this. They specifically linked child testimony and the information needed by the judge to make a decision. One judge clarified: "The judge needs information; it's the objective of the examination and cross-examination."¹⁰² While many participants questioned the need to bring children to court in case their presence was not necessary to collect information, some found that the child's presence places them at the heart of the procedure; it makes the case more 'human', more tangible for the judge.¹⁰³ Caseworkers also found that judges could benefit from listening to children, as they would then gain a better understanding of the situation, which in turn would help them choose the best solution for the child. One caseworker noted how children allow adults to see situations differently: "They

¹⁰⁰ Interview of Judge 8 by Mona Paré (21 February 2018), Quebec.

¹⁰¹ Interview of Caseworker 2 by Mona Paré (6 April 2018), Quebec [Interview of Caseworker 2].

¹⁰² Interview of Judge 1, *supra* note 67.

¹⁰³ Similarly, in England, "making the child real to the court" was noted as equally important to "making the court real to the child": Masson, *supra* note 48 at 488.

are able to show us other interesting points of view.”¹⁰⁴ In addition to the child or the judge being able to learn from the child’s presence at hearings, two judges also pointed out that it could benefit the process because of the effect that the child’s presence could have on the parents. They explained that, if parents get to hear the suffering of their child, and if they are sensitive to it, it can help to unblock the debate.¹⁰⁵

Participants also noted possible negative effects of children’s participation on the process. Both caseworkers and judges talked about demotivation among children when court decisions go against their wishes. Caseworkers particularly identified the risk of the child losing trust in their caseworker. They also noted that the child would feel caught in a conflict between their parents and the DYP. A judge described the risk of “making things worse afterwards, ruining the social intervention, making the child lose confidence in the caseworker [...] because he’s heard things said against his parents.”¹⁰⁶ According to the judge, “[the child was] also going to be affected by what [his] parents will say of his situation.”¹⁰⁷ Some participants noted that the child’s presence could also make it more difficult for other parties, and especially the parents, to express themselves. Other parties may not be as free to give their testimony as they would in the absence of their child.

¹⁰⁴ Interview of Caseworker 9 by Émilie De Bellefeuille (10 May 2018), Quebec [Interview of Caseworker 9].

¹⁰⁵ Interview of Judge 5, *supra* note 64; Interview of Judge 11 by Mona Paré (23 March 2018), Quebec [Interview of Judge 11].

¹⁰⁶ Interview of Judge 9, *supra* note 52.

¹⁰⁷ *Ibid.*

Some judges also explained that in the presence of the child, they would have to filter their message to the parents. Similarly, a child explained that they could not share their feelings about staying with their mother because the mother was there.¹⁰⁸ Another confirmed that “it’s not easy to testify, especially when your parents are there, your family [...] because the answers I have to give don’t please everyone.”¹⁰⁹ Participants also talked about the misuse of the child’s testimony by parents, with parents manipulating their child’s words to their own benefit. One judge particularly observed that children caught in high-conflict parental separation were most likely to want to attend hearings and to testify, especially when they side with one parent.¹¹⁰ The child’s parent could then use what the child said in the testimony to the parent’s advantage in separation hearings held at the Quebec Superior Court.

In conclusion, children’s participation in judicial procedures has benefits and risks directly related to the child—and to the protection process itself. Much depends on the child’s age and maturity and on their characteristics and situation. Generally, participants recognized the child’s right to be heard and their participation in the process as something positive. What also emerged from the discussions was that this right cannot be applied in a uniform way. Even children recognized that being present in court may not be suitable for all children. According to one young participant, it really depends on every child’s

¹⁰⁸ Interview of Child 9, *supra* note 34.

¹⁰⁹ Interview of Child 10, *supra* note 53.

¹¹⁰ Interview of Judge 11, *supra* note 105.

development and personal journey.¹¹¹ The next section discusses solutions for improving current practice.

IV. TOWARDS DIMINISHED RISKS AND INCREASED BENEFITS

Participants in this study were asked to share suggestions to improve the practice of child participation in judicial protection proceedings. Our recommendations are based on these suggestions as well as on our analysis of the research findings.

PRESENCE IN COURT AND BEING HEARD

It is important to distinguish between children's presence in court and ways in which they can be heard by the decision-maker. The research participants did not question children's right to be heard, even though some discussions revealed that many children are not heard systematically nor adequately. However, most participants had some reservations about the presence of children at court hearings. While this presence was considered to be beneficial—and even necessary—for adolescents, many felt that one should be very careful with the participation of younger children. As in other countries, there was a sense that children should be protected from judicial proceedings.¹¹² Some adult participants even thought that children should never have to come to court, which was described as a cold place that is not adapted to children.

¹¹¹ Interview of Child 9, *supra* note 34.

¹¹² See e.g., Masson, *supra* note 48; Križ & Skivenes, *supra* note 6; Leviner, *supra* note 15.

For a child, being present at a hearing does not necessarily mean having the opportunity to be heard. As explained earlier, the law only provides for testimony as a form of hearing the child directly in court. Yet, testifying does not give the child the freedom to express themselves as they wish, and it can be a stressful situation. Aside from testimony, we heard from children and judges that sometimes, the judge will address the child directly during the hearing to explain things, to ask if the child has questions, or to ask for confirmation of something that has been said. While this can be a less stressful opportunity for children to express themselves, as it is less formal than testimony, the exchange still takes place in the presence of all parties. Furthermore, there is no guarantee that such an opportunity will arise, and the child may not be able to express their opinion fully. A child expressed their frustration: “You are in a courtroom, you are not really comfortable saying ‘I have something to add’ [...] Children don’t really have the right to express themselves [...] You know, you are just there to be there.”¹¹³ A caseworker questioned the lack of active participation by children. They wondered how the process could be used to allow children to express themselves and to speak to the judge, if they so wish.¹¹⁴

The distinction between presence and actual participation is thus important when looking for solutions and the application of the child’s right to be heard. We heard about many benefits to children’s presence in court. It increases the possibility that they may be able to voice their opinion, it allows children to better understand the

¹¹³ Interview of Child 7, *supra* note 77.

¹¹⁴ Interview of Caseworker 17 by Mona Paré (14 June 2019), Quebec.

process and the decision, and it helps to place the child at the centre of the case. However, the right conditions have to be present for children to be able to benefit from such participation. Some of the points discussed below address potential improvements to children's participation through their presence in court.

PHYSICAL SPACE AND SERVICES

Many participants noted the fact that the courthouses were not adapted to children. One judge explained how the court is a stressful and dehumanized environment.¹¹⁵ They noted that there is no public space that resembles it. Another described what the child sees when entering the court: the black gowns and the special constables with guns.¹¹⁶ Some children also observed this. One child participant considered the presence of many police officers as aggressive.¹¹⁷ Another stated that there were many intimidating people.¹¹⁸ Others pointed to the lack of things for children to do while they wait. Judges and caseworkers recognized that even though some courthouses are equipped with playrooms, this is still rare. They suggested better equipping the premises, since children sometimes have to wait most of the day if they are waiting for their turn to testify, or for their case to be heard. Sometimes, they wait just to be told at the end of the day that the case is postponed. It was suggested that waiting rooms be equipped with games, books, music, television, etc. A child

¹¹⁵ Interview of Judge 1, *supra* note 67.

¹¹⁶ Interview of Judge 10 by Mona Paré (21 February 2018), Quebec.

¹¹⁷ Interview of Child 9, *supra* note 34.

¹¹⁸ Interview of Child 8, *supra* note 66.

noted how the waiting room just has chairs and how there could be rooms for activities or just for relaxation, with beanbags on the floor.¹¹⁹ A caseworker suggested separate rooms so that children would not have to be confronted by their parents in the waiting room.¹²⁰ Some caseworkers and children referred to “zootherapy”, with the presence of dogs that can reduce stress and anxiety in children. There were such pilot programs in some courthouses, but this was not available to all children.

In addition to making courthouses more child-friendly, another option suggested by caseworkers was to resort to testifying through videoconference. One participant suggested that this could be transmitted live from a caseworker's office or any other office outside the courthouse.¹²¹ Since our research, this option has been already developed with new practices during the COVID-19 pandemic.¹²² The possibility of virtual participation is

¹¹⁹ Interview of Child 3, *supra* note 75.

¹²⁰ Interview of Caseworker 8 by Émilie De Bellefeuille (10 May 2018), Quebec.

¹²¹ Interview of Caseworker 9, *supra* note 104.

¹²² In Quebec, child protection cases have proceeded in person during the pandemic, but videoconference is increasingly used for child testimony. The particulars of the testimony (place, presence of other people, etc.) are agreed upon with the child's lawyer. The Quebec Bar has published a guide on information technology safety for lawyers: Barreau du Québec, “Guide des TI: Gestion et sécurité des technologies de l'information pour l'avocat et son équipe” (last updated January 2016), online (pdf): *Barreau du Québec* <www.barreau.qc.ca/media/2331/guide-ti.pdf>. It has also published a guide on practice during COVID-19 in family and civil law: Barreau du Québec, “Guide - COVID-19 : Pratique professionnelle en droit civil et familial: Guide pour les membres du Barreau du Québec” (24 April 2020), online (pdf): *Barreau du Québec*

positive, but it should only be one option, and efforts should be made to improve spaces, amenities, and services in Quebec courthouses.

ROLES OF PROFESSIONALS

In addition to the physical environment, improvements could also be made at personal and professional levels. Both groups of professional participants talked about the need to prepare the child for the hearing and of the roles of different actors in accompanying the child.¹²³ Many caseworkers described the benefits of good preparation, including taking time to visit the courthouse and courtroom in advance. A judge noted that it gives the child a sense of security.¹²⁴ Some noted that it was mainly the caseworker's job to prepare the child, while others focused on the lawyer's role. All agreed that there was a problem with the lack of time to offer a thorough preparation and specially to find time for an on-site visit. One caseworker recognized the difficulty as such: "It's about speed. And because of the current circumstances, there are many changes [and] staff turnover[s]. Do the children feel listened to, heard? I'm not certain."¹²⁵ Another caseworker opined that while everyone is stuck because of work overload and the

<www.barreau.qc.ca/media/2383/guide-covid19-droit-civil-familial.pdf>.

- ¹²³ Inadequate preparation was also noted during the Laurent Commission hearings, and much of the blame was placed on the child's lawyer: CSDEPJ 2020, *supra* note 14 at 86.
- ¹²⁴ Interview of Judge 6 by Mona Paré (19 February 2018), Quebec.
- ¹²⁵ Interview of Caseworker 6 by Émilie De Bellefeuille (10 May 2018), Quebec. Heavy workload is one of the problems noted during the Laurent Commission's hearings: CSDEPJ 2021, *supra* note 12 at 345.

overburdened judiciary, the situation should not impact children.¹²⁶ Suggestions by caseworkers included having better communication and coordination between the different actors, specifically between the child's lawyer and the caseworker or the DYP's lawyer. Several caseworkers hoped that better cooperation would help in the child's preparation and in reducing uncertainties about the need to bring children to court.¹²⁷ Another suggestion was to tap into the resources of the Crime Victims Assistance Centres (CAVAC), which offer preparation and support to children who have been victims of physical or sexual abuse or criminal negligence. Support by the CAVAC's caseworkers is interesting, as they are neutral in the process. Since their mandate is limited to criminal acts, some research participants suggested their mandate be widened, so that their services could benefit more children who come to testify in court. In relation to children who are victims of criminal acts, many participants, and especially judges, noted that the aforementioned multisectoral agreement was ill-suited to meet the needs of the protection procedures. Some suggestions for improvement included replacing the child's recorded interrogation by the police, which is used in both criminal and protection hearings, with a non-suggestive interview by an independent

¹²⁶ Interview of Caseworker 2, *supra* note 101.

¹²⁷ Lack of collaboration between different actors and services has been recognized as a problem that plagues child protection in Quebec more generally: CSDEPJ 2021, *supra* note 12 at 125.

forensic interviewer, who could be a psychologist or a social worker trained in interviewing child victims.¹²⁸

As already pointed out, there was a general feeling that the child's lawyer should spend more time with the child before the hearing. Judges and caseworkers felt that children should not be brought to court just to meet with the lawyer and that the lawyer should go to the child instead. They also felt that the lawyer should not settle for a simple phone call. What came out of the discussions with the professionals was that the lawyer must be the child's voice. Based on this, we can say that, if the lawyer meets with the child whom they represent, then this allows the judge to have a better grasp of the child's opinion if the child does not come to court. This seems to be the simplest and most promising way to give a child the opportunity to be heard: to make sure that they have enough time with the lawyer before the hearing so that the lawyer can have a good understanding of their opinions and then transmit those to the judge. One young participant also felt that they would like to have more opportunities to talk with their lawyer and suggested regular meetings like with their caseworker.¹²⁹ They felt that the lawyer should be able to follow their progress, check their placement, remind them of how they felt earlier, etc. In practice, such involvement by the lawyer is quasi-impossible in the current circumstances of prescribed time periods set in the law and

¹²⁸ See e.g., Lindsay Cronch, Jodi Viljoen & David Hansen, "Forensic interviewing in child sexual abuse cases: Current techniques and future directions" (2006) 11:3 *Aggression & Violent Behavior* 195.

¹²⁹ Interview of Child 1, *supra* note 53.

the small number of lawyers who represent children in protection proceedings.¹³⁰

THE ADVERSARIAL SYSTEM

Finally, some participants, especially judges, challenged the whole adversarial nature of the system. They addressed the length and heaviness of the procedures. They also talked about the negative effects of child testimony, given that certain ways of questioning the child can be hard and manipulating, even when all actors make efforts to adapt their conduct and speech to the presence of the child. A judge recognized that everyone always acts very delicately, but “when you are being questioned and cross-examined, even if the lawyers can be super nice and careful, it’s easy to get someone to say something.”¹³¹ The judge noted that children who are not well prepared for the testimony are especially at risk of saying things that they could end up regretting.

According to some judges, we should change the adversarial system, since it is not adapted to child protection. The law is largely based on principles of consensus, but these do not apply to judicial proceedings. There is thus a contradiction: The *YPA* favours social action which includes voluntary and mutually agreed protection measures, while in reality, a great number of cases end up in court, where the adversarial system

¹³⁰ The Laurent Commission’s report notes the lack of time, but also the lack of guidelines and training for lawyers who represent children: CSDEPJ 2021, *supra* note 12 at 238.

¹³¹ Interview of Judge 2, *supra* note 49.

applies.¹³² Furthermore, the child is placed in the middle of court action as a party that must confront their version of the facts and wishes to those of other parties. Some judges deplored the excessive “judicialization” that affects the Quebec child protection system. One judge stressed that the voluntary tools are there, but that they are underutilized.¹³³ They noted that many cases that end up in court could be easily dealt with through social means. In addition to favouring social action and seeking consensus, other suggestions included turning to alternative modes of conflict resolution, such as settlement conferences, where parties discuss solutions.¹³⁴ These account for the very small percentage of cases that are dealt with in court, but through a non-adversarial procedure. Judges explained that in such conferences, the role of the judge is not to decide on the case, but to chair the meeting between the parties and facilitate dialogue. The practice of settlement conferences varies greatly, depending on each judge’s preference and training. One judge explained that training in settlement conferences is a choice; some judges who have received the training are great advocates of this mode

¹³² The Laurent Commission also noted how ill-suited the adversarial debate is to the child protection system: CSDEPJ 2021, *supra* note 12 at 232. The Commission reports that 41.3% of child protection cases are referred to the tribunal (*ibid* at 222). Of those, 98% are dealt with using the adversarial debate (*ibid* at 235).

¹³³ Interview of Judge 1, *supra* note 67.

¹³⁴ See arts 161–65 CCP. Mediation, arbitration, and settlement conferences were also some of the recommendations heard during the Laurent Commission hearings (CSDEPJ 2020, *supra* note 14 at 84), as the Commission heard that participatory approaches are rarely used (CEDEPJ 2021, *supra* note 12 at 234).

of conflict resolution and practice it frequently.¹³⁵ Some judges noted that receiving information on mediation is a mandatory step in family law disputes affecting children's interests, and parties have to follow information sessions on mediation before applying to the courts.¹³⁶ They suggested that this should also be the case in child protection or that mediation itself should be made a mandatory step before applying to the court. Currently, mediation can be practiced by the DYP's caseworkers.¹³⁷ However, judges said very little about children's participation in these non-adversarial proceedings.

If court proceedings must go forward, participants identified some issues that should be corrected. Most recognized the need to reduce the length of hearings and the waiting time. Much of this is caused by deadlines and cancellations that extend the wait for hearings and decisions.¹³⁸ A judge explained: "There are strict deadlines in this law. To enforce them is almost impossible. Dreaming about it makes us overload dockets... So, children just wait. At 4:30pm, they learn that the case is postponed to three months later because there is no

¹³⁵ Interview of Judge 4 by Mona Paré (9 February 2018), Quebec.

¹³⁶ Arts 417–19 CCP.

¹³⁷ On mediation in child protection in Quebec, see Sylvie Drapeau et al, "Application d'une approche de médiation en protection de la jeunesse : qu'en pensent les intervenants ?" (2014) 60:2 *Service sociale* 14. The authors note the difficulties posed by the caseworkers' double role as mediators and as representatives of the DYP with a child protection mandate.

¹³⁸ Similar concerns were also voiced during the Laurent Commission hearings: CSDEPJ 2020, *supra* note 14 at 51.

availability.”¹³⁹ Children also talked about this challenge. One young person explained: “What I don’t like about court is that there is no fixed time. We just wait. They say to be there at 9:30am [...] But I think that they should be more organized [...] We might have to wait there the whole day.”¹⁴⁰ Another young participant noted how the wait was harmful: “We just had to sit [...] And it’s more stressful than anything else because you can’t occupy yourself, so you brood over things, and you can just think about what’s going to happen, and why you are there.”¹⁴¹ Reducing wait times and prioritizing hearings where children are present would thus reduce risks related to children’s participation in judicial child protection proceedings.

It follows from the participants’ responses that real or perceived risks to children and to the process can be diminished with different types of measures. These include adapting courthouses to be more child-friendly, limiting the number of times a child is questioned, enforcing set times for hearing a child, setting guidelines for children’s lawyers, and including children in non-judicial procedures. Additionally, multidisciplinary training for all actors involved in these cases would be important, and this was highlighted by some judges and several caseworkers. We suggest that through training, professionals will gain a better understanding of the role of child participation, which should not be limited to simple presence or formal testimony. Participation should allow for the child to be heard directly or indirectly by the decision-maker, and it

¹³⁹ Interview of Judge 1, *supra* note 67.

¹⁴⁰ Interview of Child 1, *supra* note 53.

¹⁴¹ Interview of Child 3, *supra* note 75.

should also allow the child to hear from the decision-maker, so as to be part of the discussion.¹⁴² In practice, this is seldom the case, as children are not present in court, come in only to testify, or the court reserves judgment. Thus, we recommend a practice of “information-sharing and dialogue between children and adults based on mutual respect”.¹⁴³

V. CONCLUDING DISCUSSION

This exploratory research showed us the importance of listening to those who are most concerned by the application of child protection laws. In Quebec, the *YPA* gives much importance to the participation of children and their families in child protection proceedings. Their right to be heard is clearly stated. What seems to be less clear is the appropriate method of hearing children. In the context of judicial proceedings, the law only includes provisions on the right to legal representation and testimony. Having listened to the experiences and viewpoints of judges, caseworkers, and children, we can see that there are concerns with these practices. Legal representation does not always allow children to be heard by the decision-maker. We heard that lawyers do not always meet with the child they represent, that they may meet only briefly before the hearing, and that they may assume that the child is

¹⁴² In some jurisdictions, letters have been written to the child by the judge in family law cases, but this remains uncommon (see for example, *Haberman v Haberman*, 2011 SKQB 415, Appendix “A”, Shawn William Herman Haberman v Cherie Haberman, Div. No 03661 of 2007, Yorkton, Family Law Division. Lack of clarity about who should tell the child about the decision is more common: Masson, *supra* note 48 at 485; Rap, Verkroost & Bruning, *supra* note 15 at 44.

¹⁴³ Committee on the Rights of the Child, *supra* note 2 at para 3.

incapable of instructing them. There are no specific rules pertaining to the representation of children. As for testimony, participants had mixed feelings about it. There was consensus that testimony is stressful, and many professionals would like to spare children this experience. Yet, most participants felt that testimony can be useful, especially for adolescents, and that some children may find relief in reporting a situation to the judge. Some caseworkers deplored the lack of guidelines on the opportuneness of testimony—determining when it could be in the child’s best interests. In addition, we noted that, generally, testimony is not an optimal way to apply the child’s right to express their opinion freely on matters that concern them.

This research was timely, as the Laurent Commission just finished its work and released its final report on child protection and children’s rights in Quebec. The Commission’s work uncovered many problems leading to violations of children’s rights within the current system.¹⁴⁴ Some of the problems that stemmed from the hearings included the child’s right to be heard and judicial proceedings.¹⁴⁵ There was consistency between our findings and those of the Commission’s, as noted throughout this article. For example, while participants in the Commission’s hearings recognized the importance of

¹⁴⁴ See the Commission’s final report: CSDEPJ 2021, *supra* note 12. The preliminary report was released in November 2020: Commission spéciale sur les droits de l’enfant et la protection de la jeunesse, “Constats et orientations au 30 novembre 2020” (30 November 2020), online (pdf): www.csdepj.gouv.qc.ca/fileadmin/Fichiers_clients/20201130_CSD_EPJ_Constats_Orientations__VFP.pdf.

¹⁴⁵ See CSDEPJ 2020, *supra* note 14.

children's right to be heard, they had reservations about it in practice.¹⁴⁶ The Commission observed that the gaps in children's right to participate result more from shortcomings in implementation than from the law.¹⁴⁷ In the summary of hearings, it was also noted that, in some regions, the practice of child participation was most deficient in the context of judicial procedures.¹⁴⁸ Generally, the Commission concluded that the judicial system is ill-suited to deal with child protection cases. It recommended alternatives to judicialization, such as mediation.¹⁴⁹ Its recommendations also included mandatory training and specific ethical rules for lawyers who represent children, since children's representation is variable and poorly regulated and supervised.¹⁵⁰

Our research thus supports the Commission's findings in many respects. We hope that it will contribute to the search for solutions to improve Quebec's child protection system and ensure that it respects children's rights, including their right to participation. Solutions include amendments to the law in order to bring more clarity to children's participation and to the responsibilities of the different actors, mandatory training for the different professionals involved, and specific ethical requirements for lawyers who represent children. We also hope that our study will lead to future research. While it has strengths, it also has limitations, and further research could help to fill

¹⁴⁶ See *ibid* at 47.

¹⁴⁷ See CSDEPJ 2021, *supra* note 12 at 232.

¹⁴⁸ See CSDEPJ 2020, *supra* note 14 at 47.

¹⁴⁹ See CSDEPJ 2021, *supra* note 12 at 236.

¹⁵⁰ See *ibid* at 237, 238.

some of its gaps. Among its strengths are the participants in the study. We heard from key actors, who were able to speak of their experiences and share their opinions. Judges seldom participate in research because of their duty of confidentiality. It is also uncommon to include caseworkers in a legal study. On the other hand, many studies about children's participation in judicial proceedings focus on lawyers and their role.¹⁵¹ Most importantly, to our knowledge, it is the first time that children who are currently in the child protection system have had a chance to express themselves in a legal study in Canada and to describe their experience in court.¹⁵² This makes our research unique.¹⁵³ As an exploratory study, it is limited by the sample size. Thus, it is impossible to draw generalizations from the data we have gathered.

¹⁵¹ See e.g., Fournier, *supra* note 7; Ross, *supra* note 3; Bilson & White, *supra* note 48; Donna Martinson & Caterina Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation" (2018) 31:1 Can J Fam L 151; Rachel Birnbaum, "Hearing the voices of lawyers and clinical investigators who represent children in custody and access disputes" (2005) 24:3 Can Fam LQ 281; Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, "The role of the children's lawyers: Instructional advocate or best interests guardian? Comparing legal practice in Alberta & Ontario - Two provinces with different policies" (2013) 51:4 Fam Ct Rev 681.

¹⁵² Children have participated in a study in the United States: see Block et al, *supra* note 53.

¹⁵³ Unfortunately, the Laurent Commission's plans to hear from children fell through because of the COVID-19 pandemic: CSDEPJ 2021, *supra* note 12 at 16. The Commission heard from young adults who have had experiences with child protection in their childhood. The lack of inclusion of children's voices was recognized as a limit of a Dutch study on children's participation in protection proceedings, as that study had also heard from youth who had previously had an experience with child protection: Rap, Verkroost & Bruning, *supra* note 15.

Furthermore, the study lacks the voices of children's lawyers. While we heard *of* them, we did not hear *from* them. A full analysis of the situation would require a wider participation geographically and across the stakeholder groups. Further exploration could help to identify best practices that promote children's participation in child protection proceedings in ways that are truly respectful of their rights.