



Article 12 of the Convention on the Rights of the Child and Children’s Participatory Rights in Canada

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Presented to:

**The Family, Children and Youth Section
Department of Justice Canada**

August 31, 2015

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ISBN 978-0-660-04779-9

Cat. No. J4-40/2016E-PDF

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Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada

Nicholas Bala* & Claire Houston**

I. INTRODUCTION: SCOPE OF PAPER

In 1989, the Convention on the Rights of the Child (CRC) was adopted by the United Nations. Canada ratified the CRC two years later, in 1991. Although the CRC has not been fully incorporated into domestic law, its principles guide interpretation of the *Charter of Rights and Freedoms*, legislation and the common law in Canada.¹

The CRC recognizes that children have civil, political, economic, social, health, and cultural rights. One of the most important rights in the CRC is the “right of participation,”² set out in Article 12. Article 12(1) recognizes the right of children capable of forming views to express those views in all matters affecting them, and directs that due weight be accorded those views, depending on the age and maturity of the child as well as the matter at issue. Article 12(2) provides for the right of the child to be heard directly or indirectly through a representative in any administrative or judicial proceeding affecting the child. Article 12 is especially important since it is one of the few provisions of the CRC that children can exercise themselves, and because it provides for children's involvement in decision-making that most directly impacts on their lives.

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¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

² The term “participation” is not used in the text of Article 12 but is now generally accepted as one of the Article's principles. See United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12 at 5.

Canadian courts and legislatures have recognized the CRC, and the rights of children embodied in Article 12 in particular. The importance of children's views has been directly recognized in family law, specifically in the context of child custody and access disputes following parental separation. Children's participation rights have also been recognized in proceedings respecting child protection, health, youth criminal justice, immigration, and education.

Despite the recognition in Canada of rights of children, the United Nations Committee on the Rights of the Child has suggested that steps need to be undertaken to further promote children's participatory rights in this country. In its 2012 Report on Canada, the Committee welcomed the 2010 Yukon Supreme Court decision in *G. (B.J.) v. G. (D.L.)*,³ which cited and relied upon Article 12 to establish children's participatory rights in disputes between separated parents, a decision discussed more fully below. The Committee, however, also was "concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative procedures that impact children."⁴

This paper provides an overview and comparative analysis of children's participatory rights in Canada.⁵ Looking at legislation and case law from across the country, the paper describes and contrasts the way children's views are considered in the different

³ *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44.

⁴ United Nations Committee on the Rights of the Child, Sixty-first session, 5 October, 2012, CRC/C/CAN/CO/3-4, *Concluding Observations: Canada*, at para. 36.

⁵ The focus of this paper is on the law and literature of Canada. There is, however, a large body of writing and case law from other countries that applies Article 12 of the CRC: see e.g. James Munby, "Unheard voices: The involvement of children and vulnerable people in the family justice system," [2015] Fam Law 895; Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015); and Aisling Parks, *Children and International Human Rights Law: The Right of Children to be Heard* (London: Routledge, 2013).

provinces and territories, as well as across legal domains. The paper also considers how Canadian courts have interpreted and applied Article 12. Finally, drawing on recent academic articles, both Canadian and international, the authors offer some suggestions for how legislatures, courts and tribunals could further implement Article 12, thus promoting children's participatory rights in Canada.

A primary focus of this paper is on children's participatory rights in judicial and administrative proceedings. However, the scope of Article 12 is broader: Article 12 also requires that children be consulted in the development of law and policy that affects them. The paper therefore concludes with some suggestions for including children's voices in legislative and policy-making processes.

II. ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF THE CHILD

Article 12 of the CRC provides:

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.

Interpreting Article 12

In 2009, the Committee on the Rights of the Child published *General Comment No. 12: The right of the child to be heard*, which provides guidance on the interpretation of Article 12.

Article 12 is written in such a way as to place as few restrictions on children's participation as possible. Article 12(1), for example, does not limit the matters on which

children should be consulted. Similarly, while the Article only guarantees the right to be heard to a child “capable of forming his or her views,” capacity is to be interpreted broadly: the Committee suggests that states *presume* a child has capacity to form views. Furthermore, capacity is not determined by age, and the Committee discourages states from introducing age limits for children’s participation. Capacity does not mean a child must have comprehensive knowledge of all aspects of the matter at issue; instead, sufficient understanding of the matter is enough.

The Committee argues that Article 12 also places obligations on states to ensure that a child’s right to participate is realized. It is not enough to allow children to share their views. States must *support* children who have difficulty making their views heard, such as children with disabilities and minority children, as well as *protect* children who express their views, for example child victims who testify in criminal proceedings. The environment in which children express their views matters: venues that are not accessible or child-friendly prevent children’s views from being properly heard. Finally, to properly exercise their right, children must be *informed* of the context in which their views are heard, including information about the nature of proceedings and any potential decisions that may result.

Article 12 requires that children’s views be heard and considered. The significance accorded to a child’s views depends on his or her age *and* maturity. For the purposes of Article 12, maturity refers to the capacity of a child to express views on issues in a reasonable and independent matter. Maturity must also be assessed according to the matter at issue: the greater the impact a decision will have on a child’s life, the more relevant the assessment of maturity becomes.

Article 12(2) directs that children be given the opportunity to be heard in “any” proceedings affecting them. The Committee has provided a non-exhaustive list of judicial proceedings where children’s views might be heard, including those respecting “separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.”⁶ Examples of administrative proceedings where the views of children could be taken into account include “decisions about children’s education, health, environment, living conditions, or protection.”⁷ However, the Committee has indicated that the “main issues” that require a child to be heard are divorce and separation, separation from parents and alternative care, adoption, child offenders, and the child victim and child witness. The Committee has also noted that children’s participation rights extend to mediation and alternative dispute resolution.

Article 12(2) provides that children may be heard directly or indirectly through a representative. The Committee recommends that wherever possible, children be given the opportunity to be heard directly. Where a child is heard indirectly, there must be no conflict of interest on the part of the child’s representative.

Finally, it is important to recognize that Article 12 confers a right to express views, not an obligation to do so. Children therefore have a right *not* to exercise their right to be heard. They should not be forced to express views in matters affecting them.

⁶ United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12 at 11.

⁷ United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12 at 11.

Relationship Between Article 12 and Article 3

General Comment No. 12 of the United Nations Committee on the Rights of the Child also clarifies how the rights in Article 12 relate to other rights in the CRC, including those contained in Article 3. Article 3 provides, in part:

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.

Some commentators have suggested that Article 3 can be interpreted in such a way as to trump the rights contained in Article 12. Specifically, it has been argued that hearing the views of children may be contrary to their best interests, as it may draw them into a dispute involving their parents or other caregivers, and accordingly their views and wishes should not be solicited.⁸ The Committee rejects this approach and denies that there is tension between the two Articles. It interprets Articles 12 and 3 as mutually reinforcing: the best interests of the child will be promoted where the views of the child are heard and considered. Conversely, denying a child the opportunity to be heard would seem to violate Article 3.

While there are legitimate concerns about how children are involved in legal proceedings, and children should never be pressured to express their views or preferences, there is considerable research that allowing children to share their perspectives promotes their welfare, as well as it being necessary to protect their rights. Hearing from children often provides judges, mediators, lawyers, and parents with vitally important information about their best interests. Research suggests that children generally have better outcomes if they feel that they have a “voice” in the family dispute resolution process.⁹

⁸ This argument is reviewed in detail, and rejected in Aisling Parks, *Children and International Human Rights Law: The Right of Children to be Heard* (London: Routledge, 2013) at 58.

⁹ For discussions of the social science literature on judicial meetings and involving children in the family dispute resolution process, see Rachel Birnbaum, Nicholas Bala & Francine Cyr,

III. REVIEW OF CHILDREN’S PARTICIPATORY RIGHTS IN CANADA

This section of the paper reviews children’s participation rights in Canada in the legal contexts which have most frequently implicated these rights. The right of children to be heard in matters affecting them has been recognized in legislation, and by judicial and administrative decision-makers. This section considers how children’s voices are heard in different legal contexts and across Canadian jurisdictions. Special attention is directed to the interpretation and application of Article 12 by decision-makers in the domestic context. This section is divided into legal areas where the importance of children’s views has been recognized: family disputes after parental separation, child protection, health, adoption, juvenile justice, child victims and witnesses, immigration and refugee claims, and education proceedings.

A. FAMILY DISPUTES AFTER SEPARATION

One area in which the right of children to be heard has been consistently recognized is in disputes about child custody and access following parental separation.¹⁰ In Canada, legal rules governing the rights of separated parents depend on whether the parents were married. For married parents seeking a divorce, the relevant statute is the federal *Divorce Act*. For unmarried parents, provincial or territorial legislation governs.

“Children’s Experiences with Family Justice Professionals In Ontario and Ohio” (2011) 25 *Inter. J. L. Pol. & Fam.* 398; Rachel Birnbaum & Michael Saini, “A Scoping Review of Qualitative Studies on the Voice of The Child in Child Custody Disputes” (2013) 20 *Childhood* 260; and Joan B. Kelly & Mary Kay Kisthardt, “Helping Parents Tell Their Children about Separation and Divorce: Social Science Frameworks and the Lawyer’s Counseling Responsibility” (2009) 22 *J. Am. Acad. Mat. L.* 1401.

¹⁰ The federal *Divorce Act* and much provincial and territorial legislation uses the traditional concepts of “custody” and “access” to describe parental “rights” after separation, and that terminology is used in this paper. However, there is much to be said for the adoption of more child-focused terms like “parenting plans,” “parenting time” and “parental responsibilities.” British Columbia and Alberta have enacted statutes that adopt new concepts; see Nicholas Bala, “Bringing Canada’s Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law”(2015) 40:2 *Queen’s L. J.* 425-482.

The “Best Interests of the Child” Include the Child’s “Views and Preferences”

The majority of separating or divorcing parents agree on custody and access arrangements without involvement of a judge, whether by direct informal discussion between the parents, negotiation between lawyers, or through mediation. Whether or not children in such families are consulted on these matters depends on the attitude of the parents, and the approach of professionals, such as lawyers and mediators, who may be assisting them. In cases where a judge is asked to make a custody or access determination, the primary factor – whether under the *Divorce Act* or provincial or territorial legislation – is the “best interests” of the child. Canadian law has long recognized that children’s views are relevant to assessing their “best interests.” In most provinces and territories, judges are explicitly directed by legislation to consider the child’s views and preferences in determining a child’s “best interests,” on which a custody or access order will be based.¹¹ For example, s. 37(2)(b) of British Columbia’s *Family Law Act* instructs that in determining the best interests of a child for the purposes of a parenting or contact order, the court must consider all the of the child’s needs and circumstances, including “the child’s views, unless it would be inappropriate to consider them.”¹² In a few jurisdictions, legislation is even more directive in requiring courts to consider the child’s views and preferences when making an order for custody or access. In Prince Edward Island, for example, s. 8(1) of the *Custody Jurisdiction and Enforcement Act* provides that in any application under the statute, “a

¹¹ In Quebec, Article 34 of the *Civil Code of Québec* provides that children shall be heard in all proceedings that affect them, not just family proceedings: *Civil Code of Québec*, C.Q.L.R. 1991, c. C-1991, art. 34.

¹² *Family Law Act*, S.B.C. 2011, c. 25, s. 37(2)(b). See also e.g. Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 24(2)(b).

court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.”¹³

The *Divorce Act* stands alone in not explicitly providing for a child’s views and preferences to be heard in making a custody or access order in a child’s best interests. The Act provides, in s. 16(8), that the “best interests” of the child are to be the only consideration in making a custody or access award. Judges have, however, consistently interpreted “best interests” in this provision to include consideration of the child’s views and preferences.¹⁴

Children’s Views and Preferences Not Necessarily Determinative

While children’s views and preferences are an important factor in determining which custody and access arrangement will be in a child’s best interests, they are not the only factor. Nor are they necessarily determinative. The weight accorded to a child’s wishes depends on factors such as age, maturity, and motivation.¹⁵ Justice R. James Williams of the Nova Scotia Supreme Court, Family Division, suggests a number of factors judges should consider when assessing the significance of a child’s wishes:

- (a) whether both parents are able to provide adequate care [i.e. if there is no real choice about care arrangements, the child’s wishes may not be that significant];
- (b) how clear and unambivalent the wishes are;
- (c) how informed the expression is;
- (d) the age of the child;

¹³ *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 8(1).

¹⁴ For a discussion of case law on the views of children in cases under the *Divorce Act* and a proposal for amending the Act to more explicitly comply with Article 12, see Nicholas Bala, "Bringing Canada’s Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law"(2015) 40:2 Queen’s L. J. 425-482.

¹⁵ Nicholas Bala, “The Voice of Children in Alberta Family Law Cases” (Paper presented to the Legal Education Society of Alberta for Children’s Lawyers in Calgary and Edmonton, April 2005) at 1 [unpublished].

- (e) the maturity level;
- (f) the strength of the wish;
- (g) the length of time the preference has been expressed for;
- (h) practicalities;
- (i) the influence of the parent(s) on the expressed wish or preference;
- (j) the overall context; and
- (k) the circumstances of the preference from the child's point of view.¹⁶

Although custody and access legislation does not place age restrictions on the ability of a child to express his or her wishes, Canadian courts have found it unreasonable to expect a child 5 years of age or younger to articulate views and preferences.¹⁷ As discussed below, courts have also recognized an upper age limit, after which failing to follow a child's wishes may be futile.

The independence of a child's views and preferences is also an issue for judges making custody or access orders. A child may be unduly influenced into rejecting one parent due to the alienating conduct of the other parent. Children may also express views and preferences that conflict with their best interests. In *Jespersen v. Jespersen*,¹⁸ a 12 year-old boy expressed a desire to live with his father. The boy struggled in school and his mother played a key role in making sure he applied himself to school, which caused emotional tension for the boy. The trial judge found that this tension informed the child's stated desire to live with his father, and ordered custody to remain with the mother despite

¹⁶ R.J. Williams, "If Wishes Were Horses Then Beggars Would Ride" (Paper presented at the National Judicial Institute, Family Law Program, Halifax, February 1999).

¹⁷ See e.g. *Houle v. Poulin*, 1998 CarswellOnt 556 (Ont. Prov. Div.).

¹⁸ (1985), 48 R.F.L. (2d) 193 (B.C.C.A.).

the boy's views. For younger children, judges are more likely to disregard a child's wishes if they do not conform to his or her best interests.

Once children reach 12 or 13, they may be more likely to “vote with their feet,” and many separated parents will effectively allow children of this age or older to have a significant or determinative role in their living arrangements. Further, judges recognize that it can be difficult to enforce a custody or access order that is contrary to the child's wishes. As observed by the British Columbia Court of Appeal in *O'Connell v. McIndoe*: “In order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child.”¹⁹ However, in cases where the courts believe that there has been parental alienation or manipulation of a child's views, they may be prepared to make orders for children up to the age of 15 years or older, with the intent of promoting the child's interests and changing the attitude and behaviour of the alienating parent.²⁰

Ways of Hearing Children in Custody and Access Proceedings

There are a number of ways a court may receive evidence about the views and preferences of children in custody and access proceedings. Bala and Hebert provide the following list:

- Hearsay evidence, related by a witness, including a parent, social worker or teacher;
- A video-recording or audiotape of an interview with a child;
- Written statements from a child in the form of a letter or affidavit;
- A report or the testimony of a social worker or a mental health professional as part of an assessment of the case;

¹⁹ 1998 CarswellBC 2223 (B.C.C.A.) at para. 13.

²⁰ See *S.G.B. v. S.J.L.*, [2010] O.J. 3738, 2010 ONCA 578; and *Godard v Godard*, 2015 ONCA 568.

- A report from a lawyer, social worker or psychologist who has conducted an interview (or more than one interview) and prepared a *Views of the Child Report*;
- Counsel for a child;
- Testimony by the child in court; and
- A meeting or interview in the judge’s chambers.²¹

Some of these methods for introducing children’s evidence are provided for by statute, while others have been defined by case law. The following sections of this paper summarize the law on the admission of children’s evidence in custody and access proceedings across Canada. Some of these methods – such as judicial interviews – are more controversial than others. While the issues respecting the various methods for introducing children’s evidence will be identified, a thorough analysis of each method is beyond the scope of this paper.

Finally, it is important to note that while every jurisdiction in Canada provides for children’s views and preferences to be heard in custody and access proceedings, the reality is that children are not always heard. A 2010 study of reported Canadian decisions arising from custody and access litigation found that only 45% mentioned evidence respecting the views and preferences of the children in any form.²² Further, there are significant issues related to how parents, their lawyers and mediators learn about the views of children in cases that are not resolved by judges.

²¹ Nicholas Bala & Patricia Hebert, “Views, Perspectives and Experiences of Children in Family Cases” (Paper presented to the National Judicial Institute Program on Judicial Interviews of Children and the National Family Law Program, July 2014) at 3-4 [unpublished].

²² Noel Semple, “The Silent Child: A Quantitative Analysis of Children’s Evidence in Canadian Custody and Access Cases” (2010) 29 Can. Fam. L.Q. 7.

Assessments

In every Canadian province and territory, a judge hearing a custody and access dispute is empowered to make an order requesting the involvement of an independent third party, typically a social worker or mental health professional, to assess the case and provide a report to the court. In some areas, such as New Brunswick, jurisdiction to order an assessment is found in the provincial or territorial custody and access legislation. In others, authority flows from a separate statute, usually one governing court procedure. The actual legislation under which a judge may order an assessment depends on the level of court. For example, in Manitoba, provincial courts find jurisdiction under the *Family Maintenance Act* whereas superior courts rely the *Court of Queen's Bench Act*. Superior courts may also order assessments pursuant to its inherent *parens patriae* jurisdiction.²³

Interviews with children and observation of parent-child interactions are an important part of the assessment process. Some statutes specifically identify ascertaining the child's views and preferences as one of the objectives of an assessment. British Columbia's *Family Law Act*, for example, provides that a judge can request an assessor to report on "the views of a child."²⁴ In Alberta, superior courts may order a "Parenting Assessment" pursuant to Practice Note 8, which can address the wishes of the children.²⁵ Even in provinces and territories where the legislation is not specific, a child's views and preferences, where ascertainable by the mental health professional, will invariably be included in the assessment report.

²³ *Christopher v. Christopher*, [1987] W.D.F.L. No. 146 (Nfld. T.D.)

²⁴ *Family Law Act*, S.B.C. 2011, c. 25, s. 211(1)(b).

²⁵ Court of Queen's Bench of Alberta, "Family Law Practice Note 8: Parenting Time/Parenting Responsibilities Assessments," online: Alberta Courts <<https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/pn8-bi-lateral-assessment---final.pdf?sfvrsn=0>>.

Assessments usually include comments by the assessor about the child and the child's views and preferences (assuming the child is old enough to communicate.) Jurisdictions differ, however, on whether assessment reports should contain recommendations on what parenting arrangement would be in the best interests of the child. Section 29(6) of the Northwest Territories' *Children's Law Act* directs that an assessor "shall not make any recommendation as to whom custody or access should be granted."²⁶ In most provinces, however, whether by legislation or practice, it is common for assessment reports to include recommendations. For example, in Ontario, the *Courts of Justice Act* directs that reports based on "investigations" by a representative of the Office of the Children's Lawyer "may... make recommendations to the court on all matters concerning custody of or access to the child".²⁷ Similarly, in Alberta, court-appointed assessors – "Parenting Experts" – are expected to "assist[] the Court by providing an objective, impartial recommendation on the parenting and custody arrangement that is in the children's best interest."²⁸

Assessments are a common and important way for children's voices to be indirectly heard in custody and access proceedings. However, assessments are expensive, and can delay resolution of proceedings. In some provinces, like Alberta, Manitoba and Ontario, the government may pay for a court-ordered assessment, at least for low income litigants. However, government resources are limited, and only higher income litigants can afford an assessment. In Ontario, the Office of the Children's Lawyer (OCL) does not charge for assessments (called clinical investigations), but for budgetary reasons declines to become

²⁶ *Children's Law Act*, S.N.W.T. (Nu.) 1997, c. 14, s. 29(6).

²⁷ *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 112(1).

²⁸ *U. (A.J.) v. U. (G.S.)*, 2015 ABQB 6.

involved in a significant portion of the cases in which a court makes an order requesting involvement of the OCL. Thus, in many cases, unless parents are able and willing to pay for an assessment, it is not provided. And the reality is that most parents cannot afford the cost of these reports.

Counsel for the Child

A second method for introducing children's views and preferences into a custody and access proceeding is through the appointment of a lawyer for the child. Authority to appoint child's counsel may flow from provincial or territorial custody and access legislation,²⁹ or from another statute.³⁰ Where there is no statutory authority, superior courts can rely on its inherent *parens patriae* power to appoint a lawyer for the child.³¹

A few jurisdictions provide government-funded representation for children in custody and access disputes. In Ontario, which has the most comprehensive program for child representation in Canada, judicial requests for child representation are made to the Office of the Children's Lawyer, which, in custody and access cases, decides whether to assign counsel, undertake a clinical investigation, both or neither. Government-funded counsel for children is also provided for under the Yukon's *Children's Law Act*³² and in the Northwest Territories. In some provinces, including Alberta and Quebec, it is not uncommon for a lawyer to be appointed for the child and be paid for by Legal Aid.³³ In

²⁹ See *Family Law Act*, S.A. 2003, c. F-4.5, s. 95(3).

³⁰ See *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 89(3.1).

³¹ See e.g. *Kalaserk v. Nelson*, 2005 NWTSC 4 at para. 19.

³² *Children's Law Act*, R.S.Y. 2002, c. 31, s. 168.

³³ Nicholas Bala & Patricia Hebert, "Views, Perspectives and Experiences of Children in Family Cases" (Paper presented to the National Judicial Institute Program on Judicial Interviews of Children and the National Family Law Program, July 2014) [unpublished] at 26. See also Quebec's *Code of Civil Procedure*, R.S.Q. c. C-25, art 394.1.

other provinces, however, such as Newfoundland and Labrador, Legal Aid will not provide counsel for a child in cases involving separated parents.³⁴

Most statutes do not provide guidance as to when counsel for children should be appointed. British Columbia's *Family Law Act* and the Yukon's *Children's Act* are exceptions. British Columbia's Act provides that the court may appoint a lawyer to represent the interests of a child where:

- (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
- (b) it is necessary to protect the best interests of the child.³⁵

In the Yukon, the decision to appoint government-funded counsel for children in custody and access proceedings lies with the Office of the Public Guardian and Trustee.³⁶

The *Children's Law Act* provides that in determining whether separate representation for children is required, the Public Guardian must consider:

- (i) the ability of the child to comprehend the proceeding,
- (ii) whether there exists and if so the nature of any conflict between the interests of the child and the interest of any party to the proceeding, and
- (iii) whether the parties to the proceeding will put or are putting before the judge or court the relevant evidence in respect of the interests of the child that can reasonably be adduced.³⁷

In jurisdictions where the legislation is silent as to when counsel for a child should be appointed, judges have considered factors similar to those enumerated in British

³⁴ See e.g. *M. B.-W. v. R.Q.*, 2015 NLCA 28.

³⁵ *Family Law Act*, S.B.C. 2011, c. 25, s. 203.

³⁶ *Children's Law Act*, R.S.Y. 2002, c. 31, s. 168(2). Section 168(5)(a), however, requires the Office to "consider advice or recommendations from the judge before whom or court in which the proceedings are taking place".

³⁷ *Children's Law Act*, R.S.Y. 2002, c. 31, s. 168(5)(b).

Columbia's and the Yukon's Acts. Courts have held that child representation should only be ordered where: (1) it is in the child's best interests;³⁸ (2) the parents cannot adequately represent the child's interests;³⁹ and (3) the child can instruct counsel.⁴⁰ Following these guidelines, appellate courts have determined that child representation should not ordinarily be appointed in custody and access cases, and some decisions suggest that this should be "rare." The Alberta Court of Appeal, for example, has held that in custody and access proceedings the presumption should be against appointing a lawyer for the child.⁴¹

There is controversy in Canada about the appropriate role of lawyers for children in custody and access disputes. Lawyers may act in the role of a traditional advocate, taking instructions from their child client and advancing the child's position. Counsel may also act as litigation guardian, advocating a position that corresponds to what counsel has determined to be in the child's best interests. Finally, child's counsel may take on the role of *amicus curiae*, taking no position and simply placing evidence of the child's views and preferences before the court. The role of the lawyer varies by jurisdiction. In Quebec, the Court of Appeal has ruled that lawyers are to take on the role of advocate on behalf of children involved in custody and access disputes, provided they can instruct counsel.⁴² In Ontario, the Office of the Children's Lawyer has adopted a policy that gives lawyers more discretion: counsel must ensure that the court is made aware of the child's wishes but may advocate a position that advances the interests of the child even if that position is not

³⁸ *Lafferty v. Angiers*, 2013 NWTSC 3 at para. 16.

³⁹ *Puszczak v. Puszczak*, 2005 ABCA 426 at paras. 10-11; *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753 (Ont. C.A.); and *M. B.-W. v R.Q.*, 2015 NLCA 28.

⁴⁰ *Wagner v. Melton*, 2012 NWTSC 41 at para. 7.

⁴¹ *Puszczak v. Puszczak*, 2005 ABCA 426.

⁴² *F. (M.) v. L. (J.)* (2002), 211 D.L.R. (4th) 350 (Que. C.A.).

consistent with the child's wishes.⁴³ In practice, many lawyers vary their approach in different cases, taking more account of a child's instructions if a child is older and more mature, and less direction if the child wants an outcome that might harm the child.⁴⁴ Further, in practice, lawyers for children often play an important role in trying to encourage parents to settle their disputes without trial, which is often what children most desire.

Lawyers for children are generally responsible for placing children's views and preferences before the court. However, two appellate courts – the Ontario Court of Appeal and the Alberta Court of Appeal – have held that, unless the parties consent, lawyers for children cannot provide “evidence from counsel table” about children's views and preferences.⁴⁵ These appellate courts have held that children's views and preferences should be placed before the trial court by a social worker or mental health professional who has interviewed the child and can testify about what was said by the child and under what circumstances, and who can be cross-examined by all of the parties.

Judicial Interviews

Another way in which children are heard in custody and access proceeding is by meeting with the judge, either by coming to the court room or meeting in the judge's chambers.

In Quebec, Article 34 of the *Civil Code of Québec* provides:

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.⁴⁶

⁴³ Policy of Ontario Office of the Children's Lawyer, April 3, 1995, revised January 18, 2001. For an example of a case where counsel for the child advocated a different position from the express wishes of the child because of concern about manipulation of the child by a parent, see *Boukema v. Boukema*, [1997] O.J. 2903 (Ont. Sup. Ct.).

⁴⁴ Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, “Controversy about the Role Children's Lawyers: Advocate or Best Interests Guardian? Comparing Attitudes & Practices in Alberta & Ontario – Two Provinces with Different Policies” (2013) 51 Fam. Ct. Rev. 681.

⁴⁵ *Strobridge v. Strobridge*, [1994] O.J. No. 1247 (Ont. C.A.); *R.M. v. J.S.*, 2013 ABCA 441.

⁴⁶ *Civil Code of Québec*, C.Q.L.R. 1991, c. C-1991, art. 34.

This provision is commonly used to allow children to meet with judges, either in their chambers, or in the court room, invariably without the parents present.⁴⁷

Judicial interviews are expressly provided for in the statutes of New Brunswick,⁴⁸ Newfoundland and Labrador,⁴⁹ the Northwest Territories,⁵⁰ and Ontario. For example, s. 64(2) of Ontario's *Children's Law Reform Act* provides: "The court may interview the child to determine the views and preferences of the child."⁵¹ In other provinces, case law establishes that judges have the discretion to interview children.⁵² However, except in Quebec, judicial interviews are not very common in custody and access proceedings.

In a 2004 decision of the Ontario Superior Court of Justice, Justice Quinn suggested that judicial interviews should be used "only as a last resort" to ascertain a child's views and preferences.⁵³ Other Ontario judges have expressed concern that judicial interviews without parents present might undermine "the appearance of justice" and the traditional due process rights of parents.⁵⁴ One of the controversial issues related to judicial interviews is whether and how parents should be provided with a transcript of the meeting with the child. Commentators and some of the reported jurisprudence suggest that judges have the discretion to provide parents with a summary of the child's statements, without

⁴⁷ Nicholas Bala, Rachel Birnbaum & Francine Cyr, "Judicial Interviews of Children in Canada's Family Courts" in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015) 135.

⁴⁸ *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 6(3).

⁴⁹ *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 71(2).

⁵⁰ *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 83.

⁵¹ *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 64(2).

⁵² See *Jandrisch v. Jandrisch* (1980), 16 R.F.L. (2d) 239 (Man. C.A.).

⁵³ *Stefureak v. Chambers*, 2004 CarswellOnt 4244, 6 R.F.L. (6th) 212 (Ont. S.C.J.).

⁵⁴ See *Jandrisch v. Jandrisch* (1980), 16 R.F.L. (2d) 239 (Man. C.A.).

using the child's exact words and sparing the child from potential embarrassment or damaging a child's relationship with a parent.⁵⁵

However, there now seems to be a gradual trend towards growing judicial acceptance of this practice.⁵⁶ In 2010, Justice Martinson of the Yukon Territory Supreme Court considered whether to interview a 12 year-old boy for the purposes of ascertaining his views and preferences, despite that jurisdiction not having legislation expressly providing for judicial interviews in custody and access disputes.⁵⁷ Citing Article 12 of the CRC, Martinson J. declared:

Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate.⁵⁸

While Martinson J. declined to interview the child in that particular case, she made clear that, in her view, not only do judges have the discretion to interview children, they also have a duty to ensure that children are asked whether they would like to meet with the judge.

Views of the Child Reports

With the cost and delay involved in assessments and appointment of counsel, and the concerns about due process and other issues related to judicial interviews, a growing

⁵⁵ Nicholas Bala, Rachel Birnbaum, Francine Cyr & Denise McColley, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47:3 Fam. L.Q. 381.

⁵⁶ Nicholas Bala, Rachel Birnbaum & Francine Cyr, "Judicial Interviews of Children in Canada's Family Courts" in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015) 135.

⁵⁷ *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44.

⁵⁸ *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44 at para. 6.

practice has been the preparation of non-evaluative Views of the Child Reports (also called Voice of the Child, Wishes of the Child or Hear the Child Reports). These reports, typically prepared by a lawyer or mental health professional, are based on one or more interviews with the child and are meant to provide the court with information about the child's perspective on his or her life and the matters in dispute.⁵⁹ Views of the Child reports are much narrower in scope than traditional custody assessments, but much less costly and time consuming to prepare. Although there is variation, it would seem that the most common practice is for professionals preparing these reports to not express views about children's statements, but to offer the child the choice of what statements will be included in the report to their parents and the court.

The reports were first introduced in British Columbia, which has one of the lowest rates of government funding for full custody assessments, and have since been used in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, New Brunswick and Nova Scotia. There are a few cases of Views of the Child Reports having been ordered in Ontario, although the practice is still very rare there.

Although none of the provinces or territories in Canada have legislation that specifically provides for the preparation of Views of the Child Reports, courts have ordered these reports under the broader power to order assessments. At least two judges in New Brunswick and one in Nova Scotia have found further authority to order these reports in

⁵⁹ Rachel Birnbaum, Nicholas Bala & John Paul Boyd, "The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?" *International Journal of Policy, Law and the Family* [forthcoming in 2016].

Article 12 of the CRC.⁶⁰ These decisions recognize that Views of the Child Reports can play an important role in protecting a child’s right to be heard.

Other Evidence of Children’s Views and Preferences

Other ways of hearing children who are the subject of custody and access disputes include having the child testify in court, admitting written statements from the child, or introducing audio or video-recorded statements by a child. Child testimony in custody and access proceedings is very rare. Judges are concerned about the emotional harm to children that could result from being witnesses in open court, and testifying in the presence of their parents and potentially being subject to cross-examination. Where one parent seeks to have a child testify, as sometime happens in alienation cases, judges have the power to refuse to issue a summons to a child or to prevent the child from testifying if the judge considers that this is necessary to protect the interests of the child.⁶¹

Because children rarely testify in custody and access cases, judges are more inclined to admit evidence of children’s out-of-court statements. Some of this evidence is hearsay, and thus subject to the “necessity and reliability” test set out in *R. v. Khan*.⁶² Expert evidence, including the opinions of a custody assessor, even if based on a child’s statements, is technically not hearsay. Another exception is evidence of children’s wishes, which is admitted to establish the child’s “state of mind” rather than establish the truth of the statement. Judges have long used this exception to the hearsay rule to permit adult

⁶⁰ *D. (K.R.) v. K. (C.K.)*, 2013 NBQB 211 (Walsh J.); *S. (M.A.) v. S. (J.S.)*, 2012 NBQB 285 (Baird J.); *John v John*, 2012 NSSC 324 (Jollimore J.).

⁶¹ This power may be exercised not only by federally appointed superior court judges with an inherent *parens patriae* power to promote the best interests of children, but may also be exercised by provincially appointed judges as part of their jurisdiction to control proceedings: *Dudman v. Dudman*, [1990] O.J. 3246 (Prov. Ct.), per Felstiner J.

⁶²[1990] 2 S.C.R. 531. See Part C of this paper for further discussion.

witnesses in custody and access cases to testify about a child's wishes.⁶³ However, where the adult testifying about the child's wishes is a parent or interested party, judges have refused to admit such evidence or have accorded it very little weight; judges are concerned about the reliability of this type of evidence,⁶⁴ and the implications of allowing parents to testify about a child's statements, which may encourage parents to involve children in custody litigation.⁶⁵

Where counsel or a parent seeks to introduce children's evidence to prove a contested fact in a custody and access proceeding, in particular related to allegations of abuse or domestic violence, many judges apply the *Khan* test of necessity and reliability.⁶⁶ However, some judges accept that in custody and access proceedings, where the best interests of the child are paramount, the rules of evidence ought to be relaxed even when related to allegations of abuse or violence. In a recent Ontario decision, Justice Price of the Superior Court explained:

The court's *parens patriae* jurisdiction, when determining issues of temporary care, or custody of and access to children, especially amidst allegations of domestic violence, sexual abuse, or parental alienation, gives it a broad discretion to base its decisions on the best evidence available, and to take a flexible approach to hearsay.⁶⁷

⁶³ Nicholas Bala, "The Voice of Children in Alberta Family Law Cases" (Paper presented to the Legal Education Society of Alberta for Children's Lawyers in Calgary and Edmonton, April 2005) at 32 [unpublished]. See also discussion in D.A.R. Thompson, "Are there *Any* Rules of Evidence in Family Law?" (2003) 21 Can. Fam. L.Q. 245 at 289.

⁶⁴ Nicholas Bala, "The Voice of Children in Alberta Family Law Cases" (Paper presented to the Legal Education Society of Alberta for Children's Lawyers in Calgary and Edmonton, April 2005) at 33 [unpublished].

⁶⁵ See e.g. *M (D.G.) v. M. (K.M.)*, [2000] A.J. 1001 (Q.B.); *Livingstone v. Trainor*, [2004] P.E.I.J. 78 (S.C.T.D.), per Campbell J; *Keeping v. Keeping*, [2004] N.J. 293 (U.F.C.), per Cook J.

⁶⁶ See e.g. *G. (J.A.) v. R. (R.J.)*, 1998 CarswellOnt 1487 (Ont. Gen. Div.) at para. 12.

⁶⁷ *Ganie v. Ganie*, 2014 ONSC 7500 at para. 144.

In British Columbia, this “flexible” approach to children’s hearsay evidence in custody and access cases is prescribed by statute. Section 202 of the *Family Law Act* provides:

In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;
- (b) give any other direction that it considers appropriate concerning the receipt of a child’s evidence.⁶⁸

The provision was interpreted by Regional Senior Provincial Judge Harrison in the 2014 case of *K. (N.N.) v. L. (S.F.)*: “The common law test has been modified in *Family Law Act* matters by s. 202 of the Act, which may to some degree reduce the necessity requirement in the best interests of a child who is absent.”⁶⁹

B. HAGUE CHILD ABDUCTION CONVENTION PROCEEDINGS

A number of Canadian cases have considered children’s participation rights in the context of proceedings respecting the *Hague Convention on the Civil Aspects of International Child Abduction* [“*Hague Convention*”]. The *Hague Convention* is a multilateral treaty that provides for the return of children taken from their country of habitual residence to another member state.⁷⁰ The proceedings are typically commenced by one parent (the left behind parent) litigating against the other parent (the taking parent) to obtain an order for the return of the child to the child’s jurisdiction of habitual residence after a “wrongful removal,” so that any parenting dispute can be resolved by the courts in the jurisdiction of the habitual residence. However, the proceedings directly affect the child, since they may result in a

⁶⁸ *Family Law Act*, S.B.C. 2011, c. 25, s. 202.

⁶⁹ 2014 BCPC 297 at para. 55.

⁷⁰ Can. T.S. 1983, No. 35. For a fuller discussion of the *Hague Convention*, see Nicholas Bala & Mary Jo Maur, “The Hague Convention on Child Abduction: A Canadian Primer” (2014) 33 Can. Fam. L.Q. 267.

court order requiring the return of the child, sometimes after the child has spent a considerable period of time settling into life in Canada.

Child's Views and Objections

Article 13 of the *Hague Convention* provides for situations where Canadian courts are not bound to return the child to his or her country of habitual residence, including situations where return would expose the child to a grave risk of “physical or psychological harm or otherwise place the child in an intolerable situation.” In some cases, the views and perspectives of the child may be relevant for assessing whether the child faces a risk from return.

Further, Article 13 of the *Hague Convention* allows courts to refuse to return a mature child who “objects,” providing:

The judicial ...authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

According to the Article 13, the weight to be given a child's objection depends on the age and maturity of the child. Clearly in cases where this provision is invoked, it is important for the child's views to be communicated to the court, and it may often be appropriate for the child to have independent representation.

While Article 13 of the *Hague Convention* appears to give courts fairly wide authority to take into account a child's views, the *Hague Convention* is generally interpreted in a fashion that narrows this exception, to accord with its general intent of discouraging wrongful removal of children from their jurisdiction of habitual residence. The onus is on the parent or child seeking to invoke this exception. The courts recognize that if a child has been taken by one parent and had little or no contact with the left-behind parent for a significant period of time, the child is likely to express a preference for

continuing to reside in the new jurisdiction with the parent who wrongfully removed or retained the child, so a mere preference is not sufficient:⁷¹ there must be an “objection” to return from a “mature child.”

The British Columbia Supreme Court in *Beatty v. Schatz* cited Article 12 of the CRC for the proposition that it was important to hear the views of the child when Article 13 of the *Hague Convention* is raised, and ordered a psychologist to interview the child and report to the court. However, the court concluded that the 11 year-old boy was not mature enough to understand all of the subtleties and long-term consequences of what was happening. Furthermore, the father had been exerting subtle but significant influence over the boy, giving him the message that he did not have to return to the jurisdiction of his habitual residence, Ireland, even though the Court said that he had to. The Court was concerned that not returning the boy to Ireland would send the message that it was acceptable to retain a child in another country as long as the child asserted that he or she did not wish to return, and accordingly took a narrow approach to the scope of the child’s objection exception in Article 13 of the *Hague Convention*.⁷² Justice Martinson held that it was unfair to the child and contrary to the policy intentions of the *Hague Convention* to allow the child to in effect make the decision:

A was ten when his father placed the responsibility of what should happen on his shoulders. He just turned 11.... Though he is obviously bright and can express what he wants to do and why, he is not mature enough to understand the subtleties of what is happening and their long-term consequences on his well-being.

This is a case where the policy considerations underlying the *Hague Convention* are particularly important. As the [House of Lords] said in *Re M.*, the *Hague Convention* is there not only to secure the prompt return of abducted children, but also to deter abduction in the first place.⁷³

⁷¹ See e.g. *Den Ouden v. Laframboise*, 2006 ABCA 403.

⁷² 2009 BCSC 706, 2009 CarswellBC 1402 (B.C.S.C.). See also e.g. *G.B. v. V.M.*, [2012] O.J. No. 5825 (O.C.J.).

⁷³ 2009 BCSC 706, 2009 CarswellBC 1402 (B.C.S.C.) at para. 55-56.

The Alberta case of *R.M. v J.S.*, also illustrates the high onus of proof for raising a defence under Article 13 of the *Hague Convention* based on the child's objections, and offers some guidance for how evidence about a child's maturity and objections should be introduced. The mother and father were Palestinian Muslims, living in East Jerusalem, and had one child, a son. The parties separated, and were subsequently divorced in the Sharia Court of Jerusalem, with the mother having *de facto* custody. The father immigrated to Calgary, while the mother and son continued to live in Jerusalem on the understanding that the son would spend his summers with the father in Alberta.

When the father failed to return his then 9 year-old son to his mother in Jerusalem after a summer visit, the mother brought an application under the *Hague Convention* for the boy's return. The trial court appointed counsel to represent the interests of the child.⁷⁴ Counsel for the child reported that after interviewing the child on two occasions, that the child [then 10 years of age] objected "to being returned [to Jerusalem] and has attained an age and degree of maturity at which it is appropriate to take account of its views" within the meaning of Article 13 of the *Hague Convention*. The child's lawyer concluded that the boy was not subject to undue influence from the father, and was "mature for his age, bright and articulate when it came to describing his concerns about returning to Israel," noting that as a Palestinian youth he often felt unsafe and bullied in Israel. The judge accepted that there had been a wrongful retention, but ruled that the child was "mature" and had understandable objections to return, and accordingly refused the application.⁷⁵

⁷⁴ *J.S. v R.M.*, 2012 ABPC 184.

⁷⁵ *R.M. v J.S.*, 2012 ABQB 669.

The Alberta Court of Appeal allowed an appeal and directed that the child be returned “forthwith” to the mother in Jerusalem, expressing concern that the trial judge:

seemed to treat the child's objection as controlling. While he found that the child's objection was not coerced, nor otherwise improperly influenced, the evidence and matters he took into account in coming to that conclusion were also missing from his decision. There is also the concern that, in weighing the elements of the child's objection which spoke to the child's preferences and hopes, the Provincial Court judge fell into forming a conclusion about the child's best interests.... In short, the objects and policy considerations underlying the *Convention* appear to have been overridden without a proper evidentiary basis...⁷⁶

The Court of Appeal decision in *R.M. v J.S.* questioned the conclusions of the trial judge about the maturity of the boy, but actually rested its decision on the fact that the trial judge based his findings about the boy’s “objections” on the submissions of counsel for the child.⁷⁷ The Court suggested that evidence about the child’s wishes and views should be put before the trial court by a social worker, psychologist, or other child-care professional who had interviewed the child. This would allow the clinician to be cross-examined by the other parties, ensuring that the evidence is fairly tested. The Court of Appeal held that in the absence of *express consent* from the other parties, counsel for a child should not tell the court about a child’s views and preferences, as counsel cannot occupy the dual role of advocate and witness.

Role of Children in Hague Convention Proceedings

While *Hague Convention* proceedings are intended to be summary and presiding judges are not expected not to directly address the interests of children, children are nevertheless profoundly affected by these proceedings, and courts in a number of countries are

⁷⁶ 2013 ABCA 441 at para. 32 and 34. For a critical comment on this decision and its failure to recognize the rights of the child involved, see Nicholas Bala, Max Blitt & Helen Blackburn, “The Hague Convention and the Rights of Children” (July 2014), 7(1) Family Law News (International Bar Association) 11.

⁷⁷ 2013 ABCA 441 at para. 24 and 28.

struggling with issues about how to respect the rights of children in *Hague Convention* proceedings. Article 12 of the CRC, as well as instruments like Canada's *Charter of Rights and Freedoms* may give children the right "to be heard" in these proceedings.

The balancing of the wishes and rights of children against the obligations imposed by the *Hague Convention* is most apparent in cases where a child has made a refugee application, as in the 2011 Ontario Court of Appeal decision in *A.M.R.I. v. K.E.R.*⁷⁸ The girl in that case was born in Mexico, and after her parents' separation resided with her mother there pursuant to an order made by a Mexican court. In 2009, at the age of 12, she came to Ontario to visit her father. She told her father that the mother had been abusive. The child did not return to Mexico but remained in Ontario with the father and an aunt. In 2010, the child made an application to be accepted as a refugee in Canada due to the abuse by her mother and the failure of the Mexican authorities to adequately protect her. The father, however, had by that time moved to Norway, while the child remained in Ontario with her aunt. After the child had been living in Ontario for about 18 months, the mother brought a *Hague Convention* application for the child's return to Mexico. The hearing proceeded on an uncontested basis, with none of the father, the aunt or the child participating. The application judge held that the child was being wrongfully retained in Ontario and ordered her immediate return to Mexico under the *Hague Convention*, which was effected through the involvement of the police.

Despite the girl's return to Mexico, the father appealed, with the Ontario Children's Lawyer representing the child on the appeal. The Ontario Court of Appeal held that the trial judge had erred in ordering the child's return to Mexico without considering the girl's

⁷⁸ 2011 O.J. 2449 (C.A.).

refugee status or giving the child an opportunity to participate in the proceedings. The Court of Appeal held that in this situation, the *Hague Convention* hearing must comply with the child's right to treatment in accordance with the *Charter of Rights and Freedoms* s. 7 "principles of fundamental justice" as there was a threat to her "security of the person." Given the child's age and the nature of her objection, the *Charter* required that she be given notice and an opportunity to participate. In coming to its conclusion, the Court of Appeal cited the CRC:

art. 12(1) of the CRC stipulates that the views of a child are to be given due weight according to the child's age and maturity and that a child has the right "to express those views freely in all matters affecting the child". Article 12(2) of the CRC confirms this right in the context of "judicial and administrative proceedings affecting the child".

At almost 14 years of age, the child in this case was clearly of an age and potential maturity such that her objection to return to Mexico had to be considered.... Given the child's age, the nature of her objection, her status as a Convention refugee, the length of time that she had been in Toronto and the absence of any meaningful current information regarding her actual circumstances in Toronto at the date of the Hearing, her views concerning a return to her mother's care in Mexico were a proper and necessary consideration.⁷⁹

While the Court of Appeal order that there was to be a new hearing with the child participating had no effect in Mexico, shortly after the appellate court ruling the youth had been able to leave Mexico on her own and get to Canada.⁸⁰ There was no further hearing and she continued to reside in Canada.

The decisions of the Ontario Court of Appeal in *A.M.R.I. v. K.E.R.*,⁸¹ and the Alberta Court of Appeal in *R.M. v J.S.*⁸² raise the issue of how and when children should be involved in *Hague Convention* applications. In these cases, children were made parties

⁷⁹ *A.M.R.I. v. K.E.R.*, 2011 O.J. 2449 (C.A.) at para. 111-114.

⁸⁰ For a description of her return, see Oakland Ross, "Deported Mexican teen makes daring return to Canada," *Toronto Star*, May 05, 2011.

⁸¹ 2011 O.J. 2449 (C.A.).

⁸² 2013 ABCA 441.

or had counsel appointed to represent their interests in the proceedings.

In deciding whether to appoint counsel or make a child a party, the court should take into account concerns about not wanting to exacerbate hostility between a child and one parent, usually the left-behind parent. However, the Ontario Court of Appeal has suggested that in cases where a child's "liberty or security of the person" may be affected by a return, for example because there is a claim of potential harm due to alleged violence or abuse, s. 7 of the *Canadian Charter of Rights and Freedoms* and Article 12 of the CRC require that a child must be given notice of the proceedings and an opportunity to participate through counsel.⁸³ The Court of Appeal held that concerns about protection for a child's "liberty and security of the person" should "predominate," which requires affording the child an opportunity to participate and have his or her views heard.

Some of the factors to be considered in deciding whether to grant party status or legal representation to a child include:

- Where the child is older and there is a reasonable prospect that the child has the capacity to instruct counsel and have an independent position;
- Where the child's position may not be adequately represented by the adult parties, for example because of their lack of legal representation;
- Where an expert or therapist involved with the child recommends such involvement;
- Where the child has expressed concerns that return might affect his or her life, liberty or security of the person.⁸⁴

A court making an order appointing counsel may provide some direction or restrictions on the role of counsel for the child. In the absence of such restrictions, counsel for the child should take account of such factors as the age and capacity of the child to

⁸³ *A.M.R.I. v K.E.R.*, 2011 O.J. 2449 (C.A.).

⁸⁴ See *Re L.C.*, [2014] UKSC 1 at para. 53, per Wilson L.J.

instruct counsel, the views of the child, and any provincial law society guidelines about the role that counsel is to play. Counsel should normally be taking instructions from a child who is expressing clear and consistent views.⁸⁵ Counsel should ensure that the child understands the limited scope of *Hague Convention* proceedings, focusing on whether a child should be returned to the jurisdiction of habitual residence rather than a ruling on custody or access. A grant of party status to a child usually does not mean that the child will attend court to testify.

C. CHILD PROTECTION PROCEEDINGS

Canadian child protection proceedings are another venue in which children's right to be heard has been recognized. Many of the same principles around hearing children who are involved in custody and access disputes apply in the child protection context.⁸⁶ Indeed, the right of children to be heard may be even more compelling in child protection cases, where a state-sponsored child welfare agency may be threatening the child's relationship with parents and siblings. A child's right to be heard is granted greater recognition in child protection proceedings than in private custody and access cases, both in legislation and case law, with Canadian judges sometimes citing Article 12 of the CRC to justify this recognition.

The Importance of Hearing Children in Child Protection Proceedings

⁸⁵ Nicholas Bala "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child" (2006), 43 Alta. L. Rev. 845.

⁸⁶ In some jurisdictions, like New Brunswick, child protection and custody and access proceedings are governed by the same statute.

Like custody and access legislation, child protection statutes establish the best interests of the child as a governing test once a child has been found to be in need of protection, and most Canadian statutes expressly include consideration of a child's views and preferences as a factor in making decisions on behalf of such children. A few child protection statutes go further, underling the importance of hearing from children in these cases. Alberta's *Child, Youth, and Family Enhancement Act* provides that:

(d) a child who is capable of forming an opinion is *entitled* to an opportunity to express that opinion on matters affecting the child, and the child's opinion should be considered by those making decisions that affect the child;⁸⁷

The Northwest Territories' *Child and Family Services Act*, in addition to directing that the best interests of the child include a consideration of "the child's views and preferences, if they can be reasonably ascertained",⁸⁸ also emphasizes the importance of children's participation and the need for their views to be heard and considered:

2. This Act shall be administered and interpreted in accordance with the following principles:

...

- (h) children, where appropriate, and parents should participate in decisions affecting them;
- (i) children, where appropriate, parents, and adult members of the extended family should be given the opportunity to be heard and their opinions should be considered when decisions affecting their own interests are being made;⁸⁹

The *Children and Youth Care and Protection Act* of Newfoundland and Labrador recognizes the importance of hearing children who want to be heard, and provides specific instructions on how this "participation" should be facilitated:

53. Where a child who is the subject of a proceeding under this Act requests that his or her views be known at the proceeding, a judge shall

⁸⁷ *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 2(d). Emphasis added.

⁸⁸ *Child and Family Services Act*, S.N.W.T. (Nu.) 1997, c. 13, s. 3(i).

⁸⁹ *Child and Family Services Act*, S.N.W.T. (Nu.) 1997, c. 13, s. 2.

- (a) meet with the child with or without the other parties and their legal counsel;
- (b) permit the child to testify at the proceeding;
- (c) consider written material submitted by the child; or
- (d) allow the child to express his or her views in some other way.⁹⁰

Section 53 adds to s.9 of the Newfoundland and Labrador statute, which provides that decisions under the Act be made in accordance with the best interests of the child, and that determining best interests requires consideration of the child's "opinion."⁹¹

Children's Views and Preferences Not Determinative

As in custody and access disputes, a child's views and preferences in a child protection proceeding are not necessarily determinative. It is not uncommon for children who have been abused or neglected to express a desire to return to their homes and parental care, so their express preferences must be balanced against other factors. Again, a child's age, maturity, and the reasons for a preference will affect the weight attached to the child's wishes.⁹²

Manitoba's *Child and Family Services Act* is the only child protection statute that establishes a presumptive age at which a child's views should be considered.⁹³ Section 2(2) provides:

In any proceeding under this Act, a child 12 years of age or more is entitled to be advised of the proceedings and of their possible implications for the child and shall be given an opportunity to make his or her views and preferences known to a judge or master making a decision in the proceedings.⁹⁴

⁹⁰ *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2, s. 53.

⁹¹ *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2, ss. 9(1) and (2)

⁹² See e.g. *Child Protection Act*, S.P.E.I. 2000, c. 3 (2nd Sess.). The preamble states: "children are entitled, no less than adults, based on their developmental capacity, to be heard in the course of and to participate in the processes that lead to decisions that affect them".

⁹³ As discussed below, in a number of jurisdictions, 12 years is the presumptive age of a child receiving notice and being permitted to attend child protection proceedings; in practice if children are permitted to attend, their views are likely to be shared with the court.

⁹⁴ *Child and Family Services Act*, C.C.S.M. 1985, c. C-80, s. 2(2).

The views of children under 12 years of age may also be considered, though the court must be satisfied that the child's understanding justifies this, and that the child would not be harmed by having his or her views and preferences considered. Section 2(3) states:

In any court proceeding under this Act, a judge or master who is satisfied that a child less than 12 years of age is able to understand the nature of the proceedings and is of the opinion that it would not be harmful to the child, may consider the views and preferences of the child.⁹⁵

While children 12 and over have the right to be heard, children under 12 will only be given this opportunity in limited circumstances.

In custody and access proceedings, the wishes of older children are often given more deference, and judges may respect a child's choice of placement even if this placement is not in the child's best interests. While custody and access proceedings in some cases raise concerns about child safety, these concerns are always present in child protection proceedings. Judges in child protection matters still attach greater significance to the views and preferences of older children but will not follow these choices where doing so would place the child at risk of harm.

In *A.C. v. Manitoba (Director of Child and Family Services)*,⁹⁶ the Supreme Court of Canada explained how judges should weigh the views of older children when making a decision in accordance with their best interests in child protection cases. The case engaged provisions of Manitoba's *Child and Family Services Act* respecting judicial authorization of medical treatment of children against the wishes of both parents and child. The child, a 14 year-old Jehovah's Witness, was admitted to hospital for internal bleeding. Her doctors believed that without a blood transfusion she faced a serious risk to her health, and perhaps

⁹⁵ *Child and Family Services Act*, C.C.S.M. 1985, c. C-80, s. 2(3).

⁹⁶ 2009 SCC 30.

her life, but the child and her parents refused this treatment on religious grounds. The child was apprehended by the child protection agency, which sought an order authorizing the transfusion. Section 25(8) of the *Child and Family Services Act* provides that a court, after a hearing, may authorize any medical treatment the court considers to be in the best interests of the child. Section 25(9) states that the court shall not order treatment contrary to the wishes of a child over the age of 16, unless the child cannot understand the decision or appreciate its consequences. The judge ordered the transfusion pursuant to s. 25(8). After the transfusion, the child and her parents appealed the order, challenging the constitutionality of s. 25 of the Act. They argued that depriving children under 16 of an opportunity to prove their maturity to direct the course of their medical treatment violated provisions of the *Charter of Rights and Freedoms*, including s. 2 (freedom of religion), s. 7 (deprivation of security of the person not in accordance with principles of fundamental justice), and s. 15 (discrimination based on age).

Justice Abella, writing for a majority of the Court, agreed that there was “no constitutional justification for ignoring the decision-making capacity of children under the age of 16 when they are apprehended by the state,”⁹⁷ but did not agree that s. 25 required such an approach. Instead, the “best interests” standard in s. 25(8) could be read as a “sliding scale of scrutiny, with the adolescent’s views becoming increasingly determinative depending on his or her ability to exercise mature, independent judgment.”⁹⁸ The degree of significance attached to a child’s views also depended on the decision: “The more serious the nature of the decision, and the more serious its potential impact on the life or

⁹⁷ 2009 SCC 30 at para. 29.

⁹⁸ 2009 SCC 30 at para. 22.

health of the child, the greater the degree of scrutiny that will be required.”⁹⁹ Assessing a particular child’s views in light of the decision to be made struck a balance between protecting children’s autonomy and protecting them from harm. Abella J.’s interpretation of s. 25(8) left open the possibility that in cases involving less serious risk, the treatment wishes of a child under 16 years could be determinative, or that even in a life threatening case the views of an older child might be given greater weight.

Article 12 of the CRC played a role in the majority’s analysis. According to Abella J., Canadian law now recognizes that receiving children’s input leads to better decision-making on their behalf. This is why children’s views have become a factor in the best interests analysis, with these views acquiring more significance as the child matures.¹⁰⁰ Abella J. explained that Article 12 of the CRC, along with other Articles of the CRC, supports this “robust” reading of the best interests standard.¹⁰¹

Ways of Hearing Children in Child Protection Proceedings

The views of children in child protection proceedings are heard in similar ways to children in custody and access proceedings. An assessor or child’s counsel may introduce children’s statements, children may meet directly with the judge or more infrequently testify, or children’s out-of-court statements may be put before the court as hearsay exceptions. While the means of introducing children’s evidence in the two types of proceedings are similar, different principles and considerations may apply.

Assessments in Child Protection Cases

⁹⁹ 2009 SCC 30 at para. 22.

¹⁰⁰ 2009 SCC 30 at para. 92.

¹⁰¹ 2009 SCC 30 at para. 93.

All jurisdictions provide for court-ordered assessments in child protection proceedings. For example, British Columbia's *Child, Family and Community Service Act* allows the court to order a child or a parent to undergo "a medical, psychiatric or other examination" where such an examination is likely to assist the court "(a) in determining whether the child needs protection, or (b) in making an order relating to the child."¹⁰² The reported case law suggests that the majority of assessments in child protection cases focus on parents to assess their capacity to care for the child. These assessments, however, may include interviews with the child, and the child's statements can be introduced in the child protection proceeding through an assessor's report, which will usually include the assessor's commentary on the child's statements and overall recommendations about the case. However, courts can also order assessments solely to determine the views and preferences of the child. In New Brunswick, for example, judges have ordered Voice of the Child Reports in child protection cases.¹⁰³

Counsel for the Child

Most provinces and territories have statutes providing for the appointment of legal representation for children in child protection proceedings. Where the legislation is silent, superior court judges have relied on the court's *parens patriae* power to appoint child's counsel.¹⁰⁴ Again, only some jurisdictions provide state-funded counsel for children.¹⁰⁵

¹⁰² *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 59.

¹⁰³ See e.g. *J. (K.M.) v. New Brunswick (Minister of Social Development)*, 2011 NBQB 345. But see *New Brunswick (Minister of Social Development) v. C. (V.)*, 2014 NBQB 95 at para. 117, where the judge stated that the assessment provision in statute "does not translate in each and every case to a requirement of the formal 'Voice of the Child'. It has been recognized and accepted that a child's voice can be put before the court in differing ways."

¹⁰⁴ See *Re L. (G.)*, 2012 SKQB 388.

¹⁰⁵ See above discussion in Part IIIA of this paper.

Unlike custody and access statutes, most child protection statutes provide guidance on the judicial appointment of representation for a child. Some of the enumerated factors are also considered in custody and access cases, including whether the child's interests conflict with the interests of other parties. Others are specific to the child protection context. For example, Manitoba's *Child and Family Services Act* directs that judges consider, *inter alia*, "the nature of the hearing, including the seriousness and complexity of the issues and whether the agency is requesting that the child be removed from the home" in appointing a lawyer to represent the child.¹⁰⁶

In a few jurisdictions, legislation dealing with separate representation for children in a protection case includes reference to a specific age. New Brunswick's *Family Services Act* directs judges to consider a number of factors when appointing child's counsel, including "whether the child is 12 years of age or older."¹⁰⁷ Prince Edward Island's *Child Protection Act* only allows state-funded child representation where the child is "at least 12 years old and apparently capable of understanding the circumstances."¹⁰⁸ In Nova Scotia, the *Children and Family Services Act* provides that children 16 years of age or older are parties to the proceeding and are entitled to counsel upon request.¹⁰⁹ In the case of a child who is 12 years of age or older, the court may order separate legal representation where it is "desirable to protect the child's interests."¹¹⁰

These age provisions are generally tied to a presumption that children of the specified age have the capacity to instruct counsel. For example, Nova Scotia's Act also

¹⁰⁶ *Child and Family Services Act*, C.C.S.M. 1985, c. C-80, s. 34(3)(c).

¹⁰⁷ *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 7.1(1)(a).

¹⁰⁸ *Child Protection Act*, S.P.E.I. 2000, c. 3 (2nd Sess.), s. 34(1).

¹⁰⁹ *Child and Family Services Act*, S.N.S. 1990, c. 5, s. 37(1).

¹¹⁰ *Child and Family Services Act*, S.N.S. 1990, c. 5, s. 37(2).

provides that a guardian *ad litem* may be appointed for any child, including children 12 years of age or older where the child is “not capable of instructing counsel.”¹¹¹ Similarly, Manitoba’s *Child and Family Services Act* directs that where representation is ordered for a child 12 years of age or older, the judge may order that the child has “the right to instruct the legal counsel.”¹¹²

However, in some jurisdictions judges have held that child representation may be important even in child protection cases involving children who clearly cannot instruct counsel.¹¹³ In *Re F. (T.L.)*,¹¹⁴ Justice Ryan-Froslic of the Saskatchewan Court of Queen’s Bench ordered separate representation for a seven month-old child, holding that the principal consideration in determining whether independent representation is necessary for the child in child protection proceedings is “whether it is desirable in the interests of justice viewed from the standpoint of the child’s welfare.”¹¹⁵ In that case, the parties – the parents, their band, and the child protection agency – all had their own agendas and interests and the judge was concerned that without separate representation evidence and argument about the rights of the child would not be placed before the court. She also described the role that counsel for the young child should play:

It is clear ...that the role of the lawyer in this situation consists of representing the rights of the child and ensuring the court considers all relevant factors which will enable it to make a decision according to the rights and interests of the child. The lawyer does not put forward his or her personal convictions but rather his or her professional conclusions based on the evidence. The nature of the lawyer's

¹¹¹ *Child and Family Services Act*, S.N.S. 1990, c. 5, s. 37(3).

¹¹² *Child and Family Services Act*, C.C.S.M. 1985, c. C-80, s. 34(2).

¹¹³ But see *Children’s Aid Society of London and Middlesex v. C. (A.)*, 2013 ONSC 1870 at para. 13, where Marsham J. suggested that it is generally not appropriate for courts to order representation for children under the age of 10 years in protection proceedings, and observed: “legal representation is not generally desirable if the child is too young to express his or her views and preferences and otherwise instruct counsel. It is a waste of scarce resources to appoint legal representation to children who cannot adequately give instructions.”

¹¹⁴ 2001 SKQB 271.

¹¹⁵ 2001 SKQB 271 at para 13.

mandate would necessarily vary depending on whether the mandate comes from the child or the court.

In the circumstances of the case at bar I believe the best method of representing T.'s interest would be the appointment of independent legal counsel whose mandate it would be to represent the rights of the child and ensure that the court considers all relevant factors which will enable it to make a decision according to the rights and interests of T.¹¹⁶

As the state mandated child welfare agency is a party to child protection proceedings, if an order is made for child representation, it must be provided. This is particularly significant in Ontario where in custody and access cases, a judge makes an order requesting the involvement of the Office of the Children's Lawyer, which will then decide whether to provide a lawyer, a clinical assessment, both or neither. If an order is made in a child protection case under s. 38 of the Ontario *Child and Family Services Act*, legal representation "shall" be provided to the child, almost always by the Office of the Children's Lawyer.

Judicial Interviews

In some jurisdictions children may also be given the opportunity to meet one-on-one with judges in child protection proceedings, though this is less common than in disputes between parents as the state's role in child protection cases heightens concerns about due process. Both Newfoundland and Saskatchewan explicitly provide for this option by statute.¹¹⁷ Judicial interviews may also occur in child protection proceedings in jurisdictions where the legislation is silent. In *W. (M.) v. British Columbia (Director of Child, Family & Community Service)*, Dhillon J. of the British Columbia Provincial Court granted the request of a 12 year-old girl for a private interview after the mother and Director consented

¹¹⁶ 2001 SKQB 271 at para. 31-32.

¹¹⁷ *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2, s. 53(a); *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 29(1)(b).

to the interview taking place.¹¹⁸ The judge observed that the girl had a “clear reluctance to discuss” the reasons that she did not want to live with her mother in her mother’s presence, and indicated that the interview would remain confidential, though the parties were provided with a summary of the matters discussed and a sealed transcript was kept in the event of an appeal.

In Newfoundland and Labrador, legislation provides that if a child makes a request, a meeting “shall” be held with the judge or the child’s views shall be shared with the court in some other way.¹¹⁹ In Saskatchewan, judicial interviews are discretionary; they may be ordered if the court considers the interview to be in the best interests of the child.¹²⁰ One consideration in ordering an interview pursuant to Saskatchewan’s statute is whether the child’s views would otherwise be shared with the court. In *Re P. (G.)*, Justice Wilkinson of the Court of Queen’s Bench encouraged counsel to consider whether a judicial interview would be appropriate given conflicting evidence before the court about the five children:

I have been bereft of any evidence regarding the children that has not been filtered through many different, and often irreconcilable, points of view... so long as the Court is the final arbiter of a child’s future it must question its ability to fully honour its duty towards children who are both faceless and mute before the Court.¹²¹

The judgment notes the importance of hearing from children for whom life altering decisions are being made in protection proceedings.

Other Evidence of Children’s Views and Preferences

¹¹⁸ 2004 CarswellBC 2908, 2004 BCPC 452.

¹¹⁹ *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2, s. 53. See also *Newfoundland and Labrador (Manager of Child, Youth and Family Services Zone J) v. W. (J.)*, 2015 NLTD(F) 11 at para. 40.

¹²⁰ *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 29(1)(b).

¹²¹ 2003 SKQB 505 at para. 143.

As in custody and access proceedings, the rules for admitting children's out-of-court statements have been relaxed in child protection proceedings compared to criminal cases. While some Canadian courts have applied the *Khan* test to children's out-of-court-statements in these proceedings,¹²² the trend is to move away from the stricter standard of "necessity and reliability." Some child protection statutes make this relaxation of evidentiary standards explicit. For example, s. 67 of British Columbia's *Child, Family and Community Service Act* does not include a "necessity" requirement; children's out-of-court statements need only be "reliable" to be admitted in a child protection proceeding.¹²³ This provision has been interpreted as intended to protect children's best interests, since the alternative of testifying in the presence of the parents in court has been recognized to carry real risks of emotional harm and trauma to the child.¹²⁴ In a similar vein, Saskatchewan's *Child and Family Services Act* directs that, "The court may admit hearsay evidence if, in the opinion of the court, the evidence is credible and trustworthy and it would not be in the best interests of a child for the child to testify."¹²⁵

Additional Participation Rights in Child Protection Proceedings

Children are generally granted greater procedural rights to participate in child protection proceedings than in custody and access proceedings as the state is a party and there is a threat to children's relationships with family. In many jurisdictions, children who are the subject of child protection proceedings may be entitled to notice and may even be parties.

¹²² See e.g. *Child & Family Services of Winnipeg West v. G. (N.J.)* (1990), 69 Man. R. (2d) 43.

¹²³ *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 67. See also Alberta *Child, Youth and Family Enhancement Act*, S.A. 2004, c. 16, s.108; Newfoundland and Labrador, *Child, Youth and Family Services Act*, S.N. 1998, c. C-12.1, s. 53; Nova Scotia, *Children and Family Services Act*, S.N.S. 1990, c.5, s. 96.

¹²⁴ *British Columbia (Director of Child, Family & Community Services) v. J. (P.M.)*, 1999 CarswellBC 1466 at para. 23.

¹²⁵ *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 28(3).

In Alberta, all children are parties to child protection proceedings.¹²⁶ In Nova Scotia, whether a child is a party depends on the child's age. According to s. 36(1) of the *Children and Family Services Act*, children 16 years of age or older are parties, unless the court orders otherwise. Children 12 years of age or older may be granted party status upon the child's request where the court determines that such status is "desirable to protect the child's interests."¹²⁷ Children of any age who are represented by a guardian *ad litem* may also be made a party where necessary to protect their interests. In Saskatchewan, s. 29 of the *Child and Family Services Act* provides that a child of any age can be served with notice of a protection hearing if the court considers it in the best interests of the child, but that the receipt of notice does not make the child a party. However, at least one judge has interpreted this provision as not excluding the possibility that a child could also be made a party to a child protection proceeding in that province, giving the child (or counsel) greater opportunity to participate in the proceeding.¹²⁸

In provinces and territories that provide for notice to children who are the subject of a child protection proceeding, most restrict this requirement to children 12 years of age or older. In some jurisdictions, like Manitoba and Nova Scotia, some form of notice for older children is mandatory. However, in *C. (A.B.) v. Nova Scotia (Minister of Community Services)*,¹²⁹ Justice Dellapinna of the Nova Scotia Supreme Court considered the effect that being served personally with notice of child protection hearing would have on a 13

¹²⁶ *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 111(2).

¹²⁷ *Children and Family Services Act*, S.N.S. 1990, c.5, s. 37(2).

¹²⁸ *Re F. (T.L.)*, 2001 SKQB 271.

¹²⁹ 2003 CarswellNS 496 (S.C.).

year-old child with special needs and appointed a litigation guardian to receive documents on the child's behalf.¹³⁰

In Ontario, the right to notice is tied to the right of children to be present at child protection proceedings. For children 12 years of age or older, the *Child and Family Services Act* directs that children receive notice and be allowed to attend “unless the court is satisfied that being present at the hearing would cause the child emotional harm”.¹³¹ Children under 12 are not entitled to receive notice or be present unless the court is satisfied that the child “(a) is capable of understanding the hearing; and (b) will not suffer emotional harm by being present at the hearing”.¹³² In *Jewish Family and Child Services of Greater Toronto v. K. (S.)*,¹³³ the court considered a motion by the child protection agency to exclude a 14 year-old child from the proceedings based on risk of emotional harm. There was evidence before the court that the child had been emotionally affected by the level of conflict among the adults involved in the case and her own interactions with her parents. The child opposed the agency's motion; the parents supported it. Justice Jones of the Ontario Court of Justice refused to exclude the child, finding no medical evidence to support the society's claim that the child's attendance would cause emotional harm. Jones J. was not prepared “to curtail entirely the child's statutory right to attend court” where the potential risk of harm to the child was related to tension between the parties and interactions that had occurred outside the courtroom. The judge did recognize that contact with the parents was potentially unsettling for the child, and so ordered that a protocol was to be

¹³⁰ The litigation was also to represent the child during the proceedings. The court directed that a litigation guardian, preferably someone with “therapeutic qualifications” should be appointed to ensure that the child's interests were protected: 2003 CarswellNS 496 (S.C.) at para. 23.

¹³¹ *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 39(4).

¹³² *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 39(5).

¹³³ 2013 ONCJ 681.

used for the child's attendance to reduce the likelihood of the child having to interact with her parents.¹³⁴

D. ADOPTION PROCEEDINGS

The United Nations Committee on the Rights of the Child recommends that adoption should be an area in which children's participation rights under Article 12 are promoted and protected. In Canada, adoption proceedings are governed by provincial or territorial legislation. About half of Canadian jurisdictions deal with adoption proceedings as part of their broader child protection statutes; the other half has specific adoption statutes. Some provinces and territories also have separate legislation governing inter-country adoption.¹³⁵

Children's Views, Preferences and Wishes

All adoption statutes in Canada provide that a child's views are relevant to adoption determinations. Like custody and access and child protection decisions, each of the adoption statutes either directs that "best interests" is a guiding principle¹³⁶ for adoption or that adoption orders must be made according to the child's best interests,¹³⁷ and determining the best interests of the child includes consideration of the child's views, preferences or wishes.

¹³⁴ The protocol included offering a separate, private waiting area for the child, directing that the child enter the courtroom last and leave first, and a prohibition on exposing the child to any discussions among the parties and counsel concerning the case: *Jewish Family and Child Service of Greater Toronto v. K. (S.)*, 2013 ONCJ 681 at para. 51.

¹³⁵ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoptions; for an example of provincial legislation specifically dealing with international adoption, see *Ontario Intercountry Adoption Act*, 1998, S.O. 1998, c. 29. For a discussion of implementation of the *Hague Convention on Intercountry Adoption* in Canada, see Patricia Paul-Carson, *Intercountry Adoption Legislation in Canada: Does It Protect the Best Interests of the Child?* (Ottawa, Adoption Council of Canada, May, 2012), online: <[www.adoption.ca/uploads/File/The-Legal-Context-July-2012\(1\).doc](http://www.adoption.ca/uploads/File/The-Legal-Context-July-2012(1).doc)>.

¹³⁶ *The Adoption Act*, C.C.S.M., c. A-2, s. 2.

¹³⁷ *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 70(1).

In the Northwest Territories, the *Adoption Act* specifies that a child's views and preferences should also be considered before a decision is made about placement of the child for the purposes of potential adoption. Section 7(4) directs that where a pre-placement report is prepared at the request of the Director of Adoptions, the report must include the child's views on the proposed placement and adoption.¹³⁸ Similarly, British Columbia's *Adoption Act* requires applicants proposing adoption of a child between 7 and 12 years of age to arrange for an authorized person to meet the child and prepare a report on whether the child understands what adoption means, and if the child has any views on the proposed adoption.¹³⁹ This report must be filed with the court before an adoption order is made.¹⁴⁰

Children's Consent to Adoption

In every province and territory, children above a certain age must consent to their adoption. In most jurisdictions, the age of consent is 12. Ontario has the lowest age of consent for adoption, at 7 years of age.¹⁴¹ In some places, children under the specified age of consent are still consulted. For example, Newfoundland and Labrador's *Adoption Act* requires that children five years of age or older be counseled on the effect of adoption before being placed.¹⁴² British Columbia's *Adoption Act* has a similar counseling provision for children who are "sufficiently mature."¹⁴³ In Manitoba, the *Adoption Act* requires that where a child

¹³⁸ *Adoption Act*, S.N.W.T. (Nu.) 1998, c. 9, s. 7(4).

¹³⁹ *Adoption Act*, R.S.B.C., c. 5, s. 30(1).

¹⁴⁰ *Adoption Act*, R.S.B.C., c. 5, s. 32(c).

¹⁴¹ *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 137(6). This age restriction was described as "arbitrary" by Campbell J in *Re Children's Aid Society of London & Middlesex*, 2010 ONSC 1348 at para. 20. The child involved was 7 years old with ADHD and was suspected of being afflicted with Fetal Alcohol Spectrum Disorder. While the boy indicated that he wanted his placement to be his "forever home," the Office of the Children's Lawyer counsel was not satisfied that the boy fully understood the consequences of the adoption and was not prepared to indicate that the boy gave a "fully informed" consent. The court concluded that the child's basic understanding of a "forever home" was sufficient as a consent to this legal process.

¹⁴² *Adoption Act*, S.N.L. 2013, c. A-3.1, s. 12(1)(c)(i).

¹⁴³ *Adoption Act*, R.S.B.C., c. 5, s. 6(1)(e)(i).

is under twelve or unable to consent, the court shall, “where appropriate and feasible, take into account the wishes of the child.”¹⁴⁴ In Prince Edward Island, children twelve years of age or older are required to provide consent, and the court may order that consent is required “in any other case,” which could result in the involvement of younger children.¹⁴⁵

Some jurisdictions require or allow children to consult with a lawyer before providing consent to adoption. In Saskatchewan and Ontario, independent legal advice is mandatory before a child can provide consent to an adoption.¹⁴⁶ In Manitoba, children need only be advised of their right to independent legal advice.¹⁴⁷ The Northwest Territories’ *Adoption Act* also requires that children be informed of how to obtain legal advice, and where a child requests such advice, aided in finding counsel to provide that advice.¹⁴⁸

Adoption legislation also provides for dispensing with a child’s consent to adoption. In the Northwest Territories and Saskatchewan, the court may dispense with the requirement of a child’s consent where it would be in the best interests of the child.¹⁴⁹ In Alberta, which has a lower standard, the court may dispense with the consent of the child “if the Court, for reasons that appear to it to be sufficient, considers it necessary or desirable to do so.”¹⁵⁰ Other jurisdictions provide that a child’s consent may be dispensed with for

¹⁴⁴ *The Adoption Act*, C.C.S.M., c. A-2, s. 21. Similar provisions can be found in New Brunswick and the Northwest Territories: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 76(3); *Adoption Act*, S.N.W.T. (Nu.) 1998, c. 9, s. 7(5).

¹⁴⁵ *Adoption Act*, R.S.P.E.I., c. A-4.1, s. 22(a).

¹⁴⁶ *The Adoption Act*, S.S. 1989-90, c. A-5.1, s. 4(4)(b)(ii)(A); *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 137(7).

¹⁴⁷ *The Adoption Act*, C.C.S.M., c. A-2, s. 14(b).

¹⁴⁸ *Adoption Act*, S.N.W.T. (Nu.) 1998, c. 9, s. 23(2)(b).

¹⁴⁹ *Adoption Act*, S.N.W.T. (Nu.) 1998, c. 9, s. 25(2); *The Adoption Act*, S.S. 1989-90, c. A-5.1, s. 5(1)(a).

¹⁵⁰ *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 68(4)(c).

reasons of incapacity. For example, in Manitoba, the court may dispense with the child's consent where the child is "unable to understand or give consent."¹⁵¹

Ontario's *Child and Family Services Act* establishes two situations where the court may dispense with a child's consent where obtaining consent would cause the child emotional harm, or where the child is unable to consent because of a developmental disability.¹⁵² In *C. (A.) v. A. (V.)*, Justice Phillips of the Ontario Court of Justice considered the appropriate standard for dispensing with a child's consent on the basis of emotional harm.¹⁵³ In that case, a stepfather moved to dispense with the consent of his 12-year-old step-son on the basis that the child did not know that the stepfather was not the child's biological father and that learning this information would cause the child emotional harm. According to Phillips J., to establish risk of emotional harm that would justify dispensing with the consent of a child, an applicant must provide evidence from an expert witness skilled in making that assessment, for example a psychiatrist or psychologist. Lay testimony is not sufficient. Phillips J. justified this high standard on the basis that it was important to consult children on decisions like adoption which carry significant consequences for the child (i.e. "the severing of a prior family connection").¹⁵⁴ In underlining the importance of requiring children's participation, the judge cited and relied on Article 12 of the CRC.

Children's Participation at Adoption Hearings

Some jurisdictions provide for children's attendance and participation at adoption proceedings. Some statutes like the Yukon's *Child and Family Services Act* only provide

¹⁵¹ *The Adoption Act*, C.C.S.M., c. A-2, s. 20.

¹⁵² *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 137(9).

¹⁵³ 2012 ONCJ 7.

¹⁵⁴ 2012 ONCJ 7 at para. 70.

that a child has a “right to be present.”¹⁵⁵ Others statutes are more explicit, providing that a child has a right to be heard. For example, Prince Edward Island’s *Adoption Act* says that, “where it is practical to do so, the court shall give the child the opportunity to be heard.”¹⁵⁶ Alberta’s *Child, Youth and Family Enhancement Act* grants a child old enough to consent to the adoption (i.e. 12 years of age or older) the right to be heard, in person or through counsel.¹⁵⁷

Ontario’s *Child and Family Services Act* also grants children the right to participate in openness proceedings, which determine whether an adoption order will include provision for contact with parents or other relatives, as if the child were a party.¹⁵⁸ Ontario’s Act also provides for legal representation for children in openness hearings, which determine whether a child will have continuing post-adoption contact with parents or other relatives. Under s. 153.5(2), the court may, with the consent of the Children’s Lawyer, authorize the Children’s Lawyer to represent the child where the court determines that legal representation is desirable.¹⁵⁹ Ontario judges have also ordered representation for children in adoption proceedings. In *C. (M.A.) v. K. (M.)*,¹⁶⁰ Justice Cohen of the Ontario Court of Justice relied on rule 4(7) of the *Family Law Rules* and s. 89(3.1) of the *Courts of Justice Act* to appoint counsel for a 5 year-old child who was the subject of an adoption application. While Cohen J. found that representation to ascertain the child’s views and preferences would be futile since the child was so young, the judge found that representation could protect the child’s best interests. Counsel for the child might be able

¹⁵⁵ *Child and Family Services Act*, S.Y. 2008, c. 1, s. 118(1)(b).

¹⁵⁶ *Adoption Act*, R.S.P.E.I., c. A-4.1, s. 34.

¹⁵⁷ *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 68(2).

¹⁵⁸ *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 153.4.

¹⁵⁹ *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 153.5(2).

¹⁶⁰ 2008 ONCJ 212.

to identify broader issues than those raised by the parties themselves, who were closely focused on their own perceptions of the child's best interests.¹⁶¹

E. CRIMINAL PROCEEDINGS

Children may be involved in criminal proceedings either as witnesses, often testifying about their victimization, or as alleged offenders. While other provisions of the CRC have frequently been cited in cases dealing with both child victims and offenders, Article 12 has almost never been cited in the context of either type of criminal proceeding (though other provisions of the CRC have been influential in Canada in the development of constitutional protections for young offenders).¹⁶² However, despite the absence of citation of the CRC, over the past three decades there have been very significant changes in Canadian law to allow for more effective participation by children in both of these proceedings. Since Article 12 of the CRC is rarely invoked in this context, the treatment of issues in this paper of issues related to criminal proceedings is relatively brief.

Hearing Child Victims and Witnesses

Until the 1980s, Canadian law was premised on the view that child witnesses were inherently unreliable, and very little effort was made to accommodate children in the criminal courts.¹⁶³ The provisions governing the presumed incompetency of child witnesses and the requirements for corroboration of children's testimony made it rare for children under 14 years of age to testify, and many cases involving child victimization were

¹⁶¹ 2008 ONCJ 212 at para. 11.

¹⁶² See e.g. *R v D.(B.)*, 2008 SCC 25.

¹⁶³ Nicholas Bala, "Double Victims: Child Sexual Abuse and the Criminal Justice System" (1990), 15 *Queen's L.J.* 3.

not prosecuted; indeed, many victims of child abuse never reported to the police or even disclosed their abuse.

In the late 1980s, the justice system began to respond to the increased awareness of the nature and extent of child abuse, and to the growing body of psychological research on the reliability of child witnesses.¹⁶⁴ As a result, judges and legislators introduced many substantive, evidentiary, and procedural reforms, which have resulted in many more children testifying in court, starting as young as three years of age. Amendments to the *Canada Evidence Act* in 1988 and 2006 abolished the requirements for corroboration of children's testimony and allow children to testify if they are "able to communicate the evidence." Amendments to the *Criminal Code* allow children to testify by closed circuit television and to have a support person sit close to them while testifying, reducing the stress of this process for children, and allowing more children to come forward to testify about their victimization. Videotapes of police interviews with children and children's hearsay disclosures of abuse may now be admitted into evidence, helping to prove their victimization. Police investigators, prosecutors and judges now have much better education about issues related to child development and communication with children. In many places in Canada there are now victim-witness workers who assist in preparing children for the court process, and providing support for children and their parents.

Lawmakers in Canada continue to struggle with balancing the need to expand the scope for admission of children's evidence and support their involvement in the criminal justice system against protection of the rights of the accused and the right to a fair trial.

¹⁶⁴ Nicholas Bala, Angela D. Evans & Emily Bala, "Hearing the Voices of Children in Canada's Criminal Justice System: Recognizing Capacity and Facilitating Testimony (2010), 22 *Child & Family Law Quarterly* 21.

There continue to be concerns about how victims, including children, are treated in the criminal justice system.¹⁶⁵ While victim-witness workers may serve as informal advocates, there are concerns that too often there is insufficient regard in court to the needs and interests of children, for example, for use of accommodations like closed circuit television. However, the Canadian justice system has reached a better balance, one that more faithfully reflects the growing body of research on child development and the capacities of children, without sacrificing the rights of the accused, and that gives child victims a much greater opportunity to participate in the criminal process.

Participation Rights of Young Offenders

The *Youth Criminal Justice Act (YCJA)*¹⁶⁶ came into force in 2003. Although significantly changing some aspects of the law, and resulting in significant decreases in the rates of use of courts and custody for youthful offenders, the *YCJA* largely maintained the due process and participatory rights introduced by the previous law, the *Young Offenders Act*.¹⁶⁷ Reflecting Article 12 of the CRC, the *YCJA* s. 3(1)(d)(i) provides young persons dealt with under the Act “a right to be heard in the course of and to participate in the processes... that lead to decisions that affect them.”

In addition to the protections afforded to adults involved in Canada’s criminal justice processes under both the *Criminal Code* and the *Charter of Rights and Freedoms*, the *YCJA* provides special and significant legal rights to youths in recognition of their greater vulnerability. The *YCJA*, for example, constrains questioning by the police of young

¹⁶⁵ Sonja Brubacher, Nicholas C. Bala, Kim Roberts & Heather Price, “Investigative Interviewing of Witnesses and Victims in Canada,” in David Walsh et al., eds., *International Developments and Practices in Investigative Interviewing and Interrogation, Volume 1: Victims and Witnesses* (London: Routledge Press, forthcoming 2015).

¹⁶⁶ S.C. 2002, c. 1, in force April 1, 2003.

¹⁶⁷ R.S.C. 1985, c. Y-1.

persons suspected of offences. Section 146 of the *YCJA* provides that a statement made by a young person being questioned by the police as a suspect is admissible only if the youth has received an explanation “in language appropriate to his or her age and understanding” that the youth is not obliged to make a statement, and that the youth has the right to have a lawyer or parent present while a statement is made; any waiver of these rights by a youth must be in a signed statement or audio- or video-recorded waiver. The Supreme Court has made clear that it is not sufficient for a police officer to merely “read a youth his rights” from a form, but rather the police must provide an explanation that takes account of the youth’s age and language comprehension. In its 2008 decision in *R. v. L.T.H.*, the Supreme Court emphasized the importance of the protections against improper questioning of youth suspects by police. Justice Fish wrote:

Young persons, even more than adults, are inclined to feel vulnerable when questioned by police officers who suspect them of crime and can influence their fate. Parliament has for that reason provided them by statute with a complementary set of enhanced procedural safeguards in s. 146 of the *Youth Criminal Justice Act* . . . procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators.¹⁶⁸

Despite these legal protections, in practice young persons being interrogated by police often fail to appreciate the significance of their legal rights.¹⁶⁹ Most youths who are questioned by the police will make a statement that implicates them in the offence, usually waiving the right to advice from counsel or parents.

In recognition of the vulnerability of youth and the challenges that they face in

¹⁶⁸ *R. v. L.T.H.*, [2008] S.C.J. No. 50 at paras. 1-3. Emphasis added.

¹⁶⁹ See e.g. Rona Abramovitch, Michele Peterson-Badali & Meg Rohan, “Young People's Understanding and Assertion of Their Rights to Silence and Legal Counsel” (1995) 37 *Can. J. Crim.* 1; and Michele Peterson-Badali & Martin Ruck, “Rights Knowledge, Reasoning, and Attitudes” in Roger J.R. Levesque ed., *Encyclopedia of Adolescence* (New York: Springer, 2012) 2386.

understanding and participating in the youth court process, the *YCJA* has special provisions to facilitate access to legal representation. Lawyers for youth may provide assistance at the time of questioning by the police, at a pre-trial bail hearing, at trial, and at a sentencing or review hearing.

In proceedings under the *YCJA*, if a youth wants to have a lawyer and is unable to obtain legal representation, s. 25 requires the judge to order that representation is to be provided. While judges can consider parents' financial means when determining whether a youth is "able" to obtain representation, the youth court cannot order parents to pay for a lawyer. Parents may choose to pay for counsel for their child,¹⁷⁰ but many parents are unwilling or unable to pay for a lawyer for their children, and very few youths have their own financial resources to retain counsel. If parents are paying for a lawyer there may be some confusion as to who is instructing the lawyer. Section 25(8) of the *YCJA* provides that a youth justice court judge shall ensure that a youth is "represented by counsel independent" of the parents, if it appears that the interests of the youth and parents conflict or the best interests of the youth require representation by his or her own counsel.

For the most serious cases, youth involved in the court process will always have legal representation, whether through legal aid, their parents' paying for counsel or an order under s. 25 of the *YCJA*. However, the process for making an order for representation varies. Not infrequently there are delays in securing access to counsel, and some youths plead guilty "to get things over with," without having had proper legal advice and representation. Further, there are concerns about the quality of representation provided to

¹⁷⁰ Section 25(10) of the *YCJA* allows a province to establish a program to seek reimbursement from parents of youth for whom an order for representation is made under s. 25 of the *YCJA*; only Manitoba has done so.

youth. There are a few places, such as Calgary and Edmonton, where there are lawyers with training in dealing with adolescent clients and support from social workers at specialized clinics doing youth representation, but in most locales there are concerns that some of the lawyers who do this type of work may lack the training, knowledge and resources to provide effective representation for adolescent offenders.

Likely because the *YCJA* affords significant participatory rights to youth and lawyers, the courts in Canada have had very little need to cite Article 12 of the CRC in dealing with youth offending issues.¹⁷¹

F. PROCEEDINGS ABOUT HEALTH CARE

In Canada, children’s decision-making about health care issues occurs within a complicated legal framework. First, there is the common law “mature minor” doctrine. Generally, parents are entitled to make treatment decisions on their children’s behalf. The mature minor doctrine, however, allows children who are sufficiently mature to make their own treatment decisions. Second, there is provincial and territorial legislation governing consent to medical treatment. These statutes often provide a specific age at which children are presumed competent to consent to treatment. Third, there is child protection legislation.

¹⁷¹ The only reported youth justice case to cite Article 12 of the CRC is *R. v. C. (G.)*, 2010 ONSC 115, where Molloy J. relied on both the *Charter of Rights and Freedoms* and the CRC to conclude that a young person (invariably in this context acting through counsel) has the right to be heard prior to the Crown exercising its discretion under s. 67(6) of the *YCJA* to elect to have a youth facing a murder charge tried by a judge and jury. In a later decision, *R. v. J.S.R.*, [2012] O.J. 4063 (CA), the Ontario Court of Appeal, per Feldman J.A., explained, at para. 131:

I agree with Molloy J. that s. 67(6) of the *YCJA* must be read in the context of s. 3 to ensure that young people are treated fairly, and their right to participate in the trial process is respected. However, in my view, the Act does not require the court to read in full administrative law procedural rights in order to achieve fair treatment in the context of s. 67(6), or to avoid a finding of abuse of process based on procedural unfairness.

These provincial and territorial statutes allow a child protection agency to apply to a court to order treatment for a child where either the child or parent is refusing to consent. Finally, there are cases interpreting how these sources of law interact and which rules will ultimately govern health care decision-making for children.

Consent to Treatment Legislation

Most provinces and territories have legislation governing consent to medical treatment. Some of this legislation is “global,” applying to both adults and children; some is child-specific.¹⁷²

Jurisdictions vary in how they approach children’s consent to treatment. In some jurisdictions, children’s consent to treatment is not specifically addressed. In Ontario, Prince Edward Island, and the Yukon, all people – including children – are presumed capable of consenting to treatment.¹⁷³ Age is not mentioned in the legislation. This presumption can be rebutted where a child *or an adult* is unable “to understand the information that is relevant to making a decision about treatment.”¹⁷⁴ Other jurisdictions provide an age at which a child is *presumed* capable of consenting to treatment. In Manitoba and Newfoundland and Labrador, this age is 16.¹⁷⁵ Children 16 and over are presumed capable of consenting; children under 16 are presumed incapable. This means that children under 16 may consent to treatment where there is evidence to establish capacity.

¹⁷² For an excellent review of the law relating to children’s health care decision-making, see David C. Day, “The Capable Minor’s Healthcare: Who Decides?” (2007), 86 Can. Bar Rev. 379.

¹⁷³ *Health Care Consent Act, 1996*, S.O. 1996, c. 2, s. 4(2).

¹⁷⁴ *Consent to Treatment and Health Care Directives Act*, S.P.E.I. 1996, c. 10, s. 7(1); *Care Consent Act*, S.Y. 2003, c. 21, s. 6.

¹⁷⁵ *The Health Care Directives Act*, S.M. 1998, c. 36, C.C.S.M. c. M110, s. 4(2); *Advance Health Care Directives Act*, S.N.L. 1995, c. A-4.1, s. 7(b) and (c).

In *H. (P.) v. Eastern Regional Integrated Health Authority*,¹⁷⁶ Justice LeBlanc of the Newfoundland and Labrador Supreme Court considered whether the court had authority to order a 16 year-old child to undergo treatment where the child had capacity to refuse to consent to such treatment. The case involved an application by the child's mother to determine the capacity of her daughter to refuse to consent to treatment. In Newfoundland and Labrador, children 16 years of age or older are not subject to child protection legislation, so no child protection agency was involved. The issue of overriding a capable child's refusal to consent to treatment ended up being moot after LeBlanc J. determined that the 16 year-old did *not* have capacity, thus rebutting the statutory presumption. However, the judge held that even if the child had been found to have the capacity to refuse to consent to treatment, he would have ordered treatment pursuant to the court's *parens patriae* jurisdiction. Even though the child was not subject to the province's child protection legislation, LeBlanc J. determined that treatment decisions by minors – even mature minors – had to accord with the child's best interests.

New Brunswick's *Medical Consent of Minors Act* provides that the rules governing consent to treatment by adults apply to children who are 16 years of age or older.¹⁷⁷ However, the Act also provides a framework that allows children under 16 to consent in certain circumstances. Section 3(1) states:

The consent to medical treatment of a minor who has not attained the age of sixteen years is as effective as it would be if he had attained the age of majority where, in the opinion of a legally qualified medical practitioner, dentist, nurse practitioner or nurse attending the minor,

(a) the minor is capable of understanding the nature and consequences of a medical treatment, and

¹⁷⁶ 2010 NLTD 34.

¹⁷⁷ *Medical Consent of Minors Act*, S.N.B. 1976, c. M-6.1 s. 2.

(b) the medical treatment and the procedure to be used is in the best interests of the minor and his continuing health and well-being.¹⁷⁸

Maturity alone is not sufficient to allow a younger child to consent; the treatment must also be in the best interests of the child *in the opinion of a medical practitioner*. A similar statutory framework exists in British Columbia. That province's *Infants Act* does not set an age at which children are presumed capable of consent. Instead, the Act provides that all children may consent to treatment where,

the health care provider providing the health care

(a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and

(b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.¹⁷⁹

Again, medical professionals are to determine whether treatment is in the child's best interests and the child has the requisite capacity.

Saskatchewan and Alberta both have legislation defining the age at which a child may provide a health directive. In Saskatchewan, the age is 16;¹⁸⁰ in Alberta, the age is 18. Neither statute provides guidance on medical decision-making by children under those ages. Absent an application by a child protection agency for authorization to make a treatment decision on the child's behalf, the common law "mature minor" rule would likely apply.

Child Protection Legislation

All Canadian jurisdictions have child protection statutes that allow a state agency to make treatment decisions on behalf of a child in certain circumstances. Where a parent refuses to consent to treatment, and this refusal places the child's health or life in danger, child

¹⁷⁸ *Medical Consent of Minors Act*, S.N.B. 1976, c. M-6.1 s. 3(1).

¹⁷⁹ *Infants Act*, R.S.B.C. 1996, c. 223, s. 17(3).

¹⁸⁰ *The Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001, s. 3; *Personal Directives Act*, R.S.A. 2000, c. P-6, s. 3(1).

protection agencies are typically authorized to “apprehend” the child and provide the necessary consent in the place of the parent, subject to a process that requires a court order within a relatively short period of the apprehension. Parents must be notified of this process and have a right to participate. As discussed above, there are varying provincial provisions about children’s right to notice and participation in the child protection process, though in most jurisdictions older children may be involved.

Where the child is a “mature minor,” either according to common law or consent to treatment legislation, and refuses treatment, the situation becomes more complicated. A “mature minor” may still be a “child” under the relevant child protection statute, and thus subject to the state’s protection powers.

The leading authority on the interplay between the mature minor doctrine and child protection legislation is the Supreme Court of Canada decision in *Manitoba (Director of Child & Family Services) v. C. (A.)*.¹⁸¹ The child was a 14 year-old Jehovah’s Witness who had been admitted to hospital for internal bleeding; her treating physicians expressed concern that there was a serious risk to her health, and perhaps her life, without a blood transfusion, but both the girl and her parents refused to consent to a blood transfusion. The child protection agency apprehended the child and applied to the court under Manitoba’s *Child and Family Services Act* for an order authorizing blood transfusions. Under s. 25(8) of the *Child and Family Services Act*, the court may authorize any medical treatment it considers to be in the best interests of the child. However, s. 25(9) provides that no order can issue with respect to a child 16 years of age or older without the child’s consent, unless that child cannot understand the relevant information or appreciate the reasonably

¹⁸¹ 2009 SCC 30. This case was also discussed above in regard to the rights of children in protection proceedings.

foreseeable consequences of consenting or not consenting to the treatment. The child argued that because she had capacity to make the decision to refuse the transfusion, this decision should have been respected under the mature minor doctrine. At the trial hearing, the court agreed that the child had capacity to consent, but that this was irrelevant as she was under 16 years of age.

This decision was upheld by the Supreme Court of Canada, though the Court adopted a more nuanced approach. Justice Abella, writing for the majority, refused to accept that the mature minor doctrine allows mature children to make *all* decisions related to their medical care. While a mature minor can make decisions about such issues as an abortion, different considerations apply where the child is refusing life-saving treatment. While mature minors have strong claims to autonomy, Abella J. explained, where a child protection agency has brought an application to authorize treatment for a child, the state's interest in protecting children is engaged and the state still has the power to consider whether allowing the child to exercise autonomy accords with the child's best interests.. According to Abella J., the best interests of the child requires that children's views and preferences be weighed in accordance with the child's age and maturity. The more mature the child, the more deference provided to the child's treatment decision. It is possible, Abella J. concluded, that in certain cases the degree of maturity exhibited by the child could be so high that to disregard his or her treatment decision would not be in the child's best interests. The court needs to take account of both the child's maturity and the nature of the medical decision. According to Abella J., this "sliding scale" of scrutiny is consistent with Article 12 of the CRC.¹⁸²

¹⁸² 2009 SCC 30 at para. 22. See also *U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare)*, 2003 ABCA 66 (leave to appeal denied), where the Alberta Court of Appeal found that

G. IMMIGRATION AND REFUGEE PROCEEDINGS

Immigration and refugee proceedings in Canada are governed by the federal *Immigration and Refugee Protection Act [IRPA]*,¹⁸³ and also affected by the international *Convention Relating to the Status of Refugees*,¹⁸⁴ to which Canada is a signatory. While the *IRPA* governs proceedings involving children, there are few provisions that deal explicitly with children and their participation rights, such as s. 167(2) which addresses child representation. General provisions are assumed to cover child claimants and applicants. For example, s. 170(e), which provides those claiming *Convention* refugee status “a reasonable opportunity to present evidence, question witnesses and make representations”¹⁸⁵ also applies to children. The provisions that mention children require a consideration of the best interests of a child affected by an immigration or refugee decision.

Best Interests of the Child and the Right to Be Heard

A number of provisions direct that the best interests of the child be considered in decisions made pursuant to the *IRPA*. For example, s. 25(1) provides that the Minister may grant an otherwise inadmissible foreign national permanent residency status or exempt the individual from any criteria or obligations under the Act on the basis of humanitarian and compassionate grounds, “taking into account the best interests of a child directly affected.”¹⁸⁶

the mature minor doctrine did not oust the province’s child protection statute where a 16 year-old child refused life-saving treatment on religious grounds. The Court acknowledged that children’s views must be heard and considered in treatment decisions but that these views are not determinative. It cited Article 12 of the CRC in support of this proposition.

¹⁸³ S.C. 2001, c. 27.

¹⁸⁴ UNTS, vol. 189, p. 137, CTS 1969/6.

¹⁸⁵ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 170(e).

¹⁸⁶ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 25(1).

The importance of considering the best interests of the child in immigration and refugee matters was recognized by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.¹⁸⁷ That case considered the factors to be weighed in an application based on humanitarian and compassionate grounds under the former *Immigration Act*. Justice L’Heureux-Dubé, writing for a majority of the Court, held that “the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.”¹⁸⁸ The majority explained that this interpretation was consistent with Canada’s obligations under Articles 3 and 12 of the CRC. In *Legault v. Canada (Minister of Citizenship and Immigration)*¹⁸⁹ the best interests of the child was found to be an “important factor” that must be given “substantial weight,” in the decision of whether to remove a parent from Canada. However, the Federal Court of Appeal found that the best interests of the child were not determinative in making that decision.

In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*,¹⁹⁰ the Federal Court of Appeal was asked to define the circumstances under which the consideration of the best interests of the child would be satisfied when assessing an application based on humanitarian and compassionate grounds. A majority of the Court ruled that a best interests determination requires the decision-maker to take into account the views of the child in accordance with the child’s age and maturity, and that a child’s own views about his or her circumstances are to be considered, as required by Article 12 of the CRC. In this case the Court of Appeal held that the Immigration Officer had erred in failing to take account of

¹⁸⁷ [1999] 2 S.C.R. 817.

¹⁸⁸ [1999] 2 S.C.R. 817 at para. 75.

¹⁸⁹ [2002] 4 F.C. 358 (C.A.); leave to appeal to S.C.C. refused.

¹⁹⁰ [2003] 2 F.C. 555 (CA).

the 15 year-old child's strong preference to continue to live in Canada with her mother, who faced deportation, rather than her live with her father, who was a citizen and not facing deportation.

Designated Representatives

Any child who is the subject of proceedings under the *IRPA* must be assigned a "Designated Representative."¹⁹¹ This Designated Representative is usually the child's parent, but may be a lawyer.¹⁹² According to Guideline 3 of the *Chairperson's Guidelines*, the duties of a Designated Representative are as follows:

- To retain counsel;
- To instruct counsel or to assist the child in instructing counsel;
- To make other decisions with respect to the proceedings or to help the child make those decisions;
- To inform the child about the various stages and proceedings of the claim;
- To assist in obtaining evidence in support of the claim;
- To provide evidence and be a witness in the claim;
- To act in the best interests of the child.¹⁹³

The appointment of a Designated Representative for a child must occur as soon as possible, and the appointment applies for the duration of the proceedings.¹⁹⁴ Courts have held that failure to appoint a Designated Representative for the child in a timely fashion is a ground for judicial review, and may result in the matter being remitted for a rehearing.¹⁹⁵

¹⁹¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 167(2).

¹⁹² Immigration and Refugee Board of Canada, "Designated Representatives Guide," online: < <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/GuideDesRep.aspx>>.

¹⁹³ Immigration and Refugee Board of Canada, Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (September 30, 1996), online: < <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuideDir/Pages/GuideDir03.aspx>>.

¹⁹⁴ *Duale v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 150 at para. 3.

¹⁹⁵ *Duale v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 150 at para. 24.

In *Manalang v. Canada (Minister of Public Safety and Emergency Preparedness)*,¹⁹⁶ Justice Heneghan of the Federal Court considered the rights of children under Article 12 of the CRC who have been assigned a Designated Representative pursuant to the *IRPA*. The case involved an application by a mother and her two minor children for judicial review of a decision by the Immigration Appeal Division (IAD) dismissing the applicants' appeals from orders that prevented them from remaining in Canada as immigrants sponsored by the mother's husband, the children's step-father. A significant factor in the exclusion application was that the mother had lied on her application for admission, stating that her husband was the children's father. The applicants raised a number of arguments, including that the IAD failed to give due weight to the interests and wishes of the children as required by Article 12 of the CRC. At an initial hearing before the IAD, there had been no Designated Representative for the children, so that proceeding was terminated and a new IAD panel heard the matter, with the mother's lawyer as the Designated Representative for the children. In upholding the IAD decision to exclude the mother and her children, Heneghan J. held that the children had the benefit of a Designated Representative, whose role it was to "ensure that their interests were fully and adequately disclosed to the panel," and that there was no evidence to suggest that the representative had been barred from performing this role.¹⁹⁷ As a result, the children had exercised their right to be heard under Article 12 of the CRC.

Issues of effective advocacy and participation are especially pressing for the growing numbers of refugee claimants who are "unaccompanied minors," children who

¹⁹⁶ 2007 FC 1368.

¹⁹⁷ 2007 FC 1368 at para. 111.

arrive in Canada without parents or guardians and seek refugee status.¹⁹⁸ While some of these children may have relatives in Canada who can provide some assistance, this is a particularly vulnerable population and it is noteworthy that some lawyers are making special efforts to ensure that there is adequate representation for these children.¹⁹⁹

H. RIGHTS IN EDUCATION PROCEEDINGS

Most children spend very substantial portions of their time in schools, and educators and school tribunals make very significant decisions about children's lives. The United Nations Committee on the Rights of the Child has recognized that the right of children "to be heard within education is fundamental to the realization of the right of education," which is protected under Article 28 of the CRC.²⁰⁰ The Committee recommends that children be heard with respect to the development of school policies and codes of behavior, as well as in proceedings that affect their individual education. Too often, however, children are not included in decision-making about their education and schooling.

In Canada, education is governed by provincial or territorial legislation;²⁰¹ although there is variation in legislation and curricula across the country, there are common issues in all jurisdictions. Most decisions about children and their education are made by principals, school boards, and administrative tribunals. While it is clear that the CRC,

¹⁹⁸ Judith Wouk, Soojin Yu, Lisa Roach, Jessie Thomson, Anmarie Harris (2006), "Unaccompanied/Separated Minors and Refugee Protection in Canada: Filling Information Gaps" 23:2 *Refuge: Canadian Journal on Refugees* 125-134.

¹⁹⁹ David Renting, "Program helps 'unaccompanied minors' navigate Canada's refugee process," *Toronto Star*, Sat Aug 17 2013.

²⁰⁰ United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12 at 24.

²⁰¹ For a discussion of Ontario's legal regime, see Jeffery Wilson, *The Law's Treatment of Children and Youth* (Toronto: Lexis, 2011), chapter 7.

including Article 12, apply to these decisions, since relatively few cases result in court applications for judicial review, it is not easy to get a clear picture of how the CRC is being applied in the educational context in Canada.

One of the important proceedings that affects the education and development of children are decision-making processes governing education for children with special needs. These decisions are generally initially made at the school board level, with the possibility of an appeal to an administrative tribunal. In one of the few high visibility education law cases, parents appealed the decision to exclude their 12 year old disabled child from a program that integrated her into the regular school program and place her a special education class all the way to the Supreme Court of Canada. In its 1996 decision in *Eaton v Brant County Board of Education* the Supreme Court stated:

the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests... For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests.²⁰²

Despite this judicial statement about the importance of involving children in decision-making, empirical research suggests that in Canada children with disabilities generally do not participate either directly or indirectly in decisions that affect them in an educational context.²⁰³ While parents have standing in these processes, there may be situations in

²⁰² [1996] S.C.J. 98, [1997] 1 S.C.R. 241 at para 77.

²⁰³ Mona Paré, "Inclusion and Participation in Special Education Processes in Ontario, Canada" in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015) 37.

which parents and children have differing views and interests, and children's perspectives and preferences may not be adequately represented.

There are also concerns about the limited role for children in school disciplinary proceedings that may result in their suspension or expulsion. Although parents have standing in these proceedings, students generally do not. It has been argued that Article 12 requires greater procedural protections for students subject to disciplinary proceedings. Paré, for example, argues that children should be given an opportunity to be heard directly, as opposed to indirectly through their parents, at disciplinary hearings.²⁰⁴

Another fundamental concern is that schools in Canada often fail to provide adequate education to children about their rights, and in particular issues related to the CRC are not addressed in most curricula.²⁰⁵ Although both adults and children have low levels of awareness, a study commissioned by War Child Canada found that adults are more likely than children to have awareness of the CRC (55% versus 33%).²⁰⁶ Most children reported that they have not heard of any major United Nation's international human rights treaties. Significantly, children born outside of Canada had greater

²⁰⁴ Mona Paré, "Inclusion and Participation in Special Education Processes in Ontario, Canada" in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (New York: Oxford University Press, 2015) 37.

²⁰⁵ Canadian Coalition on the Rights of the Child, *Children's Rights in Canada 2011- Working Document: Right to Education, Research Report*; R. Brian Howe & Katherine Covell, "Schools and the Participation Rights of Children (1999-2000), 10 *Education and Law Journal* 107; and R. Brian Howe & Katherine Covell, *Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap* (Toronto: University of Toronto Press, 2013).

²⁰⁶ Canadian Coalition on the Rights of the Child, *Children's Rights in Canada 2011- Working Document: Right to Education, Research Report*.

awareness of the CRC than those born in Canada (43% versus 32%). It would seem that only in Nova Scotia does the provincial curriculum mandate education about the CRC.²⁰⁷

Despite the failure to systemically address issues of children's rights, there have been cases in which older adolescents have, through litigation guardians, been able to bring court applications to force schools to recognize their rights. Most notably in Ontario, students have brought successful court actions in regard to school proms, ironically an event that symbolizes the end of their time as students in secondary school.²⁰⁸

IV. EXPANDING CHILDREN'S PARTICIPATION RIGHTS IN CANADA

A review of legislation and case law from across the country suggests that Canadian legislatures, judges and policy makers are alert to the participation rights of children, and their responsibilities under Article 12. This is especially true in the area of family law, where children's views and preferences are a guiding factor in making custody, access, child protection, and adoption decisions in children's best interests. However, there is room for improvement. The United Nations Committee on the Rights of the Child has described Canada as having "inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative procedures that impact children."²⁰⁹

²⁰⁷ R. Brian Howe & Katherine Covell, *Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap* (Toronto: University of Toronto Press, 2013).

²⁰⁸ See *Hall v Powers*, [2002] O.J. 1803 (S.C.) (attendance at prom with gay date for youth in Catholic school permitted); and *Gilles v Toronto District School Board*, [2015] O.J. 833 (S.C.) (use of breathalyzer for students attending prom prohibited).

²⁰⁹ United Nations Committee on the Rights of the Child, Sixty-first session, 5 October, 2012, CRC/C/CAN/CO/3-4, *Concluding Observations: Canada*, at para. 36.

This concluding part of this paper offers some suggestions on how children's participation rights under Article 12 of the CRC could be enhanced in Canada.

Promoting Children's Participation in Judicial and Administrative Proceedings

This section provides specific suggestions for further promoting children's participation in proceedings addressed in this paper: family proceedings (custody and access, Hague Convention, child protection, and adoption), criminal proceedings, proceedings respecting treatment decisions, and immigration and refugee proceeding. These options are informed by practices that promote children's participation rights in other countries, and some come directly from academic writing on children's participation. It is also important to recognize that there is significant variation across Canada in the extent to which children's participation rights are recognized and promoted, and policy makers in different provinces and territories can learn from experiences in other Canadian jurisdictions.

There is no single "best" way to engage children in legal proceedings, but rather it is important to have a range of ways available to allow children to participate. Although the United Nations Committee on the Rights of the Child generally prefers direct over indirect participation, how children participate in proceedings will depend in some measure on the nature and stage of the case, and the resources available. The Committee has made clear that children should never be forced to express their views. The method used for hearing children should take into account the needs and maturity of children, as well as the need to balance children's participation with the protection of their interests and relationships. Perhaps most importantly, the views of individual children about how they wish to participate at particular stages in particular proceedings should always be taken

into account. That said, certain methods for hearing children ought to be more readily available.

Legal representation of children in custody and access proceedings in Canada is limited, and not available in some jurisdictions. Article 12 may provide an avenue for encouraging a superior court to use its *parens patriae* power to appoint a lawyer for a child involved in a custody and access proceeding.²¹⁰ However, legal representation is relatively expensive and may result in children feeling pressure to “take sides” in litigation. Assessments can be an important way for soliciting the views of children, but also relatively expensive with the potential to delay resolution of proceedings. It would certainly be appropriate for lawyers for children and assessors to ask children how they would like to participate, including whether they would like to meet the judge.

Some provincial and territorial statutes have provisions that allow for judicial interviews. Judicial interviews can provide a cost-effective and timely way of hearing directly from children in family law proceedings. Some jurisdictions, including Scotland, New Zealand and most notably Quebec, have already expanded judicial interviewing to allow greater participation by children in family cases. Empirical research establishes that children in family cases always want to be asked if they wish to contribute their views, and, if their family’s dispute is being resolved in court, many would like to meet the judge.²¹¹ Interdisciplinary education and training on issues relating to judicial interviewing of children and children’s involvement in the family dispute resolution process is also important. It is not expected that judges and lawyers should have the knowledge of mental

²¹⁰ See e.g. *B. (A.C.) v. B. (R.)*, 2010 ONCA 714.

²¹¹ Rachel Birnbaum & Nicholas Bala, “Judicial Interviews With Children In Custody And Access Cases: Comparing Experiences In Ontario And Ohio” (2010), 24(2) *International Journal of Law, Policy and the Family* 300.

health professionals who conduct assessments, but education programs can ensure that they should be aware of the importance of engaging children in a sensitive fashion, and prepared to address such issues as confidentiality, recording and Non-evaluative Views of the Child Reports, currently used in some jurisdictions, which can be a relatively inexpensive and expeditious way of allowing children to express their perspectives and preferences, and consideration could be given to expanding their use. However, issues of training, resources and protocols for Views of the Child Reports need to be addressed, including whether children should be asked whether there are matters that they would rather not be disclosed to parents, the court or a mediator, and whether they would like to meet the judge or mediator.

While the focus of this paper has been children’s participation in legal proceedings, Article 12 also supports children’s participation in non-curial family dispute resolution processes. The Netherlands, for example, requires that children’s views be reflected in all parenting plans placed before the court. In *G. (B.J.) v. G. (D.L.)*, Justice Martinson held that Article 12 requires children’s views to be considered at all stages of a custody and access case, including attempts to settle using alternative dispute resolution.²¹² In England and Wales, the government has committed itself to ensuring that children’s views are shared with parents and mediators in every case being resolved by this method of dispute resolution.²¹³

²¹² 2010 YKSC 44 at para. 6.

²¹³ In England and Wales, the previous government made significant commitments to ensuring that the “voice of the child” is heard in mediation (United Kingdom, Ministry of Justice, 2015). However, it is unclear how the new Conservative government will continue with those commitments. See Government of the United Kingdom, Policy Paper: *Voice of the Child: government response to Dispute Resolution Advisory Group report*, online: <www.gov.uk/government/publications/voice-of-the-child-government-response-to-dispute-resolution-advisory-group-report>.

The *YCJA* recognizes the right of young people accused of a crime to be heard and to participate in processes that lead to decisions that affect them. Yet research on children's experiences in the youth criminal justice system suggests that many children do not feel as if they have been heard or given an opportunity to participate.²¹⁴ Professor Myriam Denov suggests that one way to promote children's rights under Article 12 would be to introduce a statutory requirement that children's views be taken into account in predisposition reports and sentencing considerations.²¹⁵

In the health law context, commentators have suggested moving away from presumed capacity to consent to treatment decisions based on age toward presumed capacity to consent for all.²¹⁶ This is already the law in Ontario, Prince Edward Island, and the Yukon. Eliminating age presumptions for consent would be consistent with the Committee on the Rights of the Child's interpretation of the requirements of Article 12.

With respect to children's participation in immigration and refugee proceedings, Professor Sonja Grover has suggested that child refugee claimants should be assigned independent, free, and expert legal counsel in order to participate effectively in hearings.²¹⁷ Designated Representatives, because they are often family members, are less likely to be independent, raising questions about their ability to safeguard the child's interests.

²¹⁴ Ross Gordon Green & Kearney F. Healy, *Tough on Kids: Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishing, 2003).

²¹⁵ Myriam Denov, "Youth Justice and Children's Rights: Transformations in Canada's Youth Justice System," in R. Brian Howe & Katherine Covell, eds., *A Question of Commitment: Children's Rights in Canada* (Waterloo: Wilfred Laurier University Press, 2007) 153, 164.

²¹⁶ Judy Finlay, Jill Magazine, and Amanda Hotrum, *Consent and Confidentiality in Health Services: Respecting the Right to be Heard* (Toronto: Office of the Child and Family Service Advocacy, 2005).

²¹⁷ Sonja Grover, "On the Rights of Refugee Children and Child Asylum Seekers," in R. Brian Howe & Katherine Covell, eds., *A Question of Commitment: Children's Rights in Canada* (Waterloo: Wilfred Laurier University Press, 2007) 343.

There is also a need to provide children greater opportunities to participate in processes that involve decision-making in the education and schooling context, both in regard to making decisions about their individual lives and in developing policies, programs and student codes of behaviour. In order to encourage participation of children in various processes and to promote their rights, school curricula also need to address issues of children's rights.

Policy Development and Law Reform

The focus of this paper was on children's participation rights in legal proceedings, but there are other important domains for involving children in civil society. This paper did not address issues related to opportunities to promote children's participation in legislative and policy reform, but in a number of countries significant efforts have been made in this regard.

Some of the approaches that different countries, regional governments and municipalities have developed to engage children include children's clubs, children's councils, and children's parliaments, as well as representation of children and youth on various advisory councils and policy-making bodies.²¹⁸ For example, in the American state of Georgia, a children's forum was set up to allow children the opportunity to express their views on the problems facing children and to propose specific solutions. In Sweden, many municipalities have established "influence forums," which allow children to participate in decision-making at the local level on issues that affect them. At the national level, New Zealand has established a prime minister's youth advisory forum. Every year, selected youth from across the country are invited to meet three times with cabinet ministers, including the prime minister, to discuss issues affecting children and other matters

²¹⁸ See Aisling Parks, *Children and International Human Rights Law: The Right of the Child to be Heard* (London: Routledge, 2013) at 181-209.

concerning the government. Topics canvassed so far include student loans, bullying in schools, and police treatment of young people.

In Canada, some governments have also developed programs to involve children and youth in policy development and program monitoring. For example, the Ottawa Police Service has established a Youth Advisory Committee with members aged 13 to 24 years to allow for participation in development of policies and programs.²¹⁹ This type of Committee both allows children and youth to be more involved in decision-making and provides valuable information to police. In many Canadian jurisdictions there is a provincial or territorial office that has responsibility for advocacy for children and youth, often focusing on investigation of complaints and concerns related to children in the care of government agencies, most often in the care of child welfare or youth justice facilities. Some of these offices have youth advisory committees.²²⁰ However, much more needs to be done to involve children and youth in law reform and policy development, especially in areas where they are directly affected, likely family law and education policy.

Research and Policy Development

A review of statutes and cases across the country suggests that Canadian legislatures, courts and tribunals are alert to the CRC and the participation rights of children contained in Article 12. However, as this paper demonstrates, there is significant variation across jurisdictions and across legal domains in whether and how children are heard in legal proceedings that affect them. The United Nations Committee on the Rights of the Child

²¹⁹ See Ottawa Police Service, Youth Advisory Committee, online:

<<http://www.ottawapolice.ca/en/news-and-community/youth-advisory-committee-yac.asp>>.

²²⁰ See Office of the Provincial Advocate for Children and Youth, Youth Advisory Committee, online: <<http://www.provincialadvocate.on.ca/main/en/ihsts/youth-advisory-committee.html>>.

has advised that Canada needs to do more to promote and protect children's participation rights. This paper has provided some suggestions for how that could be achieved.

As discussed in this paper, there is some research on children's experiences with participation in legal processes in Canada. It is not a large body of research, and there is a clear need for more research on the experiences of children, parents, judges, lawyers and other professionals with children's participation. Although there is a clear need for further research, enough is known about the needs, rights and interests of children that all of those involved in the implementation of justice should be taking steps to improve children's participation in matters – both legal and policy – that affect them.

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