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### Evolving Capacities: The B.C. Representative for Children and Youth as a Hybrid Model of Oversight

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**Evolving Capacities:  
The B.C. Representative for Children and Youth  
as a Hybrid Model of Oversight**

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March 2012

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“Well, no offence, but I don’t really think adults listen to us and they just want to think what they think, especially if the kid is younger. And I think the kids should be listened to as well as adults. I think they should be treated the way an adult is treated and be allowed to have their say.”<sup>1</sup>

## I. Introduction

Institutional design in the modern state increasingly incorporates features from both adversarial and inquisitorial models indicating considerable convergence.<sup>2</sup> This chapter examines the hybrid model provided by British Columbia’s Representative for Children and Youth (RCY) and argues that the RCY offers important institutional insights regarding the effectiveness of these types of investigative bodies found across Canada as well as internationally. The paper also examines the evolution of procedural justice in this substantive policy area. I will argue that the hybrid mode—at least with respect to children—illustrates how procedural fairness serves substantive rights. To show this, the paper does not engage in the substantive areas of family, health, education welfare or

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<sup>1</sup> The quote is taken from an interview with a child found in the Report of the Columbus Pilot study of case management and the adversarial family law system by the Family Court of Western Australia. See Lisbeth T. Pike and Paul T. Murphy, “Invisible Parties: Listening to Children—A Social Science Perspective,” Paper presented at the Australian Family Law Conference, 24 October 2006, 1 at 12. Available at: <http://www.familycourt.wa.gov.au/files/FLC%20Paper%20Oct06.pdf>.

<sup>2</sup> Voluminous discussion regarding the precise meaning of the words ‘adversarial’ and ‘inquisitorial’ exists. For the purposes of this paper, I will maintain the common law understanding of adversarial and use inquisitorial in the more open-ended sense of an investigative model not premised on bipolar relations with an active public official at the head. On the key differences between adversarial and inquisitorial processes, see Laverne Jacob’s paper “Building on the Ombudsman: Polyjurialism and Dispute Resolution in the Canadian Access to Information Context” in this volume. For discussion of the adversarial-non adversarial debate, see Chapter 2 in Australian Law Reform Commission, Discussion Paper 62 Review of the federal civil justice system, Sydney 1999 (Available at: <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/>); A. Jolowicz, Adversarial and Inquisitorial Models of Civil Procedure,” (2003) 52:2 *International and Comparative Law Quarterly*, 281-295; and Arie Freiberg, “Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms,” (2010). Monash University Faculty of Law Legal Studies Research Paper No. 2010/17. Available at SSRN: <http://ssrn.com/abstract=1609468>.

criminal policy and their accompanying areas of law but, rather, how the institutional shift to a hybrid model indicates a kind of praxis in which the institution powers and functions as well as the rights of the vulnerable persons they affect have broadened and deepened. This enlargement of capacity is reciprocal, having been driven by internal domestic legal reform, changes in attitudes and norms with respect to children's autonomy, rights and dignity, and the increasingly direct influence of international norms such as those found in Articles 3<sup>3</sup> and 12<sup>4</sup> of the 1990 United Nations Convention on the Rights of the Child (CRC).<sup>5</sup>

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<sup>3</sup> Article 3 provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

<sup>4</sup> Article 12 provides that:

1. 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.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>5</sup> *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3. Canada signed the Convention in 1990. Parliament and nearly all of the provinces initially approved and the CRC was ratified in 1991. Alberta, which later endorsed the Convention in 1999, did not support the CRC because it argued that the rights contained in the document undermined parental authority. The CRC has not been automatically incorporated into domestic legislation due to Canada's federal structure. Nevertheless, Canada is obliged to conform, the Convention can indirectly influence policy and laws, and some provinces have taken steps to implement or incorporate the principles in specific statutes.

Before examining the development and features of the Office of the Representative for Children and Youth, the chapter will first provide an attenuated history of the governance of children and earlier institutional models of state protection of child welfare. The BCRCY will be contrasted with these earlier models in section III to show its hybrid nature as well as its institutional strengths and vulnerabilities. The final section will then consider the BCRCY in an international context in order to situate it comparatively amongst other countries' children's representatives. A comparative angle discloses that the general trend in Western countries has been to create independent and stand-alone bodies, such as the BCRCY, with a specialized focus on children.

## **II. A Short Evolutionary Story**

In order to see how the creation of the BCRCY marks a significant change to traditional approaches to child welfare and the accompanying institutional architecture, I will first provide a short genealogy encapsulating the historical development of different approaches to children's rights as well as norm change regarding children's rights in Western societies.

### *a. From Victorian Mores to Social Welfare*

Child welfare has been a government responsibility in British Columbia since 1919. As with many jurisdictions at that time, a public official or single bureau was charged with protecting neglected or otherwise vulnerable children only when parents were deemed

incapable or negligent.<sup>6</sup> The accompanying policy framework relegated responsibility for children to the private sphere for care unless they were abandoned, significantly endangered, neglected, or impoverished. Churches provided the civil society complement to state care. Family matters not resolved in the private sphere, depending on family resources, entered the legal system only in extreme cases of child abuse, children's death, or divorce. As passive, voiceless objects of parental or state control, children were neither seen nor heard.

The alternately paternalistic and laissez-faire Victorian model shifted with the development of the welfare state. Charged with multiple responsibilities for child welfare and embracing a new human rights culture, post-World War II states initiated a slew of reforms aimed at children in general as well as children-at-risk due to challenges posed by their families or particular religious or cultural communities. In most Western countries, humanitarian concerns, principles of compassion and benevolence, and the sentimentalization of childhood provided the ethical motivation for the development of modern institutions of child welfare.<sup>7</sup> As Viviana Zelizer persuasively argues, American culture shifted—morally, economically, and politically—to view children as economically ‘useless,’ but morally priceless.<sup>8</sup> Children's representation and participation

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<sup>6</sup> For specific treatment of the early history of child welfare in British Columbia, see Christopher Walmsley and Diane Purvey, eds., *Child and Family Welfare in British Columbia: A History* (Calgary: Detselig Enterprises, 2005). See also R. Brian Howe, “Implementing children's rights in a federal state: The case of Canada's child protection system,” (2001) 9 *International Journal of Children's Rights* 361 at 362-63.

<sup>7</sup> For an overview of this history, see the “Introduction,” in Mona Gleason et al, eds., *Lost Kids: Vulnerable Children and Youth in Twentieth-Century Canada and the United States* (Vancouver: UBC Press, 2010), 1-12. For a similar history, but one that draws out the implications for the treatment of the child as a legal subject, see Daiva Stasiulis, “The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement,” (2002) 6:4 *Citizenship Studies*, 507-38.

<sup>8</sup> Viviana Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (New York: Basic Books, 1985). Risks to children, historically minimized by adults, became a cause for collective concern

in the justice system, however, did not shift as radically from the original common law legal baseline where they were designated chattels or property. They remained disadvantaged by adversarial legal processes premised on adult norms and persons that did not treat them as full legal persons who could claim rights along with the fulfilment of duties. Indeed, children were generally considered incompetent, incapacitated and dependent.<sup>9</sup>

*b. The Unadulterated Adversarial Model: Lawyer Advocates*

Lawyers traditionally acted on behalf of children when welfare, protection and family cases entered the court system. For common law jurisdictions, the earliest model was a court-appointed lawyer or guardian *ad litem* who represented a child in wardship, guardianship, child protection, and access and custody cases. Studies from Australia, New Zealand and the United States that have analyzed the effectiveness of lawyer advocates in representing children convey enormous dissatisfaction with this model from many participating actors.<sup>10</sup> Systemic criticisms condemned how a common law system treated children as passive and inferior legal subjects, and emphasized how lawyers failed to listen properly to familial concerns, treat children with respect, and properly solicit their views. The studies disclosed that lawyers often did not speak to or physically meet with the children they were charged with representing. Moreover, though lawyers were

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and a measure of the advancement of society in the American Progressive Era (roughly 1896 to 1920). Zelizer discusses the broad cultural shift whereby adults expressed empathic commitments to children through modern education, health, insurance, and labour policies and programs.

<sup>9</sup> For a pithy summation of these problems, see J.M. Herlihy, "Dealing with Child Abuse: Adversarial versus Investigative Systems," (1992) 24:1 *Australian Journal of Forensic Sciences*, 16-22. Herlihy focuses on the historically recurring problems in child abuse cases in which children could be compelled to give evidence. See also Alison Cleland, "Legal Solutions for Children: Comparing Scots Law with Other Jurisdictions," (1995) 10 *Scottish Affairs*, 6-14.

<sup>10</sup> See Andy Bilson and Sue White, "Representing Children's Views and Best Interests in Court: An International Comparison," (2005) 14 *Child Abuse Review* 220 at 230-31.



considered generally effective advocates in courts, they were shown to lack the expertise and focus that individuals solely devoted to considering children's interests and representing their wishes possess. In many cases, a clear tension existed between the role of the lawyer who was simultaneously acting for the court while also serving children's interests. With busy practices and large caseloads, lawyer advocates often lacked the time and energy to provide supports to children who experienced trauma and bewilderment in the court system because they were placed in adversarial relations with family members and/or governmental agencies. Studies measuring children's satisfaction with models of representation rank lawyer-only systems poorly.<sup>11</sup> Failing to act comprehensively and compassionately and playing only short-term, temporary roles in children's lives, the lawyer-advocate model was shown to fall quite short.<sup>12</sup>

The extension of legal rights to children and the statutory direction for legal actors to consider the best interests of the child in decision have not constituted an adequate remedy for the deficiencies of the adversarial model.<sup>13</sup> One critic of the adversarial system maintains that for the adversarial system to become more flexible and meet the needs of children would "involve a change of such magnitude that it could weaken the very fabric...".<sup>14</sup> A fundamental overhaul with the adversarial system appears to be a non-starter, but the institutional consequence of this reality has been non-uniform incremental attempts at reform across a number of jurisdictions. Adversarial legal

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<sup>11</sup> *Ibid.* at 235.

<sup>12</sup> For further discussion on this point, please see the contribution to this volume by Jula Hughes which examines the challenges for traumatized victims testifying in adversarial systems.

<sup>13</sup> For a vigorous critique of how the best interests principle has been interpreted and applied by judges in custody decision in the legal system, see Cindy L. Baldassi, Susan B. Boyd and Fiona Kelly, "Losing the Child in Child-Centred Legal Processes," in *Lost Kids*, supra note 7, 192-212.

<sup>14</sup> Herlihy, supra note 9 at 18.

culture remains resistant to change and continues to permeate other models in common law countries.<sup>15</sup>

*c. The Adulterated Adversarial Model: State and Volunteer Advocates*

Generalized dissatisfaction with the adversarial system and lawyer-advocates produced a slate of alternative models from the 1970s on and which modified the adversarial system to make use of investigative methodology and more comprehensive approaches to children's cases. The challenging and multiple needs of children resulted in the creation of expert bodies whose primary function was child advocacy or, alternatively, alternative dispute resolution processes. The use of these bodies was, until recently, the orthodox model in Canada and in other common law jurisdictions. Led by Ontario and Alberta, child advocacy offices became a preferred reform choice in Canada.<sup>16</sup> On the continuum of models, the Office of the Child and Youth Advocate (OCYA) in Alberta harkens back to these early efforts to manage child welfare through an independent agency that acts as a check and a balance on government decision-making affecting young people and is primarily devoted to the amplification of child and youth voices, greater participation, and championing for child and youth rights (see Tables 1 and 2).

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<sup>15</sup> In an early article, Carrie Menkel-Meadow analyzed the co-opting tendencies of adversarial lawyers—their attitudes and practices—when participating in alternative dispute resolutions systems. See “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted, or ‘The Law of ADR,’” (1991) 19:1 *Florida State University Law Review* 1-46. In her contribution to this collection, Robin Creyke discusses contemporary difficulties in shaking the adversarial culture within the context of hearings in Australian administrative tribunals that have been statutorily designated as “inquisitorial”. See Robin Creyke, “Pragmatism v. Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process”. In the Canadian context, see British Columbia Ministry of Attorney General Justice Services Branch, “Legal Culture,” 23 February 2005, 1-18. Available at: <http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/LegalCulture.pdf>.

<sup>16</sup> Further information on Ontario's history and new model can be found in Paul C. Whitehead, Nicholas Bala et al., “A New Model for Child and Youth Advocacy in Ontario,” 2004 Report prepared for the Ministry of Children and Youth Services. Available at: [http://provincialadvocate.on.ca/documents/en/Final\\_Report\\_Eng.pdf](http://provincialadvocate.on.ca/documents/en/Final_Report_Eng.pdf).

The OCYA functions as a delegate of the provincial Ministry of Children and Youth Services. The OCYA is accountable to and receives its funding from the Ministry and is therefore neither stand-alone nor independent. Nevertheless, it is expert in its specialized focus on children and youth. The OCYA's core function remains traditional individual advocacy for vulnerable children and the investigation of complaints from adults and children regarding the provision of government services. It is one step removed from the lawyer-advocate model as evidenced by its responsibility for appointing legal counsel through its Legal Representation for Children and Youth services. It does not, unlike similar bodies in other jurisdictions, investigate children's deaths (See Table 2). The OCYA also does not undertake systemic reform efforts, attesting again to its main role as an *internal* advocacy system.<sup>17</sup> The primary audience for the Alberta office, then, is the Alberta provincial government.

A further step along the continuum brings us to the American model of citizen volunteers as guardians *ad litem* (see Table 3). In this model, state agencies recruit, train, and manage volunteer representatives from a variety of backgrounds—social workers, lawyers, and 'ordinary' citizens—to act as court appointed special advocates. Independent representation of abused and neglected children is their chief function, rather than legal services, and the shift to trained citizen volunteers reduces costs, especially when compared to the cost of using lawyer-advocates. Studies of citizen volunteers conclude that this model excelled at providing effective and efficient representation,

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<sup>17</sup> Howe speculates that the OCYA differs from other models in Canada—indeed lags—because the more conservative and libertarian political culture of Alberta places greater emphasis on the privacy and autonomy of the family. Howe, *supra* note 6 at 362.

especially when volunteers work in tandem with lawyers to effectuate the best interests of vulnerable children.<sup>18</sup> Nevertheless, this model is both resource intensive due to the constant training of volunteers and exceptional in that perhaps no other country in the world embraces a tradition of volunteerism (instead of relying on the state) as the United States does. Finally, despite reliance on volunteer advocates in what appears to be a more radical system, these child representatives are subject to pressures to professionalize in order to best represent children's interests.<sup>19</sup> Voluntary citizen review boards and volunteer citizen guardians depend on quality appointments, a requirement which means that volunteers may have to undergo training in a variety of complex child development and welfare areas, including legal, in order to make competent judgements about a child's best interests.

*d. Specialized and Hybrid Ombuds*

Instead of the adulterated adversarial model, a different institutional remedy emerged as a common form in Canada: the Ombudsman.<sup>20</sup> The virtues of the Ombuds model in the child welfare context are significant in contrast to the Alberta model discussed above: greater independence and autonomy; greater accountability to the public due to the connection with the provincial legislature; specialized focus on children and youth; and, enhanced efforts at implementing policy recommendations and systemic reform.<sup>21</sup> These

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<sup>18</sup> Bilson and White, *supra* note 10 at 229.

<sup>19</sup> For a discussion of several of the strengths and weaknesses of citizen volunteers, see Mark Hardin, "A Comparison of Administrative, Citizen and Judicial Review," (1985) 7 *Children and Youth Services Review*, 161-72.

<sup>20</sup> Norway established the first Ombudsman for Children in 1981. For an overview of types of ombuds, see Mary A. Marshall and Linda C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution," (1995) 34 *Alberta Law Review*, 215-39.

<sup>21</sup> The provinces of Nova Scotia and New Brunswick delegated responsibility for children and youth to their Ombuds offices as part of their general mandate or, in some cases, as a specialized function. Nova

bodies conform to the “classic” functions of an ombuds by resolution citizen-government disputes through listening, investigating, weighing facts, and providing remedies to resolve the dispute. But, they are also specialized ombuds with jurisdiction over a particular policy area or subject matter. Lastly, those offices which are informed by rights (e.g., civil and political, social cultural, human and collective) and international principles as part of their mandate can be considered “hybrid” ombuds.<sup>22</sup>

Ten children’s advocacy offices currently exist in Canada, each defined by their provincial enabling statutes (see Table 1).<sup>23</sup> As can be seen in Table 1, all are independent agencies, except for Alberta whose Office is contained within the Ministry of Children and Youth Services, and can therefore decide matters with relative freedom from the interference of influence of the executive branch of government.<sup>24</sup> The hallmarks of independence vary but most of these offices have a significant degree of independence from the Executive, are accountable to the provincial legislative assembly, exercise considerable statutory powers under their enabling acts, have greater security of tenure under their terms of office, operational autonomy, and more secure funding since

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Scotia’s Office of the Ombudsman, for example, has a Youth and Senior Services Division. In 2011, New Brunswick separated the Child and Youth Advocate from the Ombudsman; previously, they were merged in one office. Saskatchewan, while using one statute to enable both the Ombuds and the Children’s Advocate, nevertheless created a stand-alone Child’s Advocate Office.

<sup>22</sup> Marshall and Reif, *supra* note 20 at 231-34. See also Linda C. Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection,” (2000) 13 *Harvard Human Rights Journal*, 1-69.

<sup>23</sup> For further information on other provincial jurisdictions, see Robin MacLean and R. Brian Howe, “Brief Report on Canadian provincial children and youth advocacy offices: Highlights of functions and recent activities,” available on line at: <http://www.cbu.ca/sites/cbu.ca/files/pdfs/crc-brief-report-canadian-provincial-children-youth-advocacy-offices.pdf>. Many people in the territory of Nunavut would also like to see an independent Child’s Advocate established. See “Nunavut child’s advocate needs autonomy: minister” at <http://www.cbc.ca/news/canada/north/story/2009/08/21/nunavut-child-advocate.html>.

<sup>24</sup> In this section I rely on Laverne Jacobs’ concise overview of the concept of independence of administrative agencies in Canadian public law. See “Independence, Impartiality and Bias” in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context: A New Casebook* (Toronto: Emond-Montgomery, 2008), 139-66.

their monies come from their provincial legislatures and not the executive branch. Most are stand-alone agencies focussing on a single policy area created through a special statute, and are primarily devoted to child welfare. All of these offices hear complaints or issues raised by children, youth, or adults on behalf of children and youth and are charged with investigative powers that can be used to engage in individual and systemic advocacy. Individual advocacy in response to complaints or concerns remains a core function. All offices respond to the voice of children, but some are more active in seeking and engaging children's voices. Most of the offices recommend policy changes to governments and engage in broad publicity and education efforts.

Québec offers another variation on the ombuds model. Its Commission des droits de la personne et des droits de la jeunesse is a specialized administrative agency which also houses a tribunal and is governed by a provincial Charter of Rights and Freedoms. The Commission acts like a conventional human rights agency, but with a specialized child and youth division. Similar to the Ombuds model, the Commission reports to the provincial legislature. However, it also shares with Alberta a lack of independence in that it receives its funding from the provincial Ministry of Justice and is therefore subject to greater ministerial influence and control.

Each of these types of ombuds approximates an inquisitorial model that enquires into truth by engagement in a greater responsibility for fact and policy gathering, possesses broad recommendatory powers, and shifts various burdens and responsibilities from the parties or the lawyer-advocate to the relevant independent authority. And, though each

provincial body differs in scope and mandate, the institutional landscape is becoming less of a patchwork with Alberta standing as a clear outlier.

### **III. The Hybrid Model: B.C.'s Representative for Children and Youth**

This section will first briefly set out the most recent history leading to the creation of the RCYBC—a history that includes the shift from traditional adversarial processes, two public inquiries, a conventional child and youth advocate, a children's commission, and an internal officer within the home ministry.<sup>25</sup> I will then analyze the structure and functions of the RCYBC in terms of innovative institutional design. Lastly, the section considers some challenges and problems that have arisen for this new model.

#### *a. The Birth of a New Model<sup>26</sup>*

The creation of the first Child, Youth, and Family Advocate in 1995 resulted from a several key political moments within a lengthy period of institutional turmoil and political acrimony. First, the 1980s saw substantive change in the delivery of child services with the enactment of the first piece of child protection legislation since 1939<sup>27</sup> combined with deep budget cuts and reorganization of the government office devoted to

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<sup>25</sup> For a thorough presentation of the historical context, see Michele McBride, "Report on Child Advocacy and Complaint Resolution Process," Victoria, B.C.: Children and Youth Review, 2006.

<sup>26</sup> Consistent with the genealogy set out at the beginning of this chapter, children protection in B.C. began with the guardianship model for orphaned or neglected children as wards of the state and delivered through children's aid societies (the *Infants Act*, 1901). This was replaced by a model of social and child protection services (the *Protection of Children Act*, 1939) which then changed to a system of regional and community service delivery (*Community Resources Board Act*, 1974). Prior to the reforms which are the focus of this chapter, it morphed into an integrated system of social services, though one which was criticized for failing to recognize children's rights and for not providing a child advocate role. (the *Family and Child Service Act*, 1981). McBride, *supra* note 25 at 5.

<sup>27</sup> The *Family Child Service Act* (1981) was enacted in response to the Royal Commission on Family and Children's Law (1974-75), but failed to incorporate many of the important recommendations of that the Commission made.

delivering child welfare programs.<sup>28</sup> Economic and political turbulence resulted in a change of government in 1991 from the conservative Social Credit Party to the democratic socialist New Democratic Party. The NDP government vowed to reform the delivery of child welfare and protection services. They engaged in a broad public consultation exercise which resulted in the issue of two reports by the Ministry of Social Services, the first focusing on the views from non-Aboriginal communities regarding child welfare reform<sup>29</sup> and the second focusing on Aboriginal communities in B.C.<sup>30</sup>. Shortly after the second report, the province was rocked by the neglect, abuse and death of 5-year-old Matthew Vaudreuil in 1992 at the hands of his mother, with the media bolstering outrage by providing detailed reports on how the existing child protection services had mishandled his case. In response to these reports, the Minister of Social Services delivered new legislation—the *Child, Family and Community Services Act* (“CFCSA”)—which promised a value shift in service delivery based on a model of least intrusion to families.<sup>31</sup> Though the provincial legislature passed the CFCSA in 1994, it did not come into force until 1996 in order to allow time for the development of new policies and procedures. The provincial government also created a public inquiry in 1994, charged with examining the circumstances leading to Matthew’s 1992 death, with the aim of restoring public confidence in the child protection system. This became known as the Gove Inquiry headed by Mr. Justice Thomas Gove, a provincial court judge.<sup>32</sup>

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<sup>28</sup> From 1983 to 1988, child protection services faced substantial reductions in the staff, contracting out, and a reorganization that removed a variety of services from the single office—then the Ministry of Social Services—to separate offices managing different aspects of child welfare and protection.

<sup>29</sup> “Making Changes: A Place to Start,” Victoria, B.C.: Ministry of Social Services, 1992.

<sup>30</sup> “Liberating Our Children, Liberating Our Nations,” Victoria, B.C.: Ministry of Social Services, 1992.

<sup>31</sup> RSBC 1996, c 46.

<sup>32</sup> British Columbia, Ministry of the Attorney General, *Report of the Gove Inquiry into Child Protection in British Columbia*, 3 vols., Victoria, B.C.: Queen’s Printer for British Columbia, 1995.



After eighteen months of investigation and research, Mr. Justice Gove issued his report in 1995 recommending changes to B.C.'s child protection system as well as the creation of several new institutions: a new Ministry of Children and Family Development which consolidated several existing but then separate services under one institutional umbrella; the first Child, Youth and Family Advocate who would provide services for children and families having difficulties with the new ministry; and, a Children's Commission to review child deaths and to provide oversight of the new ministry. The overall policy direction shifted toward removing children from their homes instead of providing assistance to stay together—a major break from the family preservation model that had inspired the CFCSA. In institutional terms, then, B.C. moved away from the family-centred model that was commonly employed in Europe and which was premised on providing substantial resources for family support.<sup>33</sup> The CFCSA came into force after the Gove Report, but it was accompanied by new regulation and practices that reflected the move away from the family support model, resulting in an increase in the number of children in government care.<sup>34</sup> At the same time, the community-based providers such as women's centres faced government cuts or closure, making the situation worse for those children in care.

This institutional architecture operated until 2001 when a new Liberal government looked at the various agencies involved in child protection as part of a Core Services Review. In addition to the three agencies created in 1995 and discussed above, the Coroners Service,

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<sup>33</sup> Howe, *supra* note 6 at 371.

<sup>34</sup> From 1979 to 1993, the number of children in care decreased from 9,000 to approximately 6,000 but from 1994 to 1999 the numbers increased from 6,000 to 10,000. See Darcie Bennett and Lobat Sadrehashemi, "Broken Promises: Parents Speak about B.C.'s Child Welfare System," (Vancouver, B.C.: Pivot Legal Society, 2008), 16-17.

provincial Ombudsman, and Public Guardian and Trustee also provided child-related services. In order to trim expenses and cut duplication, the government rationalized services by creating a new Child and Youth Officer who would replace both the Advocate and the Commissioner and act as the main oversight body. The Coroner would take on a new child death review function (one more limited than the Children's Commission), while the Ombudsman would continue to monitor general fairness issues. At the same time, the government engaged in large-scale budget cuts as well as a shift towards regional provision of services in anticipation of a devolved regional governance model.

But in 2004, individuals in the child protection system turned to the former Ombudsman, the former Advocate for Children, Youth and Families, and the former Children's Commissioner to ask them to communicate widespread concerns to the Premier about the impact of budget cuts on vulnerable children and the lack of accountability in the Ministry. After a letter from the three former public officials to the Premier elicited no response, they released their letter to the public in 2005. Very shortly after this letter garnered significant publicity, two Aboriginal infants in the foster care program managed by the Ministry died and their deaths became linked with the issues raised in the letter.<sup>35</sup> Public and media scrutiny resulted in the disclosure that no internal reviews of earlier suspicious child deaths and the two current deaths had occurred. The new Coroner's

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<sup>35</sup> In 2005 Sherry Charlie, a 19-month-old Aboriginal girl placed in a kinship care agreement, was murdered while in the care of her uncle. In 2002, Chasidy Whitford, who was 2, was murdered by her father while the family was receiving child protection services. In both cases, the Liberal government was accused of sacrificing children to cost-saving because children placed in these type of kinship arrangements were not counted as 'children in care' and therefore their family providers received less government support compared to regular foster care providers.

Service did not provide the same intensive death reviews as had the earlier Children's Commission and the Ministry itself did not release several internal reviews of the problems to the public. These failings of accountability and transparency, as well as the resulting public opprobrium, compelled the Minister of Children and Family Development to appoint the Honourable Ted Hughes, a retired judge, to engage in an independent review of the child protection system in 2005: the Hughes Inquiry.

The Hughes Inquiry examined advocacy for children and youth, oversight of the government's performance in protecting and providing services in B.C., and the systems for reporting and review of child deaths and how much they furthered public accountability. At the time of the Hughes Inquiry, the Ministry had gone through nine ministers in ten years, including eight deputy ministers and seven directors of child welfare. The Ministry, Hughes concluded, had implemented a policy shift to keep children at home, but without the social supports and staff training due to budget cuts.<sup>36</sup> At the same time, the provincial government pulled back some functions to the centre from the regions while concurrently preparing the ground for the eventual devolution of child welfare services to the control of Aboriginal authorities. As Justice Hughes wrote, each of these changes on its own posed formidable challenges, but together they “created

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<sup>36</sup> Judge Hughes noted that this shift undid the earlier Gove-initiated policy direction, concluding that the earlier shift was misguided but had its basis partly in social workers' fears that they would be held responsible for children left in homes where they might be harmed. Indeed, a notorious case in Ontario involving the starvation death of an infant—Jordan Heikamp—resulted in a social worker being charged with criminal negligence for failing to intervene and protect him from his mother. The new policy direction prioritized child protection over family preservation.

a climate of instability and confusion” which ultimately frustrated the ability of the Ministry to protect vulnerable children and support families in crisis and need.<sup>37</sup>

After four and a half months of research, public consultation, file review and data gathering, Justice Hughes submitted his final report in April 2006. The report contained the results of his review and set of 62 recommendations to improve child protection and child welfare in British Columbia. One of his key recommendations was the creation of a new, independent body to oversee the child welfare system: the Representative for Children and Youth.

*b. Family Resemblances*

By implementing a largely ombuds institutional model that kept some features of the adversarial system in the context of the oversight of child protection and welfare services, British Columbia proved to be an early provincial innovator.<sup>38</sup> The *Representative for Children and Youth Act* enacted in May 2006, quickly followed on the heels of the Hughes Report.<sup>39</sup> As Table 1 shows, the RCY is a legislative officer, has the powers of a commissioner of inquiry, retains many of the functions of an Ombuds, and possesses the structural independence of a provincial auditor general.

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<sup>37</sup> E.N. Hughes, “BC Children and Youth Review: An Independent Review of BC’s Child Protection System. 7 April 2006 at 4. Available at: [http://www.mcf.gov.bc.ca/bcchildprotection/pdf/BC\\_Children\\_and\\_Youth\\_Review\\_Report\\_FINAL\\_April\\_4.pdf](http://www.mcf.gov.bc.ca/bcchildprotection/pdf/BC_Children_and_Youth_Review_Report_FINAL_April_4.pdf).

<sup>38</sup> The model for the RCY was influenced by concurrent developments in Ontario which resulted in the Office of the Provincial Advocate for Children and Youth (see Table 1)

<sup>39</sup> *Representative for Children and Youth Act*, S.B.C. 2006, c.29 [RCYA]. Though passed in May 2006, the Act itself came into force over three phases: 1) the enabling of administrative functions in November 2006; 2) the enabling of the advocacy and monitoring functions in March 2007; and 3) the enabling of the critical injury and death review and investigative functions.

As an officer of the provincial legislature, the RCY must provide annual reports to the legislature via the Select Standing Committee on Children and Youth and it receives its funding from the legislative assembly.<sup>40</sup> To be appointed, the RCY must receive unanimously recommendation by a special committee of the legislative committee and then approval by resolution in the legislative assembly.<sup>41</sup> The term of office is for five years and is renewable for a second-five year term only.<sup>42</sup> It requires a 2/3 or more vote in the legislature to remove the RCY for cause or incapacity, though he or she may also be suspended from office with or without salary according to the same terms.<sup>43</sup>

The office of the RCY has an almost \$7 million annual budget which goes some distance to funding both investigative and consultative efforts. Table 1 shows that British Columbia, Alberta and Ontario are consistently the highest spenders on child welfare services. Manitoba, on the other hand, is the highest spender per capita on child welfare services from 1992-1999.<sup>44</sup> Despite provincial fiscal restraints and federal reductions in transfers to the provinces, child protection and family services have seen increases and appear, for the moment, to attract relatively constant governmental support.<sup>45</sup>

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<sup>40</sup> RCYA, s.17(1).

<sup>41</sup> RCYA, s.2(1).

<sup>42</sup> RCYA, s.2(3) and (4).

<sup>43</sup> RCYA, s. 4(2).

<sup>44</sup> Howe, supra note 6 at 374. Despite its different model, one that is about limited intervention and not about family services and children's rights, Alberta provides the most funds.

<sup>45</sup> Nevertheless, the RCY has criticized the Ministry of Children and Family Development for failing, after five years, to implement more than half of Justice Hughes' 62 recommendations. See "Missed Opportunities in Progress on Hughes Recommendations: A Symptom of Bigger Ministry Problems," 29 November 2010. Available at:

<http://www.rcybc.ca/Images/PDFs/News%20Releases/Hughes%20Rpt%20NR%20Final%20.pdf>.

Consistent with the investigative model, the Act permits the RCY to establish multidisciplinary teams in order to assist with reviews and investigations in child deaths and critical injuries.<sup>46</sup> These reviews and investigations do not replace parallel criminal investigations, and the RCY must wait until the completion of a criminal or other investigation by a public body.<sup>47</sup> Failure of persons to answer questions or cooperate may result in the RCY applying to the B.C. Supreme Court for an order to comply and, if non-cooperation continues, the RCY can initiate contempt proceedings in court.<sup>48</sup>

Other features of the RCY clearly parallel the practical problem-solving and investigatory role of an Ombuds who can choose to act formally or informally, flexibly and efficiently. The RCY is charged with engaging in systemic and policy advocacy<sup>49</sup> and embraces stakeholder and public outreach as well as public education about children's rights and government and parental duties. Since the statutory definition of "child" is a person under 19 years of age, the scope of the RCY's child stakeholder concerns is quite broad.<sup>50</sup> Notably, in addition to the monitoring, reviewing, and auditing functions, the RCY is empowered to engage in significant research efforts.

The RCY possesses the discretionary initiative to investigate matters of import and can then submit Special Reports to the legislative assembly containing policy recommendations and information about governmental compliance with previous

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<sup>46</sup> RCYA, s.15.

<sup>47</sup> RCYA, s.13. Or, in some cases, until one year after the critical injury or death of the child—whichever comes earlier.

<sup>48</sup> RCYA, s.14 and 14.1.

<sup>49</sup> RCYA, s.6.

<sup>50</sup> RCYA, s.1. "Youth" has a more limited definition: a person who between the above the age of 16 but under 19.

recommendations. The Speaker must lay these reports before the assembly and the standing committee as soon as possible.<sup>51</sup> These investigations, however, are not solely directed at uncovering the ‘truth’ underlying individual cases, but try to ascertain the causes of systemic failures and then recommend measures that will successfully prevent children’s critical injuries and deaths in the future. This statutory intention expresses an aim to overcome the fragmentation of information and dispersal of responsibility in various organizations thus ensuring greater accountability. The underlying ethos is one directed towards problem solving, is not confrontational but consultative, and incorporates elements of restorative justice over forms of retributive justice.

Though it does have a clear advocacy role, RCY does not engage in formal advocacy in courts or before tribunals, thereby eliminating the earlier lawyerly forms of advocacy. The RCY has no statutory power to act as legal counsel.<sup>52</sup> So, while the RCY is not adversarial in the sense of providing or acting as legal counsel, the RCY does serve a more adversarial and confrontational function in the investigation review of children’s critical injuries and deaths—a responsibility carried over from the earlier provincial model and one which operates in tandem with the Coroner’s Office. Moreover, the RCY is tasked with preserving the individual autonomy of children in relation to family and state intrusion or control as legal counsel might do in dispute resolution processes. But the underlying child-centred approach focuses more on facilitating intervention than finding fault. A key function is the ensure that children no longer feel underrepresented,

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<sup>51</sup> RCYA, s.20.

<sup>52</sup> RCYA, s.9. Nevertheless, the RCY also does have subpoena powers such as those possessed by child advocates in Nova Scotia, Saskatchewan and the Yukon.

lack voice, and are disadvantaged by information asymmetries which adult decision-makers control and benefit from.

The appointment of Mary Ellen Turpel-Lafond as the first RCY also *indirectly* incorporates aspects of the adversarial system. Turpel-Lafond is a lawyer, a legal academic, and is currently on leave from the Saskatchewan Provincial Court where she is a judge, having been appointed in 1998. She has also worked as a criminal law judge in youth and adult court. She has a lengthy history of involvement in projects relating to access to justice, judicial independence, sexually exploited children and youth, and children and youth with disabilities including those who suffer from foetal alcohol disorder. It has long been noted that in the Canadian public law order, inquisitorial initiatives such as commissions and public inquiries are often headed by retired or acting judges.<sup>53</sup> While not adversarial on the surface the, the role morality and rights advocacy endemic to the common law adversarial system is blended with the inquisitorial model through the appointments process. Such a blending, however, is clearly contingent on the types of persons who are selected for the position as an ongoing commitment, and future RCYs may not always have this legal background.

Close to half of the children in care in B.C. are Aboriginal, with a similar pattern existing across the country. In provinces with significant Aboriginal populations—including B.C.—children’s representatives also incorporate a particularized focus on the circumstances of Aboriginal children. The selection of Turpel-Lafond illustrates this

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<sup>53</sup> For an excellent overview of public inquiries in Canada, see Peter Carver, “Getting the Story Out: Accountability and the Law of Public Inquiries,” in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context: A New Casebook* (Toronto: Emond-Montgomery, 2008), 359-89.



point well since she is an active member of the Muskeg Lake Cree Nation in Saskatchewan.<sup>54</sup> Her early life mirrors the experience of many of the children she represents—growing up in a poor home that was also afflicted by alcoholism and violence. Her background significantly underscores the policy shift that the RCY as an institution represents: the principle of family autonomy no longer is balanced equally against the best interests of the child. This policy shift is most clearly recognized in British Columbia, Ontario and New Brunswick.<sup>55</sup> Each of these jurisdictions engaged in major reform after the tragic deaths of Aboriginal children. In jurisdictions with substantial Aboriginal populations, the best interests of the child will likely be balanced with the principle of respecting different cultural and local community practices. In B.C., the “best interests” framework—understood as either a legal principle or a legal test—was subject to major debate over whether it was culturally and class specific, and therefore would be inappropriately applied to Aboriginal families. The outcome of these debates resulted in a modified best interests principle.<sup>56</sup>

The last notable feature of the RCY attests to the role of the office in furthering democratic and rule of law objectives. The enabling statute contains a powerful provision guaranteeing a ‘right to information’. This right, which will be discussed in more detail in

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<sup>54</sup> She published a book on the history of the Muskeg Lake Cree Nation that was short-listed for a 2005 Saskatchewan Book Award. Turpel-Lafond says that she wrote the book for her children. See Mary Ellen Turpel-Lafond, *Maskeko-sakahikanihk: 100 years for a Saskatchewan First Nation* (Saskatoon: Houghton-Boston, 2005).

<sup>55</sup> For an example of this shift in the weight given to governing principles, see New Brunswick’s *Family Services Act*, SNB 1980, c F-2.2.

<sup>56</sup> See, for example, s.52 of the *Law and Equity Act*, RSBC 1996, c 253: “52(1) In proceedings involving the guardianship, custody, access to or maintenance of a child the court must consider the best interests of the child. (2) Subsection (1) does not apply in proceedings under the *Child, Family and Community Service Act* except as provided in that Act.” The CFCSA explicitly requires the preservation of an Aboriginal child’s cultural identity to be part of the determination of best interests by a director of adoption or a provincial court.

the following subsection, gives the RCY the power to access any information in the control of a public body (other than an officer of the legislature) or director that the RCY herself deems necessary to exercise his or her statutory powers, functions and duties.<sup>57</sup> Importantly, the public body or director *must* disclose this information despite confidentiality or privilege claims (other than solicitor-client privilege).<sup>58</sup>

Turpel-Lafond has used her statutory powers and mandate effectively. Her earlier calls for the reinstatement of the position of director for child welfare met with success in 2011.<sup>59</sup> This position was axed in 2008, but Turpel-Lafond called for a new director after her January 2011 inquiry into the death of 21 infants in B.C. in order to provide more accountability into infant deaths and ensure that standards in child welfare practices are complied with. In October 2011, a special committee of the legislative assembly was struck to consider the re-appointment of Turpel-Lafond to her second term as required by section 2 of the RCYA. This special committee unanimously recommended her reappointment, which took effect in November 2011.<sup>60</sup>

*c. Challenges to independence and judicial review's protective potential*

As we have seen, the BCRCY combines several functions: high-level advocacy on behalf of children, youth and their families; sophisticated policy development and systemic advocacy; review and investigation of deaths and critical injuries of children and youth

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<sup>57</sup> RCYA, s.10(2).

<sup>58</sup> RCYA, s.10(3) and (4). The RCYA is also subject to s.51 of the provincial *Evidence Act* relating to restrictions with respect to health care evidence.

<sup>59</sup> See "B.C. appoints child welfare director at: <http://www.cbc.ca/news/canada/british-columbia/story/2011/03/31/bc-child-welfare-hughes.html>.

<sup>60</sup> For the official press release, see: <http://www.leg.bc.ca/cmt/39thparl/session-4/rfcay/media/mediaReleases/HTML/Rel-RFCAY-39-4-BCRepForChildrenAndYouthReappointedForSecondTerm-2011-NOV-15.htm>.

receiving government services; and, auditing, monitoring, and reporting. Not only does the RCY represent a polyjural model of decision-making, it also serves a multidisciplinary coordination function across government departments. Lastly, it promotes open government and public accountability in a collaborative manner with other public bodies.

Challenges to the independence of the RCY take many forms, some obvious while others are more novel. Independent public institutions generally face threats to their independence in three ways: statutory reforms to reduce jurisdiction and powers; executive control of the appointments process; and budget cuts. Though financial support appears steady in B.C., economic downturns can easily result in substantial cuts to even well-regarded bodies.<sup>61</sup> And, as explained above, although the appointments process for the RCY is more rigorous and constrained than conventional processes of appointment in the administrative state through the use of executive discretion, the integrity of a public body significantly depends on the quality of the persons leading and staffing it.

Lastly, the RCY has faced a recent challenge to its powers and structural independence through an attempt at legislative reform. In April 2010, the provincial Liberal government under then Premier Gordon Campbell introduced legislation specifically aimed at not only restricting the ability of the RCY to access cabinet documents, but doing so

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<sup>61</sup> In 2007, the RCY won the public battle to have her budget increased by an all-party finance committee: "Children's watchdog gets full budget hike," 15 December 2007, Globe and Mail: <http://www.theglobeandmail.com/news/national/childrens-watchdog-gets-full-budget-hike/article137538/>. Many motivated stakeholder groups in B.C. are committed to scrutinizing the provincial government in order to ensure optimal interaction with the RCY.

retroactively.<sup>62</sup> The government asserted cabinet privilege protected this information while Turpel-Lafond countered that “It’s very important in my role to have a look at the system behind the curtain, if you like, and then very carefully report to the public to say, ‘Here’s an issue, here’s what happened, here are some reasonable suggestions for improvement in the future.’...I’m in a pickle.”<sup>63</sup> She maintained that she had access to cabinet documents in the past and that she, as a judge, was well aware of her duties not to violate privacy issues or disclose sensitive information to the public. The proposed bill was included in a miscellaneous package of unrelated legislation, leading to charges that the government was attempting reform by stealth tactics.

The RCY challenged the Office of the Premier and the Ministry of Children and Family Development (MCFD) in court seeking to enforce her right to information and disclosure of documents she needed in the course of her formal audit of the then “Child in the Home

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<sup>62</sup> Bill-20—2010: Miscellaneous Statutes Amendment Act (No. 3), 2010, c.21. Section 36 originally provided that:

Section 10 of the *Representative for Children and Youth Act*, S.B.C. 2006, c. 29, is amended

(a) by repealing subsection (1) and substituting the following:

(1) In this section:

“committee” includes a committee designated under section 12 (5) of the *Freedom of Information and Protection of Privacy Act*;

“officer of the Legislature” has the same meaning as in the *Freedom of Information and Protection of Privacy Act*, but does not include the representative, and

(b) by adding the following subsection:

(2.1) Subsection (2) does not apply with respect to information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

<sup>63</sup> “New legislation will ‘cripple’ B.C.’s Representative,” 30 April 2010, Globe and Mail: <http://www.theglobeandmail.com/news/national/british-columbia/new-legislation-will-cripple-bcs-childrens-representative/article1553245/>. Of the approximately 4500 children in the program at the time, almost 50 per cent were Aboriginal.

of a Relative” Program.<sup>64</sup> The B.C. Supreme Court found that the legislature did not intend that the s.20 legislative remedy contained in the RCYA should preclude the RCY’s access to court in order to obtain a remedy for statutory breaches of s.10. In her judgment, Madame Justice Griffon suggested that the envisioned legislative remedy would be a report from the RCY containing a complaint that the Speaker would present to the legislative assembly and the assembly could compel persons to appear before it with the required documents. She further noted that this function—including determining solicitor-client privilege—normally lies outside the purview of a legislature and, because of this, might prove inadequate or ineffective. Citing the principle of the rule of law as a legal constraint on arbitrary state action, Madame Justice Griffin declared:

“The rule of law is a fundamental premise of our legal and democratic system. It means that no one is immune from law or excluded from the benefit of the law. For this reason, the notion that anyone, especially persons holding high public office, can breach their statutory duties without being accountable to a court of law is a highly exceptional proposition.”<sup>65</sup>

She observed that the only documents specifically excluded from the duty to disclose in the statute are those covered by solicitor-client, not Cabinet privilege and that this could not have been a legislative oversight.<sup>66</sup> Lastly, if executive actors were concerned about the potential use of the documents by the RCY as they claimed, they too could seek either the prerogative remedy of prohibition in court which would constrain the RCY’s conduct

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<sup>64</sup> *Representative for Children and Youth v. British Columbia (Children and Family Development)*, 2010 BCSC 697.

<sup>65</sup> *Ibid.* at para. 74.

<sup>66</sup> *Ibid.* at paras. 91-92.

to her statutory confines, or a declaration clarifying the meaning of the confidentiality provisions in the RCYA that would relate to the information the government was obliged to produce. Justice Griffin concluded that the RCY had a right to the information, that the MCFD and the Office of the Premier breached their statutory duty, and therefore the RCY was entitled to the remedy of mandamus ordering the production of the documents. Justice Griffin articulated in her judgment what Justice Hughes initially argued in his report: that the goal of the RCY is to restore public confidence, depoliticize child welfare issues, and provide a strong system of accountability. The right to information supported these goals.

This year, the RCY and the MCFD signed an Advocacy Protocol aiming to, among many items, clarify their roles, commit to coordination and reciprocal respect, remove barriers to the RCY's functioning, and re-affirm the RCY's right to information in a timely manner.<sup>67</sup> Though the protocol provides another confirmation of how dynamic this model of accountability has become, it also serves as a reminder of executive efforts to remove a powerful public law right. The next stage of development will be the mandatory five-year comprehensive review under section 30 of the RCYA which requires the Select Standing Committee on Children and Youth to determine, among other statutory matters, whether the Representative's functions as described in section 6, are still required. The review will be completed in 2012.

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<sup>67</sup> "Advocacy Protocol between the Ministry of Children and Family Development and the Representative of Children and Youth," 4 April 2011. Available at: [http://www.mcf.gov.bc.ca/child\\_protection/pdf/rcy\\_advocacy\\_protocol.pdf](http://www.mcf.gov.bc.ca/child_protection/pdf/rcy_advocacy_protocol.pdf).

Bodies such as the RCY are vulnerable to reform efforts when majority governments disagree with actions and criticisms and can put their displeasure into legislative effect. When this happens, the RCY's case stands as an example of how the adversarial legal system has the potential to protect a vulnerable investigative body. A broader institutional perspective affirms the complementary role that adversarial courts can play through judicial review, by acting as a necessary check on executive power and providing essential support for democratic and rule of law forms of accountability.

## V. 'The Child is father of the Man': International Kinship<sup>68</sup>

While a full examination is not possible in the confines of this paper, I wish to highlight two salient comparative issues: 1) the problems that federal jurisdictions pose for creating a RCY at the national level across different countries; and, 2) the increase in the influence and permeability of international norms in domestic legal orders.

### a. *The Problem with Federalism*

When levels of government are competitive and non-cooperative, federal systems undoubtedly complicate the implementation of children's rights. They can, due to lack of intergovernmental consultation and coordination, create a patchwork leading to the arbitrary treatment of children across a national polity.<sup>69</sup> Federal jurisdictions such as Australia and Canada do not have a Child's Representative at the national level.<sup>70</sup>

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<sup>68</sup> From William Wordsworth, "My heart leaps up when I behold" which is the epigraph to *Ode: Intimation of Immortality*.

<sup>69</sup> See R. Brian Howe on the difficulties of implementing children's rights in a federal state such as Canada's where child protection, and other constitutional heads of power, rest with the provinces. *Supra* note 6.

<sup>70</sup> In Canada, the federal government is responsible for child-related areas such as immigration and refugees, Aboriginal families and children, divorce and custody, and criminal justice. Canadian federalism

Australia, like Canada, has either a Commissioner or a Guardian in every State and Territory who represents children and youth though each of their roles differs according to their enabling legislation.<sup>71</sup> No federal representative yet exists, but the Australian Human Rights Commission has created a discussion paper proposing a national Child's Commissioner<sup>72</sup>.

By way of contrast, the United States government created a comprehensive federal agency devoted to children's rights—the Children's Bureau—in 1912. It lasted until the 1940s when the Truman Administration reorganized aspects of the federal system and the Children's Bureau lost most of its regulatory authority to larger agencies, becoming a small office limited to investigation and reporting.<sup>73</sup> The complexities of federal-state relations in U.S. constitutionalism ensure that a national function will be very difficult to re-create due to disagreements about the proper extent of state or federal authority over family law.<sup>74</sup>

In 2003, the UN Committee on the Rights of the Child recommended that Canada establish an Ombudsman's office at the federal level that would be responsible for

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is highly decentralized due to, a large extent, the constitutional demands of Quebec in the Canadian federation.

<sup>71</sup> For more information on the role of Australian Commissioners for Children and Child Guardians, see Appendix E of the House Standing Committee on Education and Training Report on combining school and work: supporting successful youth transitions," 16 November 2009. Available at: <http://www.aph.gov.au/house/committee/edt/schoolandwork/report.htm>.

<sup>72</sup> The 2010 discussion paper is available at: [http://www.hreoc.gov.au/human\\_rights/children/2010\\_commissioner\\_children.html](http://www.hreoc.gov.au/human_rights/children/2010_commissioner_children.html).

<sup>73</sup> For more on this history, see Kriste Lindenmeyer, *A Right to Childhood: The U.S. Children's Bureau and Child Welfare, 1912-1946* (Urbana: University of Illinois Press, 1997).

<sup>74</sup> See Anne C. Dailey, "Federalism and Families," (1995) 143 *University of Pennsylvania Law Review*, 1787-1888 and also Ann Laquer Estin, "Sharing Governance: Family Law in Congress and the States," (2009) 18 *Cornell Journal of Law and Public Policy*, available at SSRN: <http://ssrn.com/abstract=113140>.



children's rights.<sup>75</sup> In June 2009, Liberal MP Marc Garneau initiated a private member's bill to establish a Child's Commissioner of Canada.<sup>76</sup> The Child's Commissioner would facilitate the promotion and implementation of the Convention as well as any recommendations from the UN Committee on the Rights of the Child's review of Canadian practices. Due to the instability of current Canadian politics, this bill only made it through first reading and it is too soon after the 2011 election to know if the current government will resurrect this proposal.

*b. International Relations*

The last twenty years have seen substantial changes regarding the strength of children's rights—Western societies exhibit far less ambivalence about their importance—and the influence of the CRC domestically. Situating the RCY in the international landscape (see Table 3), we can see the growing right of children to participate in formal decision-making, to be listened to, and to be heard in various proceedings that affect their lives. Many jurisdictions clearly refer to the CRC in enabling legislation or incorporate particular principles to guide judicial interpretation, inform general standards and soft law, and constrain administrative action in order to conform to international norms. Even without incorporation in dualist legal systems, increased porosity is evident.<sup>77</sup> In monist jurisdictions, the CRC clearly has direct influence. The prevailing ethos is child-centred

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<sup>75</sup> Available at:

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/995a15056ca61d16c1256df000310995/\\$FILE/G0344648.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/995a15056ca61d16c1256df000310995/$FILE/G0344648.pdf).

<sup>76</sup> Bill C-418, An Act to establish a Children's Commissioner of Canada. Available at:

<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C418&Language=E&Mode=1&Parl=40&Ses=3&View=1>.

<sup>77</sup> For an early argument on the permeability of international norms in domestic law, see Stephen J. Toope, "The Convention on the Rights of the Child: Implications for Canada", in M. Freeman (ed.), *Children's Rights: A Comparative Perspective* (Aldershot: Dartmouth Publishing, 1996).

and child-inclusive with an emphasis on participatory rights that embody substantive guarantees of procedural fairness and recognize the equal moral status of children.

Table 3 confirms that the general trend in Western countries regarding the most effective institutional model has been to create independent and stand-alone bodies with a specialized focus on children. Systemic reform in Canada includes the recent strengthening of functions and independence of offices in Ontario and British Columbia by decoupling child advocacy from Ombuds functions. Since the 1990s, states and territories in Australia have created children's commissioners. New Zealand created its Children's Commissioner in 2003. Lastly, Europe has seen the expansion of children's ombuds since Norway created the first Ombudsman for Children in 1981 with the United Kingdom providing some of the latest developments.<sup>78</sup>

It is not hard to conclude that the elevation of children's moral worth has had a concomitant bolstering of the powers of public bodies charged with taking their views, rights and interests into account and facilitating their voice and will. The value shift in cultural norms influences the representational and advocacy capacities of these institutions that must embody this new perspective. As Daiva Stasiulis argues, "Rather than view children as 'pre-citizens', or as silent, invisible, passive objects of parental and/or state control...children are cast as full human beings, invested with agency,

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<sup>78</sup> For a list of members of the European Network of Ombudspersons for Children, see <http://www.crin.org/enoc/members/index.asp>. The European Network of Ombudspersons for Children (ENOC) is a not-for-profit association of independent children's rights institutions, established in Norway in 1997. Latin American also has many Ombuds with children's rights units or staff dedicated to defending children's rights. For an earlier comprehensive overview of international developments, see Linda C. Reif, "The Ombudsman for Children: Human Rights Protection and Promotion," in *The Ombudsman, Good Governance and the International Human Rights System* (Boston: Martinus Nijhoff Publishers, 2004).

integrity and decision-making capacities.”<sup>79</sup> Guarantees of procedure fairness like those found in Articles 3 and 12 of the CRC give real effect to the substantive moral commitments confirming the dignity of child citizens.

Nevertheless, an eye to historical development and recent innovation serves to remind that procedures, representation, and decision-making frameworks can, inadvertently and when badly designed, make the vulnerable even more vulnerable. Though I have argued that a hybrid model such as the RCY is a positive development, it is also a vulnerable body in its own way. This case study therefore poses the recurring question of whose interests are being served at what costs regardless of the label or model chosen.

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<sup>79</sup> Stasiulis, “supra note 7 at 508-09.

**Table 1 Comparison across Canada: Structure**

	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	New Brunswick	Nova Scotia	Newfoundland & Labrador	Yukon
<b>Name</b>	Representative for Children and Youth	Office of the Child and Youth Advocate	Child's Advocate Office	Office of the Children's Advocate	Office of the Provincial Advocate for Children and Youth	Commission des droits de la personne et des droits de la jeunesse	New Brunswick Child and Youth Advocate	Office of the Ombudsman	Office of the Child and Youth Advocate	Office of the Child and Youth Advocate
<b>Enabling Act</b>	<ul style="list-style-type: none"> <li>• Representative for Children &amp; Youth Act (2006)</li> </ul>	<ul style="list-style-type: none"> <li>• Child, Youth &amp; Family Enhancement Act (2000)</li> <li>• Protection of Sexually Exploited Children Act (2000)</li> </ul>	<ul style="list-style-type: none"> <li>• Ombudsman &amp; Children's Advocate Act (1978)</li> </ul>	<ul style="list-style-type: none"> <li>• Child &amp; Family Services Act (2003)</li> <li>• Adoption Act (2003)</li> </ul>	<ul style="list-style-type: none"> <li>• Provincial Advocate for Children &amp; Youth Act (2007)</li> <li>• Child &amp; Family Services Act (1990)</li> </ul>	<ul style="list-style-type: none"> <li>• Quebec Charter of Rights &amp; Freedoms (1975)</li> <li>• Youth Protection Act (1977)</li> </ul>	<ul style="list-style-type: none"> <li>• Child &amp; Youth Advocate Act (2007)</li> </ul>	<ul style="list-style-type: none"> <li>• Ombudsman Act (1989)</li> </ul>	<ul style="list-style-type: none"> <li>• Child &amp; Youth Advocate Act (2002)</li> </ul>	<ul style="list-style-type: none"> <li>• Child &amp; Youth Advocate Act (2010)</li> </ul>
<b>Standalone</b>	✓	✗ Ministry of Children and Youth Services	✓	✓	✓	✗ Child and youth division	✓ Decoupled from Ombudsman's Office in 2011	✗ Youth and Senior Services Division	✓	✓
<b>Independent</b>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
<b>Terms of Office</b>	<ul style="list-style-type: none"> <li>• 5 years</li> <li>• Renewable for 2nd 5-year term</li> </ul>	<ul style="list-style-type: none"> <li>• 5 year non-renewable term</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years</li> <li>• Renewable for 2nd 5-year term</li> </ul>	<ul style="list-style-type: none"> <li>• 3 years</li> <li>• Renewable for 2nd 3-year term</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years</li> <li>• Renewable for 2nd 5-year term</li> </ul>	---	<ul style="list-style-type: none"> <li>• Between 5 and 10 years</li> <li>• Non-renewable</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years</li> <li>• Renewable (unspecified)</li> </ul>	<ul style="list-style-type: none"> <li>• 6 years</li> <li>• Renewable for 2nd 6-year term</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years</li> <li>• Renewable for 2nd 5-year term</li> </ul>
<b>Accountable to Legislative Assembly</b>	✓ Select Standing Committee on Children & Youth	✗ Ministry of Children and Youth Services	✓ Directly	✓ Directly	✓ Directly	✓ Commission reports directly	✓ Directly	✓ Through the Ombudsman	✓ Directly	✓ Directly
<b>Funding from Legislative Assembly</b>	✓	✗ Ministry of Children and Youth Services	✓	✓	✓	✗ Ministry of Justice	✓	✓	✓	✓
<b>Recent budget</b>	2009-10 = \$6,991,519	2009-10 = \$7,233,000	2009-10 = \$1,621,000	2009-10 = \$2,384,000	2009-10 = \$6,100,000	---	2009-10 = \$1,679,000	2009-10 = \$1,658,000	2008-09 = \$983,400	2009-10 = est. \$432,000
<b>Specialized or exclusive focus on youth &amp; children</b>	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓

**Table 2 Comparison across Canada: Functions and Powers**

	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	New Brunswick	Nova Scotia	Newfoundland & Labrador	Yukon
<b>Name</b>	Representative for Children and Youth	Office of the Child and Youth Advocate	Child's Advocate Office	Office of the Children's Advocate	Office of the Provincial Advocate for Children and Youth	Commission des droits de la personne et des droits de la jeunesse	New Brunswick Child and Youth Advocate	Office of the Ombudsman	Office of the Child and Youth Advocate	Office of the Child and Youth Advocate
<b>Individual/case advocacy</b>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>Systemic advocacy</b>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
<b>Policy advocacy/ recommendation</b>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>Public reports</b>	✓	via Minister	✓	✓	✓	✓	✓	✓	✓	✓
<b>Receive complaints</b>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>Investigate complaints/ systemic matters</b>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>Access to information</b>	✓ Right to information (s.10)	✗	✗	✓	✗	via Minister	✓	✓	✗	✓ Right to information (s.23(1))
<b>Subpoena power</b>	✓	✗	✗	✗	✗	✓	✗	✗	✓	✗
<b>Investigate deaths</b>	✓	✗	✓	✓	✓	✗	✗	✗	✗	✗
<b>Legal counsel</b>	✗	✓ Appoints	✗	✗	✗	✗	✗	✗	✗	✗
<b>Consultation processes</b>	✓	✗/✓ Underway	✓	✓	✓	✓	✗	✓	✓	✓
<b>Child welfare</b>	✓	✗	✓	✓	✓	✓		✓	✓	✓
<b>Child and Youth Protection</b>	✓	✓	✓	✓	✓	✓	?	✓	✓	✓
<b>Public education</b>	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓
<b>Informed by UNCRC principles</b>	✓	✓	✓ Child and Youth First Principles	✓ Best interests	✓	✓	✗	✓	✗	✓
<b>UNCRC as direct influence</b>	✗	✗	✗	✗	✓ Section 2(3)	✗	✗	✗	✗	✓ Section 17(1)(b)

**Table 3 International Models of Children’s Representatives<sup>80</sup>**

	<b>British Columbia</b>	<b>United States<sup>81</sup></b>	<b>United Kingdom<sup>82</sup></b>	<b>New Zealand</b>	<b>Germany</b>	<b>France</b>	<b>Norway</b>
<b>Model</b>	Independent, stand-alone agency accountable to Parliament	Panels of volunteers	Independent agency accountable to Parliament	Independent Crown agency	National association of guardians <i>ad litem</i>	Special judicial system	Ombudsman (1981)
<b>Legal actors</b>	Representative for Children and Youth is a Legislative Officer	Agencies recruit, train, manage volunteers (attorneys, social workers, citizen volunteers)	Children’s Commissioners <ul style="list-style-type: none"> <li>• England (2004)</li> <li>• Scotland (2003)</li> <li>• Wales (2000)</li> <li>• Northern Ireland (2003)</li> </ul>	Children’s Commissioner (2003)	Voluntary membership	Judge trained in child rights	Appointed by the king
<b>Legal framework</b>	Specialized statutory regime blends inquisitorial and adversarial features but does not provide legal representation	ADR model which interacts with the courts but does not provide legal representation	Individual complaints heard in Wales & Northern Ireland; role in England is to promote rather than safeguard rights	Specialized statutory regime blends inquisitorial and adversarial features but does not provide legal representation	Self-regulating within national standards but limited accountability and no state control	Operates within the inquisitorial legal model	Operates within the ombudsman model with respect to public and private institutions but not family disputes
<b>Role of child</b>	Participatory, represented, consulted	Represented, consulted	Participatory, represented, consulted	Participatory, represented, consulted	Participatory, less represented, consulted	Child has participatory right to express views directly to the judge	Represented, consulted, less participatory
<b>Convention Art. 3: best interests of the child</b>	Indirectly through systemic advocacy	Primary	Shall have regard to or must regard relevant provision in England, Wales, Northern Ireland; mandatory in Scotland	Legislation incorporates principle	Co-equal with Art. 12	Carries less weight than Art. 12	Fully implements the CRC
<b>Convention Art. 12: ensure procedural rights and enhanced representation</b>	Indirectly by ensuring child’s views/wishes are effectively & systematically represented	Duties ranked with best interests taking priority over enhanced representation & participation	Shall have regard to or must regard relevant provision	Legislation incorporates principle	Effectuate child’s will, opinion, rights to participation and self-determination	Legislation incorporates Art. 12	Fully implements the CRC

<sup>80</sup> Modified and expanded table from Andy Bilson and Sue White, “Representing Children’s Views and Best Interests in Court: An International Comparison,” (2005) 14 *Child Abuse Review*, 220-239.

<sup>81</sup> Note that only the United States and Somalia have not ratified the *Convention on the Rights of the Child*.

<sup>82</sup> Until 2004, England’s model was an independent government agency employed guardians *ad litem* in conjunction with legal representation. Scotland employed a panel of guardians as its model where local authorities recruited and administered lists of guardians (“Safeguarders”) who did not provide legal representation.